



REPUBLIC OF KENYA



**Mwangi v Republic (Criminal Appeal 2 of 2018)
[2023] KEHC 2726 (KLR) (21 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2726 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL 2 OF 2018
SC CHIRCHIR, J
MARCH 21, 2023**

BETWEEN

SAMUEL NDIRANGU MWANGI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant was charged with the offence of rape contrary to section 3(1) (1) (a)(c)3 of the *Sexual Offences Act* No 3 of 2006 (the Act). He faced an alternative charge of sexual Assault contrary to section 5(1) (b)(2) of the same *Act*.

The particulars are that on the 5th day of August 2017 at 22.30 hours in Mathioya sub- County within Muranga County. intentionally and unlawfully caused his penis to penetrate the Vagina of JWK by use of force, intimidation and threats.

He faced an Alternative charge of sexual Assault contrary to section 5(1) (b) (2) of the *Act*. He pleaded not guilty and after a full trial, he was convicted on the first charge and sentenced to 20 years in prison. He was dissatisfied with the finding and consequently filed this appeal.

2. In the amended petition of Appeal he sets out the following grounds.
 1. That the learned Magistrate erred in both law and facts by relying on contradicting and doubtful evidence adduced by the prosecution.
 2. That one key witness was not summoned.
 3. That the investigation carried out was incomplete and the prosecution's case was not proved beyond reasonable doubt.



Appellant Submissions

3. The Appellant has submitted that there were inconsistencies and gaps in the prosecution evidence; that the complainant was couched by the prosecution's counsel and that some key witnesses, like the brother of the complainant, were not summoned to testify.
4. It is further submitted that there was no proper investigations done. That failure to take him for medical examination, which examination, he believes, would have shown if he was connected to the offence, dented the prosecution's case.
5. He also submit that, the weapon he is alleged to have used to cut the iron sheet in order to gain access to the complainant's house was not produced.

Respondent's Submissions.

6. It is the respondent's submissions that the ingredients of the crime of rape was proved, namely lack of consent and penetration; that the perpetrator was duly identified by at least 4 witnesses, including the complainant. On the alleged contradicting evidence, the respondent submits that, the contradictions, if any, were minor and did not go into the substance of the case.
7. On alleged their relationship between the appellant and the complainant, it is submitted that there was no evidence to prove that such a relationship did exist.
8. It is further submitted that if there were any facts that were not investigated further, such facts were immaterial to warrant further investigations.
9. On the sentence meted out, the respondent submits that the sentence was in tandem with the offence and the trial court had considered all the relevant factors when meting out the sentence.

Analysis of the Evidence and Determination.

10. This is the first Appeal and the duty of this court is to look at the evidence afresh, re-evaluate and arrive at its own conclusion. I must bear in mind however that the trial court had the benefit of hearing and seeing the witnesses first hand (See *Okeno vs. Republic* [1972] EA 32.

I will proceed to address the grounds of Appeal as set out by the Appellant.

Was the prosecution evidence, contradicting and doubtful

11. The Appellant has pointed out for instance that the complainant's allegation of being raped was in variance with the findings of the clinical officer; that the prosecution's failure to take the Appellant for medical examination dented the prosecution's case.
12. In the case of *Twehangane Alfred vs. Uganda* CRA No 139 of 2001 (2003) UGCA, cited with approval in the case as *MFG vs R* (Criminal Appeal No 667/2021) (2022)eKLR, the court held with regard to contradiction in the prosecution's case:

“the law as set out in the numerous authorities is that a grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to a deliberate untruthfulness or if they do not affect the substance of the prosecution's case”.



13. I did not find any major contradictions in any of the witnesses' testimonies or contradiction between witnesses. Apart from the complainant's testimony, there is a convergence of all the other 3 eye witnesses. They all testified on the fact that screams were heard in the complainant's house, they found the complainant and the Appellant, and they found the iron sheets had been cut to allow access to the complainant's house.

