



**Muithya v Republic (Criminal Appeal E004 of 2022)
[2024] KEHC 17241 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 17241 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E004 OF 2022
TM MATHEKA, J
SEPTEMBER 18, 2024**

BETWEEN

NICODEMUS MUTIE MUTHYA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Nicodemus Mutie Muithya was charged with rape contrary to section 3(1) (a), (b), (3) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were that on 20/11/2018 at about 1500hrs in Kyaani village, Malunda sub location Mukinyu location, Mbooni East sub-county within Makueni county he intentionally and unlawfully caused his penis to penetrate the vagina of M.N without her consent. In the alternative he was charged with the offence of indecent act with an adult contrary to section 11A of the same Act – that on the same day, time and place he committed the offence by intentionally touching the complainant’s vagina with his penis without her consent.
2. The appellant pleaded not guilty to the charge.
3. After a full trial where the prosecution called five witnesses – the accused was found to have a case to answer and was put on his defence.
4. He chose to remain silent.
5. The learned trial court analyzed the evidence before it, found the accused guilty of the main charge, convicted and sentenced him to 10 years imprisonment on 22/5/2019.
6. On 20/12/2021 he filed an application to file appeal out of time. The same was allowed.
7. His appeal seeks to have this court answer the questions: -



Whether there was evidence to prove the offence of rape as required by law and whether the charge was proved beyond a reasonable doubt,

Whether the trial court shifted the burden of proof upon the appellant and whether the court misdirected itself hence arriving at the wrong conclusion,

whether the trial court dismissed the appellant's defence,

Whether there are sufficient grounds to warrant that the conviction be quashed, the sentence be set aside.

8. In submissions the appellant addressed the following issues: -
9. The speedy trial – he submitted that the speed at which the trial was conducted was such that it resulted in his right to fair trial being violated – that even though Article 50(2)(f) of *the constitution* envisages a speedy trial, it does not envisage one which results in injustice. He cited Indian case Ratitiram v State of M.P (2012) 4 SCC 516 to the effect that a fair trial should be devoid of prejudice to the accused person, Lack of corroboration of the complainant's evidence. It is his position that the complainant's evidence was "cooked, coached and tailored" by a "cartel of people organized to victimize the accused ..." and was not corroborated. He cited Bernard Kebiba v – R [2002] e KLR, Benjamin Mugo Mwangi & Another –vs-R (1984) e KLR - in the requirement that unless the court is satisfied that the complainant is telling the truth, it cannot act on uncorroborated evidence and must warn itself where it is acting on uncorroborated evidence. He went on to cite other authorities from the 60s. He also cited John Otieno Oloo vs – Republic [2009] e KLR for the proposition that the proviso to section 124 of the *Evidence Act* affords an exception to the general rule requiring corroboration. In several offences it is argued that the trial court did not set out the law under section 124 of the *Evidence Act* or any authorities to support the position it took because in this case there was no eye witness.
10. The appellant addresses what he refers to as discrepancies in the evidence before the trial court and submits that the court failed to reconcile the same to his benefit. He relies on Vincent Kasyula vs R CRA No. 98 of 2014.
11. In their response, the prosecution opposed the appeal on the ground that the state had established the ingredients of the offence.

The age of the victim as 18 years of age –

"proof of defilement" this of course was an error as the charge was rape. However, the substantive submission was that the evidence on record established that the appellant was the only one in the house with the victim, she woke up to find herself bleeding and the medical report confirmed that she had been raped.

Speed of the trial – it was submitted that the evidence of the complainant was taken on the day of the plea 27/11/2018, and the appellant was given time to cross examine the witness after going through her statement – that she was school going, had visited the aunt and was leaving to go back to school – making it difficult for her to come back.

On appellant's defence: that the appellant never tendered any.

