



REPUBLIC OF KENYA



KENYA LAW
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**Juma v Republic (Criminal Appeal E050 of 2022)
[2023] KEHC 20293 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20293 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E050 OF 2022**

**A. ONG'INJO, J
JULY 13, 2023**

BETWEEN

IDDI JUMA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Conviction and Sentence of the Honorable
D. Odhiambo Senior Resident Magistrate Sexual Offence Case
No. E071 OF 2021 at Shanzu Law Courts on 17th June 2022)*

JUDGMENT

1. The Appellant Idd Juma was accused of the offence of rape contrary to Section 3(1) (a) as read with Section 3(3) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars were that Idd Juma on the 7th day of May 2021 in Kilifi County of the Coast Region intentionally and unlawfully caused his penis to penetrate the vagina of RC an adult aged 25 years old without her consent.
3. In the alternative the appellant was charged with the offence of committing an indecent act with an adult contrary to Section 11(a) of the *Sexual Offences Act* No. 3 of 2006.
4. The trial Magistrate considered the evidence of 6 prosecution witnesses and the sworn statement of the appellant and his witness and concluded that the appellant was guilty of the offence of attempted rape. As a consequence of the conviction, the appellant was sentenced to serve 5 years in prison.
5. The Appellant was aggrieved by the conviction and sentence and he preferred this appeal on the following grounds: -



- i. That the learned trial Magistrate erred in law & fact by convicting the appellant with offence of attempted rape despite the fact that the prosecution had not proved its case beyond reasonable doubt.
 - ii. That the learned trial Magistrate erred in law & fact by failing to consider the evidence on record and the Appellant's defence.
 - iii. That the learned trial Magistrate erred in law & fact by failing to consider the Appellants submissions.
 - iv. That the learned trial Magistrate judgement does not conform to the relevant laws.
 - v. That the learned trial Magistrate erred in law and fact by sentencing the Appellant to 5 years' imprisonment which sentence is harsh and excessive.
6. The Appellant prayed that the conviction be quashed and sentence set aside. The prosecution case was that PW 4, 11 years old ENK, was playing with friends when they saw a thief raping someone. He said the person took RC to a hidden path removed his shorts and lay on the complainant. He said the appellant pulled up the complainant's white dress.
 7. That when the appellant saw them he put on his shorts and ran away. He said they ran and went to call the sister of the complainant EK who went after the appellant and caught him. PW 4 said that it was at 1.00pm and he saw the appellant very well.
 8. PW 1 EK aged 18 years old and a student at [Particulars Withheld] testified that on 7th May 2021 she was at home watching a movie with her sister J when some children informed them that their 1st born sister, the complainant, was about to be raped. She said the children were E , D & M . That they went out and found the complainant's clothes had been removed and the person who wanted to rape her had run away. That they followed and caught up with him and he wanted to beat her.
 9. PW 1 said they called for help from neighbours and after calling her mother they went and recorded statements at the police station. PW 1 said the incident happened around noon & the appellant was identified by the children. PW 1 said the complainant has a mental disability and does not talk. She said she saw the appellants zip was open.
 10. PW 2 reiterated what PW 1 said and she said their 1st born sister the complainant herein is mentally disabled and she does not talk and everything is done for her. She said when the appellant was arrested his parents came and begged for forgiveness.
 11. PW 3 ET testified that the Complainant was her daughter and that she started suffering from epilepsy and lost her speech when she was 10 years old. She said the Complainant does not do anything for herself. She testified that on 7th May 2021 she was at work in [Particulars Withheld] when at 1.00pm EK – PW 1 called and told her that someone wanted to rape the Complainant. That PW 3 returned home and found a crowd gathered at her house. That the appellant admitted he is the one who wanted to rape the complainant. That the police went and arrested the appellant and the complainant was taken to hospital and treated and PRC & P3 forms filled – Exp 1 & 2.
 12. PW 3 said she did not know the accused prior to this incident. On 27th October 2021 the prosecution amended the charge to that of attempted rape and the appellant initially pleaded guilty but when facts were read he changed and pleaded not guilty. Defence counsel who had just come on record prayed for PW 1, PW 2, PW 3 & PW 4 to be recalled and the prayer was granted.



