



**Gichuru v Republic (Criminal Appeal E037 of 2021)
[2023] KEHC 3386 (KLR) (20 April 2023) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E037 OF 2021
LN MUGAMBI, J
APRIL 20, 2023**

BETWEEN

LEONARD MWAI GICHURU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Kiambu Criminal Case No. 2717 of 2016 delivered by Hon. P. Khaemba, Principal Magistrate on the 10th of April, 2019)

JUDGMENT

1. The Appellant was charged with two counts: the first count being robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars of the offence were that: on the 14th day of November, 2016 in Ndegu location within Kiambu County, the Appellant robbed IWM one mobile phone make Infinix valued at KShs. 10,000 and immediately before/immediately after the time of such robbery used actual violence on the said IWM .
2. The second count was rape contrary to section 3(1)(a)(b)(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that: on the 14th of November, 2016 in Kiambu County, the Appellant intentionally and unlawfully cause his penis to penetrate the vagina of IWM [name withheld].

The Prosecution's Case

3. On the 28th of December, 2016, the Appellant was arraigned and he pleaded not guilty to both counts. The prosecution called four witnesses.
4. The Complainant in the present case testified as PW1. She stated that on the 14th of November, 2016, she invited the Appellant to her house for him to fix her TV. That he tried fixing the same and failed.



She then told him to leave it if he could not fix it. Suddenly, he started strangling her. She fainted from the strangulation and upon waking up, she discovered she had no panty on and her skirt had been pulled up. She testified that she felt like she had been raped and pleaded with the appellant to allow her to go to the toilet since he had blocked her from leaving the house when she attempted to dash to the door to open. She sweet-talked the Appellant to open the door and let her visit the toilet. He opened but confiscated her phone telling her he would strangle her if she refused. She went to the toilet and appellant escorted her ordering her to leave the door open as she relieved herself. Thereafter, she told the Appellant she was feeling unwell and convinced him accompany her to Bethsaida Dispensary for treatment which he agreed to. However, the appellant ran away when they got to the dispensary the appellant ran away telling her she had set him up. He ran with her phone which he had taken already.

5. The Clinical Officer, Rodgers Kipewa Arebu, was PW2. He confirmed meeting PW1 at Bethsaida Dispensary who told him she had been raped and advised that he could not treat her before making a report to the police. He took her to the Ngegu Police Post to report and thereafter to Kiambu District Hospital where he left her receiving treatment. He confirmed that PW1 had bruises around the neck.
6. Police Constable Genga Kimamo from Ngegu Police Post was the Investigation Officer and he testified as PW3. He confirmed that the Complainant went to the Police Post on the 14th of November, 2016 and reported that she had been raped by the Appellant who had also escaped with her phone. That the Appellant was arrested later and charges preferred against him.
7. Dr. Fatuma Mohammed of Kiambu Referral Hospital was PW4. She produced the P3 form that had been filled by Dr. Kevin. She stated that the Complainant was examined and found to have dirty clothes with blood coming from the sides of her tongue and other injuries on the hands, neck and legs. That upon examination of her genitalia, there was presence of discharge and some dirt coming out of the birth canal. She testified further that the hymen was not intact because the victim had already given birth.

The Defence Case

8. The Appellant was put up his defence by giving sworn testimony and called two witnesses.
9. The Appellant testified as DW1 and stated that the Complainant had borrowed some money from him and that when he demanded the same from her, she insulted him by calling him a prostitute. That he was later arrested by the Police who warned him that he should never demand for money from the Complainant again.
10. George Gichuru Njeri testified as DW2. He stated that they had been looking for the Appellant when they received information that he had been arrested. He confirmed that he was not aware of the offence that the Accused had committed.
11. Felista Nduta testified as DW3. Like DW2 she stated that she heard that the Accused had been arrested and that they found him at Ngegu Police Post where he had been beaten on the head.
12. The Trial Court in its judgement made the following finding:
 - a. ...considering the totality of the evidence presented before me, I am satisfied that the prosecution proved the offence of robbery with violence against the accused beyond any reasonable doubt. I accordingly convict the accused under section 215 of the *Criminal Procedure Code* for the offence of robbery with violence contrary to section 292(2) of the *Penal Code*.



