



**Julia v Republic (Criminal Appeal E009 of 2023)
[2023] KEHC 24006 (KLR) (Appeals) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24006 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

APPEALS

CRIMINAL APPEAL E009 OF 2023

DR KAVEDZA, J

OCTOBER 24, 2023

BETWEEN

IRUNGU MAINA JULIA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence delivered by Hon. E. Kanyiri (SRM) on 5th August 2022 at Makadara Chief Magistrate's Court Criminal Case No. 951 of 2018 Republic vs Irungu Maina Julia)

JUDGMENT

1. The appellant, Irungu Maina Julia, was charged and after a full trial, convicted on two counts of robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*. He was also charged and convicted for the offence of rape contrary to section 3 (1) (c) and 3 of the *Sexual Offences Act* No. 3 of 2006. He was sentenced to serve 10 years each for counts I and II- and 40 years imprisonment for count III. The sentences were to run consecutively.
2. Being dissatisfied with the conviction and sentence, he filed an appeal. In amended grounds of appeal, he raised six (6) grounds which have been summarised. He challenged the totality of the prosecution's evidence against which he was convicted for the offence of robbery with violence and rape. He contended that his conviction was unsafe as the charge sheet was defective. He complained that the trial court failed to consider his defence, thereby reaching a wrong conclusion.
3. In opposition, the respondent filed grounds of opposition dated 17th April 2023. The grounds raised are that the prosecution proved its case beyond reasonable doubt. The trial magistrate properly applied herself to the law and facts, arriving at a correct finding. The appeal lacks merit and should be dismissed.



4. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate and reanalyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that. (See *Okeno v Republic* [1972] EA 32)
5. The prosecution called eight witnesses in support of its case during the trial. DM,(PW1) told the court that on April 28th 2018, at around 3 a.m. he was heading home after work in the company of his wife EN (PW 2). As they walked, they noticed three men following them. Two of these men grabbed him while one held onto his wife. One of them, who had a knife, pointed it at his stomach, while the other brandished a gun, also aimed at his abdomen.
6. He narrated that they demanded money but he told them he didn't have any. The attacker with the knife searched him and took his Nokia phone worth Ksh. 2000 and a wallet containing Ksh. 900, his identification card, and various receipts. They also searched his wife and took her Samsung phone along with her national identification card. He testified that they were led to an alley by the assailant with a knife. He instructed PW 2 to undress and bend over.
7. PW 1 told the court that he pushed him and ran calling for help. He reached Matano's (PW 3) residence and came to help. They all returned to the location where PW1 had left the assailants and his wife. However, upon their return, they found that the assailants had fled. The assailant who was with a knife was still at the scene attempting to fasten his trousers. They ran after him and he fell and was subsequently arrested. He was still in possession of the knife used to threaten the victims. They reported the incident at the police station. He identified the appellant as the assailant with the knife.
8. EN, (PW2) in her testimony reiterated the evidence of PW 1 on how they were attacked by three armed men. After her husband fled to seek assistance, she told the court that the assailant with a gun removed coerced her to bend over and removed his penis, and inserted it into her vagina. At the time she was dressed in a knee-length dress, tight black pants, and red underwear. The ordeal lasted for about 30 minutes. The assailant used her handkerchief to wipe his penis.
9. She told the court that after the assault, as the appellant was dressing, her husband, PW1 and PW3 arrived and he was apprehended. She was taken to MSF for treatment. She told the court that she was six (6) months pregnant at the time. On cross-examination, she maintained that there was adequate lighting in the nearby shops to see and identify her assailants.
10. Dennis Mark Matano, (PW3) the chairman of '*nyumba kumi*' testified that on April 28, 2018, at around 4 am, he was in his house asleep. PW1, his neighbour, knocked on his door and shouted for help. He informed him that urgently on his door, causing people to take notice. PW1 informed him that three individuals had robbed him and was raping his wife. They went to the scene and saw one of the perpetrators attempting to flee. He fell and was apprehended. At the scene, PW 2 was in distress and narrated her ordeal.
11. Kipngetch Bernard, (PW4) a Government Analyst, testified that he received several items for analysis related to a case on May 3, 2018. These items included swabs from PW2 and the appellant, a handkerchief found at the scene, and various clothing items. Upon forensic analysis, his findings were that the boxer underpants belonging to the accused had no blood stains. Both the red pantie and the high vaginal swab from the complainant were highly stained with semen, but they did not yield a DNA profile. The handkerchief recovered at the scene was moderately stained with semen which matched the DNA profile of the appellant. He produced the report dated 20th September 2019.



