



REPUBLIC OF KENYA



**HTK v Republic (Criminal Appeal E040 of 2022)
[2023] KEHC 22261 (KLR) (18 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22261 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E040 OF 2022
SM GITHINJI, J
SEPTEMBER 18, 2023**

BETWEEN

HTK APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the Chief Magistrate Court at Malindi
delivered by Hon E.K.Usui – CM in Criminal Case No.SO E040 of 2020)*

JUDGMENT

Coram

Hon. Justice S. M. Githinji

Appellant in person

Ms Mutua for the State

1. HTK was charged in the lower court with a main count of Rape contrary to section 3 (1) (a)(c) of the [Sexual Offences Act](#) No 3 of 2006.
2. The particulars of this offence are that on the December 9, 2020 in Malindi Sub-County within Kilifi County, the appellant intentionally and unlawfully caused his penis to penetrate into the vagina of DKS aged 81 years without her consent.
3. The appellant also faced an alternative count of committing an indecent act with an adult contrary to section 11 (A) of the [Sexual Offences Act](#) No 3 of 2006.
4. The particulars of this offence being that KWK, on the December 9, 2020 in Malindi Sub-County within Kilifi County, the said accused intentionally and unlawfully committed an indecent act by touching the vagina of DKS, aged 81 years, using his penis.



5. The prosecution case is that the complainant who offered evidence as Pw-1 was born in 1939 and at the time of the alleged offence on December 9, 2020 she was aged 81 years. The appellant herein is her neighbour at [Particulars Withheld]. The complainant alleged that prior to December 9, 2020, the appellant herein had seduced her but she had declined his overture. On December 9, 2020 at 8.00Pm the appellant visited her. He later told her to escort him and on the way he held her and led her to the bush in her farm. He pushed her down. She had no pant. He told her not to scream. He removed his clothes partly and used his penis to penetrate her vagina. After he was through she went back home and later reported to the village elder and the chief. On December 11, 2021 she reported the matter at Langobaya Police Station. Pw-2 recorded the report and referred her to the hospital with a P-3 form. The officer later visited the scene. Pw-3 treated her on December 14, 2020. She was depressed and her vagina was swollen. Laboratory tests showed that urine had blood cells. The witness was of the opinion that she had injuries as a result of forcible sex. Her P-3 was thus filled.
6. The trial court found that the appellant had a case to answer and accordingly placed him on his defence. The appellant gave sworn evidence and called two witnesses.
7. In his defence, the appellant stated that he is a neighbour to the complainant. They had a land boundary dispute and the complainant called the area chief to resolve it. On October 16, 2020 she called the appellant before the village elder where she raised a complaint that since the boundary dispute issue arose, her son stopped visiting her and the appellant was jealous of her homestead.
8. On November 23, 2020 she made the appellant appear before the area chief on allegation that he had raped her. The area chief addressed the issue and dismissed the complaint as she had alleged she was raped 15 years ago. On December 19, 2020 she raised a similar complaint to the police. The police arrested him and was charged.
9. Dw-2 (indicated as Dw-1) is an uncle to the appellant. The complainant is his aunt. By the time he gave the evidence he was a Nyumba Kumi elder of Mkondoni. On November 23, 2020 he was in the sub-chief's office. The complainant alleged the appellant had raped her. On December 19, 2020 he escorted him to the police.
10. Dw-3 (indicated as Dw-2) is the wife of the appellant and the village elder of Mkondoni. She stated the appellant and the complainant had a boundary dispute which was resolved in presence of the complainant's son. The village elder had resolved it, but the complainant said it was not done fairly and was referred to the area chief.
11. After the chief resolved it, two weeks after the complainant alleged that the appellant had a 'bad eye' for her homestead. She later claimed the appellant had raped her many years back. The area chief dismissed her rape claim. She went ahead and raised the same claim at the police station.
12. The trial court evaluated the evidence and found that the main count of rape was proved against the appellant beyond reasonable doubt. He was therefore convicted of it and sentenced to serve 10 years in prison.
13. The appellant dissatisfied with the said conviction and sentence, appealed to this Court on the grounds that; -
 - i. The trial court did not consider that the complainant took three days to report the case.
 - ii. The trial court erred in failing to record the date of delivery of the judgment.
 - iii. The trial court erred in failing to appreciate that the appellant is a lay person who does not know the stipulation of section 215 of the [Criminal Procedure Code](#).



