



**Gichovi v Republic (Criminal Appeal E007 of 2024)
[2024] KEHC 12868 (KLR) (23 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12868 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E007 OF 2024
LM NJUGUNA, J
OCTOBER 23, 2024**

BETWEEN

DENNIS MUTEMBEI GICHOVI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant herein was charged with the offence of rape contrary to section 3(1) (a) (b) as read with section 3 of the [Sexual Offences Act](#) No. 3 of 2006, in Chief Magistrate’s court at Embu in Sexual offence No.E024 of 2021. The particulars of the charge were that, on the 7th day of March, 2021 at Embu North Sub- County within Embu County, intentionally and unlawfully caused his penis to penetrate the vagina of M.M without her consent.
2. He also faced an alternative charge of committing an indecent act with an adult contrary to section 11(1) of the [sexual offences Act](#) No. Of 2006. The particulars being that, on the 7th day of March 2021 at Embu North sub- County within Embu County intentionally and unlawfully touched the vagina of MM with his penis against her will.
3. The matter proceeded to hearing with the prosecution calling four witnesses.
4. PW1 was Dennis Mwenda a Clinical Officer working at Embu level 5 Hospital. He stated that on 12th March,2021 one Mercy aged 23 years went to her with a history of rape. She had a red skirt in blood 4 x 6cm and bloody line on the back of the skirt. Laceration 3cm long on the lower side of the vagina at 6 O’clock, with pus. Hymen was lacerated at 7 and 4 O’clock clots on the margins of the laceration. There was foul smell and pus discharge from the injury site. He confirmed rape occurred and that the injuries were 5 days old. Lab tests showed epithelial spermatozoa and pus cells. Urine had blood and pus cells an indication of frictional trauma on the vagina.



5. PW2 M.M was the complainant who stated that she knew the appellant as a boda boda operator and he used to carry her. That on 7th, March, 2021 she was at home at 6.00 p.m when the appellant called her on the road. She went and joined him on the road and he held her hand and pulled her to a bush and threw her to the ground. He removed her skirt and panty and raped her and after he was done with her, he left her there. That she dressed up and went home and told her mother who called her father and they took her to Kianjokoma level 4 Hospital after reporting the matter at Karau police station. That she was later referred to Embu level 5 Hospital where she was admitted for five days. She later identified the appellant whom she had known for a long time. She stated that the incident happened at 6.00 p.m and there was still light. On Re- examination she stated that she did not scream because she was scared and confused and that where the appellant pulled her hand, it was on the road side and there were no other people nearby.
6. PW3 AN the mother to the complainant stated that on the 7th, March 2021, she returned home and her grand- daughter was at home. She asked her where PW2 was, and she was told that she was outside. She heard PW2 crying and upon enquiring from her what was wrong, she showed her blood oozing from her private parts and she told her that it was inflicted by the appellant. She informed the father to PW2 and they took her to Kianjokoma Hospital where she was treated and they were referred to Embu level 5 Hospital where she was admitted for five days.
7. PW4 was PC Rose Waruguru who investigated the case. She stated that on the 7th, March 2021, PW2 reported that she was raped by the appellant. She escorted them to Kianjokoma Hospital where they were referred to Embu level 5 Hospital and she was admitted for five days. That on the 12th March, 2021, she recorded her statement and she accompanied her (PW4) and PC Kirima to Mbuvari market where she pointed out the appellant and he was arrested.
8. After the close of the prosecution's case, the appellant was placed on his defence. He gave unsworn evidence as DW1 and called one witness. He stated that on the 7th, March, 2021 he had gone to pick his wife from her maternal home in Kairuri and they arrived home late. He went to Mbuvari and stayed with his cousin Mugambi who informed him that a report had been made in the police station by a lady who was saying that he had raped her. That he was arrested on the 13th, May, 2021 and he was later charged in court with the offence of rape.
9. DW2 Dorothy Murugi the wife to the appellant stated that, she was married to him for 10 years and that for all that time, she had never heard that he walks around with women. That on the material day, she stayed with him at her sister's home until very late and she was surprised how he was said to have committed the offence. On X-examination, she stated that she was with the appellant the whole day and it was on a Sunday and that she was with her sister Catherine and one Rosemary.
10. The learned magistrate after analyzing the evidence that was adduced before him found the appellant guilty, convicted him and sentenced him to serve an imprisonment term of 10 years.
11. The appellant being dissatisfied with both the conviction and the sentence, moved this court vide the memorandum of appeal dated the 26th, January, 2024 seeking for the orders that; the conviction be quashed and the sentence be set aside. The following are the grounds of appeal;
 1. The learned magistrate erred in law and in fact by failing to consider that the appellant being a first offender is entitled and qualified for the benefit of the law as stipulated under Articles 25(c), 27(1) (2) and 28 as read with Article 50 (2) (p) of the *Constitution*.
 2. The learned magistrate erred in law and in fact by failing to take into consideration the provisions of sections 216 and 329 of the *Criminal Procedure Code* before sentencing.



