



**Muraki v Republic (Criminal Appeal E026 of 2022)
[2023] KEHC 18715 (KLR) (20 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 18715 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL APPEAL E026 OF 2022
MS SHARIFF, J
MARCH 20, 2023**

BETWEEN

HARRISON MWENDA MURAKI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the original conviction and in Sexual Offences
No E035 of 2021 in the Principal Magistrate's Court at Marimanti
delivered on 17th August 2022 by Hon. J. M. Gacheru, RM)*

JUDGMENT

A. Case Background

1. The appellant was charged and convicted of rape contrary to section 3(1) (a) (c) (3) of the *Sexual Offences Act* No 3 of 2006. He was sentenced to serve 20 years imprisonment given that he was a repeat offender.
2. The particulars of the charge were that on November 27, 2001 in Gituma location of Tharaka South sub county within Tharaka Nithi county the appellant intentionally and unlawfully caused his penis to penetrate the vagina of DMS by use of force.
3. The appellant faced an alternative charge of committing an indecent act with an adult contrary to section 11(A) of the *Sexual Offences Act* No 3 of 2006.

B. Appeal

4. The appellant was aggrieved by both the conviction and sentence and filed this appeal. He assails the judgment of the trial court on grounds that his identification was not proper due to poor light, that



there existed a grudge between his family and the complainant's family. Further that his sentence was excessive and that his defence was disregarded.

5. The appeal is resisted by the respondent.

C. Submissions

6. The appeal was canvassed by way of written submissions.

Appellant's submissions

7. The appellant posits that given the offence was said to have been committed at night when it was raining heavily the circumstances were not favourable for positive identification of the assailant.
8. The appellant submits that in the absence of a DNA test then there is no nexus between the spermatozoa found in the complainant's vaginal swab and him. He relies on the case of *Amos Kinnyua Kugi v Republic* (2015) eKLR.
9. The appellant maintains that penetration was not proved to have been committed by him. He also submits that the complainant had lied about the whole incident and that it was unsafe to base a conviction on her evidence. He cites the case of *Maina v Republic* (1970) EA on this regard. Further that the complainant was an adult with a child whereof penetration was a non-issue.
10. The appellant faults the trial court for not recognizing the existence of a long standing land dispute between his family and that of the complainant.
11. The appellant submits that the sentence meted upon him was excessive and unconstitutional and he cites the case of *Francis Karioko Muruatetu*(1).
12. The appellant further faults the trial court for failing to consider his pre trial term spent in custody as it is enjoined by section 333(2) of the *Criminal Procedure Code*. He relies on the case of *Bethwel Wilson Kibor v Republic* (2009) eKLR on this regard. Finally, the appellant submits that his defence was not considered.

Respondent's submissions

13. The respondent maintains that it had proved beyond any reasonable doubt the charge of rape against the appellant
14. It is the respondent's position that the ingredients of rape as defined in section 3 of the *Sexual Offences Act* were duly proved; the appellant had intentionally and unlawfully penetrated the complainant's vagina without her consent by threatening to kill her with a machete.

D. Evidence

Respondent's evidence

15. PW 1 narrated how the appellant had forced his way into her house in the middle of a rainy night whilst she was asleep with a young child. The door had no lock but was supported by a stone and the victim was woken up by a spot light only for the appellant to grab her by her hand and after he had confirmed that no one had seen him enter the victim's house he forced her onto her bed whilst holding a panga by her throat and raped her.
16. PW1 notified her sister-in-law of the incidence immediately thereafter and the latter called the victim's husband through her cellular phone and PW1 narrated the incident to her husband who was working



away from home. PW1's husband advised her to go and lodge a complaint with the police which she immediately did by making a complaint at police station. PW1 was referred to hospital for a medical examination and treatment.

17. The medical evidence adduced by PW 3 corroborated PW1's evidence and proved penetration as the P3 form produced by this witness as P exhibit 1 confirmed the presence of spermatozoa in the complainant's vagina. PW1 had also sustained minor injuries on her face.

Appellant's evidence

18. The appellant denied the charge and maintained that there was a land dispute between the family of the victim's husband and his and that he had previously been jailed on account of that dispute. He further stated that he had spent the night in the company of DW2. On his part DW2 stated that did not know where the appellant had spent his night on the material night and he therefore did not avail the appellant an alibi defence. In any event no alibi notice had been issued to the state by the appellant during trial.

E. Analysis And Determination

19. The evidence of the State as adduced by PW 1, the complainant, PW 2, and PW 3 was credible, consistent and corroborative. PW 1 gave a consistent narration of how the appellant forced his way into her house, placed a machete in her throat and raped her. She recognized his voice, his dread locks which she touched and his face as he lit the cellphone light in a bid to trace his torch. The medical evidence by PW3 confirmed that PW 1 was raped.
20. The appellant on his part maintained that there was an existing land dispute and that he had been incarcerated previously at the instance of the complainant's husband's family. The appellant appears therefore to have had the requisite motive to revenge his said incarceration hence his decision to rape PW 1.
21. His defence goes to no issue as his defence witness did not know where the appellant spent the night when the offence was committed.
22. I am alive to the duty imposed on me as a first appellate court; to re-evaluate, scrutinize and analyze the evidence afresh while taking into account the fact that I did not have the advantage enjoyed by the trial court of seeing and hearing the witnesses testify and I cannot make any assessment of their demeanor. (See *Okeno v Republic* (1972) EA 32; *Pandya v Republic* (1975) EA 336 and *Shantilal M. Ruwala v Republic* (1957) EA 570.
23. After having subjected the entire evidence to a scrutiny, re-evaluation and analysis akin to a retrial, I am persuaded that the respondent's witness were credible, consistent and corroborative. I cannot say the same of the appellant's evidence and his defence, which I find to be no more than a sham. I find that the charge of rape contrary to section 3(1)(a) (3) of the [Sexual Offences Act](#) No 3 of 2006 was proved against the appellant beyond any reasonable doubt.
24. The trial court did not comply with section 333(2) of the [Criminal Procedure Code](#).

Conclusion

25. The appeal on conviction is devoid of merit and is thus dismissed. The sentence is however set aside and substituted with an imprisonment term of twelve (12) years.

It is hereby so ordered.



DATED, SIGNED AND DELIVERED AT CHUKA THIS 20TH DAY OF MARCH 2023

MWANAISHA S. SHARIFF

JUDGE

