



**Gathoni v Republic (Criminal Appeal 105 of 2023)
[2024] KEHC 15768 (KLR) (13 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15768 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 105 OF 2023
DR KAVEDZA, J
DECEMBER 13, 2024**

BETWEEN

ERIC MBURU GATHONI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the sentence as per the judgement delivered on 5th April 2023 by Hon. Mutua (SPM) at Kibera Chief Magistrate's Court Sexual Offences Case no. E045 of 2023)

JUDGMENT

1. The Appellant was charged and after a full trial convicted by the Subordinate Court on two counts of offences; Count I was the offence of rape contrary to section 3(1)(a) and (b) as read with section 3(3) of the *Sexual Offences Act* No 3 of 2006, and Count II was the offence of assault causing actual bodily harm contrary to section 251 of the *Penal Code*. For the first count, he was sentenced to serve fifteen (15) years imprisonment, and for the second count he was sentenced to serve three (3) years imprisonment, less the thirty-three (33) days he had spent in custody. These sentences were to run concurrently.
2. In the petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He complained that the charge sheet was defective. He argued that the trial court failed to consider his defence. He urged the court to quash his conviction and set aside the sentence imposed.
3. This being the first appellate court, we are guided by the ruling in *Okeno v R* [1972] EA 32. In this case, the court opined that a court of first appeal ought to re-examine all the evidence afresh and in an exhaustive manner, to come up with its own conclusions without overlooking the conclusions of the trial court, bearing in mind that it never saw the witnesses testify.



4. To succeed in a prosecution for rape, it must be proven that the accused committed an act that caused penetration without the other person's consent. "Penetration" under section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
5. Further, section 3 of the *Sexual Offences Act* No 3 of 2006 provides thus;
 3. Rape
 - (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.
6. The prosecution of an offence of rape must therefore prove the other ingredients of the offence. The prosecution called five (5) witnesses in support of their case. PW1, the complainant, D.O. (name withheld), testified that she was employed at a salon and a wines and spirits shop. On 2nd May 2022, at around 3:00 a.m., the appellant, who introduced himself as "Jose," offered to escort her home on his motorbike. He initially informed her that he was ferrying another customer but assured her he would return to pick her up, which he did.
7. As they were en route to her house in Lower Kabete, he stopped and asked her to alight, claiming he needed to check the fuel. Unexpectedly, he produced a knife, placed it against her neck, and demanded all her belongings. She handed over her handbag, which contained three phones and a trench coat. He then swept her feet from under her, causing her to fall to her knees, and proceeded to assault her.
8. During the assault, PW1 managed to grab one of her phones and called her sister, PW2. However, when the appellant noticed this, he took the phone and disconnected the call. PW2 repeatedly attempted to call back, but the appellant ignored and declined her calls. He then proceeded to have forced and non-consensual sex with her then instructed her to lick his penis, and shortly after PW2 arrived. When the appellant attempted to escape, PW1 shoved his motorbike, causing both of them to fall. Shortly after, her sister arrived at the scene accompanied by two other individuals. PW1 also managed to call her brother, who alerted the police about the incident.
9. The police arrived, transported PW1 to the hospital, and issued her with a Post-Rape Care form and a P3 form. The appellant was later arrested, and his motorcycle was recovered. At the police station, PW1 learned that his real name was Erick Mburu Gathoni, and the knife he used was also retrieved.
10. During further cross-examination, PW1 recounted that the appellant had claimed his motorcycle's fuel tank had an issue. He ended their journey in a poorly lit area without streetlights. He took all her phones and coerced her into having sex with him.
11. Was there an absence of consent? A person is said to consent, if he or she agrees by choice, and has the freedom and capacity to make that choice. In the case of *Republic v Oyier* [1985] eKLR, 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.”

