Muli v Republic (Criminal Appeal E078 of 2023)
[2024] KEHC 13986 (KLR) (11 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13986 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E078 OF 2023

FR OLEL, J

NOVEMBER 11, 2024

BETWEEN

JESSE NGOVE MULI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Conviction and Sentence of Hon S.Kandie (RM) Delivered in Mavoko Criminal Case no 10 of 2019 Dated 9th November 2023)

JUDGMENT

A. Introduction

1. The Appellant was charged with the offence of Sexual Assault contrary to section 5(1)(a)(i) as read with section 5(2) of the *Sexual offences Act* No 3 of 2006.The particulars were that on the 17th and 18th day of March, 2019 at [Particulars withheld] area Mlolongo Township, in Athi River sub county, the appellant penetrated the genital organ(anus) of NMS with his hands.

2. In the alternative the Appellant was charged with the offence of committing an indecent Act with an adult contrary to section 11A of the *Sexual offences Act* No 3 of 2006 . The particulars were that on 17th and 18th day of March, 2019 at [Particulars withheld] area Mlolongo Township, in Athi River Sub County within Machakos County, the appellant intentionally and unlawfully touched the vagina of NMS against her will.

3. The appellant was further charged with in the alternative with the offence of Indecent Act with an adult contrary to section 11(A) of the *Sexual offences Act* No 3 of 2006.The particulars were that on the 17th and 18th day of March 2019 at Syoikamu area of Mlolongo township in Athi River sub county within Machakos county, the appellant intentionally and unlawfully committed an indecent act by touching the anus of NMS against her will.

4. On county II the appellant was charged with the offence of Rape contrary to section 3(1)(a)(b)(c) as read with section 3(3) of the *sexual offences Act* No 3 of 2006. The particulars were that on the 17th and 18th day of March, 2019 at Syokimau area Mlolongo township in Athi River sub county within Machakos county, the appellant intentionally and unlawfully caused his male organ (penis) to penetrate the female organ (vagina) of NMS aged 24 years without her consent.

5. The appellant denied all the charges leveled as against him and the matter proceeded for hearing. During trial the prosecution called five (5) witnesses who testified in support of their case. The appellant was placed on his defence, gave sworn evidence and called no witnesses to support his case. The trial magistrate did consider all the evidence adduced and found the Appellant guilty of the offence of sexual assault contrary to section 5(1)(a)(i) as read with section 5(2) of the *sexual offences Act* and proceeded to convicted the appellant under section 215 of the *Criminal Procedure Code*.

6. The Appellant being dissatisfied by the conviction and sentence filed his petition of Appeal on 07.12.2023, where he raised the following grounds of Appeal that;

    a. The learned Trial Magistrate erred in law and in fact in convicting the Appellant basing his judgement on assumptions and allowing use of fabricated testimony and not credible evidence.

    b. That the learned trial magistrate erred in law and in fact in convicting and sentencing the Appellant in spite of the inconsistencies in the evidence tendered by the prosecution.

    c. That the learned Trial Magistrate erred in law and in fact by shifting the burden of proof to the Appellant.

    d. That the charges against the Appellant were defective in total and the prosecution evidence did not support and/or warrant a conviction.

    e. That the conviction and sentence is a miscarriage of justice as the Appellant was declared insane during the commission of the alleged offence hence the same should be quashed and set aside.

B. Facts at Trial

7. The prosecution called five (5) witnesses in support of their case. PW1 the complainant testified and stated that she was a student at USIU and resided with her grandmother at Lovington estate Nairobi. On 17.03.2019 she had gotten a call from the appellant's sister, one K, who informed her that she was worried about the appellant as he was making weird posts on Instagram and during their conversation suggested that they hold a joint meeting between her, K and M at the Appellants house. She reached the Appellants family house at about 5.30pm and did not find the Appellant. She asked the worker to call him and when he came, the appellant was not himself. He had a pair of shorts and had no shirt and looked disoriented.

