



**Kipaa v Republic (Criminal Appeal 053 of 2023)
[2024] KEHC 9669 (KLR) (22 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9669 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL APPEAL 053 OF 2023
SN MUTUKU, J
JULY 22, 2024**

BETWEEN

FREDERICK KIPAA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant was tried for two charges of rape contrary to section 3(1)(a)(c)(3) of the [Sexual Offences Act](#) and two alternative counts of committing an indecent act contrary to section 7 of the [Sexual Offences Act](#). The victims are JMM aged 30 years and her niece SBM aged 23 years. The offences were allegedly committed on 24th August 2021 in Kajiado West Sub-County within Kajiado County.
2. He was tried, found guilty and convicted for the two charges of rape and sentenced to serve 15 years imprisonment in each count to run concurrently. He is aggrieved by the conviction and sentence and has filed this appeal. He has raised the following grounds of appeal:
 - i. That the prosecution failed in entirety to prove lack of consent which is one of the key ingredients of the offences of rape and committing an indecent act.
 - ii. That the evidence adduced was contradictory and inconsistent. The whole of the Prosecution case was riddled with material contradictions which not only impeach on the credibility of witnesses but also goes to show that the burden of proof was not discharged as required in law.
 - iii. That the learned trial magistrate erred in law and fact in failing to promptly inform the Appellant of his rights under Section 200(3) and (4) of the [Criminal Procedure Code](#).
 - iv. That the learned trial magistrate erred in law and fact by holding that the prosecution had proved its case against the Appellant to the required standard of law whereas the evidence on record is not sufficient to make such finding.



- v. That the learned trial magistrate erred in law and fact by holding that offences under section 3(1) (a) (c) (3) and 7 of the *Sexual Offences Act* No. 3 of 2006 had been established which finding was contrary to evidence adduced in court.
 - vi. That the learned trial magistrate erred in law and fact by not properly analyzing the evidence in court and hence arrived at a wrong finding.
 - vii. That the learned trial magistrate erred in law and fact by passing a conviction and sentence not supported by proper and sufficient evidence.
 - viii. That the judgment of the learned trial magistrate is against the weight of the evidence adduced in court.
3. The Appellant prays that the Appeal be allowed, conviction quashed and sentence set aside.
 4. The Appeal was canvassed through submissions. The Appellant, through Mr. Nyarango, learned counsel, filed submissions on 19th April 2024. He has submitted on the following issues:
 - i. Whether the trial court's failure to adhere to provisions of sections 200 (3) and (4) of the *Criminal Procedure Code* violated the Appellant's right to fair hearing.
 - ii. Whether the evidence tendered by the Prosecution was discharged to the required standard and sufficient to sustain a conviction.
 - iii. Whether the Appellant engaged in sexual intercourse with the complainants without consent.
 - iv. Whether there was physical resistance and whether the complainants' understanding was whether to consent or not.
 5. Mr. Nyarango submitted on the above issues and concluded that the appeal has merit and ought to be allowed, the conviction vacated, the sentence set aside and the Appellant set free.
 6. The prosecution conceded the appeal.
 7. I have considered this matter. I have read the entire record of the lower court and the defence of the Appellant. I have noted from the grounds of appeal that the central issue, other than ground number (iii) of the appeal, questions the evidence tendered by the prosecution. Ground (iii) of the Appeal is framed as follows:
 - iii. That the learned trial magistrate erred in law and fact in failing to promptly inform the Appellant of his rights under Section 200(3) and (4) of the *Criminal Procedure Code*.
 8. I have decided to deal with this ground of appeal and decline to consider the other grounds of appeal or make pronouncements in respect of the other grounds of appeal for reasons that will become clear at the conclusion of this judgment.
 9. Mr. Nyarango submitted at length on ground (iii) of the Appeal and cited several authorities to support his submissions including *Catherine Mueni Makau v. Republic* [2013] eKLR. The High Court sitting on revision opined, in reference to section 200 (3) of the *Criminal Procedure Code*, as follows:

“This provision has been given a liberal interpretation to mean that it is entirely up to the accused to chart the way forward of his case where it is taken over by another magistrate. He may elect to have the case commence de novo or proceed from where the previous magistrate left. Therefore, the decision whether to proceed from where the previous magistrate left does not lie with the magistrate. It is with the accused. The incoming magistrate has no discretion



or choice in the matter. The provisions are couched in mandatory terms. These are some of the so-called fair trial provisions of the law. they cannot be sacrificed at the altar of the complainant's convenience.....”

10. I have read the entire record of the lower court in respect to this ground of Appeal. The record of the trial court shows that the trial was conducted by two magistrates. The first magistrate, Hon. G. Simatwo, RM, took all the evidence of prosecution witnesses and placed the Appellant on his defence. She placed the matter for hearing of the defence case on 5th April 2023. On that date, the Appellant was presented before another magistrate Hon. A. N. Makau, PM, who informed the Appellant that the trial magistrate had gone on transfer. Hon. Makau placed the matter for hearing before Court No. 1 presided over by Hon. P. Achieng, SPM.
11. Defence hearing proceeded on 26th July 2023. The record of that day reads as follows:

26/7/2023

Before: Hon. P. Achieng, SPM

Prosecutor - Venda

Court Assistant - Felly/Jackie

Accused – Present

Accused – I am ready to give my defence.

State Counsel – I am ready to proceed.

Court – Matter to proceed for hearing.
12. The court proceeded to receive evidence of the Appellant and his witness after which the matter was fixed for delivery of judgment on 6th September 2023.
13. Section 200 (3) and (4) of the [Criminal Procedure Code](#) reads as follows:
 - (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.
 - (4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.
14. Subsection 3 of the above section is clear that “the succeeding magistrate shall inform the accused of that right.” This means that the succeeding magistrate is obligated to inform the accused that he has a right to demand that any witness be resummoned and reheard. As stated in the authorities cited, the succeeding magistrate has no discretion in the matter. It is his/her duty to inform the accused of his right to demand recalling of witnesses to be heard afresh by the succeeding magistrate. This is what the right to fair trial demands and it does not matter, in my view, that the accused is represented by a counsel who ought to know better. The succeeding magistrate must inform the accused and his counsel where one is present.
15. While the Appellant through his counsel have urged this court to quash the conviction, set aside the sentence and set the Appellant free on the grounds of infringement of his right to fair trial, I hold a



different view. I have considered this ground of appeal and I choose to go by the provisions of section 200 (4) of the Criminal Procedure Code which provide that:

Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.

16. Recalling and rehearing the prosecution witnesses afresh will equip the trial magistrate with the opportunity to observe the demeanor of the accused and the witnesses.
17. For the above reasons, I decline to determine the other grounds of appeal or to make any pronouncements on the same to avoid prejudicing the parties in this matter. I order that this matter is referred to a different magistrate at Ngong Law Courts for retrial. This matter (lower court file) shall be placed before Magistrate in charge of Ngong Law Courts for directions on the matter.
18. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 22ND JULY 2024.

S. N. MUTUKU

JUDGE

In the presence of:

1. - for the Appellant.
2. - for the Respondent
3. Frederick Kipaa - Appellant

