



**Miriti v Republic (Criminal Appeal E001 of 2022)  
[2023] KEHC 2589 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2589 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
CRIMINAL APPEAL E001 OF 2022**

**LW GITARI, J**

**MARCH 9, 2023**

**BETWEEN**

**MOSES MURIITHI MIRITI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant herein was charged in Criminal Case No 16 of 2020 for 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 (hereinafter the 'Act'). It was alleged that on March 12, 2020 in Maara sub-county, within Tharaka Nithi County, the Appellant intentionally and unlawfully caused his penis to penetrate the anus of KMK without his consent.
2. The Appellant pleaded not guilty to the said charge and was subsequently tried. By a judgment that was delivered on December 22, 2021, the trial court convicted the Appellant of the offence and sentenced him to serve ten (10) years' imprisonment.
3. Aggrieved by the said judgment, the Appellant has preferred this appeal against both the conviction and sentence. His grounds for appeal are listed in his Petition of Appeal that was filed in court on January 4, 2022. They are as follows:
  - i. THAT the learned trial magistrate erred in both matters of law and facts by failing to consider that the adduced prosecution evidence was inadequate to stand the conviction.
  - ii. THAT the learned trial magistrate erred in both matters of law and facts by convicting the Appellant without considering that the adduced evidence was full of contradictions and collaborated hence inconsistent with Section 163(1) of the [Evidence Act](#) (Cap 80 of the Laws of Kenya).



- iii. THAT the learned trial magistrate erred in both matters of law and facts when he rejected the Appellant's defence without giving cogent reasons.
  - iv. THAT the trial court magistrate erred in both law and facts by imposing a harsh and excessive sentence upon the Appellant without considering that being a first offender, he was qualified and guaranteed the benefit of the law as enshrined under Article 50(2)(p) of the Constitution of Kenya 2010.
  - v. THAT such further grounds to be adduced at the hearing of the appeal.
4. The appeal was disposed of by way of written submissions.

### **Appellant's Submissions**

5. The Appellant filed his written submission on May 12, 2022. It was the Appellant's submission that the medical evidence did not support the offence that he was charged with. That the complainant framed the Appellant of rape so as to cover up for stealing the Appellant's woofer. The Appellant thus urged this court to re-analyze the evidence and reached its own decision. Finally, he prayed for the appeal to be allowed and he be set at liberty.

### **Respondent's Submissions**

6. On their part, the Respondent filed their written submission on October 27, 2022. They submitted that the ingredients of the offence of rape as set out under Section 3 of the Act were proved by the prosecution against the Appellant. Further, that the element of penetration in rape cases is not proved by medical evidence but by oral and circumstantial evidence. The Respondent relied on the case of AML vs Republic [2012] eKLR to buttress this stand. It was thus the Respondent's submission that the evidence of the victim was believable and did not require corroboration as the same was in relation to a sexual offence. In addition, it was the Respondent's submission that the charge against the Appellant was proved to the required standard of beyond reasonable doubt.
7. On the contention that the Appellant was framed, the Respondent submitted that the Appellant did not tender any satisfactory evidence to substantiate his contention. Further, that the trial court did consider the Appellant's defence and that it was correct for the court to find it wanting.
8. On the legality of the sentence meted out, the Respondent submitted that Appellant's right to a fair hearing during sentencing was safeguarded as he was given a chance to mitigate and that the trial court did consider his mitigation before meting out the sentence. It was further the Respondent's submission that the Appellant could not benefit from any other sentence other than that provided for under Section 3(3) of the Act, which provides a minimum sentence of ten (10) years' imprisonment. As such, the Respondent's submitted that the sentence was proper and that this court ought not to interfere with the same. The Respondent thus urged this court to dismiss the appeal for want of merit.