- b. The issue of consent does not present any difficulty to the Court because the accused never stated that the complainant had consented to the sexual intercourse. He put forward a mere denial. The Complainant stated that she was raped while unconscious and after a struggle with the accused person and thus sufficient evidence that she did not consent. In the end, I am satisfied that the prosecution proved that the offence of rape contrary to section 3(1)(a)(b)(3) of the *Sexual Offences Act* beyond any reasonable doubt and I proceed to convict the accused person under section 215 of the *Criminal Procedure Code*.
13. On sentence the pronounced the same as follows:
- “I have considered the mitigation offered by the accused and the fact that he is a first offender. The law of the land as it stands today, as set in the Supreme Case of Francis Muruatetu & Another v Republic is that the maximum penalty for both murder and robbery with violence is death but the court has discretion to impose any other penalty that it deems fit and just in the circumstances. In the instant case, although all the elements for the offence of robbery were proved, there are truly no aggravating circumstances which would lift this case to the scales of the death penalty. It appears the primary intent of the accused herein was not to rob the complainant but rather to rape her. The violence he meted against the complainant, it would appear, was meant to incapacitate her so that he rapes her. I therefore sentence the accused person to life imprisonment in respect to count one and for count two, I sentence him to serve 15 years imprisonment. Sentence to run concurrently.”
14. The Appellant was aggrieved by the conviction and sentence, and brought this appeal vide a petition of appeal filed on 31st of October, 2019. The grounds of appeal were filed separately on the 4th of June, 2021. They were:
- a. That, the Trial Court erred in law by failing to give due regard to the material contradictions, discrepancies and inconsistencies in the prosecution case, thereby reaching a wrong decision and resulting in a miscarriage of justice;
- b. That, the learned Magistrate erred in law in failing to observe that the lower court had accepted expert evidence by a person other than the maker (Section 77 of the *Evidence Act*);
- c. That, the learned Trial Magistrate misapprehended the facts, applied the wrong legal principles and drew erroneous conclusions to my prejudice;
- d. That, the learned Trial Magistrate erred in law and fact in finding that the Prosecution had proved its case to the required standard and thereby failed to give the benefit of doubt to me;
- e. That, the learned Trial Magistrate erred in law and fact by drawing inferences from evidence which did not follow and reasonably flow from that evidence;
- f. That, the findings of the learned trial Magistrate were against the weight of the available evidence on record.
15. The Appellant prayed that the appeal succeeds in its entirety.

The Appellant’s Submissions

16. On the 9th of June, 2022, the Court directed that the appeal be canvassed by way of written submissions. The Appellant filed his submissions on the 7th of June, 2022. The Appellant submitted that this being a first appeal this Court has a duty to make a complete and comprehensive appreciation of all vital features



of the case in both law and fact and to scrutinize the evidence with care and caution. That it was also the duty of this Court to weigh the materials and consider the evidence objectively and dispassionately in order to arrive at its own conclusion. The Appellant sought to rely on the cases of *Okeno v Republic* 1972 EA 32 and *Kiilu & Another v Republic* (2005)1 KLR where Court of Appeal set out the duties of the first appellate court.

17. He submitted on the following issues for determination:

- a. Whether it was the Appellant who robbed the Complainant;
- b. Whether the Appellant raped the Complainant;
- c. Whether the offence of rape was medically proved beyond reasonable doubt;
- d. Whether the two counts were proved to the required standard of proof.

18. On the first issue, the Appellant reiterated the evidence adduced by the prosecution witnesses and submitted that the Complainant who testified as PW2 was not honest while adducing her evidence. He stated that there was bad blood between him and her and this case is a creation of vengeance. That the Court in the case of *Ndungu Kimanyi v R* (1979) KLR at page 284 held that:

“the witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

19. The Appellant submitted further that during his testimony, he stated that he knew the Complainant because he had lent her some cash which allegation was confirmed by PW3, the Investigation Officer, who interrogated the Complainant and she stated that she was his girlfriend. He relied on the South African case of *Ricky Ganda v The State* where the Court stated thus:

“The acceptance of evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be more than reasonable doubt that the evidence implicating him is true...the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts’ impression of the witness...it is acceptable in totality in evaluating the evidence to consider inherent probabilities....”

