



**JOHANA KUBAI MUREITHI v Republic (Criminal Appeal E084 of 2023)
[2024] KEHC 10966 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10966 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E084 OF 2023
AK NDUNG’U, J
SEPTEMBER 19, 2024**

BETWEEN

JOHANA KUBAI MUREITHI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from original Conviction and Sentence in Nanyuki CM
Sexual Offence Case No.E007 of 2023 - Hon. L. Nyaga, RM)*

JUDGMENT

1. The Appellant herein, Johana Kubai Mureithi, was convicted after trial of rape contrary to section 3(1)(a)(b) as read with Section 3 of the *Sexual Offences Act* No.3 of 2006. It was alleged in the charge that on 27th day of January, 2023 at [Particulars Withheld] of Laikipia County, he intentionally and unlawfully caused his penis to penetrate the vagina of one MM by use of force.
2. On 4th July, 2023 the Appellant was sentenced to serve fifteen (15) years imprisonment.
3. Aggrieved by the conviction and sentence, the Appellant has lodged this appeal and in his undated petition has raised the following grounds;
 - i. That he is the sole breadwinner of his family.
 - ii. That the learned trial Magistrate erred in matters of law and fact by failing to note that there was contradictions as to the time of the commission of the alleged offence.
 - iii. That the learned Trial Magistrate erred in matter of law and fact by failing to note that the sentence meted upon the Appellant was harsh and exorbitant.
 - iv. That the learned Trial Magistrate erred in matters of law and fact by failing to appreciate that the complainant went for medical examination after eight days from 27.01.2023 to 3.2.2023.



- v. That the learned Trial Magistrate erred in matters of law and fact by failing to note that according to the medical examination the complainant had changed clothes.
 - vi. That the Appellant prays to be present at the hearing of the appeal and to be served with trial court proceedings in order to adduce more grounds.
 - vii. That the Appellant prays that his appeal succeed in its entirety.
4. In his hand-written amended grounds of appeal presented together with his written submissions, the Appellant raised the following additional grounds of appeal –
- viii. That the learned Trial Magistrate erred in both law and facts by convicting and sentencing the Appellant on a case that was not proved beyond reasonable doubts.
 - ix. That the learned Trial Magistrate erred in law and in facts by convicting the Appellant while relying on single witness evidence of an incredible witness.
 - x. That the learned Trial Magistrate erred in law and facts by convicting the Appellant without medical proof of both penetration and mental disability of PW1.
 - xi. That the learned Trial Magistrate erred in law by convicting the Appellant after quashing his defence statement without giving good reason why the Prosecution case was preferred against his as provided by section 169 of the Criminal Procedure Code.
 - xii. That the learned Trial Magistrate erred in law and facts by applying wrong principle during sentencing by meting out a manifestly, harsh and excessive sentence to a first offender.
5. The appeal was canvassed by way of written submissions. In his submissions, the Appellant claims that the Prosecution did not prove each and every element of the offence in order for his conviction to be safe and sound and instead relied mainly on hearsay and unverified conjectures.
6. It is submitted that penetration was not proved as there was no evidence of the same save for the observation of an old broken hymen which did not support recent sexual activity on the part of the complainant.
7. It is further urged that the information in the P3 form was transferred to the PRC form raising credibility questions on the medical evidence. The Appellant challenges the assertion that the complainant was mentally challenged.
8. It is urged that the trial while relying on the evidence of the victim the court did not record as required by the law that the witness was telling the truth. Further that the demeanour of the witness was not recorded.
9. It is submitted that there were contradictions and inconsistencies in the evidence and that the defence evidence was not weighed vis-à-vis the prosecution case. No reasons were given by the court why the court considered the Appellant's defence as an afterthought.
10. On sentence, the same is challenged as being harsh and excessive and the court failed to consider that mandatory minimum sentences have been recently frowned upon by superior courts.
11. The Respondent counsel opposes the appeal in its entirety.
12. The starting point in the analysis of the issues raised in this appeal is to recognize that this is a first appeal. It is the duty of this court as the first Appellate court to re-evaluate the evidence and make its



own conclusions. In the case of *Okeno v Republic* [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”

13. The Court of Appeal for Eastern Africa in *Pandya -vs- Republic* [1957] EA 336 is as follows: -

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

14. The court is not involved in finding evidence to support the conviction. It is involved in wholesome review of evidence and reaching its own conclusions.