### **Issues for determination**

9. I have considered the Appellant's petition of appeal and the grounds of appeal listed therein. I have also considered the submission made by the parties. The main issues that arise for determination by this Court are:
- i. Whether the ingredients of the offence of rape were proved against the Appellant to the required standard of beyond any reasonable doubt, and if so,



- ii. Whether the sentence meted out on the Appellant was harsh and excessive in the circumstances.

## **Analysis**

10. This being a first appeal this court is obliged to re-examine and re-evaluate the prosecution case and draw its own conclusions on the same (See: *Okeno vs Republic [1972] EA 32*). Guided by this authority on the duty of this court as a first appellate court, here below is an analysis of the evidence tendered by the parties.

## **The Prosecution's case**

11. The Appellant in this case was charged with the offence of rape. PW1 was EMNK, the complainant's mother. She stated that the Appellant is someone she knew. She then recalled that on the morning of March 14, 2020, she received a text message from his other son, JMM, informing her that he had received a call from the Appellant, a teacher. That the Appellant told him to tell his younger brother, KM, who is the complainant herein, to return the things he had taken. PW1 stated that she then received a second message informing her that the complainant had slept at someone's house and that something had happened. PW1 informed her husband who then went woke up the said K. K's father interrogated him and PW1 states that the complainant revealed that the Appellant had sodomised him. The complainant and his father then went to hospital.
12. PW2 was the complainant in this case, one KMK. He is a bodaboda operator. He stated that he knew the Appellant as a good friend of his. PW2 recalled that on the material day at around 9.00 pm., he was at a hotel called Gakenia when he received a phone call from the Appellant. The Appellant asked him if he had his motorcycle and PW2 told him that he did not have it. The Appellant then asked him to borrow a motorcycle and go for him at Kariani Market. PW2 then borrowed a motorcycle from one Charles and went to Kariani Market where he met the Appellant.
13. PW2 then took the Appellant to his rented house. PW2 stated that he stood outside the gate of the house. That the Appellant asked him to return the motorcycle and the return to the Appellant's house so that they could cook meat. PW2 did so and returned to the Appellant's house between 9.30 pm. and 10.00 pm. That he found the Appellant cooking meat and when he finished cooking, they ate. That the Appellant then offered PW2 an alcoholic drink.
14. PW2 stated that that was the first time for him to take alcohol. That the Appellant forced him to take more alcohol and he got drunk. He then told the Appellant that he could not go home because he was so drunk. It was his testimony that he slept on the sofa but the Appellant carried him to his bed. The Appellant then went to the shower and when he returned, he started removing PW2's trouser stating that he was sweating. He also removed his short. PW2 tried to resist but the Appellant overpowered him and then sodomised him by inserting his penis into PW1's anus several times. PW2 stated that he felt a lot of pain and then fell unconscious. The next morning, PW2 woke up having regained his consciousness. He was still in pain. The Appellant told him that he was leaving and asked him to lock the house when he leaves. It was the testimony of PW2 that he put on his clothes and left the accused house carrying with him a woofer and the alcohol that had remained. That he passed by his home before going for examination and treatment at Muthambi Health Centre. He then reported the incident to the police.
15. PW3 was Joseph Mwenda Mirebu, a clinical officer attached at Chuka District Hospital. He physically examined PW2 and filed his P3 form. He produced in evidence the medical notes from Muthambi Health Centre, the P3 Form, and the PCR Form as P. Exhibits 1, 2, and 3 respectively. According to



him, PW2 complained of sexual assault on March 12, 2020 by a person well known to him. The positive finding was that the anal region was normal except for a slight brownish discharge that was noted.

16. PW4 was Corporal John Kwaliamba attached at Chogoria Police Station. It was his testimony that on March 27, 2020 he was assigned a rape case from Marima Police Post to investigate. He investigated the case and recorded the statement of the witnesses.