20. The Appellant contends that the trial magistrate was biased and had pre-conceived mind to convict the Appellant and termed him as unbelievable solely because he was in informal employment. That Count 1 was therefore not proved to the required standard because: there was no evidence to show that the Complainant owned an Infinix phone at the time of the alleged offence. The Appellant urged the Court to take judicial notice that stolen phones were traceable with ease by service providers. He also added that the Investigation officer did not bother to recover the pliers purported to have been used as a weapon against the Complainant and neither did he visit the appellant’s house in a bid to recover both the screw driver and the phone. That PW2’s evidence was not corroborated. That in the case of *DPP v Kilbourne* (1973) Lord Simmons defined corroboration as nothing other than evidence which confirms and supports or strengthens other evidence and went in to state that: it is short evidence which renders other evidence probable.



21. That in the present case, the Magistrate agreed that there was no case for robbery with violence in the first place. That intent is a key requirement to prove a case of robbery with violence as stated in *SIMS* (1946) KB 531, Per Lord Goddard C.J @P.539 it was held that:

“Whenever there is a plea of not guilty, everything is in issue and the prosecution has to prove the whole of their case, including the identity of the accused, the nature of the act and the existence of any necessary knowledge or intent.”
22. The Appellant urged the Court to find and hold that Count One was not proved to the required standard and that he should be acquitted on the said ground.
23. On the second issue, the Appellant submitted that the case was reported immediately it occurred and material items including the blouse, the panty and the skirt which the Complainant had worn before and after the incident and the same were preserved by the police. That PW2 stated that from the way she felt, she knew she had been raped and that she saw something like sperms on her thighs yet the Appellant vehemently denied raping her.
24. He relied on the case of *Daniel Kiplimo Cheronov Republic* (2014) eKLR where the Court held that:

“...where a complainant was emphatic that the penetration took the form of complete sexual intercourse like in the present case, the prosecution bears the burden of proving beyond doubt that indeed the victim had engaged in sexual intercourse on the date alleged.”
25. That further in the case of *Mwangi v Republic* (1984) KLR 595 at 603 the Court rendered itself thus: *Michael Mumo Nzioka v Republic* (2019) eKLR:

“The presence of spermatozoa alone in a woman’s vagina is not conclusive proof that she has sexual intercourse nor is absence of spermatozoa in her vagina proof to the contrary. What is required to prove that sexual intercourse has taken place is proof of penetration an essential fact of the offence of rape.”
26. That it was necessary for the prosecution to link the alleged penetration to the Appellant yet there was no attempt to link the purported semen on the complainant’s thighs and vagina to the Appellant. The Appellant contends further that the Complainant was not subjected to a high vaginal swab (HVS) to collect traces of the sperms/semen that may have been present in her genitals at the time she sought medical attention. That the medical investigation fell short of the standard of procedure recommended in collecting evidence in a case of rape and in this regard, the Appellant relied on Merck Manual Professional Version on Medical Examination of Rape Victims in which it is recommended that several laboratory tests be carried out to detect the presence of sperm. That the medical evidence thus falls short of proving that the Appellant committed the offence and it is doubtful as to whether the Complainant engaged in any sexual activity on the 14th of November, 2016.
27. That the biological evidence was important to corroborate PW2’s evidence since PW4 did not find any spermatozoa in the vagina of PW2 but instead found discharge and dirt coming from the birth canal. The Appellant submitted that based on the medical reports, there was no evidence of fresh penile penetration into the vagina of PW2. That the Court therefore erred in law by holding that the presence of discharge is proof of sexual intercourse. He relied on the case of Michael Mumo Nzioka (supra).
28. On the issue of whether there was consent from the Complainant, the Appellant submitted that there was no direct link of the alleged rape to him. That suspicion however strong cannot lead to conviction.



He relied on the cases of *John Mutua Munyoki v Republic* (2017) KLR and *Charles Ndirangu Kibue* (2016) eKLR.

29. That the conduct of the Complainant before, during and after the alleged rape is inconsistent with the absence of consent therefore casting doubt as to whether there was any sexual intercourse between the complainant and the Appellant. The Appellant relied on the case of *Cornelius PChumba v Republic* (2016) eKLR. That the complainant's conduct was inconsistent with the demeanour of rape victims to the extent that she never attempted to even scream when she was being escorted to the hospital by the Appellant.
30. On the issue of whether the case had been proved the Appellant relied on the case of *Woolmington v D.P.P* (1935) A.C 462 where the Court held that:

“Throughout the web of the English Criminal Law, one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt. If at the end of the whole case there appears any reasonable doubt created by the evidence brought forward by the prosecution, the prosecution has not proved its case and the prisoner is entitled to an acquittal. It is not for the prisoner to establish his innocence; the prisoner is merely required to cause doubt as to his guilt. In either case he is entitled to the benefit of doubt.”

