



REPUBLIC OF KENYA



**Mwingirwa v Republic (Criminal Appeal E033 of 2022)
[2023] KEHC 23626 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23626 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E033 OF 2022
JN ONYIEGO, J
SEPTEMBER 22, 2023**

BETWEEN

ANDREW MWINGIRWA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence of Hon. Aganyo R. delivered on 24.06.2022 in Criminal Case No. E021 of 2021 PM'S Court at Wajir)

JUDGMENT

1. The appellant herein was charged with the offence of rape contrary to section 3(1) (a) (b) (3) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were that on 09.12.2021 in Wajir West Sub County within Wajir County intentionally and unlawfully caused his penis to penetrate the vagina of H.M.Y. without her consent.
2. He was also charged with an alternative count of committing an indecent act contrary to section 11(A) of the [Sexual Offences Act](#) No. 3 of 2007 (2006) with particulars being that; on 09.12.2021 at Kubey Surur in Adan Awale location of Wajir West Sub County within Wajir County intentionally touched the buttocks/breast/anus/vagina of H.M.Y. with his penis against her will.
3. Having denied the charges, the case proceeded to full trial with the prosecution calling a total of five witnesses. Upon conviction on the main count, he was sentenced to serve twenty years in prison. Aggrieved by the conviction and the sentence of the court, he filed on 06.02.2022 an amended petition of appeal on grounds summarized as follows:
 - i. That the learned trial magistrate erred in law and fact by meting out an excessive and harsh sentence.



- ii. That the learned trial magistrate erred in law and fact to find that the appellant's defence was not tested in cross examination.
 - iii. That the trial court erred in law and fact by failing to find that the evidence of identification/ recognition was questionable
 - iv. That the trial magistrate erred both in law and fact by convicting on the offence herein yet the prosecution's evidence was marred with contradictions and inconsistencies.
4. The court gave directions with the consent of both parties for the appeal to be disposed of through written submissions. Consequently, parties filed written submissions to canvass the appeal herein.
 5. The appellant urged that the sentence meted out by the trial court was excessive in the given circumstances. It was further Submitted that the trial magistrate did not exercise her discretion appropriately. To support case, the appellant to support his case placed reliance on the case of Benard Kyallo Mayoli H.C Crim. Application No. 7 of 2019 where the court addressed itself on the minimum sentences as denying a trial court an opportunity to exercise its discretion.
 6. On the ground that his evidence was not challenged during cross examination, the appellant submitted that the prosecution did not challenge the evidence of the appellant despite the same being unsworn. That in *Macharia v Republic (1976) 209, Kneller and Platt JJ* noted that a defendant ought to be cross examined on its defence if it is different from the case of the prosecution and the court may believe the defence if it raises reasonable doubt.
 7. On identification, the appellant urged this court to find that the circumstances under which the complainant identified the appellant were questionable considering that the prosecution witnesses were divided as to whether the number of the men that the appellant was found with were ten or five. To that end, support was placed on the case of *John Stelen Olemwenda Criminal Appeal No. 51 of 1989* wherein it was held that the circumstances under which identification is premised, a trial court ought to be enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.
 8. It was his prayer that this court reconsiders the evidence afresh and reach a finding that the conviction by the trial court ought to be quashed and the sentence set aside.
 9. Mr. Kihara for the respondent submitted that the evidence by the prosecution clearly proved that the appellant committed the offence charged and therefore this court was urged to uphold the same. It was his contention that the sentence invoked by the trial court was legal and appropriate bearing in mind the circumstances of the case and therefore the same should be upheld by this Honourable Court.
 10. This being a first appeal, this court is mandated to re-evaluate the evidence adduced before the trial court afresh and make its independent conclusion. The Court of Appeal in *Gabriel Kamau Njoroge – vs- Republic [1982 – 88] 1 KAR 1134* expressed itself on the duty of the 1st Appellate court as follows;

“It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this.”