3. The learned magistrate erred in law and in fact in imposing an excessive sentence without taking into consideration the appellant's age and background.
12. In this appeal, the court gave directions on filing of submissions but only the appellant complied with the said directions. In his submissions, he stated that the complainant was his girlfriend and that on the material day, it was the complainant who called him to their home area and they agreed to have sex and that explains the reason why she did not scream. That it was not their first time to have sex and on the material day he escorted her to their home after they had sex and the complainant did not have any problem.
13. This court has considered the grounds of appeal and has also re-evaluated the evidence that was adduced before the trial court. The appellant herein was charged with the offence of rape. The offence of rape is provided for in section 3(1) of the [sexual offences Act](#) as;
 - (1) A person commits the offence termed as 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.
 - c) The consent is obtained by force or by means of threat or intimidation of any kind.
14. I will proceed to consider all the elements together. The evidence on record is that, on the 7th, day of March, 2021, PW2 was at their home when the appellant who was on the road called her. She went and joined him on the road. He pulled her and took her to the bush and raped her. When she arrived home, her mother, PW3 enquired what had happened and she told her that the appellant had raped her. She was taken to Hospital by her father and mother where she was admitted for five days. It was her evidence that the appellant was a person well known to her as he used to carry her on her boda boda.
15. PW1 who examined PW2 confirmed that indeed she was sexually penetrated. It was his evidence that the skirt that PW2 was wearing on the material day, had a blood line at the back and that the hymen was lacerated. It was his further evidence that urine had blood and pus cells an indication of frictional trauma on the vagina and the injuries were five days old. He assessed the degree of injury as grievous harm. The offence is said to have been committed on the 7th, March 2021 and he examined PW2 on the 12th March, 2021 which was five days after the offence had been committed.
16. From the evidence of PW1 and PW2, it is clear that the sexual encounter between the appellant and PW2 was not consensual as the appellant would like this court to believe. From the evidence of PW1, PW2 sustained injuries to her vagina which he classified as grievous harm. He also noted the presence of blood in the urine of PW2 and pus cells which were an indication of frictional trauma on the vagina. This is sign that the appellant must have used force to penetrate PW2. It is also worth noting that PW2 reported the incident to her mother, PW3 when she arrived home after the ordeal which was an indication that she did not consent to having sex with the appellant.
17. In his defence, the appellant denied committing the offence and raised a defence of alibi. It was his evidence that on the material day he had gone to pick his wife from her maternal home at Kairuri and went back home later in the day. That he then went to Mbuvari where he stayed with his cousin Mugambi who told him that a report of rape had been made against him by a certain lady. His witness who testified as DW2 gave evidence that contradicted his defence. She told the court that on the material day she was with the appellant at her sister's home the whole day where they stayed until very late.



18. In the submissions that he filed in this appeal, he has completely deviated from his defence and has admitted having had consensual sex with PW2 on the material day and that PW2 was his girlfriend. This evidence did not come out during the trial. I am fully aware that submissions are not evidence but I fail to understand why the appellant would choose to change his defence in the appeal yet he never raised it before the trial court! This means that he did not have a solid defence and he was on a fishing expedition.
19. On whether the sentence is harsh and excessive, the appellant was charged under the *Sexual Offences Act* and the mandatory minimum sentence for rape is prescribed as not less than 10 years. He was sentenced to serve the mandatory minimum sentence and therefore, the same is within the law and it's not excessive.
20. I find that the appeal has no merits on both the conviction and sentence and it is hereby dismissed.
21. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF OCTOBER, 2024.

L. NJUGUNA

JUDGE

..... for the Appellant

..... for the Respondent