31. The Appellant contended that since the offence at hand was a serious offence, it demanded equally heavy proof as held in the case of *Charles Kibara Muraya v Rep.* Cr. App. No. 33 of 2001 at Nyeri.
32. That the Respondent failed to carry out forensic medical examination on the exhibits recovered from complainant and the only possible explanation for this failure would be that the evidence would be adverse to the prosecution's case as held in the case of *Paul Kanja Gitari v R* (2016) eKLR where the Court held:

“The state of the evidence with all of its inconsistencies means that the appellant's complaint that some vital witnesses were not called is also not idle. It is of course trite that there is no number of witnesses required for the proof but then failure to call vital witnesses/evidence may entitle the court to draw an inference that had such witnesses been called, their evidence would have been adverse to the prosecution case.”

33. That the prosecution's evidence was marred with contradictions and inconsistencies that are so fundamental as to cause prejudice to the Appellant. That the magistrate erred by considering the prosecution's evidence in isolation thereafter arriving at a provisional conclusion without considering the Appellant's testimony. That the prosecution failed in its attempt to prove its case.
34. The Appellant concluded by submitting on the issue of sentencing, he stated that the ingredient of rape had not been proved and the Court should only have convicted if there was absolutely no doubt as to his guilt. He urged the Court to set aside the conviction and sentence of the trial court and the Appellant be acquitted on all charges.

Prosecution's Submissions

35. The Respondent filed its submissions on the 20th of January, 2023. It submitted that none of the grounds of appeal advanced by the Appellant raises any reason to warrant this Court to disturb the findings of the trial court. That the prosecution established that the Appellant was armed with a dangerous weapon and was not in the company of other people and some form of violence was meted on the person of the victim.



36. On the second count, the prosecution submitted that despite the Appellant's arguments that there were inconsistencies in the prosecution case, the case was consistent and the same was proved beyond a reasonable doubt.
37. On the issue of identification, the Prosecution submitted that the identification of the Appellant at the scene by the witnesses was proper. That the offence took place at night but the place was well lit to enable clear vision and identification. Further that the Appellant was someone who was clearly known to the prosecution witness who identified and recognized him at the scene.
38. The Prosecution concluded by submitting that the evidence on record established all the requisite elements of the offence of robbery with violence against the Appellant. That they also adduced proper evidence on identification and place the Appellant at the scene of the crime. That the conviction was therefore safe and the sentence meted legal and urged the Court to uphold the findings of the lower court and dismiss the appeal in its entirety.

Determination

39. The Appellant seeks an acquittal while the Respondent wants the conviction to be upheld. From the pleadings and submissions before this Court it is evident that these are the issues for determination:
 - a. whether the elements of robbery with violence were sufficiently proved in the trial Court;
 - b. whether the elements of rape were sufficiently proved in the trial Court; and
 - c. whether the conviction should be upheld.
40. This being a first appeal, this Court has the duty to re-evaluate the evidence and reach an independent conclusion. This was the holding in the case of *Okeno v Republic* [1972] EA 32 where the East Africa Court of Appeal stated the duty of the Court on a first appeal:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”

41. With regards to the charge of robbery with violence, Section 296(2) of the Penal Code defines it as follows:

“ 296.

Punishment of robbery

1. Any person who commits the felony of robbery is liable to imprisonment for fourteen years.
2. If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or



immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

42. Cockar, C.J., Akiwumi & Shah, JJ.A. discussed the ingredients of robbery with violence in the case of *Jobana Ndungu v Republic* CRA. 116/1995, [1996] eKLR where the Court of Appeal in Mombasa stated as follows: -

“...In order to appreciate properly as to what acts constitute an offence under Section 296 (2) of the Penal Code, one must consider the subsection in conjunction with Section 295 of the PC. The essential ingredient of robbery under Section 295 is ‘use of or threat to use’ actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the afore -described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in Section 296 (2) which we give below and any one of which if proved, will constitute the offence under the subsection:

- i. If the offender is armed with any dangerous or offensive weapon or instrument;
or
- ii. If he is in company with one or more other person or persons; or
- iii. If at or immediately before, or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.”