8. She asked the Appellant to go upstairs and call his sister from her room. He did so but was shouting and growling and PW1 asked the servant to give him water as she though he was drunk. The appellant removed his shorts and wrapped himself with a black blanket and continued to growl as he held his certificate in his mouth and a statue on his hand. The Appellants brother also came with his girlfriend and together with K and M, they gave him milk and kept talking to him to calm down. Later on, the Appellant's sisters left and she remained in the house with the appellant, his brother Sam, his girlfriend. The appellant went to sleep, woke up, asked for water, before falling asleep again.

9. At about 1.00 a.m the appellant woke up agitated and angry. He asked for his pants, went downstairs to look for the said pants and did not find the same. He came back holding his trouser and said "they had taken his drugs" while checking on trousers/jeans pockets. At that point PW1 realized that the

appellant must have taken other drugs other than normal Alcohol. She tried to cool him down, but the appellant reacted by hitting and slapping her while stating that "blood must pour". At that point she ran downstairs and sought help from the worker and the appellants brother Sam, who assured her that all was well.

10. The appellant came downstairs, while naked and asked PW1, why she was talking to "Judas", while referring to his brother "Sam", he held her and dragged her upstairs while pulling her by her hair until they got into the room, he pushed her onto his bed and locked the door. PW1 started to scream as the appellant continued to hit her on her eyes and head, and threated to kill her using a knife, he forcefully undressed her /lifted her dress while she was lying face down, poured water on her buttocks, put oil on his hands and pushed his fingers inside her Anus. PW1 kept screaming for help, and the appellant chocked her and threatened to kill her, while also stating that "blood must be poured". Eventually the appellant removed his fingers, from her Anus, smeared the blood on the floor and put his penis in her Anus, he forced her to turn over and again put his finger inside her vagina, after which he also put his penis inside her vagina. During this horrendous ordeal, the Appellant bit PW1 ear, and scratched her all over her back. Eventually when he was done he poured water on her again.

11. The Appellant prevented PW1 from raising up to go to the bathroom, and hugged PW1, as he slept. The following morning, PW1 left and went to her cousin's place in South C Estate. She dialed the hotline phone number of Nairobi women hospital and was told not to shower. Her cousin (PW2) came picked her and they went and reported this incident at Athi River police station before going to the said Hospital for treatment and counselling. She was treated and referred to a specialist to assess her injuries and rule out fistula. The following day PW1 went back to the police station and accompanied the police as they went and effected arrest of the Appellant. PW1 confirmed that the appellant had been her boyfriend for four years and had previously physically assaulted her but not sexually. They had engaged in sex before but what had transpired on 17.03.2019 was different. She also confirmed that the only reason she had gone to the appellant's house was that she did not want him to harm himself.

12. Upon cross examination, PW1 confirmed that that she had been in a relationship with the appellant for a period of four (4) years, and on the material, day noticed that he was not in the right frame of mind as he was acting drunk and doing extra ordinary things that she had not witnessed before. She was at the appellant house and others present were the appellant's brother, his girlfriend and a servant but none of them came to her aid when she was screaming for help on the Material night. The Appellant was extremely aggressive and she feared for her life as the appellant kept on assaulting her. In the morning, she took an Uber to her cousin's place in South C and reported the incident to the police later went to hospital.

13. PW1 further confirmed that previously the appellant had been violent towards her but had never subjected her to sexual violence. She also confirmed that her immediate family had never approved of her relationship with the appellant and after the incident she had told her parents what had transpired. In reexamination, PW1 reiterated that the appellant had removed her cloths, including her panty and sexually assaulted her by inserted his hand inside her Anus.

14. PW2 TKA testified that on 18.03.2019, he received a call from PW1, who sounded distressed and he directed her to go to his house. Later his house help called him and informed him that PW1 had arrived and looked severely injured. He returned to the house and found PW1 had injuries, including swollen eyes and was bruised all over. She could hardly walk. PW1 informed him of what transpired and he took her to Mlolongo police station to report this incident and later, they went to Nairobi women's hospital-Kitengela, where PW1 was treated. They also got the P3 form filled at Athi River level 4 hospital and later he accompanied the police to arrest the Appellant.

15. Upon cross examination, PW2 reiterated his evidence and also confirmed to have previously met the appellant and the complaint at social gatherings. He was not aware if on the material morning, the complainant had her inner wear and/or if she had taken a bath as had left all issues to be handled by the police. The complainant had also informed him that there were other persons within the house where she was assaulted but could not recall if they had also recorded their statement with the police. Eventually, when they went to arrest the appellant, they found him asleep and he was reeking of alcohol smell.