- iv. The trial court did not appreciate that there was a land dispute between the complainant's son and the appellant.
 - v. The trial court did not consider that the complainant had made similar allegations 5 years before and were dismissed.
 - vi. The scene of the alleged offence was not properly described.
 - vii. Prosecution case was not proved beyond reasonable doubt.
 - viii. The injuries the complainant allegedly suffered were not properly described.
 - ix. The alleged swollen vagina was not proof of penetration.
 - x. The defence case shook the prosecution case.
14. The prosecution opposed the appeal of which was canvassed by way of written submissions.
 15. As an appellate court I have gone through the charge sheet, evidence adduced by the prosecution witnesses, defence case, judgment made by the lower court and sentence meted, grounds of appeal and submissions by both sides.
 16. Having done so, I do find that the only sound issue I need to evaluate is whether the offence of rape, of which the appellant was convicted and sentenced, was proved by the prosecution beyond reasonable doubt.
 17. Pw-1 who at the time of the alleged offence was aged 81 years, stated that the appellant had before seduced her but she had declined to his overtures. The two are related though it's not clear how. In her scanty evidence, she stated that she lives alone at home and on December 9, 2020 at 8.00 Pm the appellant visited her. He later requested her to escort him and on the way he held her, took her to the bush, pushed her down and raped her. He told her not to scream. A clear evaluation of this evidence shows that it's doubtful. The complainant was living alone and the evidence raises the question why he could not have raped her in the house where it was safer than in the bush where he allegedly led her. I also find it odd that a younger man would request an elderly woman aged 81 years to escort him at night and she readily agrees to do so. The purpose of the said escort is strange. She said she was held and led to the bush. She did not describe how and if at all she resisted. She did not say she was dragged into the bush. Likewise, she alleged she was told not to scream. She did not claim she was threatened not to or ordered not to scream. If she was simply told not to scream, this raises doubts as to whether there was rape. The incident was allegedly raised three days after. There is no explanation why she did not raise the complaint immediately or soon thereafter. Pw-3 the investigations officer, stated that he visited the scene of crime. He however did not adduce any evidence in relation to the scene. One wonders whether he observed anything at all which corroborated the complainant's claim. Sketch plan of the alleged scene in relation to the complainant's and the appellant's homestead was not presented. It would have been essential to know whether the alleged scene direction was towards the appellant's home as the two are neighbours. The clothes the victim and the appellant were wearing were not recovered and subjected to examination in relation to what they may have picked in the alleged bush. Lack of such evidence leaves the complainant's evidence as to the claim that the incident happened in the bush uncorroborated.
 18. In her evidence in chief, the complainant towards the end stated that she had no land dispute with the appellant. For her to have stated such must have been aware that there was a claim by the appellant that she had raised the allegation out of a land dispute which they had.



19. The appellant raised the issue of the alleged land dispute while cross-examining Pw-2. When he was placed on his defence he alleged he was fixed out of it, and his two witnesses confirmed there was such a dispute. The witnesses also disclosed that the complainant had alleged she was raped previously, many years back by the appellant. The defence was not shaken by the prosecution on cross-examination. The evidence that complainant's vagina was swollen and urine had blood cells, on its own is not evidence enough that it was as a result of forceful penetration by a male genital organ. It could as well have resulted from other sexual activities within the genital organ, carried out by the complainant for purposes of fixing the appellant given the boundary dispute they had.
20. The bottom line is that the prosecution presented a weak case which was effectively offset by the defence, raising reasonable doubts as to whether the offence actually took place. Had the trial court properly evaluated the entire evidence, he would have noted existence of reasonable doubts and resolved them in favour of the accused. The prosecution bears the burden of proving their case beyond reasonable doubt. This to me means that a rational person considering the evidenced presented by the prosecution and the arguments put forward must ascertain that the alleged offence was committed, and by the accused person. As it was held in the case of [*Elizabeth Waithiegeni Gatimu v Republic \[2015\] eKLR*](#), where a reasonable doubt exists, the doubt should be resolved in favour of the accused person.
21. In this case I find existence of reasonable doubt as to whether the alleged offence was committed. I resolve the doubt in favour of the appellant. The appeal therefore succeeds. The conviction and sentence are hereby quashed and the appellant is set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF SEPTEMBER, 2023

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S.M. GITHINJI

JUDGE

In the Presence of

1. Mrs Mkongo holding brief for Ms Mutua for the Prosecution
2. Appellant virtually