43. This was also the holding by the Court of Appeal in the case of Criminal Appeal No. 300 of 2007, *Dima Denge & Others v Republic* (2013) eKLR, the learned Bench stated as follows:

“the elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence.”

44. From the evidence adduced during trial, the Appellant managed to escape with the Complainant's mobile phone. The Complainant in her evidence said that the Appellant left hurriedly with the phone because he realised the complainant was reporting him. Section 295 of the *Penal Code* describes the elements of robbery to include stealing of something and immediately before stealing it uses actual violence on any person or property in order to retain the stolen thing.
45. The defence by the appellant did not directly address the incident of 14/11/2016 that the complainant in her evidence implicated him with. He instead insisted by way of defence that he had differences with the complainant who had refused to pay KShs. 3500/- which he had loaned her way back on 9/10/2016 and refused to refund telling him they had not entered into any agreement over the same. That the complainant had even sent boda boda operators who warned him against demanding the said money from her. He was eventually arrested on 25/12/2016 and the police officers equally warned him against asking for the refund of the said money from the complainant.
46. The question that this defence raises is, did the events narrated by the complainant of 14/11/2016 occur, and if so, was the participation of the appellant proved beyond reasonable doubt?
47. The question of whether or not violence was meted against the Complainant on 14/11/2016 is positive. Her own evidence and the medical evidence that was presented was spot on this particular issue. Although the Appellant submitted that the medical evidence relied on was hearsay, the



circumstances for admission of the evidence were established before the evidence was introduced which is permissible under section 33 (b) of the Evidence Act. It provides:

Section 33- Statements written or oral or electronically recorded, of admissible facts made by person who is dead, or who cannot be found or who has become incapable of giving evidence, or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appear unreasonable, are themselves admissible in the following cases-

- a)
- b) made in the course of business-

When the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in discharge of professional duty or an acknowledgement when written or signed by him of the receipt of money, goods, securities or property of any kind, or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated or signed by him.

In addition, under Section 77 of the Evidence Act, the court may admit such evidence without calling the maker unless it finds it necessary summon and examine him on the subject matter thereof.

In the present case, the Court was informed that Dr. Kevin who had filled the P.3 form was no longer in the employment of Kiambu Referral Hospital. Dr. Mohammed Fatuma (PW 4) who produced the P.3 form on his behalf informed the court that he had proceeded for higher studies. Her stepping in had been preceded by numerous summons that did not yield fruit. In allowing the application, the Court noted that it was in interest of justice to have the matter decided expeditiously.

- 48. I find nothing wrong in the procedure undertaken in allowing the admission of the medical evidence in the circumstances as the report was filled by the doctor in discharge of professional duty and his unavailability had already occasioned delay and was bound to cause further delay. In any case, the report was produced by a fellow doctor who confirmed she was conversant with his handwriting and signature hence all the conditions precedent for admission of the evidence were fulfilled.
- 49. The P.3 form showed that the complainant had blood coming from the sides of the tongue and other injuries were on the hands and neck and legs which the doctor assessed as harm. This evidence even without more corroborated the fact of violence on the person of the complainant which was corroborative of her oral testimony.
- 50. The next issue that arises is whether this violence was done in furtherance of stealing the mobile phone or not. PW1 confirmed that the phone was confiscated after the initial violent episode in which she fainted and on coming up realized she had been raped. By then, realizing her assailant could harm her further, she sweet-talked him and asked him to open the door so that she may visit the toilet. It is at this point that he asked her to surrender the phone. When she hesitated, he warned that he could strangle her. Apparently, save for the verbal threat, no violence was used or applied in taking the phone. The



force that had been used earlier was solely directed at having her subdued so as to rape her. This agrees with the statement made by the trial Court in its judgement thus:

“...The violence meted out against the Complainant would appear was meant to incapacitate her so that he rapes her...”

51. I find that in taking the phone, the elements of robbery with violence under section 296 (2) of the [Penal Code](#) were thus not proved beyond reasonable doubt. Nevertheless, the complainant only gave out the phone in response to the threat by the Appellant to strangle her if she did not. She testified:

“...I gave him the phone as he threatened to strangle me if I refused...”