16. PW3 Winfred Musembi testified that he was a qualified clinical officer working at Athi River level 5 hospital and had 15 years' work experience. On 19.03.2018 he examined the complainant who alleged to have been physically assaulted by a person known to her. She had sustained injuries to her head, face, neck, lower limbs, upper limbs, back, chest, anal region and vagina. On physical examination she still had a painful neck, tender right elbow multiple bruises all over the body and scratches on her thighs. On vagina examination her labia Majora and Minora were both tender, and the patient had an old scar on the hymen, which was torn. The patient also had had whitish discharge with blood from her anal region. She also complained of pain while urinating and pain on the anal region. He filled in her P3 from and formed the opinion that the complainant had suffered soft tissue injuries secondary to assault and sexual assault. In cross examination PW3 confirmed that he examined PW1 who had first been treated at Nairobi women's hospital and later went to their facility after 15 hours.

17. PW4 John Njuguna confirmed that he was a clinical officer working at Nairobi Women's hospital and was in court to present the medical report prepared by Dr.John Mwendwa, who has since moved on from their facility. He confirmed that PW1 was examined at their facility on 18.03.2018, where she had reported a case for physical assault by her ex-boyfriend, which incident occurred at Syokimau area. The ex-boyfriend had strangled her, hit her on the face and had been forced to have anal sex. The patient was anxious, had a red face, redness on the chest, and bruises on the thigh. On genital examination, the exterior wall was normal, hymen was not intact, had an old scar and she was in pain and had whitish discharge. Further the patient also had laceration with blood on the anus. PW4 produced the PRC and GVRC as exhibits and therein it was confirmed that the injuries sustained by the complainant were highly consistent with assault and penile penetration.

18. Upon cross examination PW4 confirmed that both the PRC and GVRC captured the evidence of assault, though the GVRC did not show examination of the anus and also the doctors remarks in the PRC form had indicated that the outer genitalia was also normal. They had also carried out virginal swab analyses and confirmed that spermatozoa were present and that could only have been produced/ come from a male.

19. PW5 PC Chelangat, the investigating officer, confirmed that on 18.03.2018, the complainant reported to having been assaulted by her boyfriend who residence within Mlolongo area. The previous evening, she had gone to the appellant's house and noticed that he was not his usual self and was acting weird. The complaint called the appellants siblings, who came, managed to talk to him and he calmed down. Later at night while in the appellant's bedroom, he sexually assaulted her and nobody came to rescue her as the incident happened behind closed door. PW1 had told her that during the incident, the appellant had taken a knife while reciting some phrases, which she could not understand, took some oil and after undressing her, poured oil on her body/Anus and proceeded to rape her on the anus. When the report was made, the complaint had Swollen eyes, a neck bruised and she could not walk properly. She conducted her investigations and proceeded to arrest the Appellant, who appeared drank and had him charged with the offence before court.

20. Upon cross examination, PW5 confirmed that the appellant and complainant were in a relationship and the complaint had volunteered to stay with the appellant on the material evening as he was not behaving normally. During the night he had sexually assaulted her and forced himself on her without her consent. When she reported the incident, the complainant had not brought her undergarment to the police and after completing investigations, arrest the appellant on the following afternoon. PW5 also confirmed that she did not record the witness statement of the house servant or brother of the appellant and the photographs produced into evidence were not dated.

C. Defence Case

21. The appellant gave sworn evidence. He confirmed that the complaint was his girlfriend and that they had dated for a period of about five (5) years. On the material day PW1 had gone to their house, where he resides with his brother at about 6.00pm. He was not feeling well and slept after supper. The following morning, he woke up and found that the Appellant had left. During the day his sister took him to hospital and he was disorganized with psychosis. Later he was arrested and was examined at Mathare hospital before being released on medical grounds. The appellant further testified that he could not recall assaulting the complainant as he suffered from post-traumatic disorder and had a mental breakdown. He had received treatment and was now feeling better. Under cross examination the appellant stated that he had previously had two similar incidences and denied abusing alcohol and urged the court to also note that the initial psychiatric report had found that he had suffered from mental breakdown and not fit to stand trial.