### **The Defence Case**

17. When put to his defence, the Appellant gave a sworn statement and stated that the complainant is a brother to his friend. He denied committing the crime. It was his testimony that the complainant went to his house sometime in February 2020 and spent the night. That the following day, the Appellant left the complainant in his house sleeping on the couch. Later, the complainant sent him a message asking for Kshs 200 but the Appellant told him that he did not have money on Mpesa. That after a week, the complainant asked the Appellant for a loan of Kshs 650 stating that he would refund the same once he was paid at work. Again, the Appellant told him that he did not have money.
18. It was the Appellant's testimony that on March 13, 2020, he inquired from PW2 why he had taken the Appellant's house keys. That the PW2 told the Appellant that he would give him the keys. AT 4.00 pm., the Appellant went to his house and found PW2 with his girlfriend and a bottle of drink. The Appellant asked him why he did not inform him that he was going to his house. According to the Appellant he then went back to school where he worked and at 8.00 pm., he received a text message from PW2. PW2 told him that he had carried his music system and a flash disk. The following day, the Appellant told PW2 to bring him the house keys. The Appellant also called PW2's brother and informed him that PW2 had taken his music system. According to the Appellant, went to the police on March 18, 2021 and was told that a case had been reported against him. That he was released at 6.00 pm. and he went home. That on March 21, 2020, PW2's brother returned the music system to the Appellant and on March 27, 2020, the Appellant was called to Chogoria Police Station. He was released on cash bail and told to appear in court on April 7, 2020.
19. I shall now analyse the issues arising for determination.

### **Whether the offence of rape was prove beyond any reasonable doubt**

20. Section 3(1)(a)(b) of the Act provides that:

- ' (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'

21. From above provisions, it is clear that penetration is one of the key ingredients for the offence of rape. 'Penetration' is defined under Section 2 of the Act as 'the partial or complete insertion of the genital organs of a person into the genital organs of another person'. It was the duty of the prosecution to adduce sufficient evidence to prove that penetration did occur and that it was the Appellant who caused the penetration.
22. In this case, the Appellant and the complainant were friends and the Appellant did not refute this. The Appellant actually acknowledged that the complainant (PW2) used to visit his house and that he would allow him to sleep over. The identification of the Appellant is therefore not in dispute and the same was proved beyond any reasonable doubt.



23. On the proof of penetration, PW2 testified that when he woke up the following day after the alleged offence, he felt a lot of pain in his anus area and found some blood stains in his inner wear. That the inner wear was taken by the police officer who accompanied him to hospital. However, the stained inner wear alleged to have been stained was never produced before the trial court as evidence.
24. It was the evidence of PW3 that the complainant was treated 48 hours after the alleged incident. This evidence is substantiated by medical report from Muthami Health Centre and the P3 Form produced as P. Exhibits 1 and 2 respectively as the two exhibits makes reference to OB No 9/14/03/2020. It is therefore evident that PW2 made the police report on March 14, 2020 and he went for a medical examination the same day. This was two (2) days after the alleged offence.
25. It was further PW3's evidence that the clinical officer who physically examined the complainant did not note any injuries in his anal region. From the Post Rape Care (PRC) Form produced before the court as P. Exhibit 3, there were no lacerations, no bleeding and no blood on examination of the complainant's anus. PW3 further stated that PW2's anal region was seen to be normal except a slight brownish discharge that was noted. There was no indication from the clinical officer what that slight brownish discharge could have been. It could have been seminal fluid or urine or faecal matter. The burden was on with the alleged rape. The burden was not discharged.
26. The Respondent however submitted that penetration in the offence of rape is not proved by medical evidence but by oral and circumstantial evidence. I am inclined to disagree with this position. In the case of *AML V REPUBLIC* [2012] eKLR, cited by the Respondent, the court was categorical that 'the fact of rape or defilement is not proved by way of a DNA test but by way of evidence.' This is a persuasive case. That notwithstanding, the interpretation of that holding, in my view, is that penetration can be proved by any cogent evidence and not just a DNA test.
27. In this case, the prosecution produced a medical report, P3 form and PCR form which all indicated that no injuries were seen on the complainant's anus. No blood stains were noted and there was no evidence of HIV infection or any other sexually transmitted infection. It was the complainant's testimony that prior to the alleged incident, he was very intoxicated and it is the Appellant who carried him to bed. That he fell unconscious and regained his consciousness in the morning when the Appellant woke him up. In my view, the element of penetration was not sufficiently proved.
28. In addition to this, the credibility of the complainant is highly in doubt for a number of reasons. First, it was his testimony that he went to the hospital on the same day. This was however rebutted by the evidence of PW3 which clearly proved that PW2 went to hospital on March 14, 2020, which is two days after the incident. Indeed even the complainant's mother (PW2) talked of receiving a message on March 14, 2020 at 8.00 (see page 9 line 10 to 19 of the record.) 'I found my son MM had sent me a message in my mobile phone. He told me a teacher called M had called him to tell him to tell his younger brother to return the things he took. I went to the house where KM sleeps. A second message came into my mobile phone still from JMM. The last message came as a forwarded message which had been sent to him by his brother K. When the father asked K what happened, K told him that the teacher had sodomised him. K and the father went to hospital. I also followed them. K was treated.' The allegation was that the complainant had taken some properties from the appellant and the allegation of sodomy must be an afterthought and a cover up. In any case PW2 admitted to taking some items from the house of the Appellant. He claimed that he took them as security because he knew that the Appellant would look for him so that he could return them. However, PW2 did not take those items to the police while reporting the incident. According to the Appellant, the items were returned to him by the complainant's brother on March 21, 2020. In my view, the claim by PW2 that he took the Appellant's items as security could have been further from the truth. Finally, PW2's allegation that he



