



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Muriithi v Republic (Criminal Appeal E032 of 2021)
[2023] KEHC 18970 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18970 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E032 OF 2021
AK NDUNG’U, J
JUNE 15, 2023**

BETWEEN

JOSEPH KARIUKI MURIITHI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from original Conviction and Sentence in Nanyuki
CM Sexual Offence Case No 19 of 2018 – V.M. Masivo, RM)*

JUDGMENT

1. The Appellant was charged with the offence of Rape contrary to section 3(1) (b) (b) as read with section 3 of the *Sexual Offences Act*. The particulars of which were that on the March 2, 2018 at [Particulars Withheld] area of Nanyuki Township in Laikipia County within the Republic of Kenya intentionally and unlawfully caused his penis to penetrate the vagina of NWW without her consent. In the alternative, he was charged with committing an indecent act with an adult contrary to section 11(A) of the *Sexual Offences Act* No 3 of 2006. The particulars of which were that on the March 2, 2018 at [Particulars Withheld] of Nanyuki Township in Laikipia County within the Republic of Kenya, intentionally touched the vagina of NWW with his penis against her will.
2. He was tried and in a judgment dated April 23, 2021, he was found guilty and convicted for the offence of rape and subsequently sentenced to 10 years imprisonment.
3. Dissatisfied with the conviction and sentence, the Appellant lodged this appeal based on the following grounds –
 - i. That the learned trial magistrate erred in matters of law and fact by failing to note that the evidence adduced by the prosecution was not watertight to warrant conviction.



- ii. That the learned trial magistrate erred in matters of law and facts by failing to consider the Appellant's defence.
 - iii. That the learned trial magistrate erred in matters of law and facts by failing to note that the identification parade was not conducted according to the law.
 - iv. That the learned trial magistrate erred in the matters of law and fact by failing to note that the prosecution did not prove its case beyond reasonable doubt.
 - v. That the learned trial magistrate erred in matters of law and fact by failing to note that the prosecution evidence was contradicting, uncollaborating and inconsistent.
 - vi. That the grounds herein was laid down in the absence of the court's judgment and the proceedings and may be added or changed later.
 - vii. That since the Appellant cannot recall all what transpired during the trial, he wished to be availed with the trial proceedings and judgment to draft more cogent grounds.
4. The appeal was canvassed by way of written submission. The Appellants submissions made in person are on record (undated) while Ms Kimani for ODPP filed submission dated March 13, 2023.
5. I am alive to my legal duty, this being a first appeal, to re-evaluate the evidence tendered at the trial court and to make my own conclusions therefrom. The usual caution as captured in *MK vs Republic (2020)eKLR* is applicable. In that case the court rendered itself as follows –

' Similarly, the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya vs Republic (1957)EA 336* is as follows –

'On a first appeal from a conviction by a Judge or Magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or Magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or Magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or Magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.'

6. A brief recapitulation of the evidence before the trial court is as follows:- PW1 stated that she was on her way to Old Market to buy shoes when she was accosted by someone who grabbed her nose. She later woke up in a house naked in a flat and the Appellant was lying beside her. She saw blood on the bedsheets. There was light in the room. It was 5:00 pm. As she tried to exit the room, a struggle ensued between her and the Appellant and she had a good look at the Appellant. The Appellant was naked and PW1 saw a black mark on his lower leg. She managed to leave the house and noticed it was on the 2nd floor of the building.
7. In her report to the police, PW1 described the assailant as one with a black mark on the lower middle part of his leg and a small spot on the forehead. On March 6, 2018, PW1 was called to the police station where she picked out the suspect in an identification parade relying on the mark on the leg and forehead. PW4 conducted the identification parade. He lined up 8 persons among them the Appellant.



The Appellant was picked out by PW1 based on the black mark on his forehead and the leg. PW4 personally saw these marks as they were visible. When cross-examined, PW4 stated that 2 members of the identification parade had marks on their bodies.

8. PW8 concluded upon examination that there was penetration of the patient (PW1) based on evidence of redness of the valva (vagina inner part), the hymen was broken, and, on a high vaginal swap spermatozoa was present.
9. The defence evidence was that the Appellant left Nanyuki on February 28, 2018 following the death of his uncle. He returned on March 5, 2018. He was arrested by members of the public on March 6, 2018 as he headed to work. He was assaulted and taken to Nanyuki Police Station. He was then charged.
10. It is the duty of the prosecution to prove criminal charges against an accused person beyond reasonable doubt. Any scintilla of doubt established through defence evidence or the court's own view of the prosecution's evidence benefits the accused, who, if such doubts exist, must be acquitted. Put differently the accused bears no burden to prove his innocence.
11. From my re-evaluation of the evidence herein, the thrust of the grounds of appeal and submissions on record, the issues for determination crystalize to whether the prosecution proved its case beyond reasonable doubt focus and emphasis being on whether the identification of the Appellant was proper and whether the ingredients of the offence were proved to the required degree.
12. On identification, the evidence available is that the incident happened in broad daylight and the complainant noted a scar on the lower leg of the Appellant and on the forehead. This description was given in the initial report to the police. The lighting in the room and the proximity with the Appellant was conducive for a proper identification. The complainant saw and noted some distinctive marks on the Appellant. These features enabled her to easily pick out the Appellant in the identification parade. I have reviewed the conduct of the identification parade by PW4. The same meets the necessary legal criteria. The procedural requirements for a valid identification parade were adhered to. In his objection, the Appellant did not raise anything on the impropriety of the conduct of the parade but only indicated he did not rape the girl.
13. The offence of rape is defined under section 3 of the *Sexual Offences Act* which states as follows –