22. The trial Magistrate did consider all the evidence tendered, the parties submissions and proceeded to convict the appellant for the first count of sexual assault contrary to section 5(1),(a)(i) as read with section 5(2) of the *sexual offences Act* under section 215 of the criminal procedure code and proceeded to sentence him to serve a term of ten (10) years as provided for in law.

D. The Appeal

23. The Appellant filed his submissions on 11.03.2024 and urged the court to reexamine the evidence adduced and determine three issues namely;

    a. Whether the trial court erred by failing to properly evaluate the defence of insanity which was well grounded and thereby grant the accused/appellant the benefit of doubt?

    b. Whether the prosecution proved mens rea on the part of the Appellant?

    c. Whether the court erred in failing to appreciate the testimony of all the witnesses.

24. The appellant urged the court to find that as at the time the incident occurred, he was not in the right state of mind and had suffered from psychosis, this fact had been confirmed by the evidence of PW1, who had confirmed that during the incident he had looked for his medicine inside his trousers but had not found them. He further relied on section 11 and 12 of the Penal code, which stated that a person was not criminally liable for act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind makes him incapable of understanding what he was doing, or of knowing that he ought not do the act or make the omission. Reliance was placed on Julius Kirimi Vs Republic (2018) eklr , Wakesho Vs Republic (criminal Appeal No 8 of 2016),(2021) KECA 223(KLR).

25. The Appellant further submitted that the prosecution failed to prove mens rea on his part and only focused Actus Reas. The evidence adduced did not prove that he had a guilty mind and or intention to harm the complainant. Reliance was placed on the book extract by Andrew Ashworth and Jeremy

Horder, in their book "Principles of criminal law" (oxford university press 2013) at 155. Where they stated that, "the essence of the principle of mens rea is that criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and the consequence it may have, that they can fairly be said to have chosen the behavior and consequences....."

26. Finally, the Appellant also faulted the prosecution for failing to call key witnesses, who would have testified and corroborated the evidence given by the complainant relating to the circumstances as to how the incident occurred. The complainant had stated that there were three (3) other persons who were present on the material night and it was incumbent upon the prosecution to have called the said witnesses to corroborate her evidence as to what had transpired and prove that the appellants action was not irrational. This failure on the part of the prosecution was intentional with intent to conceal relevant material evidence. Reliance was placed on the case of Bukenya & others Vs Uganda (1972) EA 549 & Chila Vrs Republic (1967) EA 722.

27. The Appellant urged the court to find that, the trial magistrate erred in failing to consider evidence placed before him relating to his state of mind and on that basis be pleased to allow this appeal, and set aside his conviction & sentence.

28. The respondent too did file their submissions in opposition to this Appeal and stated that they had successfully proved the necessary ingredients of sexual assault which was proof of penetration and positive identification.PW1 had a relationship with the appellant and he was a person well known to her. On the material night PW1 clearly explained at length how the appellant physically and sexually assaulted her. This evidence was corroborated by the evidence of PW2 who took her to Nairobi women's hospital -kitengela where she was treated and all the medical reports produced by PW3 and PW4 indeed confirmed evidence of both physical/sexual assault and thus, the appellant was rightly convicted under section 5(2) of the *sexual offences Act* No 3 of 2006.

29. Further as regards the issue of insanity, the initial mental assessment report from Mathare mental hospital did find the appellant was not fit to plead, but after the 2nd report psychiatric report was undertaken, he was found fit to plead and understood what transpired during trial. It was the respondent's further contention that the appellant had failed to prove that he had defect of reason caused by disease of mind, which prevented him from understanding and/or knowing what he was doing during the assault. PW1 testimony had clearly proved to the contrary that the Appellant was well aware of his actions and was in control of his mental faculty during the assault on PW1. The respondent urged the court to find that the sentence melted out was not a miscarriage of justice and urged this court to dismiss this Appeal.

E. Analysis and Determination

30. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up to its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanor. This court is guided by The Court of Appeal case of Okeno – VS – Republic (1972) EA 32 where it was stated as follows: -

> " An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate's findings can be

supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses".

31. Also in Peter's vs Sunday Post(1958) E.A. 424 it was said that it is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.

32. In the case of Republic Vs Edward Kirui (2014) eKLR, the Court of Appeal quoted the Supreme Court of India case of Murugan & Another Vs State by Prosecutor, Tamil Nadu & Another (2008) INSC 1688 where the case of Bhagwan Singh Vs State of M. P. (2002)4 SCC 85 was cited as follows:-

> " The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not."

33. Having considered the entire record of Appeal, the petition/grounds of appeal as raised and the submissions of the parties, I find the following as issues for determination;

a. Whether the evidence adduced by the prosecution was sufficient to prove the charge of sexual assault preferred against the appellant beyond any reasonable doubt.

b. Whether the Appellant was sane/insane during the commission of the offence

c. Whether the sentence melted out was sufficient under the circumstance.

34. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in Miller vs. Ministry of Pensions (1947) 2 All ER, 372 stated as follows:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice."

35. On the first issue, the offence of sexual assault is created by Section 5 of the *Sexual Offences Act*, No 3 of 2006 which provides that:

(1) Any person who unlawfully:

(a) penetrates the genital organs of another person with—

(i) any part of the body of another or that person; or

(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault."

36. The Court of Appeal in the case of John Irungu V Republic, [2016] eKLR which was cited by the learned trial magistrate in his judgment pronounced itself on the essential ingredients of the offence of sexual assault as follows:

> "....Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose."

37. The ingredients for the offence of sexual assault can be thus summarized as follows;

a. penetration and

b. proper identification of the perpetrator.

38. On the issue of penetration, the same is defined in section 2 of the *Sexual Offences Act* as;

> "penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

39. PW1, the complainant gave her lengthy testimony as to what occurred on the material day. She confirmed that they were in a relationship with the Appellant had been called by his sister who raised concerns regarding his posts on Instagram. They went to his house at Syokimau and found him wearing a pair of shorts with no shirt and together with other family members calmed him down before the appellant slept. Later at night when he woke up, the appellant was agitated and it got worse, when he realized he did not have the drugs he had left in his trouser pocket. She tried to cool him down, but the appellant slapped her on her cheek, while stating that he was going to rape her.

40. PW1 called the appellant brother, Sam who assured her that the appellant would not harm her. At that point the appellant came downstairs while naked and demanded that the she goes back upstairs, he proceeded to pull her by her hair into his room and locked the door behind him. The Appellant pushed her to the bed, and while she was lying facing down, lifted her dress, poured water on her buttocks, put some oil on his hands and pushed his fingers into her anus. When he removed his finger, the appellant then proceeded to penetrate her using his penis still in her Anus, forced her to turn over and again penetrated her using his finger and penis in her vagina. During the whole ordeal, she kept on screaming and resisting the appellant's action, but got no help from the other persons present in the house. The appellant also inflicted a bite on her ear and scratched her all over her back and after he was done poured water on her.

41. In the morning PW1 took an uber to PW2 house and he assisted her to have the matter reported at Mlolongo police station and was attended to at Nairobi women's Hospital -Kitengela and Athi River level 4 hospital. PW3 confirmed examining PW1 at Athi river Health center and confirmed that she had sustained injuries on the head, face, anal region, neck, lower limbs, upper limbs, back and vagina. On physical examination he confirmed that PW1 had multiple bruises all over her body and scratches on her thighs. On the genitalia, the labia Majora and minora were both tender, and the patient had whitish discharge with blood on the anal region. She also complained of pain while urinating and pain on the

anal region.PW3 formed the opinion that PW1 had suffered soft tissue injury secondary to physical and sexual assault and produced the P3 form into evidence.

42. PW4 John Njuguna also confirmed that PW1 was examined and treated at Nairobi Women's hospital -Kitengela and had both the PRC and GVRC filled at the said hospital.PW1 had reported that she had been assaulted by her boyfriend and had been hit on her face and he had forced her to have anal sex, while being strangulated. On examination the patient had redness on the face and chest and also had bruises on her thigh. On genital examination, the exterior was normal, hymen was not intact and had an old tear. There was also laceration with blood on her anus. High vagina swab results showed presence of spermatozoa and also traces of blood in the urine. They concluded that PW1 had assaulted and there had been penile penetration

43. In reference to the identification of the appellant as being the person who perpetrated the offence, it is trite that in sexual offences, the positive identification of the victim is what connects them to the offence. It is therefore extremely important that any evidence on identification must be thoroughly and carefully scrutinized to avoid any miscarriage of justice. 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."

44. In this case, both the appellant and respondent confirmed that they were in a relationship and no doubt knew each other well. The appellant also confirmed that they had dated for the last five years and PW1 presence at their family house on the material day thereby leaving no rom for doubt about the fact that it was the appellant who perpetrated this offence

45. The evidence of physical assault, penetration and identification was thus sufficiently proved based on the victim's testimony which was corroborated by the evidence of both clinical officer's (PW3 and PW4). PW1's evidence was cogent and believable and the trial court was right in accepting the same. From the above analysis it can be confirmed that the offence of sexual assault was sufficiently proved beyond reasonable doubt.

46. The appellant did raise the defence of being insane and could not recall what happened on the material night. He stated that he had suffered from hallucination's and had a mental breakdown. He had been taken to hospital and it had been disclosed that he suffered from post-traumatic disorder which was related to effects of physical and emotional abuse he saw his mum suffer as they were growing up and later exacerbated by the death of her mother. When he was initially arraigned before court, plea taking was differed and he was taken to Mathare hospital for examination and released based on his mental health condition. He had received treatment and was now feeling well. The appellant also informed court that he had a similar breakdown in 2013 and it was not related to alcohol intake.

47. The trial magistrate did consider the appellants defence and found that based on the facts presented before court it could not be said that the appellant was swinging successively between sanity and insanity during the entire material time when the incident occurred. He had failed to present medical reports to support prior treatment for psychosis. Too the contrary and as supported by the medical report dated 30.07.2019 from Mathare hospital the appellant suffered from substance induced psychosis which he had purposefully taken to harm the complainant. The incident which occurred was inhuman, well-choregraphed, meticulously executed and therefore the defence of insanity could not hold.

48. Under section 11 of the Penal code;

> " Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes into question, until the contrary is proved"

49. Further section 12 of the said *Penal Code* does provide that;

> " A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he was doing, or of knowing that he ought not to the act or make the omission; but a person maybe criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon him mind one or other of the effects above mentioned in reference to that act or omission."

50. The court of Appeal in the case of Wakesho Vrs *Republic (criminal Appeal No 8 of 2016)* (2021) KECA 223(KLR) stated that;

> " The critical point at which the mental state of the accused person was relevant for purposes of the defence of insanity was at the time of the commission of the act complained of. If the appellant was suffering from a disease which affected his mind and made him incapable of understanding what he was doing or knowing that what he was doing was wrong at the time of the commission of the offence of murder, then he was not responsible for his actions."

51. The same court further relied on the case of Leonard Mwangemi Munyasia Vrs Republic (2015) Eklr, where it was held that;

> " under the rule, insanity is a defence if at the time of the commission of the act, the accused person was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or ,if he did know it, that he did not know he was doing what was wrong. In such circumstances, the accused person would not be entitled to an acquittal but under section 167(1)(b) of the criminal procedure code, he would be convicted and ordered to be detained during the president's pleasure because insanity was an illness (mental illness) requiring treatment rather than punishment. Such people when so detained are considered patients and not prisoners.
>
> Both section 12 aforestated and the McNaughten rules recognize that Insanity would only be a defence if it was proved that at the time of commission of the offence charged, the accused person, by reason of unsoundness of mind, was either incapable of knowing the nature of the act he was charged with or was incapable of knowing that it was wrong or contrary to law. The test was strictly on the time when the offence was committed and no other. Yet it would be virtually impossible to lead direct evidence of the exact mental condition of the accused person at the time of the commission of the crime.

