



REPUBLIC OF KENYA



**Barasa v Republic (Criminal Appeal 61 of 2019)
[2023] KEHC 23840 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23840 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL 61 OF 2019
AC MRIMA, J
OCTOBER 19, 2023**

BETWEEN

NICHOLAS WANYONYI BARASA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal arising from the judgment, conviction and sentence by
Hon. C. M. Kesse, Senior Resident Magistrate in Kitale Chief Magistrates
Court Sexual Offence Case No. 107 of 2018 delivered on 13/06/2019)*

JUDGMENT

1. The appellant herein, Nicholas Wanyonyi Barasa, was arraigned before the trial court on July 6, 2018 where he 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 of the offence were that 'on 16th day of June, 2018 at [particulars withheld], intentionally and unlawfully caused his penis to penetrate the vagina of ANW without her consent.'
2. The appellant was charged in the alternative with committing an indecent act with an adult contrary to section 11A of the *Sexual Offences Act* No. 3 of 2006.
3. The appellant initially pleaded guilty to the charge of rape and a guilty plea was entered. He further admitted the facts as presented and he was convicted on his own plea of guilty. On mitigations, the appellant informed the court that he did not rape the victim since it was a consensual act having given her money.
4. The trial court, rightly so, changed the plea of guilty to a plea of not guilty and the case was fully heard.
5. When the plea of guilty had been changed, it was incumbent upon the court to call upon the appellant to plead to the alternative charge. However, that, did not happen.



6. The prosecution called four witnesses in a bid to prove the charges. PW1 was the complainant/victim, one ANW PW2 was the husband to PW1. A Clinical Officer from Kitale County Hospital testified as PW3 and the investigating officer one No. 60115 Cpl. Benjamin Tarus attached at Sibanga Patrol Base testified as PW4. For the purposes of this judgment this Court will refer to the said witnesses according to the sequence in numbers in which they testified before the trial Court except for PW1 whom I will also refer to as 'the complainant' or 'the victim'.
7. At the close of the prosecution's case the trial court placed the appellant on his defence. The appellant opted to given an unsworn defence. Thereafter, the court rendered its judgment where the appellant was found guilty of the offence of rape and was convicted. He was sentenced to 10 years' imprisonment.
8. Being dissatisfied with the conviction and sentence, the appellant preferred an appeal by filing a Petition of Appeal dated June 17, 2019.
9. He challenged the entire judgment and sentence on the following four grounds: -
 1. That Your Lord the trial magistrate erred in not observing that the circumstances of the offence was consensual and not rape as alleged by the prosecution.
 2. That My Lord the trial court could have discovered that the appellant failed to honour Kshs.200 to pay the complainant that it accelerated the charges hence prosecution.
 3. That My Lord the prosecution's witnesses were not credible to supporting their case.
 4. That Your Lordship I pray to be supplied with copies of my trial proceedings to enable me raise more grounds during the hearing of my appeal.
10. Directions were taken and the appeal was disposed of by way of written submissions. The appellant duly complied and filed his submissions, but the State made brief oral submissions.
11. This being the appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of *Okeno v R* (1977) EALR 32 and further in the Court of Appeal case of *Mark Oiruri Mose v R* (2013) eKLR that this court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.
12. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of rape or alternatively those of the offence of committing an indecent act were proved and as so required in law; beyond any reasonable doubt.
13. The starting point is how the offence of rape is described in law. section 3 of the *Sexual Offences Act* No. 3 of 2006 (hereinafter referred to as 'the Act') defines 'rape' as follows: -
 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.



- (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.
14. From the above definition, the ingredients of the offence of rape, therefore, include proof that the victim was not a minor, proof of penetration, proof of the perpetrator and proof that the consent was not freely given.
15. On looking at those aspects in this judgment, this court shall consider each of them singly. I must however confirm that the evidence was well captured in the judgment under appeal and I hereby adopt the same as part of this decision by reference.

(a) Age of the complainant:

16. The age of the complainant was not contested in this appeal. According to the P3 Form, the victim was 23 years old. The complainant was, hence, not a minor in law.