' 3 Rape

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.
 2. In this section the term 'intentionally and unlawfully' has the meaning assigned to it in section 43 of this Act.
14. The ingredients that need to be proven in a charge for the offence of rape are thus –
 - a. Intentional and unlawful commission of an act which causes penetration with genital organs;



- b. Lack of Consent
- c. Identification.
15. In the instant case, the complainant was unconscious at the time the act occurred. She came to only to find blood on the bedsheets and she was bleeding from her vagina and was in pain. The complainant was in a state of being a person incapable of appreciating the nature of an act which causes the offence. On the part of the Appellant, the act was intentional and unlawful since the definition of intentional and unlawful at section 43 of the *Sexual Offences Act* includes an act in respect of a person who is incapable of appreciating the nature of the act which causes the offence. On the question of penetration, the medical evidence availed leaves no doubt on this aspect of the prosecution case. The 1st ingredient was therefore proved.
16. As regards lack of consent, the evidence of the complainant was that she was unconscious and only came to after the fact. In the circumstances the complainant was incapable of giving consent to the act but rather the act was made possible due to the state of unconsciousness of the complainant at the time, which was unconsciousness had been induced by the Appellant. The act was without the complainant's consent.
17. In rebuttal to the prosecution's evidence the accused raised an alibi defence stating that he had gone home on February 28, 2018 following the death of his uncle only to return on the March 5, 2018. He was arrested by members of the public on March 6, 2018 as he headed to work, taken to the police station and charged.
18. The accused in a criminal trial bears what is referred to as evidential burden. He has a duty, if he so chooses, to adduce evidence or raise an alibi. Once an alibi defence is raised, it is the duty of the prosecution to disprove it. The court is then invited to, and bears the duty to, test the evidence of alibi against the evidence adduced by the prosecution and if there be any doubt in the mind of the court, the issue is resolved in favour of the accused.
19. Jurisprudence on this from Nigeria and Uganda illuminates the matter. The Supreme Court of Nigeria in *Osaki and Another Vs. the State* held that for a defence to be rejected it must be incredible and that the defence must be weighed against the evidence offered by the prosecution. In the Uganda case of *Uganda Vs. Sebyaka & Others (1969) EA 2004* the court stated –
- ' The accused doesn't have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin; an alibi which is not particularly strong may very well raise doubts.'
20. I have weighed the evidence of alibi adduced by the Appellant at the trial court against the prosecution evidence. The prosecution evidence on identification and prove of the ingredients of the offence of rape is watertight and is not shaken by the alibi defence raised by the Appellant. In light of the evidence on record for the prosecution, the alibi cannot possibly be true. On the strength of the evidence on record, I do find, just as the trial court did, that the prosecution proved its case beyond reasonable doubt.
21. As regards sentence the Appellant was sentenced to ten years imprisonment. Section 3(3) of the *Sexual Offences Act* provides –
- ' (3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.'



22. Sentencing is at the discretion of the trial court and an appellate court will not easily interfere with the exercise of such discretion unless it is proved that the trial magistrate acted on some wrong principles, overlooked some relevant factors or failed to consider relevant factors, considered irrelevant factors or where the sentence is manifestly excessive.
23. In our instant case, the trial magistrate in what is a detailed and elaborate sentencing considered relevant mitigating factors including that, the Appellant, was in his youthful stage of life and had shown remorse.
24. The court went ahead to consider the aggravating circumstances surrounding the commission of the offence including an assault on the complainant and the trauma she suffered. The court considered that the Appellant was not a first offender he having been convicted of assault and sentenced to 5 years imprisonment.
25. The court clearly appreciated the principles of sentencing and was guided by relevant case law in this regard.
26. From the foregoing, I am satisfied that the trial court exercised its discretion properly. The sentence was lawful and I see no ground upon which to interfere with the exercise of that discretion.
27. With the result that the appeal herein fails in its entirety. The same is dismissed.

DATED, SIGNED AND DELIVERED THIS 15TH DAY OF JUNE, 2023.

A.K. NDUNG’U

JUDGE