12. Guided by the principles laid out in Okeno V R and other authorities on the duty of a 1st appellate court and alive to the fact that I never heard or saw any of the witnesses testify, and my limitation to the record – I find that upon a careful consideration the issues are:



2. Whether the trial was conducted at a speed that was prejudicial to the appellant.
3. Whether the prosecutor proved the charge of rape beyond a reasonable doubt.
4. Whether the appeal has merit.
13. On the speed of the trial Article 50(2) states that the right to fair hearing includes the right of every accused person (c) to have adequate time and facilities to prepare a defence and (e) to have the trial begin and conclude without unreasonable delay.
14. Definitely, this requires a balancing act as the accused person and the victim have the same rights, and none ought to supercede the other. The accused must have time to prepare his defence, the victim, to be heard and to present her case,
15. The appellant took plea on 27/11/2018. He pleaded not guilty to the charge. The prosecution indicated to the court that the victim was in court and they wanted to proceed with the case. The court directed that the accused be supplied with witness statements – and hearing would proceed at 10:30 am. The matter later proceeded and he cross examined the complainant and a fresh date was given for 16/1/2019. On that day two witnesses testified and the matter was adjourned on 28/1/2019 when the accused was admitted to bond and a surety approved.
16. It proceeded on 2/4/19. The Doctor testified. Upon closure of the case for the prosecution the court found that the accused had a case to answer. After the explanation of his rights under section 211 of the CPC the accused told the court that he would remain silent.
17. From the record, it is evident that it is only on the date of plea that one can say that the matter was heard very quickly. However it is not abnormal for the testimony of a witness whose attendance may be difficult to get later, to give their evidence very early in the trial, including on the date of plea.
18. In this case the prosecution did not make the “application” they are making in submissions – the reasons given here for why the witness ought to have been given before the trial court as to why it was necessary to proceed with the complainant’s case on the day of plea.
19. It is evident that the prosecution did not make an application, the prosecution did not give any explanation why the accused would not be given more time to prepare his defence.
20. The court too ought to have been vigilant. The record says that the court stated that the victim was in court and hence the matter could proceed: the mere fact that the victim was in court was not sufficient reason to proceed with her evidence. The question ought to have been whether she ready, and prepared to testify.
21. In this trial, both the accused and the victim were ambushed – at the risk of prejudicing the trial, and the risk of victim not presenting her case properly. The record shows that the accused cross examined the victim and hence it would appear there was no prejudice.
22. On the 2nd issue whether the prosecution had proved the case; PW1 told the court she was in her aunt’s home on 20/11/2018. She was alone when a person hawking some goods came to the home. He greeted her – they exchanged pleasantries. She told him she would not buy any wares from him as the owners of the home were away. He told her his name was Nico Mutie. He asked her for friendship and she refused. He asked for sex, she refused.
23. At some point when he arrived and approached her he told her that the thermos he had had an insect inside. He shook his thermos and asked her to check, she did and saw nothing. After all these conversations, she told her she wanted to rest and told him to leave. She went and lay on the sofa.



24. When she woke up she was naked. Her skirt and pant had been removed. She was bleeding, she had stomach pains. She woke up cleaned herself, washed her clothes, then went out to open the goat house. She was feeling light headed. She fell down. At some point she called out to her grandfather who was herding cattle outside and told him she was unwell. She fell down at the door of the main house he came and carried her to the house and put her to the sofa.
25. Her aunt called her parents and they came and took her to hospital, first to Kalawa and later Makueni Referral hospital where she was admitted for two days. Accused was arrested on the Thursday and she saw him on the Friday. She identified her certificate of birth, the P3, and post-rape form in court. She told the court that she felt sleepy after chatting with the accused.
26. Dr. Makau Alex found testified that the victim had a vaginal tear, her hymen was missing and she was bleeding from the vagina. She was admitted on 21/11/2018 and discharged on 22/11/2018. The vaginal wall tear was repaired under general anesthesia. She had signs of infection and had suffered excessive blood loss.
27. Her aunt DNK confirmed that she told her about the incident – they took her to hospital where she was treated. She said the hawker was found 10km away and responded to the name she had given. She said she had met him before while he was hawking his wares previously.
28. SN is the one who found her when she had collapsed outside the house and carried her inside.
29. No 67026 CPL John Ateka. He was the Investigating Officer. He spoke to the complainant who gave a name and a description leading to the arrest of the accused. He also visited the scene and saw the blood stained seat. He produced the blood stained clothes in court.
30. There is no doubt from the complainant’s testimony that someone had sexual intercourse with her without her consent. This was confirmed by the doctor’s evidence that she sustained a vaginal tear. Monthly periods do not cause vaginal tears-

