



REPUBLIC OF KENYA



KENYA LAW
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**Mrefu v Republic (Criminal Appeal E113 of 2021)
[2023] KEHC 24276 (KLR) (16 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24276 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E113 OF 2021
GMA DULU, J
OCTOBER 16, 2023**

BETWEEN

DERRICK MWANIKI MUINDI ALIAS MREFU APPELLANT

AND

REPUBLIC RESPONDENT

(From original conviction and sentence in Sexual Offence Case No. 39 of 2019 at Makueni Law Court delivered on 30th September 2020 by Hon. Otieno J. (RM))

JUDGMENT

1. The appellant was charged with rape of a person with mental disability contrary to Section 7 of the [Sexual Offences Act](#) No 3 of 2006.
2. The particulars of offence were that on diverse dates during the month of October 2019 in Makueni County intentionally and unlawfully caused his penis to penetrate the vagina of NM (name withheld) without her consent a person with mental disability.
3. In the alternative, he was charged with committing an indecent act with an adult contrary to Section 11(A) of the [Sexual Offences Act](#), the particulars of which being that during the month of October 2019 at the same place touched the vagina of NM with his penis against her will.
4. He denied both charges. After a full trial, he was convicted of rape contrary to Section 3 of the [Sexual Offences Act](#), and sentenced to 6 years imprisonment.
5. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal, and relied on the following grounds:-
 1. The learned trial Magistrate erred both in law and facts by holding that the prosecution had proved their case beyond reasonable doubt against the appellant whilst there was no such evidence to prove thereby deciding the case against the weight of the evidence.



2. The learned Magistrate erred in law and facts in ignoring a cardinal principle in criminal law and procedure that the burden of proof lies on the prosecution side and they must prove each and every ingredient of the charge beyond reasonable doubt.
 3. The learned trial Magistrate erred both in law and facts and failed to make a finding that there existed some doubts in the prosecution case and further failed to make a finding thereof that the benefit of aforesaid was given to the appellant and erred in law in failing to acquit the appellant as a result thereof.
 4. The learned trial Magistrate erred both in law and facts not to find that enough doubt was created to secure an acquittal of the appellant.
 5. The learned trial Magistrate erred both in law and facts in convicting the appellant without considering that the medical evidence was not conclusive.
 6. The learned trial Magistrate erred in both law and facts in convicting the appellant without considering that no other witness came to court to prove what PW1 claimed as such the evidence remained of a single witness.
 7. The learned Magistrate erred both in law and facts in convicting the appellant without considering that the doctors and medical examination was contradictory and did not support the alleged offence.
 8. The learned trial Magistrate erred both in law and facts in failing to consider the defence case adequately and failed to make a finding thereof.
 9. The learned trial Magistrate erred in law and facts by failing to believe the appellants defence and further failed to give proper or reasonable grounds of rejecting the appellant's defence from the evidence adduced.
 10. The learned trial Magistrate erred both in law and facts by failing to make due regard to material contradictions, discrepancies and inconsistencies in the prosecution case thereby reaching a wrong decision causing miscarriage of justice.
 11. The learned trial Magistrate erred both in law and facts in failing to consider the evidence as a whole before making a guilty finding against the case of *Aden Mohamed Abdi v Republic* [2020] eKLR.
6. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.
 7. This being a first appeal, I have to be guided by the principle that as a first appellate court, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences, but bear in mind that I did not have the opportunity to see witnesses testify and to give due allowance to that fact – see *Okeno v Republic* [1972] EA 32.
 8. In determining this appeal also I have to bear in mind that under Section 107 of the *Evidence Act* (Cap.80), the burden was on the prosecution to prove each of the elements of the offence beyond any reasonable doubt. This being a criminal case, the standard of proof was beyond any reasonable doubt.
 9. In proving their case, the prosecution called four (4) witnesses. On his part, the appellant tendered sworn defence testimony and was cross-examined. He also called one defence witness DW2 Kennedy Kimanthi.



10. The elements of the offence for which the appellant was convicted are contained in Section 3 of the *Sexual Offences Act*. They are intentional and unlawful penetration with the genital organ. Secondly, there has to be lack of consent for that penetration or consent obtained by force, threats or intimidation.
11. Though the Magistrate convicted for this offence, the appellant was charged with rape of a mentally retarded person under Section 7 of the Act, whose sentence is not less than 10 years imprisonment, while for the offence for which the appellant was convicted, the sentence is not less than 10 years, but can be enhanced to life imprisonment.
12. Thus in my view, the appellant was convicted of a different offence which he did not defend himself for, and which was not a minor and cognate offence to the offence charged, and thus in my view, the trial court erred in convicting for the offence of rape. On that account alone this appeal will succeed, as sustaining the conviction will amount to a violation of the constitutional requirements for fair trial under Articles 25(c) and 50 of the *Constitution*.
13. Coming now to the evidence on record, even if I am wrong in my finding in paragraph 12 above, this appeal would still succeed.
14. The first reason for the appeal to succeed is that a crucial witness Nthambi Junior was not called to testify by the prosecution in court, and no reason was given by the prosecution for that failure. Infact from the evidence on record, no witness statement was recorded from him by the police.
15. In my view, the failure to call this witness or give an explanation for that failure by the prosecution greatly weakened the prosecution case and created the adverse inference that his evidence would be in conflict or variance with the other prosecution evidence on record. I thus rely on the reasoning in the case of *Bukenya v Uganda* [1973] EA to give the benefit of that adverse inference to the appellant.
16. The evidence that connects the appellant to the incident thus remains that of PW2 Nthamba Mwongeli, the alleged victim. Under the proviso to Section 124 of the *Evidence Act*, such evidence can sustain a conviction without necessity of corroboration, if it is believable and so believed by the trial court for reasons to be recorded.
17. In my view, the evidence of PW2 is not believable firstly because her complaint was not voluntary, but arose on being persuaded by others like PW1 and the potential witness who was not called to testify.
18. Secondly, in my view, if indeed there was non-consensual sex that day the medical evidence would have revealed some friction, like the presence of epithelial cells in the vagina of PW2. However, the medical evidence was to the effect that there was vaginal discharge and puss cells, which was not described to be connected to forceful sexual intercourse. On that account also the appeal will succeed.
19. Consequently, and for the above reasons, I allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty, unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 16TH DAY OF OCTOBER 2023 AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Appellant



Mr. Kazungu for State