52. PW1 testified at length regarding the events of 17.03.2024 and specifically into the Appellants conduct before and during the assault. She stated that she was called by the Appellants sister, who was worried about the Appellants wellbeing, given that he was making weird posts on Instagram, they went to the Appellant family home at Syokimau at about 4.00pm and did not find the Appellant. He came in at about 5.30pm and according to PW1 when she saw him, "he wasn't himself." The Appellant had a pair of shorts, no shirt and looked distant. He went upstairs and started to shout and growl, he came back downstairs having removed his shorts and had covered himself with black blanket, while holding

a certificate and a statue. He continued to growl while holding the certificate on his mouth. It took a while for PW1 and the Appellants siblings to calm him and he eventually slept.

53. At about 1.00am the Appellant woke up agitated and angry. He asked for his pants, he left the room, went downstairs to look for the same and when he did not find them came back stating that "they took my drugs", while checking on the jeans pocket. It was at this point that PW1 realised that the Appellant must have taken something else other than Alcohol and she started assaulting her, while stating that blood must pour and that PW1 was virgin Mary. She escaped and went downstairs, where she met the Appellants brother, who assured her that the Appellant would not harm her and that all would be well. The Appellant come downstairs and asked her why she was talk to "Judas" in reference to his brother, he was naked and dragged her upstairs before proceeding with his assault on her.

54. During the assault, the Appellant kept on repeating that "he would kill PW1 and blood must pour." He sexually assaulted her and while at it, inflicted a bit on PW1 ear , scratched her all over her back and when he was done he pour water on PW1. He refused to let her move out of the bed and slept while hugging her until the following morning.

55. After arrest plea was deferred and the trial court did direct that the Appellant be taken to Mathare National Teaching and Referral Hospital for assessment. The first medical report dated 1st April 2019 established that the Appellant suffered from schizoaffective disorder, combine with substance abuse and his major trigger was unstable childhood, where he witnessed a lot of domestic violence towards his mother by his father. It was also noted that, this was the second incident as he had had a similar mental breakdown in the year 2012. The second report from the said hospital dated 4th June 2019 also confirmed past psychiatry history of the Appellant and confirmed that by then he had recovered, had no mental illness, thus could understand the charges against him and could mount a defence. The Appellant also presented before court a report from Eden house group, which was a NACADA accredited institution that confirmed that he was attending group support for drug induced psychosis.

56. Considering the totality of the prosecution evidence presented especially touching on the Appellants conduct on the material day, it is obvious that he was not in a lucid state of mind, and had had suffered from a mental breakdown exacerbated by substance abuse, which explains the strange behavior he exhibited the whole day leading to the vicious assault melted on PW1 and his action, though completely reprehensible, cannot be said to be premeditated or deliberate. The trial magistrate did find that, "the accused took a substance and suddenly became wild and assaulted her(PW1) and therefore agreed with the complainant that the accused induced those substance to purposely harm her."

57. The trial magistrate finding to this extent was an error of fact, as the evidence presented did not allude to the aforestated finding and nowhere did PW1 state in her evidence that the Appellant took substance during the night, to the contrary the evidence is that he woke up agitated and go more so, when did not find his drugs in his trouser pocket. Thus while the evidence and medical report confirm that the Appellant abused narcotic drugs, the first medical report from Mathare National Teaching & Referral Hospital dated 1st April 2019 also confirmed that the Appellant suffered from florid auditory hallucination and grandiose delusion leading to him having a mental breakdown. He was diagnosed to have suffered from Schizoaffective disorder, which disorder is a combination of schizophrenia and mood disorder combine with substance abuse.

58. What the appellant did was reprehensible and under normal circumstances would have been severely punished, but under the circumstances of this case, the facts reveal without doubt that at the time of commission of the offence charged, the accused person, by reason of unsoundness of mind, was incapable of knowing the nature of the act he was charged with or was incapable of knowing that it

was wrong or contrary to law. He must be given the benefit of doubt as to the state of his mental health as at the time of commission of the offence.

Disposition

59. Having considered the facts in this case, I hereby find that this appeal is merited, the conviction and sentence melted out against the Appellant by Hon S Kandie (RM) in Mavoko CMCR no. 10 of 2019 is hereby quashed and set aside. The Appellant will be freed unless otherwise lawfully held.

60. Right of Appeal 14 days.

61. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 11TH DAY OF NOVEMBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 11th day of November, 2024.

In the presence of;

Appellant present from Kitengela prison

Ms Otulo for O.D.P.P

Susan/SamCourt Assistant