found some blood stains in his inner wear cannot also be true as there was no evidence of injuries that were noted when he was examined. Considering the evidence on record in its totality, it is clear that complainant lied on oath. His testimony is therefore not reliable. As such, a conviction on a charge of rape in the circumstances surrounding this case cannot stand. As submitted by the prosecution, that is being a sexual offence corroboration is not required is the true position. However, there must be a finding by the trial magistrate that she was satisfied that the victim was telling the truth. Section 124 of the *Evidence Act* provides:

' Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.'

The trial magistrate did not record the reasons why she believed that the complainant was telling the truth. Though she stated that she had no doubt in her mind that the appellant had sodomised the complainant this was merely based on the story given by PW2 and failing to consider other evidence which showed that the complainant could not have been telling the truth. I find that since the credibility of the complainant was doubtful reliance on his testimony was prejudicial to the appellant. The burden of proof in criminal matters is always permanently in the prosecution's back-yard and the burden never shifts. The appellant in his defence stated that on March 12, 2020 he was at the school and this was not rebutted. It emerged from the evidence that the appellant went to the hospital on 14<sup>th</sup> and he alleged that he went to hospital the following morning. This should then have been on March 13, 2020. Since he did not go to hospital on 13/03/2020, it confirms the defence of the appellant which the trial magistrate disregarded that he did not meet the complainant on March 12, 2020. I am inclined to agree with the accused that the trial magistrate failed to correctly analyze the evidence and more so the defence of the respondent. I find that the complainant was not truth and his testimony would have required corroboration by some material evidence for the court to rely on it to convict and especially from the medical evidence. I find that the complainant's evidence was insufficient and was incapable of proving the charge against the appellant.

## **Conclusion**

29. From the foregoing, it is my view that trial court erred in rendering a conviction on the subject charge. I find that present appeal has merits. I order as follows:-
1. The appeal against conviction and sentence succeeds.
  2. The conviction is quashed and the sentence of ten (10 Years is set aside.
  3. The appellant shall be set at liberty unless he is otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 9<sup>TH</sup> DAY OF MARCH 2023.**

**L.W. GITARI**

**JUDGE**

**9/3/2023**



The Judgment has been read out in open court.

**L.W. GITARI**

**JUDGE**

**9/3/2023**

