



REPUBLIC OF KENYA



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**Wagura v Republic (Criminal Appeal E014 of 2022)  
[2023] KEHC 17501 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17501 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CRIMINAL APPEAL E014 OF 2022  
CM KARIUKI, J  
MAY 18, 2023**

**BETWEEN**

**CHARLES MUREITHI WAGURA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the judgment delivered on the 11th April 2022 by Hon. V K Kiplagat- Resident Magistrate -Nyabururu in Nyabururu Chief Magistrate's Court in SOA Case No. 83 of 2017)*

**JUDGMENT**

1. The Appellant was charged with the offense of rape Contrary to Section 3(1) (a) (b) as read with Section 3 of the *Sexual Offences Act* No. 3 of 2006. He also 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.
2. Particulars being that, On 25th June 2017, in Laikipia County intentionally and unlawfully caused his genital organs, namely the penis, to penetrate the genital organs, namely the vagina of LWW, aged 19 years, without her consent.
3. The Appellant pleaded not guilty, and the prosecution presented five witnesses, and at the end of it all, the Appellant was found guilty on count one and was sentenced to serve ten years imprisonment.
4. He lodged an instant Appeal and set five (5) grounds for appeal.
5. The prosecution conceded the Appeal and submitted as follows:



## Respondent Submission

6. The Appellant has been charged with the offense of Rape; the statutory definition of Rape is in Section 3(1) of the [Sexual Offences Act](#) as follows:

- “(1) A person commits the offense of Rape if-
- a. they intentionally and unlawfully commit an act that causes penetration with their 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.

7. The main ingredients of the offense of Rape created in Section 3(1) of the [Sexual Offences Act](#) include intentional and unlawful penetration of the genital organ of one person by another coupled with the absence of consent. In the case of Republic v Oyier [1985] KLR353, the Court of Appeal held that:

- a. The lack of consent is an essential element of the crime of Rape. The men's rea in Rape is primarily an intention, not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented.
- b. 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.
- c. Where a woman yields through fear of death or coercion, it is Rape, and it is no excuse that the woman consented first if the offense was afterward committed by force or against her will; nor is it any excuse that she consented after the fact."
  - a. Lack of Consent/rape

8. The complainant testified as follows:

“I went to his house. He called me to his house. It was a Sunday. He was my neighbor. He said he was to tell me what my mother said. He told me to go to his home. I sat on a chair. He gave me tea and chapati. He gave me one orange. I refused the tea.

He watched outside, and he closed the door. He is married. They went to the shops. I saw the wife and children go to the shops in the morning. I went to his house at 2.05 pm. He told me he waited for me for so long. I was on a sofa set. He took off my skirt. He made me lie on the sofa. He took off my inner clothes as well. He had sex with me. He was holding me by the hands using his right hand. He took off my clothes using his left hand. He was standing. He also removed my inner clothes. He opened his zip.

This was after he removed my skirt. He then lay on me. After he finished, he told me to go home.”

9. The circumstances and evidence on record, which include the complainant voluntarily visiting the Appellant's house after his wife left, there being no evidence of violence from the victim or clinical



officer, and no screams and threats from the Appellant is sound evidence that the complainant consented to the act/sex and was in a relationship with the Appellant.

10. The prosecution Concede to this Appeal on the grounds that the complainant's acts on record are inconsistent with that of Rape but consensual sex between adults.
  - b. Penetration
11. Penetration of the female genitalia in Rape cases is one of the core elements. The law does not envisage absolute penetration into the genital nor the release of spermatozoa or semen of the male organ for the act of penetration to be complete see; Daniel Wambugu Maina v Republic (Supra)
12. The complainant testified that the Appellant took off her inner clothes and had sex with her.
13. PW1, PW4, and PW5 all testified that PW1 was taken to the hospital, where it was confirmed that she was already ten weeks pregnant. She further testified that she was pregnant for the Appellant and wanted to commit suicide because the Appellant refused the child.
14. The trial Magistrate linked the Appellant to the pregnancy.
15. On 28/8/2018, the trial magistrate considered the State's application and the defense counsel's response and ordered that the accused, the complainant, and the baby be availed for DNA testing on a date to be agreed upon by the State.
16. The test's DNA results were negative, as indicated by the trial magistrate on page 54 of the record line 17.
17. Consequently, the DNA results are contrary to the testimony of PW1; this aspect of her testimony casts doubt on the credulity of the testimony. See the case of Eliud Ouma Agwara v Republic [2016] eKLR. Furthermore, the results excluded the Appellant as the father of the child.

- c. Identity

18. PW 1, PW 2, PW3, and PW4 all testified that they knew the Appellant before. PW 4 testified that they were friends, and it was usual for their children to visit each other's homes bearing in mind that they were neighbours.
19. However, in the case of Simon Gichuki Main v Republic [2016]eKLR, it was stated that:

“While paternity test cannot conclusively prove the fact of defilement, those DNA results cast genuine doubt on the evidence of the complainant and bring her veracity into question. If, as proved Appellant was not the father of her child, then the complainant must have had sexual intercourse with a person other than the Appellant, and that person fathered her child. Her identification of the Appellant as the man who defiled her is cast into doubt. The very real possibility that the complainant only named (identified) the Appellant purely to shield some other third party cannot entirely be ruled out.”
20. The court also noted the Appellant's counsel submissions.