13. PW 5 – Jah Mwebi – Clinical Officer at Mtwapa Health Centre testified that he attended to the 25-year-old complainant who was deaf, dumb and mentally retarded. He said the complainant was presented to the facility after she had been raped. PW 5 said that on examination she had whitish discharge and broken hymen. He said that pregnancy test was negative and no abnormality was detected in the urine microscopy. Her HB was also normal. He produced PRC & P3 forms. He said the complainant was taken to a house under construction and her siblings saw the accused on top of her and called for help to rescue her. He said the perpetrator attempted to rape the Complainant. He said appellant was not well known to the complainant. He said the Complainant was deaf and dumb and could not communicate. That she was only able to make sound. PW 5 said the complainant was taken to hospital the same day that incident happened. He said he could not tell when the hymen was broken.
14. PW 1 was recalled and cross examined by Mr. Mwawasi Advocate. PW 1 said accused was arrested at the scene. She said he could not remember now accused was dressed. She said she did not see the accused on top of the Complainant. She said it was E,D and another child who told her they saw the accused doing their sister.
15. PW 2 in cross examination said she was in the house and the Complainant was outside and that it is E who reported what was happening. That when they got out the accused had run away but they caught up with him after a short distance. PW 2 said that the accused was in a black shirt & jeans. She said she was seeing him for the 1st time.
16. PW 3 was also cross examined by the defence counsel and she said accused was arrested not so far from the scene.
17. PW 4 in cross examination said that the complainant stayed not far from where they stayed. He said he was playing with J , JU and D on the day incident happened behind the complainant's house. He said he saw the accused lying on top of the complainant. He said he had not known the accused before but he saw his face very well. He said the accused had lowered his trouser. He said accused had a black trouser and shirt. That the accused ran away when he saw them but he was chased and arrested next to golden keys.
18. PW 6, P.C. Clemence Nguma, investigated the offence and preferred charges against the accused person. She visited scene and found the accused who was reported to having raped the complainant had been apprehended and locked in a house so that the irate mob could not beat him. She said the complainant was mentally handicapped and that accused took her to a narrow path and removed her panty and raped her. PW 6 said that the Complainant was taken to hospital and it was confirmed she had been raped. When placed on defence the appellant gave sworn statement and said he had gone to look for work when a lady went to her and claimed he had raped her sister. That a group of people wanted to beat them. He said he was not arrested at the scene of the incident. He said he was arrested 1km away from scene of the incident and taken back to scene.
19. He said he did not know the girl he was accused of raping. He said his friend suggested that he should be taken to the police station and the girl be taken to hospital. He said nobody went to confirm he had raped the girl and he was never taken to hospital for any tests and the complainant's clothes were also not examined. The appellant said he stays in Mtwapa far from Complainants home. He said he was looking for jobs in construction site when he was arrested. He said he was not running when he was arrested. He said the boys who allegedly saw him rape the Complainant did not testify. He said that Peter rescued him from being beaten. He said he had never had sex with the Complainant.
20. DW 2 PMSaid he was at work when he heard people arguing. That a lady was saying her sister had been raped. DW 2 said he knew the boy who was alleged to have committed the offence and he advised he



should be taken to the scene of offence as there was a big crowd. That at the scene the Complainant's mother said she found her without a panty. DW 2 said he called the police who went and arrested the accused. He also called the accused person's mother. He said there are kids who identified the accused as the one who raped the girl. DW 2 said that he went to school with the appellant's elder brother & he had known him for around 10 years. He said he had no way of knowing the Complainant had been raped. DW 2 said he did not talk to the Complainant as she was not talking.

21. This appeal was canvassed by way of written submission. The Appellant's submissions were filed by Mr. Mwawasi on 29th November 2022 and argued that the prosecution did not prove the offence of attempted rape beyond all reasonable doubt and the accused/appellant ought to be acquitted.
22. It was submitted that the Complainant R.C. never tendered evidence on account of a letter dated 17th May 2021 written by the National Council for persons with Disabilities. Mr. Mwawasi Advocate contended that the alleged letter was not in court records and was not produced by the prosecution and the application declaring the Complainant a vulnerable witness was amorphous. It was argued that the basis was laid for the application to be granted. It was argued that failure to tender evidence by the Complainant had serious legal ramifications as any other witnesses who tendered his/her evidence meant that evidence was mere hearsay hence the probative value and ought to be disregarded in total as contradistinguished with the role of an intermediary – 5, 31(4) of the Act No. 3 of 2006. It was also argued that the court having failed to appoint an intermediary ought to have given reasons for not appointing one but this was also not done.
23. Mr. Mwawasi Advocate argued that purpose of declaring a witness vulnerable is meant to protect the witness while tendering evidence and not to disentitle them from tendering evidence. It was argued that the trial court did not comply with provisions of Section 31(5) of Act No. 3 of 2006. It was also argued that the trial court ignored the submissions in respect to this issue. The holding in *MM v Republic* [2014] was relied upon by the appellant's counsel: -