11. PW1, HM, the complainant herein testified that on the material day, she was herding goats when the appellant accosted her and then raped her. It was her evidence that the appellant raped her severally from 4.00 p.m. to 7.00 p.m. when he abandoned her while in pain. She stated that she lay down on the same spot the whole night till morning when her brothers found her. That they followed cow footprints which led them to a home where they found the appellant in company of about five other men.
12. She stated that she easily identified the appellant given that he was non-local as the other men in company of the appellant were of Somali origin. On cross examination, she reiterated that the appellant was the person responsible for her attack.
13. PW2, Ismael Mohamed Yakub testified that the complainant was his younger sister and that on the material date, she had set out to graze goats when the appellant raped her. It was his evidence that he noticed that the complainant had failed to return home for lunch prompting him to go look for her. That as darkness set in, they only managed to find the goats and not the complainant. He stated that they went back home and upon reaching morning, they embarked on the mission of searching for her.
14. He stated that they found her lying down on the ground unconscious and upon being given water, she regained her consciousness and then told them of what had ensued. It was his evidence that they followed cow footprints which led them to a home where they found the appellant in company of about five other men. That the complainant easily identified the appellant given that he was a non-local as opposed to the other men who were of Somali origin.
15. PW3, Fian Kumane Abdi testified that the complainant is her daughter and that on the material date, she failed to return home after having set out to graze goats. That together with her other sons, they set off on different directions to find the complainant. She was later informed by her sons that the complainant had been found having been raped.
16. She reiterated the evidence of PW 1 and PW 2 stating that the complainant's brothers followed cow footprints which led them to a home where they found the appellant herein in company of about five other men. That the appellant was easily identified by the complainant as he was a non-local as opposed to the other men who were of Somali origin.
17. PW4, Wycliff Nyambane testified that he received pw1 for medical examination following a report of sexual assault. That upon examination, the complainant's hymen was not intact and that there was minimal bleeding. That a vaginal swab was undertaken and the laboratory results revealed that there were immobile spermatozoa seen. Additionally, the witness produced treatment notes, a referral letter and PRC Form noting the extent of the injuries of the complainant and a P3 Form as Pex 1,2,3 and 4.
18. PW5, George Wanga testified that he was the investigating officer in the matter herein and given that the complainant did not have any document to show her age, an age assessment was carried out which determined that she was an adult. That he carried out investigations and recorded evidence from the witnesses herein and thereafter charged the appellant with the offence herein.
19. The prosecution closed its case and the trial magistrate upon considering the evidence before him placed the appellant on his defence.
20. The appellant in his unsworn testimony denied committing the offence and prayed that he be acquitted of the charges herein.
21. In the present appeal, the issue for determination is whether the prosecution established the offence of rape contrary to Section 3(1) as read with Section 3(3) of the [Sexual Offences Act](#) to the required standard of proof beyond any reasonable doubt.



22. This court has re-evaluated the evidence in this appeal in light of the grounds of appeal and submissions made. 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.”
23. The prosecution was therefore required to establish penetration, absence of consent, and that the appellant was the perpetrator of the act. In respect to penetration, Section 2 of the [Sexual Offences Act](#) defines penetration to mean the ‘partial’ or complete insertion of the genital organs of a person into the genital organs of another. [See *Alex Chemwotei Sakong v Republic* [2108] eKLR]
24. In the same breadth, the evidence in relation to penetration is that even without considering the presence or otherwise of medical evidence, an offence of this nature can be proved by oral evidence of a victim of rape or circumstantial evidence. This position is fortified by the holding of the Court of Appeal in *Martin Nyongesa Wanyonyi vs. Republic* Criminal Appeal No. 661 of 2010, (Eldoret), citing *Kassim Ali vs Republic* Criminal Appeal No. 84 of 2005 (Mombasa) where 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.”
25. The complainant testified that the appellant accosted her while grazing goats in the bush. That he forcefully raped her severally from 4.00 p.m. to 7.00 p.m. when he left her in pain. This evidence was corroborated by the medical evidence tendered by PW4 who confirmed that indeed the complainant had been sexually assaulted. The hymen was missing and there was partial bleeding detected. This evidence was not challenged and therefore this Honourable Court equally finds that the element of penetration was proved beyond reasonable doubt.
26. The next question is whether there was consent. The complainant narrated how the appellant pounced on her and thereafter raped her. It was her evidence that she did not consent to the Sexual Act. According to the Proviso to Section 42 of the [Sexual Offences Act](#), “a person is said to consent if he or she agrees by choice, and has the freedom and capacity to make that choice.”. In *Republic v. Oyier* [1985] eKLR, the Court of Appeal held as follows: -
- “The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.
- 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.”
27. In the case herein, PW4 during cross examination testified that upon examining the complainant, he noted a swollen neck and an eye signifying that there must have been a struggle. Further, PW4 also noted that when he examined the appellant, he found that he had inter alia chest injuries which according to the appellant, were as a result of the trees that he had been previously cutting.