15. In *Kiilu & Another v Republic* [2005]1 KLR 174, the Court of Appeal held that:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.”

16. Towards that end, it is imperative to have a brief summary of the evidence adduced at the trial court.

17. PW1 testified that the Appellant found her in a house feeding a child. He sucked her breasts, untied his belt and removed PW1’s trouser. He lay on her. After 4 days she told her mother what had transpired. The next day, the Appellant went to the home and said he had been sent by PW1’s father to greet her. PW1 asked the Appellant to leave her alone.



18. It is her evidence that on Friday (sic) the Appellant came again, entered the house and locked it. He removed PW1's clothes, licked her breasts and untied his belt and laid on her. He did "tambia mbaya" to her. He raped her four times. He had earlier raped her when she was in standard 7 and 8.
19. PW2 told the court that the Appellant had been to their home but had not entered the house. That he had brought greetings from PW1's father. After 3 days, she met the Appellant and asked him why he had gone to her place. The Appellant stated that he had gone to the home and found PW1 watching Inooro TV and had moved the decorder. Pw2 realized that the accounts of PW1 and the Appellant were different. She confronted PW1 when she got home and told her that the Appellant had been arrested and that PW1 would also be arrested if she did not tell the truth. It is then that PW1 disclosed that the Appellant had done "tambia mbaya" to her. PW2 reported the matter at Baraka Police station and they were referred to the general hospital where PW1 was treated and tests done. A report was then made at Nanyuki police station and statements recorded.
20. PW3 produced a P3 form which was filled by her colleague Salat Chari Guyo who was away on annual leave. She confirmed that she had worked with Guyo since 2020 and that the P3 form was in his handwriting and bore his signature. She testified that on head to toe (sic) examination was normal and the approximate age of injury was 6 days and there had been sexual assault. On laboratory examination, there was no spermatozoa and no infection noted save for a foul smelling white discharge.
21. On cross examination, PW3 stated that tests were conducted on the patient even though she came after 8 years (sic).
22. PW4 the investigating officer interviewed PW1 and established from her that the Appellant had raped her on 27/1/2023. The complainant did not reveal this as she was afraid. Further information was that the Appellant had earlier raped PW1 when she was in STD 7 and 8. PW4 caused the arrest of the Appellant and she took PW1 to hospital for treatment and investigations.
23. The Appellant gave a sworn defence. He stated that on 3/2/23 he woke up as usual, took his children to school and went to his boda boda business. At 7pm he was arrested by 2 police officers and taken to Baraka police station. He was taken to Nanyuki police station at 11.30pm. He said that on interrogation he said he did not know M. He told the officer that he was not educated and he was forced to sign the statement. He was then charged. He saw the complainant for the first time in court. He denied knowledge of the house where he was said to have gone. He added that PW2 had a grudge as the Appellant had declined to lend her money. PW2 had also sought to be his friend but he refused. On cross examination, he said there was no witness to state where he was on 27/1/23.
24. From the recap of the evidence and the submissions on record, the issues for determination are 2 fold;
 1. Whether the prosecution proved its case to the threshold required in law.
 2. Whether the sentence herein was harsh or excessive.
25. I have considered the evidence as recorded by the trial court. I have taken cognizance of the fact that I neither heard nor saw the witnesses testify and have given due allowance for that fact. I have had due regard to the submissions made and case law cited.
26. In considering these issues, I bear in mind that it is trite law in the criminal justice system that the burden of proof always lies with the prosecution and that it does not shift as held in *Okethi v Okale v Republic* (1965) E.A.555. It is incumbent upon the prosecution to discharge that responsibility to



the required degree by establishing the allegations levelled against an accused person. In the case of Republic v Davis Muriuki Kinyua [2021] e KLR the court had this to say;

“...It is a cardinal principle of Criminal Law that one who claims must prove, every allegation due to that accusations to convince the Court that the claims are true. These findings were in consonant with the guidelines set out in R. T. Bhatt v R {1957} EA 332; with a rider that, “a prima facie case does not mean a case proved beyond any reasonable doubt since at this stage, the Court has not heard the evidence for the defence.” (See Uganda v Mulwo Aramathan CR Case No. 103 of 2008).