14. Was there a love relationship between the Appellant and complainant?

The appellant told the court that the complainant was his girlfriend and the complainant was only falsely accusing him because he failed to give her money. I find the Appellant's submissions implausible. And this is why:

a). The Appellant gave unsworn statement. This is the Appellant's right under Section 211(1) of *Criminal Procedure Code*. However regarding the probative value of unsworn statements, the court in the case of *Mercy Kajuju & 4 others vs Rep* (2009) eKLR for instances stated.

“.....unsworn statements have no probative or evidential value. Unsworn statements are not in evidential sense facts, which either go to prove or disprove a point alleged by one party and disputed by another. Facts in issue must be proved and unsworn statements are inappropriate subject of evidence.....”

b). The appellant further failed to avail any witness to corroborate his alleged some relationship with the complainant.

15. There is another reason why I find the Appellant's evidence implausible: According to the Appellant, earlier, on the material day, PW2 had gone to the complainant's house. She found the Appellant there. PW2 started asking for her money from the complainant on account of which she had supplied some milk, and because the complainant could not pay, the two women started quarrelling. He left as the quarrel went on.

It is not plausible, as the Appellant would want the court to believe, that some hours later, the two women were now friends and scheming to implicate the Appellant in a crime.

16. Was the offence of rape proved beyond reasonable doubt?

The Appellant's complain is that there was no presence of spermatozoa when the tests were carried out; that he was not subjected to a medical examination which would have determined if indeed he was the perpetrator. Section 3 of the *Act* defines the rape as follows;

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”.

On penetration, section 2 of the Act, defines “penetration” as

“ The partial or complete insertion of the genital organs of one person into the genital organs of another person.”



17. In the case of *Kassim Ali vs- R.* Mombasa Cr. Appeal No 84 of 2005, it was held that
“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 victim or by circumstantial Evidence”

The complainant gave an account of what transpired. She stated:

“he came on top of me and pulled my dress to the waist..... He pulled down his trouser and short..... He took his penis and inserted it in my vagina then he ejaculated in me.....He did it forcefully”

18. The entry on the P3 form indicate that there was evidence of vaginal penetration but could not be ascertained when it took place; that the hymen was broken but not freshly, and the complainant had a clear discharge.
19. On the basis of the complainant’s testimony, am satisfied that penetration as proved.

Was this consensual sex?

20. Lack of consent is an essential element in rape cases, and pursuant to section 3 (c) of the *sexual offences Act* consent obtained by duress or intimidation is as good as no consent. In the case of *Republic – vs- Oyier* (1985) KLR 353, the Court of Appeal held:
- “1. 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.”
21. The following portions of evidence indicate the sex was far from being consensual: the complainant told the court that the appellant held her neck and mouth. Apart from the complainant, four other witnesses told the court that the iron sheet was cut to allow access to the complainant’s house. The evidence of PW1, PW2, PW3, PW5 and PW6 was consistent on the fact that the Iron sheet had been cut through. The Appellant’s sweater, shorts, and his gumboots were found at the complainant’s house. The complainant too was screaming.
22. If consent did exist, there would have been no need for the Appellant to force his way to the complainant’s house, no need to leave his wearing apparel behind, and the complainant would not have been calling for help.
23. I am satisfied that both penetration and lack of consent has been proved, beyond reasonable doubt and I have no reasons to fault the lower court’s finding in this regard.
24. In conclusion, I am satisfied that the offence of rape was proved beyond reasonable doubt, the appellant was properly convicted.
25. On the sentence, the trial court took into account the seriousness of the offence, the conduct of the appellant and the trauma, which the complainant was left with, in handing down the sentence of 20



years. Sentencing is an act of discretion and I see no reason to interfere with the trial's discretion in this regard.

Orders:

The appeal is hereby dismissed and the trial court's finding on both conviction and sentence is upheld.

DATED AND SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 21ST DAY OF MARCH, 2023

S. CHIRCHIR

JUDGE

In the presence of:

