



**Iman v Republic (Criminal Appeal E019 of 2024)  
[2024] KEHC 14394 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14394 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL APPEAL E019 OF 2024  
JN ONYIEGO, J  
NOVEMBER 7, 2024**

**BETWEEN**

**GEDI MOHAMED IMAN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence of Honourable X. F. Baraka delivered on 19th march 2024 in Wajir PM's court in sexual offences case No. E002 of 2024)*

**JUDGMENT**

1. The Appellant was convicted of the offence of rape contrary to section 3 (1) (a) (c) (3) of the *Sexual Offences Act* No. 3 of 2006 and sentenced to 12 years' imprisonment on 19.03.2024. The particulars of the offence were that on 12.01.2024 at Hadado Sub County within Wajir County, he intentionally and unlawfully caused his penis to penetrate the vagina of HB by use of force.
2. He was also charged with an alternative offence of committing an indecent act with an adult contrary to section 11(a) of the *Sexual Offences Act* No. 3 of 2006. Particulars were that on 12.01.2024 at Hadado Sub County within Wajir County, he intentionally touched the vagina of HB by use of force.
3. The appellant denied the charges when he appeared before the court for plea. The case thus went to full trial wherein the prosecution called five witnesses in support of its case.
4. At the conclusion of the hearing, the learned trial magistrate found the appellant guilty as charged on the main charge, convicted and sentenced him to 12 years' imprisonment taking cognizance of the time already spent in remand custody.
5. Aggrieved by the said conviction and sentence, the appellant filed a petition of appeal citing the following grounds;



- i. That the learned trial magistrate erred in law and fact by basing the conviction on speculation and contradictions from the prosecution's side.
  - ii. That the case against the appellant was not proved beyond reasonable doubt.
  - iii. That the learned trial magistrate misapprehended the facts thus drew inferences from the evidence which did not flow logically and reasonably.
  - iv. That the learned trial magistrate erred in law and fact by rejecting the appellant's defence without giving any good reason.
6. The appeal was canvassed by way of written submissions. Both parties filed and exchanged their respective written submissions.
7. The appellant in his submissions dated 26.09.2024 urged that the prosecution did not prove its case to the required standard as the element of penetration was not proved. It was argued that DNA was not performed and neither were spermatozoa found in the complainant's genitalia. In the same breadth, it was argued that the conviction was not safe for the reason that the trial magistrate relied on a single witness evidence without warning himself of the dangers of the same. To that end, reliance was placed on the case of *Chila vs R* [1979] EA to express the dangers of convicting on uncorroborated evidence of a single witness.
8. It was further urged that the finding by the trial court was not supported by the evidence on record for the reason that despite the complainant stating that the appellant held her by her neck while threatening to kill her, the medical evidence did not support the same. It was further contended that the investigating officer conceded that he did not visit the alleged scene of crime to determine whether the ground was disturbed or any proof of violence or struggle.
9. On the discrepancies aspect, it was urged that the complainant's evidence as compared to PW2, her husband, was at variance and therefore, the same could not be relied on. It was further urged that identification was only done after the arrest of the appellant and therefore, the prosecution's evidence failed the test of beyond any reasonable doubt.
10. On sentence, the appellant averred that the sentence meted out by the court was not commensurate to the circumstances of the case. The appellant therefore sought that the conviction be quashed and sentence set aside and that he set at liberty.
11. The appeal was opposed by Mr. Kihara, the prosecution counsel who orally submitted and thereafter filed written submissions dated 29.06.2024. It was urged that the appeal was bereft of any merit as the trial court's finding was safe. That the prosecution demonstrated that the appellant had unconsented sexual intercourse with the complainant. To that end, reliance was placed on the Court of Appeal decision in the case of *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 it was held that absence of medical evidence is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence. Counsel urged this court to uphold the finding of the trial court and dismiss the appeal.
12. I have duly considered the appeal, record of the lower court and the submissions tendered. This being a first appeal, this court is mandated to re-evaluate the evidence adduced before the trial court afresh and subject the same to an independent analysis so as to arrive at its own independent conclusion as to whether or not to uphold the decision of the trial court. [ See the Court of Appeal in the case of *Gabriel Kamau Njoroge vs Republic* [1982 – 88] 1 KAR 1134].



13. Briefly, PW1, HBA testified that on 12.01.2024, she was grazing goats together with her two young children when one of the children told her that there was someone behind her. The person thus held her by her neck, slapped her and then threw the child she was carrying on her back down. That the appellant thereafter threw her on the ground and then raped her. She stated that during the ordeal, the appellant pressed her neck thus she could not talk. After the appellant was done, she picked her child and went back to where the goats were. That she told a neighbour of what had befallen her who in turn informed her husband of her predicament. The husband together with Mr. Daudi visited the alleged scene of crime and thereafter went home.
14. She further stated that it was her brothers who took her to the police station where they reported the matter and subsequently referred to the hospital for medical attention. Upon leaving the hospital, her husband together with her brothers went to look for the appellant whom they traced nearby after following some footsteps. She stated that when the appellant was arrested, the chief called her to go and confirm whether the appellant was her aggressor a fact she positively confirmed. On cross examination, she stated that the appellant attacked her from behind, hit her, raped her and thereafter ran away into the forest.
15. PW2, AOH recalled that on the material day, he received a call from his neighbour informing him of what had befallen his wife, PW1. He went home and found his wife who looked very sick and disturbed. After making some enquiries from her, together with Mr. Daudi, they left for the scene where the incident was allegedly perpetrated. They searched for the appellant following some footsteps which led them to where the appellant was tending to his goats.
16. That the appellant was dressed up in a kikoi matching the description previously given by PW1. He further stated that the complainant was able to identify the appellant in the presence of their area chief who subsequently, arrested the appellant and thereafter took him to the police station.
17. PW3, Daud Hussein Ibrahim Chief Dado location testified that on the material day, he received information regarding a rape case. That the informant told him that they had followed foot prints which led them to where the appellant was. That he picked the complainant and thereafter drove to the scene in order for the complainant to identify her alleged aggressor. Upon arriving at the appellant's home, he found people gathered there. That the complainant identified her aggressor after which he ordered him into his car. That they had previously been given the description of the person who had allegedly raped the complainant.
18. PW4, Lameck Mokua, a medical officer recalled that on 02.01.2024 the complainant was presented to the hospital having been allegedly raped. That the complainant had already taken a shower and further changed clothes. On examination, she was fairly well, well dressed, her neck, chest, abdomen and upper limbs were normal. On examining her genitalia externally, she was normal. She also examined her vulvar clitoris minora and found no discharge. That being a married woman, he didn't expect to see the hymen and further, upon looking at the vaginal walls he found no issue.
19. Upon conducting swab, there were no spermatozoa cells seen and in conclusion, he formed the opinion that there was no evidence to support the alleged offence of rape. On cross examination, he stated that it was reported that the complainant had been raped some 4 hours before presentation to the hospital. He reiterated that there was no evidence of forceful entry.
20. PW5, 10xxxx PC Timothy Kipsang testified that on the unfortunate day, he was at the station when the appellant was brought to the station by the chief on allegations that he had raped the complainant. That the complainant identified the appellant as the person who raped her and the same notwithstanding, the appellant also conceded that indeed, he raped the complainant. He filled a P3



Form and thereafter escorted the complainant to the hospital for medical attention as she felt very sick. He confirmed that he did not visit the alleged scene of crime but proceeded to record statements and thereafter charged the appellant with the offence herein. On cross examination, he stated that the appellant was properly identified as the complainant knew his face together with the manner of his dressing.

21. At the close of the prosecution's case, the court found that the prosecution had established a prima facie case against the appellant and he was thus put on his defence. He gave unsworn evidence and called no witnesses.
22. DW1, Gedi Mohamed Iman testified that on 07.12.2023, he was herding his goats when the area chief and three men arrested him. That he was later taken to the police station and charged with the offence herein. He denied committing the offence and urged the court to set him free.
23. I have considered the record of appeal herein, grounds of appeal and submissions by both parties. The only issues that arise for determination are; whether indeed there was proof of penetration; whether there was positive identification; whether there were material contradictions in evidence; whether the prosecution discharged its burden of proof to the required degree.
24. In the case of *Bassita v Uganda* [S. C. Criminal Appeal No. 35 of 1995](#) the Supreme Court held:

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victims' evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt.”

“For evidence to be capable of being corroborated it must:(a). Be relevant and admissible- *Scafriot* {1978} QB 1016. (b). Be credible- *DPP v Kilbourne* {1973} AC 729 (c). Be independent, that is emanating from a source other than the witness requiring to be corroborated- *Whitehead J* IKB 99(d). Implicate the accused”

25. This court has re-evaluated the evidence in this appeal in light of the submissions made thereof. 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.”
26. The prosecution was therefore required to establish penetration, absence of consent, and that the appellant was the perpetrator of the crime.
27. The main ingredients of the offence of rape created in section 3 (1) of the [Sexual Offences Act](#) include intentional and unlawful penetration of the genital organ of one person by another, coupled with the absence of consent. In the case of *Republic vs Oyier* [1985] KLR 353 the Court of Appeal held that; “

“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”.



28. To prove the mental element required in rape, the prosecution was duty bound 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.
29. The complainant gave a detailed narrative how the appellant accosted her, grabbed her by the clothes on her neck and squeezed her neck so that she could not talk. She stated how the appellant knocked her on the ground, undressed her and then proceeded to rape her. The foregoing were the allegations by the complainant in as much PW4 gave contrary evidence.
30. On the issue of identification, it was stated that the appellant was a person unknown to the complainant. PW2 narrated that upon following footsteps, they found the appellant tending to his goats and that he had the same features as those already described by the complainant. That upon the complainant being brought at the scene, he confirmed that indeed the appellant was her aggressor. In the case of *Anjononi & Others vs Republic* [1980] KLR 59 the Court of Appeal held that;  

“...recognition of an assailant is more satisfactory, more reassuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another.”
31. Taking into account the period that the assailant spent allegedly with the complainant and further, considering that the offence herein occurred during broad day light, it is my view that identification was proper and positive.
32. On the element of penetration, the complainant testified that the appellant raped her. That the appellant accosted her while she was grazing goats, grabbed her by the clothes on her neck, thus squeezing her neck so that she could not scream. He forced her on the ground, undressed her and then forcefully, inserted his penis into her vagina. PW2, PW3 and PW5’s evidence was uncorroborated in so far as penetration was concern. On the other hand, PW4 testified that upon examining the complainant, he found no evidence in support of the allegations herein.
33. In the case of *Abdulsalim vs Republic* (Criminal Appeal E005 of 2023) [2023] KEHC 25863 (KLR) it was held that proof of penetration can be either by way of medical evidence or other evidence.
34. In this case, the appellant claimed that penetration was not proved as the medical evidence did not support the same. Additionally, it was urged that since the complainant was a married woman, it was not unusual for her hymen to be absent. Although the clinical officer ruled out penetration, the evidence of the complainant was very consistent. Under section 124 of the *evidence Act*, evidence of a single witness in asexual offence is sufficient and does not mandatorily need corroboration as long the trial court is satisfied that the witness is truthful.
35. In the instant case, the court was satisfied that the evidence of the complainant was believable. In the circumstances, I have no doubt that the complainant’s detailed testimony was not a frame up. She had no reason to fabricate this case against somebody she did not know before.
36. The appellant’s evidence was centred on a frame up scenario as he denied committing the offence herein. However, he did not deny that on the material day grazing his livestock at the same point the complainant was attacked. After the attack pw1 reported and described the person who had attacked her to pw1, pw2 and pw3. Upon arrest the complainant positively identified the appellant.
37. Despite believing the complainant, the act of penetration was not established.



38. Having noted that the offence of rape was not proved to the required standard, it is my view that the appellant ought to have been found liable for the alternative charge of committing an indecent Act with an adult. In my view, if there was penetration and the medical examination took place four hours later, most likely, some traces of evidence of penetration would have been detected.
39. An indecent act has been defined to mean an unlawful intentional act which causes—
- (a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;
  - (b) exposure or display of any pornographic material to any person against his or her will;
40. The same section stipulates that any person who commits an indecent act with an adult is guilty of an offence and liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or to both.
41. The upshot of the foregoing observations is that the conviction on the main charge is hereby quashed and instead, the appellant is found guilty of the alternative charge of committing an indecent act with an adult contrary to section 11A of the *Sexual Offences Act* No. 3 of 2006. Accordingly, the sentence of 12 years is hereby substituted with five years imprisonment less two months seven days being the period spent in remand custody pursuant to section 333(2) of the CPC.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 7<sup>TH</sup> DAY OF NOVEMBER 2024**

**J. N. ONYIEGO**

**JUDGE**