52. Eventually however, he disappeared with the phone which was never recovered which demonstrates an intention to permanently deprive her of the said phone. An offence was thus committed, but not robbery with violence which the Prosecution preferred. It is my finding that these facts are consistent with an offence of robbery which under section 295 of the [Penal Code](#) which is defined as follows:

Section 295- A person who steals anything, and at or immediately before or after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of felony termed robbery.

Section 296 (1) A person who commits the felony of robbery is liable to imprisonment for fourteen years.

53. Going by the facts surrounding the taking away of the complainant’s phone by the assailant, it is my finding that the offence that was committed under the circumstances was robbery contrary to section 295 of the [Penal Code](#). By then, violence that the complainant went through was primarily geared towards raping her and was not in way intended at obtain or retaining any property from the complainant. The elements of the offence of robbery with violence were thus not proved. Instead, the later episode proved an offence of robbery under section 295 of the [Penal Code](#) as the taking was conditioned on the threat to use violence on her if she refused. Even if the Appellant had a screw driver, evidence led through the complainant was that he had been using it to repair the complainant’s T.V. set and there was instance where she said that he converted it into a weapon against her in order to obtain the phone from her.

54. Section 179 (1) of the [Criminal Procedure Code](#) provides as follows:

Section 179 (1) – When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

55. The next question then becomes, in the light of the Appellant’s defence, was he the perpetrator of this crime? The trial Court relied on demeanour in accepting the complainant’s case as against the appellant. I have closely and carefully read through both testimonies and I equally find the complainant’s evidence consistent and intrinsically convincing. In any case, the complainant was the one that invited the appellant in her house to repair her T.V. set because he knew her well only for him to turn against her. This was identification through recognition. The evidence squarely placed him at the scene of the offence. He was thus the perpetrator of the offences committed against the complainant.



56. Considering that robbery is a lesser included offence for robbery with violence, I would pursuant to section 179 (1) of the [Criminal Procedure Code](#) substitute the conviction for robbery with violence under section 296 (2) of the [Penal Code](#) to that of Robbery under section 295 of the [Penal Code](#).
57. On the second issue, count two was rape contrary to section 3 of the [Sexual Offences Act](#). Section 3(1) of the [Sexual Offences Act](#) states that a person commits the offence of rape if;
- “He or she intentionally and unlawfully commits an act which causes penetration with his or genital organs;
- a. The other person does not consent to the penetration; or
 - b. The consent is obtained by force or by means of threats or intimidation of any kind.
58. From the medical evidence adduced by PW2 and PW4, it is evident that there was no spermatozoa present when the Complainant was tested the following day. PW4 confirmed that there was white discharge present that was pooling on the posterior fornix. The Doctor also noted that there was no vaginal laceration on the Claimant. Courts have however held that medical evidence is not a conclusive indication that rape happened. In the case of [Kassim Ali vs Republic](#) Criminal Appeal No. 84 of 2005, [2006], eKLR, the court stated 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 a victim or circumstantial evidence.”
59. The case was also relied on in the case of [Martin Nyongesa Wanyonyi v Republic](#) Criminal Appeal No. 661 of 2010, [2015], eKLR.
60. So how does one prove that penetration occurred in the absence of medical evidence? The Court in the case of [Alex Chemwotei Sakong v Republic](#) [2108] eKLR went to a great extent in expressing what penetration entails in a sexual offence as follows:
- “Penetration is defined under section 2 of the [Sexual Offences Act](#) to mean the partial or complete insertion of the genital organ of a person into the genital organs of another person. This position was explained by the court of appeal (Onyango Otieno, Azangalala & Kantai JJ A) in the case of [Mark Oiruri v Republic](#) Criminal Appeal 295 of 2012 [2013] eKLR in which they opined thus:
- “...Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ...”
61. In most the sexual offences cases, despite the absence of the spermatozoa or discharge, lacerations on the vaginal wall, redness and soreness has been taken as an indication of penetration. See the cases of [Mohamud Omar Mohamed v Republic](#) [2020] eKLR and [CMM v Republic](#) [2022] eKLR.



62. In this present case, there were no lacerations on the labia. Does this indicate that no penetration occurred? In a recent case of *Makau v Republic* (Criminal Appeal E055 of 2021) [2022] KEHC 9798 (KLR) (14 July 2022) (Judgment), the Court discussed the issue and stated thus:

“In this case, the P3 Form indicates that there is laceration on the labia and there is no hymen. There can only be lacerations if there was a struggle...”