27. The court further stated that;

“...The court is cognizant of the fact that the burden of proof in criminal cases lies with the prosecution. The standard of prove is beyond reasonable doubt. The phrase and burden of proof of beyond reasonable doubt was explicitly captured in the case of Miller –VS- Minister of Pensions (1947) 2ALL ER 372-373 by none other than Lord Denning who stated as follows:-

“It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. If the evidence is so strong against a man as to leave only a remorse possibility in his favour which can be dismissed with the sentence of course it is possible the case is proved beyond reasonable doubt, but nothing of short of that will suffice.”

28. The statutory definition of rape is in section 3 (1) of the [Sexual Offences Act](#) -

- “(1) A person commits the offence termed rape if—
- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
 - (b) the other person does not consent to the penetration; or
 - (c) the consent is obtained by force or by means of threats or intimidation of any kind.”

29. Thus the main ingredients of the offence of rape created in section 3 (1) of the [Sexual Offences Act](#) include intentional and unlawful penetration of the genital organ of one person by another, coupled with the absence of consent. The identification of the perpetrator certainly is also key. In the case of Republic vs. Oyier[1985] KLR 353 the Court of Appeal held that;

“The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.

2. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.
3. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards



committed by force or against her will; nor is it any excuse that she consented after the fact.”

The prosecution was therefore required to establish penetration, absence of consent, and that the Appellant was the perpetrator of the act.

30. Penetration is defined under section 2 of the *Sexual Offences Act* to mean the partial or complete insertion of the genital organ of a person into the genital organs of another person. This position was explained by the court of appeal in the case of Mark Oiruri vs. Republic Criminal Appeal 295 of 2012 [2013] eKLR in which they opined thus:

“...and the effect that the medical examination was carried out on her on 16th November, 2008 five days after the event, and that during that time she must have taken a bath and no spermatozoa could be found. In any event the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ...”

31. In the case of *Kassim Ali v Republic*(2021)e KLR the court of appeal stated that;

“So the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence”

32. In this particular matter, by the time a medical examination was conducted, no findings were made by the clinical officer supporting that the genitalia of PW1 had been penetrated. In his comments about the physical state of and any injuries on the genitalia, the clinical officer records “No injuries”. At part B of the P3 form, he found the head and neck, thorax and abdomen, upper limbs and lower limbs all normal. Inexplicably, he goes ahead to note approximate age of injuries as 6 days, a strange finding since in his examination of PW1 he noted no injuries. Similarly, he states that probable type of weapon causing injury was sexual assault, again a mind boggling conclusion, he having found no injuries on PW1.

33. The trial court’s finding at paragraph 30 of the judgement therefore is not supported by evidence as the conclusion by the clinician that there was sexual assault is not based on his actual findings as recorded in the P3 form.

34. I need to comment on the production of the P3 form by PW3, a clinical officer other than the one who examined PW1 and filled the form. The provisions of Section 33 of the *Evidence Act* clearly allows for the production of documents/expert evidence if the makers cannot be found or whose attendance cannot be procured without an amount of delay or expense. The prosecution or any party who wishes to rely on such evidence are required to get another expert witness from the same field and who is familiar with the handwriting of the author of the document to tender the evidence.

35. The provisions of Section 77(1) of the *Evidence Act* provides as follows:-

“In criminal proceedings any document purporting to be report under the hand of a Government Analyst, Medical Practitioner or of any Ballistics Expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.”



The provisions of Subsection 2 of the same provision makes a presumption that the said document is genuine and the signature thereof is authentic. This provision therefore gives the trial court discretion to admit such documents as evidence subject to compliance with Section 33 of the [Evidence Act](#).

36. In *Sibo Makovo V. Republic*, Criminal Appeal [1997] eKLR, the Court of Appeal addressing the legal requirement stated as follows;

“The P3 form was filled in by the Medical Officer, Naivasha District, was produced by PW3. The record does not show that the contents of the P3 form were explained to the appellant. Nor does the record show that the maker of the report (P3 form) was not available to give the requisite evidence. No foundation was laid so as to produce the P3 form by a person other than the maker thereof. It is trite law that if the maker of a document is not available the document can be produced only after another person identifies the signature of the maker and in terms as laid down in section 33 of the [Evidence Act](#) (Cap 80, Laws of Kenya) so far as relevant. It appears to us that production of P3 forms in courts is not taken seriously and we wish to impress upon trial magistrates to be careful in admitting P3 forms when the maker is not called.