12. In the present case, during the ordeal, PW1 was assaulted and was fearful for her life. It was her evidence that the appellant was armed with a knife which was produced in evidence. It is clear to this court that PW1 was not in a position to consent to the sexual act since she was assaulted and subjected to forceful sexual intercourse. Despite being threatened, PW1 physically tried to push the appellant away but was unsuccessful. I hold that these actions are consistent with the testimony of PW1 that she did not consent to the sexual intercourse.
13. PW 1's testimony did not require corroboration in accordance with the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if the trial magistrate recorded reasons why she believed the victim was telling the truth. The trial magistrate found PW1 to be a truthful witness and found no evidence of any grudge between the appellant and the complainant that would make her give a false narration of the events. Further, I have thoroughly looked at the record and I note that PW1 was consistent in her narration of the series of events. Despite being subjected to rigorous cross-examination by the appellant, her evidence was not shaken on cross-examination.
14. Regarding additional evidence presented by the prosecution, PW2, CA, testified that she operated a wines and spirits shop. On 2nd May 2022, she saw her sister, PW1, leaving on a motorcycle but was not informed of her destination. While attending to her business, she received a call from PW1 and overheard her pleading, saying, "Don't kill me, I will give you what you want." Alarmed, she and a friend decided to follow her. They found PW1 along the way, crying and clinging to a motorcycle. PW1 disclosed that the appellant had forced her to have sex with him and warned them not to approach him as he was armed with a knife.
15. The police later recovered the knife from the appellant's gumboot, arrested him, and took PW1 to the hospital. Their brother, PW4, also arrived at the scene during the incident.
16. PW3, John Njuguna, a clinical officer at Nairobi Women's Hospital, testified on behalf of a colleague who was unavailable to appear in court. He stated that PW1 arrived at the hospital on 2nd May 2022 at 1:00 a.m. for examination. He observed bruises on her lower limb and right thigh, as well as abnormal redness in her genital area accompanied by abnormal discharge and the presence of spermatozoa. He concluded that these findings were consistent with vaginal penetration.
17. During cross-examination, PW3 acknowledged that the injuries observed could result from other causes, not exclusively sexual assault. He further clarified that he could not confirm whether the spermatozoa belonged to the appellant, as a DNA test, which was not conducted, would have been necessary for such identification.
18. PW4, KO, testified that on 2nd May 2022, between midnight and 1:00 a.m., he received a call from PW1, who informed him that the appellant had forced her to have sex with him. He immediately rushed to the scene with a man named George. Upon arrival, they found PW1 crying, with bleeding knees, and the appellant at the scene with his hands tied and holding a knife.
19. PW4 contacted the police, who arrived and arrested the appellant. He also noted that PW2 was present at the scene, accompanied by security guards.
20. PC Lorna Afwade, who was the Investigating Officer in this case, testified that on 2nd May 2022, she found the appellant at Kabete Police Station, where she recorded his statement. She later called PW1 to



- the station, who came with her Post-Rape Care Form, GVRRC, and P3 Form duly filled. PW1 recounted to her all that had happened. She recovered a knife and phone from the appellant.
21. In his defence, DW1, Erick Mburu Gathoni, testified that on 2nd May 2022, at around 2:00 a.m. in the Gitaru Area, he encountered PW1 hiding at a junction while ferrying a male customer. She claimed she had quarreled with her boyfriend after receiving a call from another man. When he offered assistance, she hesitated because there were two men present. He assured her he would return after dropping off his customer, which she agreed to.
 22. When he returned, PW1 asked him to take her home and then to her sister's salon. On the way, she requested a shortcut, but he insisted on using the main road. At her house, she invited him inside, changed into a towel, and asked him to take her photo using her phone. She then removed the towel and invited him to have sex, but he refused and went outside. She later apologized for her behavior and asked him to take her to Kabete Gander Inn for a drink.
 23. While en route, they encountered her sister and another man. PW1 made a call before continuing the journey. She later asked him to stop so she could relieve herself. As a vehicle approached, she accused him of trying to escape and clung to his motorcycle, injuring herself in the process.
 24. Her brother arrived with a friend and assaulted him with a rungu, stealing his phone and money. A security guard labeled him a thief. He noted he was injured on the right side of his head before his arrest and claimed the knife presented as evidence was not tested for his fingerprints. Additionally, he stated his request for medical attention was ignored.
 25. I have weighed the appellant's defence against the prosecution case and find that it amounts to a mere denial and it does not in any way raise doubts about the prosecution's witness testimonies. I therefore affirm the appellant's conviction for the offence of rape.
 26. On the evidence of assault, Section 251 of the *Penal Code* provides that: -

“Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.”
 27. The essential elements of the offence of assault causing actual bodily harm are;
 - i. Assaulting the complainant or victim
 - ii. Occasioning actual bodily harm
 28. I have re-evaluated the evidence adduced by the prosecution witnesses. I find that (PW1) testimony regarding the assault is substantiated by multiple sources. PW2 and PW4 corroborated her evidence. The medical evidence presented by PW3 confirmed that she had multiple bruises on her lower limb and right thigh. The injuries were classified as harm.
 29. Additionally, PW1 was unequivocally able to identify the appellant. Secondly, the evidence convincingly establishes the appellant's presence at the scene during the incident. Thirdly, the evidence strongly indicates that the appellant perpetrated the assault against PW1. Fourthly, medical evidence documented injuries sustained which leaves no ambiguity that the complainant was indeed assaulted. Furthermore, despite considering the appellant's defense, characterized primarily by denial, it fails to undermine the prosecution's evidence. In the premises, the conviction for the offence of assault is affirmed.
 30. As regards the sentence, the appellant has submitted that the same was harsh and excessive.



31. A cursory reading of the sentencing notes reveals that the trial magistrate in imposing the sentence the trial court considered the following: the pre-sentence report; the 33 days spent in remand custody; the appellant being a first offender. She then sentenced the appellant to fifteen years imprisonment in Count 1 and 3 years imprisonment in Count II. The sentences are running concurrently. In the circumstances, the sentence imposed was proper and is affirmed.
32. The upshot of the above analysis is that the appeal against conviction and sentence is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 13TH DAY OF DECEMBER 2024

D. KAVEDZA

JUDGE

In the presence of:

Hamisi for the Appellant

Mburugu for the Respondent

Achode Court Assistant.