This evidence answers to the definition of Rape at Section 3 of the *Sexual Offences Act* which states (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.
31. The accused person was the only one present just before the incident happened. He is the one she was speaking to just before she felt tired and needed to lie down. He is the one who had just propositioned her for sex and she had refused tried to get to befriend her she declined.
32. The victim was clear in her testimony that something the accused did make her sleepy and when she woke she had been raped.
33. Evidently the sexual act was not consensual, it was obtained by force, by use of some unknown substance, causing her to be lose her agency.
34. Is this evidence credible? The trial court found that penetration as defined by section 2 of the *Sexual Offences Act* was proved. Forceful penetration that establishes rape – was established – the court saw the blood stained clothes of the complainant together with the Doctor’s evidence.
35. Hence it is my view that from the evidence the penetration, without consent was proved.



36. Regarding the identity of the perpetrator, the trial court found her testimony consistent, cogent and uncontroverted. The court was persuaded that the evidence of the complainant that the appellant was the assailant. I have considered that evidence and even without having observed the demeanor of the complainant, all the fingers point to the appellant – he spoke to the complainant just before the incident – she felt sleepy and when she woke up she had been raped. It happened at 3pm in the afternoon. She was able to identify him. In my view is sufficient evidence to support the identity of the perpetrator.
37. Did the court shift the burden of proof to him? The record shows that the appellant did not offer any evidence – the trial court in its judgment indicated that the finding of a case to answer against the accused created a presumption of guilt.
38. That statement gives the impression that the court was of the view that the accused was now presumed guilty until he proved himself innocent. If that is what the trial court meant – then that was not correct. To be presumed innocent until the contrary is proved is part of the right to fair trial; The presumption of innocence only comes to an end when the accused is found guilty as per the law, beyond a reasonable doubt. We do not have a presumption of guilty in our Constitutional framework as that would mean that an accused person has to prove himself innocent. Our constitution does not envisage a situation where one can be presumed guilty of a criminal offence.
39. The presumption of innocence and the duty is upon the prosecution not dislodge that presumption.
40. When an accused person is found to have a case to answer – it does not mean that he is guilty
 - otherwise the law would have allowed the court to proceed to convict. The court is required even where the accused chooses to remain silent to re-analyse and re-evaluate the evidence – review with a view of making the finding whether or not the charge is proved beyond a reasonable doubt.
41. Even with a ruling of a case to answer the court could find that the charge has not been proved beyond a reasonable doubt and acquit.
42. In this case the accused exercised his right to remain silent.
43. However, upon analysis of the evidence I am satisfied that even with that mishap on the part of the trial court the evidence of the complainant was persuasive and corroborated, was consistent and pointed only to the appellant.
44. Ultimately I find that the appeal is without merit and is dismissed.
45. The conviction and sentence are upheld, only that the sentence to exclude the days from 23/11/2018 to 28/1/2019 i.e. 67 days when he was in custody.

DATE, SIGNED AND DELIVERED IN OPEN COURT ON 18TH SEPTEMBER 2024

MUMBUA T MATHEKA

JUDGE

CA: Ms Nelima/Ms Elizabeth Ms Nyakibia for State Appellant present

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

