



REPUBLIC OF KENYA



KENYA LAW
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**EW v Republic (Criminal Appeal E047 of 2021)
[2023] KEHC 1705 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1705 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E047 OF 2021**

**A. ONG'INJO, J
MARCH 9, 2023**

BETWEEN

EW APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of Hon. E.A. Nyaloti, Chief Magistrate delivered on 11th day of May 2020 at Mombasa Law Courts Sexual Offence Case 1594 of 2018)

JUDGMENT

1. The Appellant EW was charged with the offence of rape contrary to Section 3(1) (a) & (b) as read with Section 3(3) of the [Sexual Offences Act](#) No 3 of 2006.
2. The particulars are that EW on the September 11, 2018 at [Particulars Withheld] area in Mombasa District within unlawfully and intentionally caused his penis to penetrate the vagina of FN without her consent.
3. In the alternative the appellant was charged with the offence of committing an Indescent act contrary to Section 11(A) of the [Sexual Offences Act](#) No 3 of 2006.
4. In Count II, the appellant was charged with the offence of personation contrary to Section 38(1) as read with Section 36 of the [Penal Code](#). Particulars are that on September 11, 2018 in Mvita Sub-County within Mombasa County with intent to defraud presented himself to be a police officer to FN .
5. The appellant was also charged with the 3rd count of resisting lawful arrest contrary to Section 254(b) of the Penal Code. Particulars were that on September 12, 2018 in Mombasa District within Mombasa County resisted arrest by No xxxx PC Fadhili Omari and No xxxxxx. PC Justine Mutwiri police officers who at the time of the said resistance were acting in due executive of their duties.



6. The prosecution tendered the evidence of 3 witnesses and the appellant on his defence gave a sworn statement. The trial Magistrate found the appellant guilty and convicted him. He was subsequently sentenced to serve 8 years imprisonment.
7. The appellant was aggrieved by the conviction and sentence and he filed petition of appeal on June 30, 2021 on the following grounds: -
 - i. That the learned trial Magistrate erred in law & fact by finding him guilty & convicting & sentencing him without considering that the experts report did not prove the case of rape beyond reasonable doubt.
 - ii. That the learned trial Magistrate erred in law & fact by finding him guilty, convicting & sentencing him without considering that the prosecution case was governed by massive contradiction and discrepancies.
 - iii. That the learned trial Magistrate erred in law & fact by finding him guilty, convicting & sentencing him without considering that the case was poorly investigated which led to miscarriage of justice.
 - iv. That the learned trial Magistrate erred in law & fact by failing to comply with Section 329 of the [Criminal Procedure Code](#) as mitigation is part of the trial process.
 - v. That the learned trial Magistrate erred in law & fact by finding him guilty without considering his defence.
 - vi. That the trial Magistrate erred in law and fact by finding him guilty and convicting & sentencing him without considering the sentence to be harsh and excessive, unjust, unconstitutional in human and degrading.
8. The Appellant sought that appeal be allowed, conviction quashed & sentence set aside. Directions were taken on January 24, 2022 that the appeal was to be canvassed by way of written submissions but upto February 6, 2023 the Appellant had not filed his submissions.
9. The Respondent filed submissions in which it was argued that the evidence of the prosecution witnesses was consistent and proved all reasonable doubt that the Complainant was raped by the appellant who led her to a club where he threatened to kill her. That the Complainant identified the appellant and he was arrested. The Respondent said the appellants defence was an afterthought.
10. From his courts re-evaluation & analysis of the evidence in the trial court and the judgment as well as consideration of the grounds of appeal this court is to determine:-
 - i. Whether the prosecution proved the offence of rape against the appellant beyond all reasonable doubt
 - ii. Whether there were contradictions and discrepancies in the prosecution's evidence.
 - iii. Whether the trial Magistrate considered the appellants evidence in defence
 - iv. Whether the trial Magistrate considered the appellant's mitigation
 - v. Whether the sentence passed was harsh & excessive the circumstances.
11. The complainant was the sole witness for the act of rape. She however led police back to the scene where she was raped and was able to physically identify the appellant. Although the appellant claimed in his defence that the complainant was his wife and that she fabricated him because he wanted to divorce



- her, the complainant testified and she was cross examined by the accused but he did not raise the issue of the alleged relationship.
12. The complainant said that she was not even sure the name the appellant gave her was his true name and when he reported he described his physical appearance to the police and led police to the club and identified him and he was arrested.
 13. The Appellant did not tell the investigating officer that the complainant was his wife. This court agrees with the trial Magistrate that the allegation was an afterthought. The trial Magistrate did in effect consider the appellant's defence and disregarded it as an afterthought.
 14. This court has not seen any discrepancy and contradiction in the prosecution case and the appellant did not file submissions to identify the alleged discrepancies. Neither did the appellant tell this court how investigations were shoddy.
 15. The appellant was given an opportunity to mitigate and he said he had a wife and children and he prayed that the court considers the time he was in custody. He also said he was a sole bread winner and that he was unwell in prison.
 16. The trial Magistrate while passing sentence said:

' I have considered the accused's mitigation. I have also considered the time the accused has been in custody. I have also considered that the accused is a 1st offender. The accused is sentenced to 10 years imprisonment less two years the accused has been in custody. The accused will serve eight years' imprisonment'.
 17. This shows the accused persons mitigation was considered. Accused was charged under Section 3(1) (a) & (b) as read with Section 3(3) of the [Sexual Offences Act](#) No 3 of 2006 Section 3(3) provides:-

' A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life'.
 18. This court finds that in consideration of the manner the appellant executed the commission of the offence while using threats to kill the complainant, the sentence passed against him was very lenient. This court finds it was a lawful sentence.
 19. The appeal herein lacks merit and it is dismissed. The Appellant has 14 days Right of Appeal.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 9TH DAY OF MARCH 2023**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for the Respondent

Appellant present in person

Hon. Lady Justice A. Ong'injo

Judge