37. In the instant appeal, no proper basis was laid for the production of the P3 form by PW3. The explanation that Salat Guyo was on leave does not in my view achieve the legal threshold set in Section 33 of the [evidence Act](#). In take the position that an officer on leave is a witness who can be recalled when necessary to testify and secondly, usual days of leave are few and the prosecution could seek to be indulged to await the officer to complete his leave.
38. That said, the absence of medical evidence does not necessarily rule out penetration. As held in *Kassim Ali v Republic* (supra) the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence. The available evidence is that of PW1. She states that the Accused sucked her breasts and laid on her. That he did “tambia mbaya” to her.
39. I have re-evaluated this evidence. This court is disadvantaged in that it did not have the opportunity to see and hear PW1 testify and make conclusions on her demeanour and truthfulness. The trial court which had such an opportunity in its analysis indicated that the evidence of PW1 on penetration was corroborated by the PW3 and the P3 form produced. I have already made a finding that the medical evidence did not support penetration and therefore my conclusion is that the said evidence could not corroborate PW1’s evidence.
40. Under Section 124 of the [Evidence Act](#), the court can convict on the uncorroborated evidence of the victim of a sexual offence if for reasons to be recorded the court is satisfied that the victim is telling the truth. This provision was not applied by the trial court as the basis of its finding is that PW1’s evidence was corroborated, a fact which I have concluded to be unfounded.
41. Even assuming penetration was proved, the next issue is to consider whether PW1 consented to the act. From a plain reading of the evidence adduced, there is no indication at all that PW1 resisted the sexual act. The finding in *Republic vs. Oyier* (supra) to prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.
42. The charge herein relates to rape a clear indication that the complainant was an adult. The evidence on record indicates that the Appellant raped her. She did not tell her mother. PW2, the mother stated that it is only when she threatened PW1 with arrest that she disclosed what had happened.



43. At this juncture, it is opportune to state that in a rape case, it is the complainant who should volunteer the information that she did not consent to a sexual act. When prodded to do so by someone else, more so through threats of arrest, the denial that there was consent becomes watered down. This apparently is the obtaining situation in this case.
44. In my analysis of the evidence I have not missed an apparent attempt by the prosecution, though a feeble one, to introduce the angle that PW1's understanding and knowledge were such that she was not in a position to decide whether to consent or resist. It is indicated in the PRC form that PW1 was mentally retarded. Where a mentally retarded person is the victim of rape, her understanding and knowledge would be such that she would not be in a position to consent or resist. Of particular note is that such a mental state must be proved by evidence. In the present case, other than an indication in the PRC form that the complainant was mentally retarded, no further evidence is offered in support thereof.
45. I opine that prove of mental incapacity is a serious issue that would require proper interrogation complete with medical examination report(s). Am quick to note that the P3 form produced does not mention the mental state of PW1 and there is no indication that she was mentally incapacitated. To the contrary, the evidence on record was that PW1 was a form 2 student who only happened to be home over school fee arrears.
46. Flowing from the above, the issue whether the complainant consented to the act, if at all, remains murky and raises a lot of doubts.
47. As regards the question of identification of the Appellant as the perpetrator, I would have no difficulties in finding that there could be no doubts over this as the Appellant was well known to the complainant, the act was in broad daylight and the attempt by the Appellant to deny knowledge of PW1 is foolhardy and would not have come to the aid of the Appellant had other evidence been supportive of the charges.
48. Based on the foregoing, it is my finding that the evidence on record falls short of proving the charge to the require threshold of beyond reasonable doubt. With the result that the appeal herein succeeds in its entirety. I accordingly set aside the conviction and sentence meted out by the trial court and substitute thereof an order acquitting the Appellant. He is to be set free forthwith unless otherwise held under another warrant.

DATED SIGNED AND DELIVERED AT NANYUKI THIS 19TH DAY OF SEPTEMBER 2024

A.K. NDUNG'U

JUDGE