12. Dr. Joseph Maundu, (PW5), from Nairobi Police Surgery, informed the court that on May 3, 2018, he examined PW2, a 27-year-old female from Shauri Moyo police station, who had alleged rape on April 28, 2018. During the examination, he observed swelling around her right eye, and a bruise below her right eye, and noted that she was pregnant. He determined that her injuries were approximately 4 days old and consistent with the use of a blunt object. She had received treatment at MSF. On genital examination, he found no injuries, and her hymen was broken with old healed tears, indicating that these were not recent injuries. PW5 mentioned that PW2 had a PRC (Post-Rape Care) form with her, and he signed the P3 form on May 4, 2018, which he produced as Exhibit 6.
13. He also examined the appellant on 4th May 2015. He had a tender swollen scrotum and tender testis, and the injuries were also about 4 days old, consistent with blunt trauma. They had not received any treatment for these injuries, which were classified as harm.
14. Penninah Angwenyi, (PW6) a medical practitioner at MSF Mathare Project told the court that PW2 was brought to their facility with a history of having been sexually assaulted by an unknown person. On examination, she was found to be wearing tight and knee-long clothing, and she appeared to be pregnant. Her vital signs were normal, and she had a bruise on her right eye. On the genital examination, the outer genitalia appeared normal, with no injuries observed. Her vagina was moist and pinkish, with no injuries detected. However, her hymen had multiple old tears, but the overall examination was normal. PW2 was wearing red panties, which were packed in khaki paper and handed over to the police.
15. Medical tests revealed the presence of spermatozoa, and she was subjected to HIV testing, which came out negative. Spermatozoa were also found in her urine. She was provided with treatment for HIV prevention, and Sexually Transmitted Infections (STIs), and received vaccines for tetanus and hepatitis B. She was booked for counseling sessions. A PRC (Post-Rape Care) form was filled out, both of which were signed. PW3 produced the medical report as Exhibit 3 and the PRC form as Exhibit 4.
16. No. 84xxx, PC James Omondi, (PW7) a Police Officer from Shauri Moyo police station, testified about an incident on April 28, 2019. He and Corporal Elisha Oyatta were on patrol when they received a call from a *Nyumba Kumi* representative in Shauri Moyo. They arrived at the scene and found a married couple (PW1 and PW2), the *Nyumba Kumi* representative (PW3), and the appellant. The appellant, in the company of others had allegedly robbed the couple and raped PW 2. They arrested him and referred PW 2 to the hospital. They recovered a stained handkerchief and a knife from the appellant.
17. No. 89xxxx, Corporal Beatrice Nyakinja, (PW8) the investigating officer told the court that in the course of her investigation, she recorded statements from both complainants, PW1 and PW2, who were husband and wife. Both the complainant and the accused were escorted to a government doctor and a Government Analyst for examination. PW8 also filled out an exhibit memo and forwarded the handkerchief, the accused's boxer shorts, and the complainant's panties for further examination at the government chemist. Buccal swabs were taken from both the complainant and the appellant during this process. PW8 further confirmed that she visited the scene of the crime and later charged the accused with the present offenses. She described the scene as an open area with sufficient lighting.
18. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. He gave unsworn testimony and did not call any witnesses. He told the court that he worked at CDF toilets where he was a cleaner. On the material night, he was in the course of his work when he was apprehended by unknown individuals and inquired about his identity. Police officers arrived shortly after and he was arrested and accused of the offences he was convicted of. He was subsequently charged and he maintained his innocence.



Analysis and Determination.