28. This court is alive to the fact that indeed consent may be either expressed or implied depending upon the nature and circumstances of the case. See *Charles Ndirangu Kibue v Republic* [2016] eKLR. Upon carefully considering the facts herein and particularly the injuries sustained by the complainant and the appellant and not forgetting the reasons fronted by the appellant, it is my humble view that indeed, the evidence by the prosecution dislodged that of the appellant.
29. As regards the identity of the perpetrator, the complainant stated that the appellant accosted her and then tied her hands and neck together using her scarf and thereafter raped her severally from 4.00 p.m. to 7.00 p.m. That she easily identified the appellant given that he was a non-local. In the case of *Kariuki Njiru & 7 others v Republic*, Criminal Appeal No. 6 of 2001 (Unreported) the court held as follows:
- “Law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.”
30. I have no doubt in my mind that the appellant herein was properly identified given the time taken to tie the complainant and thereafter repeatedly raped her from 4.00 p.m to 7.00p.m. There was sufficient time for interaction to enable the complainant clearly identify him. The fact that the appellant was a non-local also made identification easier and in my humble view, the circumstances were favourable enough for a proper identification. It therefore follows that ground 3 of the appeal cannot stand and therefore dismissed.
31. On the ground that the prosecution evidence was marred with contradictions and inconsistencies in relation to the number of men the appellant was in company with at the time of arrest the same is not fatal. In that regard am guided by the holding in the case of *Mujuni v Uganda* (HCT-04-CR-CN 33 of 2011) [2013] UGHCCRD 2, where the court noted that:
- “... the law that allows admission of evidence of a witness who has been truthful in one part and false in another area of his or her testimony admitted in part is obsolete and the courts of law have long varied this position. The law now governing inconsistencies or a discrepancy is that grave inconsistencies if not satisfactorily explained will usually result in the evidence of the witness being rejected. Grave inconsistency or contradiction is the one that goes to the root of the case”.
32. It therefore follows that the inconsistencies and contradictions that go to the root of a case are the ones that are meant to be rejected. In the case herein, this court has re-evaluated the evidence of the prosecution and arrives at a finding that the same did not tamper with the root of the case and therefore baseless.
33. On sentencing, this court recognizes the fact that the same is at the discretion of the trial court; this being an appellate court, it follows that this court can only interfere with the said sentence if it finds that the same was excessive or was arrived at based on wrong principles of the law by considering irrelevant factors. See *Ogolla s/o Owuor vs R*, (1954) EACA 270 wherein the Court of Appeal stated as follows:
- “The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors”. To this, we would add a third criterion namely, “that the sentence is manifestly excessive in view of the circumstances of the case (*R - v- Shershowsky* (1912) CCA 28TLR 263).”



34. The appellant contended that the sentence was excessive given the circumstances of the case herein. In this case the appellant was charged under 3(1) (a) (b) (3) of the *Sexual Offences Act* No. 3 of 2006 which provides as follows:

“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.”

35. In the case of *D W M vs. Republic* (2016) e KLR the Court held that:

“As for the sentence the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the *Sexual Offences Act* that the offender “Shall be liable to imprisonment for life” means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant’s protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion.”

[Also see *Felix Nthiwa Munyao vs. R Nairobi* Court of Appeal Criminal Appeal No. 187 of 2000].

36. In this case, this court having holistically reviewed the finding of the trial court and the sentence imposed, it is my belief that the learned trial magistrate’s view, in imposing the sentence, was influenced by the fact that the pre-sentence report was not favourable to the appellant and the fact that the victim remained stigmatized.

37. It is my humble view that despite the fact that the pre-sentence report was not favourable to the appellant, the trial magistrate ought to have mirrored the same against the submissions by the prosecution that the appellant was a first-time offender coupled with his mitigation that he was an orphan with responsibilities from his dependents. Besides, where the minimum sentence is provided, there must be good grounds for enhancement.

38. Accordingly, I find that the sentence imposed was harsh hence excessive. I therefore dismiss the appeal on conviction and allow the appeal on sentence and substitute the sentence of 20 years with that of 10 years to run from the date of arrest.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 22ND SEPTEMBER 2023.

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J.N. ONYIEGO
JUDGE

