



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kamau v Republic (Criminal Appeal E073 of 2022)
[2024] KEHC 8330 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8330 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL E073 OF 2022**

**J WAKIAGA, J
JULY 11, 2024**

BETWEEN

SAMUEL GACHAU KAMAU APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising from the original conviction and sentence in Criminal Case
No E001 of 2022 Muranga Chief Magistrates Court Hon. S. K. Nyagah SRM)*

JUDGMENT

1. The Appellant was charged, tried, convicted and sentenced to twenty (20) years imprisonment for the offence of rape of a person Contrary to Section 3(1) of the [Sexual Offences Act](#) No 3 of 2006.
2. Being dissatisfied by the said conviction and sentence, he filed this appeal and No. E063 of 2022, which was withdrawn and raised the following grounds of Appeal;
 - a. That the trial Court erred in law and fact in convicting and sentencing the Appellant when there was insufficient, contradictory and misplaced evidence.
 - b. That the trial magistrate disregarded pertinent information of facts and evidence which were not properly adduced for corroboration and disregarded the Appellants facts and statements.
 - c. That the Court erred in sentencing the Appellant to mandatory minimum sentence Contrary to the prevailing jurisprudence on sentencing.

Submissions

3. Directions were issued on the determination of the appeal by way of written submissions. It was submitted by the Appellant that whereas corroboration is not mandatory in sexual offences, the victim's evidence must be convincing enough and that having discrepancies between the accounts of



- the events and testimonies cannot be ignored. It was contended that it was alleged that the complainant PW1 was partially deaf and dumb and therefore there ought to have been interpretation by a trained person.
4. It was contended that there was contradiction in the testimony of PW4 as to where the complainant was found and whether the same was found together with the Appellant. It was stated that PW2 testified that the victim's clothes were dirty while PW3 stated that her T shirt was white and clean and that PW6 who arrested the Appellant testified that she could not understand what the complainant was saying while the Doctor PW5 testified that whereas the complainant's hymen was broken, it had not been freshly broken.
 5. It was finally submitted that the prosecution case was not proved as there was no positive identification and that the appeal should be allowed and in support thereof reference was made to the case of Elizabeth Waithiegeni Gatimu v R [2016] eKLR.
 6. On behalf of the Respondent, it was submitted that the age of the complainant was proved through the production of her identification card to be 25 years, penetration through her oral evidence, PW2 her mother whose evidence was that her pants had a blood spot and PW5 the Doctor through the production of P3 Form and that the Appellant was positively identified by recognition through the evidence of PW3, PW4 and PW1 who stated that he was a cousin of the victim who identified him at the dock. It was contended that PW4 placed the Appellant and the victim together in the locus in quo.
 7. It was contended that the victim did not consent to the act who stated that the Appellant had sexual intercourse with her without her consent and that is why she screamed, further that she was mentally incapacitated and as per Section 43(4) of the Act could not consent.
 8. On sentence it was submitted that the Act provides for a minimum sentence of ten years which may be enhanced to life imprisonment and that the Court considered the fact that the victim was a vulnerable person under Article 45 of *the Constitution*. It was however conceded that the pre-conviction period in custody under Section 333 of CPC should be considered.
 9. This being a first appeal, the Court is under a duty to re-evaluate the evidence tendered at the trial and to come to its own determination thereon, while giving allowance to the fact that unlike the trial Court, it did not have the advantage of seeing and hearing witnesses see the case of Ndirangu Kibue v Republic [2016] eKLR.
 10. PW1 BM who was declared a vulnerable person by the Court and testified through an intermediary gave unsworn statement and testified that the Appellant whom she identified in the dock had Sexual intercourse with her by force in the farm. PW2 JNM stated that the victim was her child and was aged 23 years partially deaf and dumb who was a student at (Particulars withheld) Special School, she was not in school at that time as it was holiday. She was called and informed that she had been raped by her eldest son DK, she found the Appellant, his father, mother and the victim at the police station. The victim was taken to the hospital where the doctor saw blood stains on her red underwear and that the victim and the Appellant were cousins. She stated that she wanted the charges dropped as she had forgiven the Appellant.
 11. PW3 BMK , the father of the victim testified that he was called to go home where he found the Appellant and the victim who was angry and gesturing that the Appellant had held her and raped her. The Appellant whom he considered his son was taken to the police station while the victim was taken to the hospital. In cross examination he stated that he found the Appellant who was drunk on the ground asking not to be beaten and that he never resisted being taken to the police station.