(b) Penetration:

17. The trial court rightly handled the definitive part of penetration. The court was accordingly guided by the provisions of the 'the Act'.
18. The trial court's analysis yielded that it is not necessary that medical evidence be availed to prove full penetration of the suspect's sexual organ into the sexual organ of the victim. As long as there is evidence that there was even partial penetration, only on the surface, the ingredient of the offence is demonstrated.
19. In demonstrating this ingredient, the complainant stated how the ordeal took place. When she returned home, she informed her husband, PW2, who examined her private parts and confirmed the presence of fresh semen.
20. Of course, PW3 could not find any evidence of possible penetration since he examined the victim after such a long time.
21. The complainant was old enough to know what she meant by saying that there was penile penetration into her vagina. She was a wife to PW3. It is not likely that she was mistaken on what happened to her. Going by the definitions of 'rape', 'penetration' and 'genital organs' in the Act coupled with the evidence of the complainant and PW2 as well as the contents of the P3 Form and the Post Rape Care Form, this court is satisfied that indeed penetration was proved in the circumstances of this case.

c) Whether the appellant was the perpetrator and the issue of consent:

22. The appellant vehemently denied any involvement in the alleged offences.
23. This court has carefully gone through the evidence on record. The incident occurred during day-time. The complainant testified that she was on her way to hospital to take her 2-weeks' baby who was ailing. She used a route which passed through a maize plantation. Suddenly, someone, unknown to her, appeared from the plantation and asked the victim to 'give her' or he will injure her.
24. As she resisted, the attacker forcefully pulled her into the plantation, fell her as the baby also fell down next to her, striped off her underpants and was raped for around 20 minutes. The attacker then disappeared into the plantation.



25. The victim gave a description of the attacker. She alleged to have spotted her twice in the neighbourhood before he was arrested on other offences. She went and identified him at the police station.
26. In this matter the aspect of identification is by way of a single-witness identification.
27. In *R v Turnbull & others* (1973) 3 ALL ER 549, which English decision has been generally accepted and greatly used in our judicial system, the court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The court rendered thus: -

... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.
28. The ordeal took place abruptly. There was no engagement between the victim and the assailant. The victim was pulled and strangled as the act took place. The attacker then disappeared immediately thereafter. Ordinarily, the victim, in such circumstances, would be more concerned of the safety of her baby.
29. There was no identification parade conducted by the police. All that was relied upon was the dock identification. Such identification, is mostly unsafe especially in instances where the victim never knew the attacker before.
30. In this matter, had it not been the appellant's statement that led to the change of plea, this court would have found that the aspect of identification was not proved as required in law. The appellant stated as follows: -

... I did not defile the complainant. I gave her money. I did not use force...
31. The appellant, however, did not challenge the prosecution's evidence on the above standing. He did not pursue the issue of the complainant having agreed to the sexual act with him or at all. Instead, he largely narrated how he was arrested.
32. It is on the basis of that aspect of the appellant's statement that corroborates the evidence of PW1 that indeed it was the appellant who had a sexual encounter with her without her consent.
33. This court, therefore, finds that it was the appellant who had a sexual encounter with the complainant against her will.
34. The offence of rape was, hence, proved beyond any peradventure and as such, the appellant was properly convicted. As a result, the appeal on conviction is hereby disallowed.
35. On sentence, the appellant was sentenced to 10 years' imprisonment. That was on June 13, 2019. He had been in remand since July 6, 2018 when he was charged. The Court did not state whether it had



taken into account the period the Appellant had been in remand during the trial in computing the sentence to 10 years' imprisonment.

36. The appellant has by now been in prison for 5 years. By considering the issue of one-third remission of the sentence, the appellant is to serve a prison period of 7 years. He, therefore, has around 2 years to complete his sentence.
37. Given the pathetic state of congestion in the Kitale GK Prison and coupled with the period already served, this court believes that the appellant must have learnt his life lessons.
38. The sentence is, hence, reviewed to the period already served and the appellant is hereby set at liberty unless otherwise lawfully held.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 19TH DAY OF OCTOBER, 2023.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Nicholas Wanyonyi Barasa, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Regina/Chemutai – Court Assistants.