“...the role of the intermediary ...”
24. It was also argued that declaration that the Complainant was a vulnerable witness due to mental retardation/impairment and/or disability was not prima facie evidence that she could not make independent discussions including consenting to sex if it even happened.
25. It was further argued that the prosecution was under the duty to protect the Complainant so as to enable her tender evidence through an intermediary as mentally retarded people have their own rights as human beings. It was contended that prosecution assumption that complainant's capability of making informed decisions and was vitiated by the fact of being mentally retarded was fatal as it left the lower court to determine the matter on pure assumptions.
26. On whether there were conducive conditions for proper identification of the perpetrator the appellant's counsel argued that PW 4 was the sole eye witness and that his evidence was not corroborated and the appellant denied, vehemently that he committed the offence. PW 4 stated he was seeing the appellant for the 1st time and he did not say how close he was to the appellant to be able to identify him. It was argued that there was contradiction between evidence of PW 4 and PW 6 as to the colour and types of clothes the appellant was wearing. The holding in *Benson Samwel Erahu vs Republic* (2019) eKLR was relied upon.

“...it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be



satisfied that the circumstances of identification were favourable and free from error before it can safely make it the basis of conviction...”

27. It was argued the appellant was a victim of pure suspicion who was dragged to court on unsubstantiated allegations.

WWN v Republic –

“...the suspicion may be strong but this is a game with clear and settled rules of engagement ...”

28. On the 3rd ground it was also argued that the prosecution’s case had material contradictions. It was argued that PW 1 contradicted herself when she said the appellant was arrested at the scene when she also said that by the time they were called he had already run.

WWW v Republic (2020) eKLR: -

“ ... with regard to contradictions ...”

29. On sentencing, it was argued that the exercise of discretion was not judicious. It was submitted that 5 years was harsh, inconsistent and unjustified as the period the appellant spent in custody from date of arrest to sentencing was never factored in his sentence – Ahamed Abolfathis Mohamed & Another vs Republic (2018) eKLR. It was also contended that the trial Magistrate did not record and consider the appellant’s mitigation. The Respondent on the other hand filed their submissions on 23rd January 2023 and opposed the appeal and said the trial Magistrate properly analyzed the evidence applied the relevant laws in finding the appellant was guilty of the offence of attempted rape. The authority of Peter Wanjala Wanyonyi v Republic (2021) eKLR was relied upon as well as Abraham Otieno v Republic (2011) eKLR.
30. On grounds 2 & 3 the Respondent argued that the appellant’s defence was considered by the trial Magistrate in his judgment and it was misleading to intimate that defence and submissions were never considered.
31. On sentencing it was argued the same was proper as the Act stipulates a minimum of 5 years – which can be enhanced to life imprisonment. The Respondent said the appellant was not remorseful and in mitigation he said he had nothing to say. The holding in Shadrack Kipkoech Kogo v Republic, CR. Appeal No. 253 of 2003 was relied upon.
32. The Respondent argued that the trial court had an opportunity to see, hear and observe the demeanor of the witnesses including that of the appellant and found the prosecution had proved its case beyond all reasonable doubt and the finding should be upheld.

Analysis and Determination

33. This being the first appellate court, this court guided by the principles in David Njuguna Wairimu v Republic [2010] eKLR where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered



the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

34. After considering the grounds of appeal, records from the trial court and submissions by the appellant’s and respondent’s counsels, issues for determination are as follows: -
- i. Whether the prosecution proved the offence of attempted rape beyond reasonable doubt
 - ii. Whether the trial magistrate considered the evidence on record and the appellant’s defence
 - iii. Whether the trial court considered the appellant’s submissions
 - iv. Whether the judgment conforms to the relevant laws
 - v. Whether the sentence was harsh and excessive in the circumstances.
35. The issues above are intertwined and the court will collapse them and endeavor to analyse them jointly as follows: -
36. Section 4 of the *Sexual Offences Act* provides: -
- Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life.
37. Section 388 of the Penal Code provides: -
- (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.
 - (2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.
 - (3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.
38. From the above section, the prosecution is required to prove the identity of the perpetrator and the steps taken by the perpetrator to attempt to commit the intentional and unlawful act of rape.
39. In the case of *Njau v Republic*, Criminal Appeal No. 130 of 1992 [1993] eKLR, it was held that any crime of attempt consists of the following elements: -
- (a) an intent to commit the crime,
 - (b) an overt act towards its commission,
 - (c) the failure to complete the crime, and
 - (d) the apparent possibility of committing it.
40. It follows that attempt to rape is, therefore to try to accomplish sexual intercourse with a person without consent of that person. Accordingly, attempted rape as an offence, is conduct indicating a determination to gratify sexual passion in spite of resistance or lack of conscious consent.