63. The Complainant’s evidence that she was unconscious when the rape happened because she fainted on being overpowered by the appellant who was strangulating her. She believed she had been raped because she found herself without the panty, her skirt lifted and felt wetness in her vagina. She stated:

“...I fainted and only found myself in my bed with skirt lifted up and I had no inner wear. I noticed I had been raped. I then heard Mwai calling out my name...yes, I had fainted but when I came I felt that I had been raped...”

64. It is obvious that in the state of unconsciousness, the complainant could not state with certainty that indeed sexual penetration had been accomplished, that is why she said ‘ I felt I had been raped’.

65. With that state of evidence, medical evidence was critical in providing corroboration as whether indeed sexual penetration occurred but what was presented was also not definite in confirming indeed the complainant was penetrated sexually. With medical evidence failing to ascertain the fact of penetration with certainty coupled with the nature of the oral testimony of the complainant that she was not conscious to witness the raping, I would also be hesitant to make a conclusive finding that she was in fact sexually penetrated.

66. Nevertheless, the evidence of struggle with the appellant prior to her fainting as he tried to strangle her, the regaining of conscious and realizing she had no panty on and the lifting of skirt, clearly depict that the perpetrator’s intent was to commit the act of rape on her. The complainant stated that when she woke up, she heard him call out her name. It is my finding that the fainting most certainly interrupted and shocked the appellant from actually completing the offence of rape though the evidence clearly manifests an unmistakable intention on part of perpetrator to rape her he was interrupted from completing the act by the sudden unconsciousness of the complainant which could also reasonably explain why the medical evidence failed to conclusively establish the fact of penetration. The intention to rape her however was certainly overtly manifested and going by the struggle that preceded the fainting, the appellant was definitely committed to raping her were it not for the sudden interruption which to me appears to have been the sudden fainting of the complainant. I am satisfied that based on those facts, and despite the inconclusive nature of the medical evidence, an offence of attempted rape was established beyond reasonable doubt. Section 180 of the *Criminal Procedure Code* provides:

Section 180- When a person is charged with an offence, he may be convicted of having attempted to commit that offence although he was not charged with the attempt.

I would thus set aside the conviction for rape and substitute the same with the conviction for attempted rape on the basis of the proved facts.

67. On the third issue, the Appellant was sentenced to life in prison for the offence of robbery with violence and for 15 years in prison for the offence of rape, which sentences were to run concurrently. However, since the offence of robbery with violence fails in this appeal, the sentence imposed against the Appellant for robbery with violence cannot stand as well. The offence of rape was also not proved but the facts on record established an offence of attempted rape. The sentence of 15 years imprisonment



for rape cannot also be maintained. Under section 4 of the *Sexual Offences Act*, the punishment for attempted rape is a term not less than five years but which may be enhanced to imprisonment for life. Emerging jurisprudence has however restored the discretion of courts in sentencing and mandatory minimum sentences in sexual offences are no longer considered to fetter the court's discretion in determining the appropriate punishment.

68. The maximum sentence for robbery under section 296 (1) of the *Penal Code* is 14 years imprisonment.
69. This appeal therefore partially succeeds in view of the fact that the Appellant's conviction for robbery with violence is substituted with that of robbery contrary to section 295 of the *Penal Code* and that of rape is substituted with that of attempted rape. These findings have a fundamental effect on the sentences that was meted out on the appellant by the trial court. The life sentence for robbery with violence and 15 years imprisonment imposed by the trial court are hereby set aside.
70. In sentencing the appellant based on the present findings, it is evident that the Appellant put the complainant's life in great risk as he smothered her in his attempt to rape her. The intensity of the force applied was so high that she fainted in the process. That conduct thus exhibited extreme violence.
71. He is to serve twelve years (12) years imprisonment for the offence of robbery contrary to section 295 of the *Penal Code* and five (5) years imprisonment for the offence of attempted rape. These sentences shall run concurrently from the date of the previous sentences which were imposed by the trial court.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 20TH DAY OF APRIL 2023.

L.N MUGAMBI

JUDGE

In presence of:

Appellant-

State/Respondent- Mr. Gacharia

Court Assistant- Alice

Court

This Judgement be transmitted digitally by the Deputy Registrar.

L.N. MUGAMBI

JUDGE