19. In his appeal, the appellant submitted that the evidence of PW 1 and PW 2 was contradictory on how they were accosted by three assailants and the weapons used. He also submitted that the identification was not proper as there was no adequate lighting in the area. He maintained that the trial court ought to have cautioned itself before accepting the identification evidence adduced in this instance. In addition, the appellant submitted that penetration was not proven beyond reasonable doubt. The appellant argued that other than the evidence of PW 2 which was not corroborated, there was no proof that she had been sexually assaulted.
20. In rebuttal, the respondent submitted that the requirements for proof of identification of the appellant as one of the perpetrators were met. In addition, the appellant was found to be in possession of the knife used in the attack against the complainants. That he was also found in possession of the bag stolen from PW 2. It was argued that the doctrine of recent possession was applicable in this case. On whether the elements of the offence of rape were proven, the respondent submitted that the prosecution proved beyond reasonable doubt the ingredients thereto.
21. The key ingredients for a robbery with violence charge are found in section 296(2) of the *Penal Code*. It provides as follows-

“if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death”.
22. The issues for consideration by this court are whether the appellant was positively identified and whether the prosecution did prove its case beyond reasonable doubt. The evidence on record does prove that PW 1 and PW 2 were attacked on 28th April 2018 at around 3 am by 3 male adults. PW 1 and PW 2 told the court that their attackers were armed with a knife and a gun. It is established that one of the robbers was the appellant. It was the evidence of PW 1 and PW 2 that the appellant was the one holding one of the knives. The other two were holding a gun and another knife.
23. During the ordeal, they stole Kshs. 900, a Nokia 110 phone from PW 1, and a Samsung phone from PW 2. The complainant told the court that the nearby shops were well-lit and they could identify their assailants by sight and through their voice. In addition, the appellant was caught at the scene of the crime committing another offence. From the material placed before the court, PW 1 and PW 2 were very clear on the facts of the incident, and their evidence was not shaken on cross-examination. It is my considered view that the appellant was properly and positively identified by PW 1, PW2, and PW 3 who arrived at the scene and apprehended him. I find the testimony of PW1 and PW2 to be reliable direct evidence of visual identification against the appellant.
24. For consideration is whether force was used to rob them. It was the testimony of PW 1 and PW 2 that the appellant was armed with a knife, which was used as a weapon to threaten harm. The knife was recovered from the appellant and produced in court. This court is satisfied that the prosecution proved that the appellant and his accomplices robbed and threatened to harm the complainants. His conviction on Counts 1 and II for the offence of robbery with violence was therefore safe.
25. The next issue is whether the offence was rape was proven beyond a reasonable doubt. Rape is defined under section 3 of the *Sexual Offences Act* to mean, the intentional and unlawful penetration of a



person's genital organ into another's genital organ without their consent. In *R vs Oyier* (1985) KLR pg 353, 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. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact.”

26. PW 2 narrated that the appellant ordered her to undress and bend over. The appellant proceeded to rape her in an alley. She maintained that the ordeal lasted for about 30 minutes. In addition, it was without her consent. Her testimony was corroborated by the evidence of PW 6 who examined the victim after the ordeal. A high vaginal swab revealed spermatozoa, which, after DNA analysis, was matched to the appellant by PW 4. Accordingly, the prosecution proved that there was intentional and unlawful penetration of PW 2's genital organs without her consent.
27. On identification, the appellant was arrested while trying to flee the scene of the crime. The DNA analysis from the handkerchief recovered also placed him at the scene. The victim's testimony and the medical evidence all pointed at the appellant as the perpetrator of the offence. This court finds that the appellant was positively identified as the perpetrator of the offences herein by the consistent, well corroborated and water tight testimonies of the prosecution witnesses.
28. The appellant also argued that the trial court failed to consider his defence. In his defence, the appellant denied committing the offences and maintained his innocence. From the record, the trial court considered the appellant's defence and found it to be unbelievable. the ground therefore fails. His conviction for the offence of rape was therefore proper.
29. On sentence, the appellant was sentenced to serve 10 years each for Counts I and II, and 40 years for Count III. The sentence was to run consecutively. In the sentencing proceedings, the trial court considered the appellant's mitigation and the time spent in pre-trial custody. The sentence imposed was of a cumulative term of 60 years imprisonment.
30. Section 329 of the *Criminal Procedure Code*, gives judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the offence is prescribed. In that regard, I find the sentence imposed shatters all hopes of the appellant for rehabilitation or having another chance to start afresh.
31. Therefore, the appeal on sentence partially succeeds. The sentence of 10 years imprisonment for Counts I And II is maintained. In respect to count III, the appellant is sentenced to serve 20 years imprisonment from the date of his conviction. The sentences shall run concurrently.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 24TH DAY OF OCTOBER 2023.

D. KAVEDZA

JUDGE