12. PW 4 DK a brother of the victim stated that he was at home alone when he heard screams from the victim who had gone to the farm to watch over the monkeys and when he responded, he found the Appellant and the victim at the scene. The Appellant was drunk. It was his evidence that he had seen the Appellant pass through their home earlier with one of their uncles carrying alcohol. When he found the victim, who was dumb she pointed to her private part showing him what had been done to her.
13. PW5 John Ndeleva Mwangi a Clinical Officer confirmed the age of the victim and produced P3 form confirming sexual assault with a bloody discharge on the Virginia. PW6 CPL David Kandie arrested the Appellant and took the victim to the hospital who kept on pointing at the Appellant. He produced the mental assessment report on the victim confirming that she was mentally challenged.
14. When put on his defence, the Appellant testified that on the material day he was with one of his uncles going to drink alcohol when the brother of the victim told them not to pass through their home and they left him there making noise and that when they came back there arose an altercation with the said brother and that he sat there until their father came, who said that he had assaulted the victim and was arrested. It was his evidence that later his uncle visited him in the prison and said that he was sorry and wanted to withdraw the case.

Determination

15. From the proceedings herein and the submissions, the following issues have been identified for determination:
 - a. Whether the prosecution case was proved against the Appellant.
 - b. Whether the sentence was lawful.
16. On the proof of the prosecution case, the Appellant was positively identified by recognition, he was known to the victim who was his cousin, he was placed together with the victim at the scene by the brother of the victim PW 4 and the father PW3. The Appellant in his defence confirmed that PW4 had seen him pass through their home and he was subsequently arrested at the scene. I am therefore satisfied that his identification was free from error.
17. The age and the fact of penetration was also proved beyond reasonable doubt and the fact that the victim did not consent to the sexual act was proved by her testimony and further by the fact that she did not have legal capacity to give consent. As was stated in the case of R v Oyier [1985] e KLR lack of consent is an essential element in the crime of rape and that the prosecution had to prove that the complainant physically resisted or that if she did not, that her understand and knowledge were such that she was not in a position to decide whether to consent or resist.
18. I therefore find no fault with the trial Court's finding that the complainant had no mental capacity to give free consent by virtue of her being a vulnerable person as per Article 54 of *the Constitution*.
19. I therefore find no fault with the conviction of the Appellant as the Appellant's contention that there were contradictions in the prosecution's case has no merit based on the evidence on record as evaluated herein, which I hereby affirm.
20. On sentence, the same remains at the discretion of the trial Court and the Appellant Court will only interfere with the same if the Court took in to account irrelevant matters or if the same is not lawful see Republic v Rabie 1975(4) SA 855(A). In this matter the Court did not give the minimum sentence nor the maximum sentence. In arriving at the sentence herein the Court had this to say: "a look at the Court record clearly reveal that there are no mitigating circumstances that would move the Court to act leniency. It is clear that there are many aggravating circumstances herein. The accused clearly took



advantage of his position of trust as a relative to the victim to commit the offence. He further took advantage of a person living with disability ...”

21. As was stated in Charles Ndirangu Kibue v Republic (supra) the victims mental incapacity constitutes an aggravating factor. I therefore find no fault with the Court’s determination on sentence and will not interfere with the same save for the fact that it shall run with effect from 3rd March 2022 when the Appellant first appeared in Court in line with the provisions of Section 333 of the Criminal Procedure Code.
22. From the matters stated herein it follows that the appeal lacks merit on both conviction and sentence and is therefore dismissed and the Courts finding thereon affirmed. And it is Ordered.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 11th DAY OF JULY 2024

J. WAKIAGA

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of :

Appellant present virtually at Nyeri Maximum Prison

Court Assistant - Jackline