41. PW4, the only eye witness said that he was playing with his friends, Jane, Julia and Dante when they saw the appellant lying on top of the complainant behind the complainant's house and he ran to go and report to her sisters. Although he did not know him prior to the material day on 7th May 2021, he said he saw his face very well. He also said he saw the appellant had lowered his trouser when he saw him lying on top of the complainant and when he saw them he ran away. He was however pursued and arrested and PW4 confirmed he was the person he saw lying on top of the complainant. PW4 was recalled for cross examination by the appellant's counsel and he was categorical that he saw the appellant. He said it was in a hidden path.
42. This court has no doubt that PW4 identified the appellant because it was during the day and visibility was clear. When the appellant was apprehended by the sisters of the complainant, PW4 confirmed he was the one he saw lying on top of the complainant in the hidden path behind the complainant's house.
43. The contradictions that are alluded to by the defence council in the submissions as to the identity of the appellant cannot therefore be sustained.
44. The issue that this court finds to be in dispute is the manner in which the complainant was declared vulnerable witness under Section 31 (4) and (5) of the Sexual Offences Act which provides: -
- (4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court shall, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures-
- a. allowing such witness to give evidence under the protective cover of a witness protection box;
 - b. directing that the witness shall give evidence through an intermediary;
 - c. directing that the proceedings may not take place in open court;
 - d. prohibiting the publication of the identity of the complainant or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family; or
 - e. any other measure which the court deems just and appropriate.
- (5) Once a court declares any person a vulnerable witness, the court shall direct that an intermediary referred to in subsection (3), be appointed in respect of such witness unless the interests of justice justify the non-appointment of an intermediary, in which case the court shall record the reasons for not appointing an intermediary.
45. The 25-year-old complainant was declared a vulnerable witness on account of a letter that was issued by the National Council for Persons with Disabilities which letter was not produced as an exhibit and no medical report was tendered to assess the extent of the complainant's mental disability. It was not established whether she could communicate to court either by sign language or any other means in consideration that she was said to be dumb and deaf. Her ability to give consent or otherwise was therefore not assessed by the court. It was necessary for the court to establish that the complainant did not have capacity and free will to make the choice of having sexual intercourse and was incapable of consenting by reason of mental impairment as was held in *Wilson Morara Siringi v Republic* (2014) eKLR.

“The prosecution evidence for lack of consent was that the complainant was mentally impaired. The issue is not whether the complainant was mentally impaired generally but



whether, “at the time of commission of such act was the complainant mentally impaired.” In the words of section 42, 43(1) and (4) of the Act which I have emphasized in paragraph 10 above, the inquiry is focused on whether the complainant exercised freedom and capacity to make the choice of having sexual intercourse and whether at the time the act took place the complainant was incapable of consenting by reason of mental impairment. While the testimony of PW 1 and PW 3 alludes to the fact that PW 2 was mentally unstable, that alone does not assist the prosecution case. The medical evidence on this issue is sparse as the medical examination report merely states that the complainant was not “mentally stable”. PW 3, who testified on behalf of the doctor who examined the complainant, did not state the nature and extent of mental illness afflicting the complainant so that the court can conclude that the complainant was unable to exercise her own free will.”

46. In consideration of the above finding as to declaration of the complainant as a vulnerable witness and in consideration of the failure by the prosecution to tender medical evidence as to the mental capacity of the complainant, this court finds that the trial magistrate was in error to find that the appellant attempted to rape the complainant. The appeal is therefore allowed. The appellant is set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 13TH DAY OF JULY 2023**

HON. LADY JUSTICE A. ONG’INJO

JUDGE

In the presence of: -

Bebora- Court Assistant

Mr. Ngiri for Respondent

Mr. Mwawasi Advocate for the Appellant – No appearance

Appellant- present in person (From Shimo La Tewa Prison virtually)

HON. LADY JUSTICE A. ONG’INJO

JUDGE