### **Appellant Submissions.**

21. It is worth reminding ourselves that the alleged offence is Rape, not defilement.



22. In the case of Geoffrey Njogu Gachanja -vs.- Republic (2019) eKLR, the court held as follows.

“ To prove an offense of rape, the prosecution has to prove the ingredients of penetration, lack of consent on the victim's part, and, of course, the perpetrator's identity.”
23. PW1's evidence that she was 25/6/2017 raped by the Appellant in his house at 2.00 pm. is unbelievable. According to her, she voluntarily escorted herself to the Appellant's house, and this was with the knowledge that his wife and child were not at home, as she testified that she had seen them leave for the shop in the morning. Furthermore, although she claimed to have been raped, she did not scream, wail, or even perform any act of resistance when the Appellant purportedly removed her clothes and his clothes while standing before lying on her on the sofa she was lying on.
24. She did not testify to trying to flee from the house; from her evidence, her mouth was not covered.
25. She is said to have been 19 years old, and her brother's house was around 100 meters away, but she did not scream. Furthermore, the complainant did not mention anywhere having been threatened by the Appellant in any way.
26. According to her, after the ordeal, she met with her brother PW2 at the Appellant's outer gate but did not tell him anything.
27. According to PW2, the complainant's brother told him that she had gone to borrow a metal box or a matchbox as per the typed proceedings. The brother confirmed that she looked normal and that she was walking normally.
28. There was no mention of torn clothing or garments, which would have implied force.
29. The sister-in-law, who testified as PW3 in cross-examination on page 25, lines 10-11, testified, "I think they had a relationship."
30. The complainant did not inform anyone of the alleged Rape until she discovered she was pregnant. If indeed she had been raped, why not inform those she was living with when she returned home, whereas no threats had been issued?
31. DNA results produced in evidence proved that the Appellant is not the child's biological father, purported to have been sired from the rape ordeal.
32. The birth certificate for the child was not marked for identification nor produced as an exhibit. In addition, no medical report for the complainant was marked for identification or produced as exhibits to confirm that she was ten months pregnant in August 2017 when she reported the matter. If anything, if she was raped on 25/6/2017 and the matter was reported on 25/8/2017 when a doctor saw her, the pregnancy would have been nine weeks and not ten weeks, as alleged.
33. The trial Magistrate erred in believing the complainant's evidence, given that she was an adult who acted normal until she discovered the pregnancy.

### **Determination**

34. The core issue is whether the prosecution proved its case beyond a reasonable doubt. From the onset, it's apt to observe that the prosecution Concede to this Appeal on the ground that the complainant's acts on record are inconsistent with that of Rape but consensual sex between adults.
35. PW1's evidence that she was 25/6/2017 raped by the Appellant in his house at 2.00 pm. According to her, she voluntarily proceeded to the Appellant's house, and this was with the knowledge that his wife



and child were not at home, as she testified that she had seen them leave for the shop in the morning. It is apparent from the evidence on record that although she claimed to have been raped, she did not scream, wail, or even perform any act of resistance when the Appellant purportedly removed her clothes and his clothes while standing before lying on her on the sofa where she was lying.

36. Nowhere on record has she testified that she tried to flee from the house or that the Appellant covered her mouth during the alleged rape ordeal.
37. She is said to have been 19 years old, and her brother's house was around 100 meters away, but she did not scream. Furthermore, the complainant did not mention anywhere having been threatened by the Appellant in any way.
38. According to her, after the alleged rape ordeal, she met with her brother PW2 at the Appellant's outer gate but did not tell him anything.
39. According to PW2, the complainant told him she had gone to borrow a metal box or a matchbox as per the typed proceedings. The brother confirmed that she looked normal and that she was walking normally.
40. There was no mention of torn clothing or garments, which would have implied force. The sister-in-law testified as PW3 in cross-examination, "I think they had a relationship."
41. The complainant did not inform anyone of the alleged Rape until she discovered she was pregnant. If indeed she had been raped, why not inform those she was living with when she returned home, whereas no threats had been issued?
42. DNA results were produced to prove that the Appellant is not the child's biological father, alleged to have been sired from the rape ordeal.
43. The birth certificate for the child was not marked for identification nor produced as an exhibit. In addition, no medical report for the complainant was marked for identification or produced as exhibits to confirm that she was ten months pregnant in August 2017 when she reported the matter. If anything, if she was raped on 25/6/2017 and the matter was reported on 25/8/2017 when a doctor saw her, the pregnancy would have been nine weeks and not ten weeks, as alleged.
44. Thus, I agree with the prosecution's concession of the Appeal as there was no sufficient evidence to warrant conviction; therefore, the court holds that the trial Magistrate erred in believing the complainant's evidence, given that she was an adult who acted normal until she discovered the pregnancy.
45. Thus, the court arrives at a conclusion that the Appeal has merit and thus makes the following orders;
  - i. The conviction is quashed and the sentence set aside, and the Appellant is set at liberty forthwith unless otherwise lawfully held.

**DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 18TH DAY OF MAY 2023.**

.....

**CHARLES KARIUKI**

**JUDGE**

