



**Musembi v Republic (Criminal Appeal E063 of 2025)  
[2025] KEHC 14648 (KLR) (21 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14648 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL E063 OF 2025  
DR KAVEDZA, J  
OCTOBER 21, 2025**

**BETWEEN**

**JOSPHAT NDETI MUSEMBI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered on 30th April 2025 by Hon. Z. Abdul (PM) at Kibera Chief Magistrate's Court Sexual Offences Case No. E036 of 2024 Republic vs Joseph Ndeti Musembi)*

**JUDGMENT**

1. The appellant was charged and after full trial convicted by the Subordinate Court of the offence of rape contrary to section 3(1)(a)(c) as read with 3(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the 3<sup>rd</sup> March 2024 in Westlands Sub-County within Nairobi County intentionally and unlawfully cause his penis to penetrate the vagina of DJK without her consent.
2. Aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He contended that the trial court failed to consider his defence. The appellant urged the court to quash his conviction and set aside the sentence imposed.
3. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
4. PW1, DCK, testified that on the night of 2<sup>nd</sup> to 3<sup>rd</sup> March 2024, at about 1:00 a.m., she was leaving the Alchemist Club when she approached a motorcycle operator and requested a ride to Gachie. Another



- operator overheard the conversation and offered to take her, stating that he also lived in Gachie. They agreed on a fare of Kshs. 300, which she paid.
5. They proceeded along Peponi Road, but along the way, the operator informed her that he had run out of fuel and stopped in the middle of the dimly lit road. He made a phone call, telling her that his brother was on the way to pick them up. The area was near a forest and thick bushes. When PW1 suggested that they wait in a well-lit place, he warned her that they might encounter thugs. As she began to walk away, he followed her, grabbed her left hand, stepped on her right foot, pushed her to the ground, and took her mobile phone.
  6. The appellant then proceeded to undress her, then raped her beside the road. She tried to struggle with him but in vain, he laughed sarcastically, she asked him to use protection. He put the condom on and then raped her. After he was done, asked her to dress up and board the same motorbike as he said he was now taking her to Gachie.
  7. Upon reaching Roselyn Heights, the appellant told her that his fuel had run out. She alighted and asked for her phone, but he suddenly sped off. The area was well lit, and she was able to clearly see his face. Shortly after, he returned and rode past her, looking in her direction. She then approached another motorcycle operator and narrated what had happened.
  8. Together, they followed the appellant towards a nearby junction, where they found his motorcycle parked outside a gate with its lights still on, though he was nowhere to be seen. On their way back, they met him pushing the motorcycle. When she demanded her phone, he denied having it and accused her of mobilising people against him. She further testified that she recognised him as the man who had raped her earlier that night. She was then advised to report the matter to the police.
  9. She reported the incident at Gachie Police Station and was referred to Gigiri Police Station, where an ambulance from MSF took her to a clinic in Eastleigh for treatment. The appellant was later arrested, and during an identification parade, she successfully identified him.
  10. In cross-examination, she stated that the incident occurred after she left the club with her friends. Since taxis were unavailable, she opted for a boda boda. The first rider she approached declined, and the appellant, who overheard the conversation, offered to take her, claiming he also lived in Gachie. He wore a black jacket and took Peponi Road, where he stopped, alleging that his fuel was finished.
  11. She maintained that he stepped on her foot, pushed her to the ground, and raped her. After the ordeal, he ordered her to dress up and threatened her. She maintained that she did not consent to the act and that he fled with her phone.
  12. PW2, Lorna Kerubo, a Clinical Officer, produced medical records relating to PW1. Upon examination, she noted no external physical injuries; however, the vulva showed fresh abrasions, redness of the vaginal wall, and remnants of the hymen. Spermatozoa were detected during the vaginal swab. In cross-examination, she stated that vaginal abrasions may result from aggressive rubbing.
  13. PW3, Anthony Gitonga Muungu, a boda boda operator, testified that around, 2:00 a.m. on the material night, PW1 approached him seeking help to follow a motorcyclist who had taken her earlier but disappeared. They traced a motorcycle parked outside a residential plot. PW1 informed him that the rider had stolen her phone. Shortly after, the rider appeared, and when confronted, he denied having the phone.
  14. PW1 requested PW3 to search the rider, but he refused. PW3 later dropped PW1 at her home and gave her his phone number. She later called him and asked him to record a statement at Gigiri Police



- Station, which he did. In cross-examination, he stated that he did not know the appellant personally and bore no grudge against him.
15. PW4, Police Constable Felix Kibet, the investigating officer attached to Gigiri Police Station, testified that he received a report of rape and was directed to investigate. He interviewed PW1, who led him to the scene and introduced him to PW3. Together, they proceeded to the appellant's residence, where he was arrested. An identification parade was later conducted, and PW1 positively identified the appellant.
  16. On cross-examination, PW4 confirmed that he was not present during the identification parade and that no DNA samples were collected from the scene. He admitted that he had called the appellant's phone to lure him out and that the appellant's wife later provided his contact details.
  17. PW5, Sergeant Kennedy Njue, conducted two identification parades, each consisting of nine members. The appellant stood at positions 2 and 4, respectively, and was positively identified by PW1 through touch. The appellant did not object to the parade but claimed PW1 had seen him earlier while in custody. During cross-examination, PW5 said he was not aware why PW1 had seen the appellant before the parade, but clarified it was coincidental, as she had seen him speaking with his parents. He further stated that about 70% of the parade members shared the appellant's complexion and build.
  18. Having considered the evidence adduced by the prosecution, the trial court ruled that a prima facie case had been established. The appellant was then placed on his defence.
  19. DW1, the appellant herein, stated that on the material day the ordeal occurred he was at Kangemi where he had taken a customer at Natema Travellers from Gachie. He went home and found the gate locked hence left his motorbike outside. When he went to open the gate he met PW1 who asked him to return her phone which he had stolen. He maintained he didn't use Peponi road that day.
  20. The next day he was called by the investigating officer who informed him that his motorbike had been involved in a road accident and they agreed to meet the next day. The next day he came and was accompanied by another officer and taken to Gigiri Police Station. After being detained for three days his mother came to inquire and was informed he raped a lady at Peponi Road.
  21. During cross-examination, he stated that he first saw PW1 when she confronted him about a stolen phone. He further stated that he is well known to PW3, and they have issues at the stage.
  22. DW2, Regina Ndunge, testified that she was informed by her son, DW1, faced an accident charge. When she visited him, a police officer told her he had also been accused of stealing a phone. She requested to speak with the complainant to compensate her, but the complainant declined, alleging rape. DW2 questioned why she had not screamed since the road was busy. In cross-examination, she stated that she was with her son on the material day but was unaware of what had occurred.
  23. The trial court found him guilty of the offence charged and convicted him accordingly.
  24. I have considered the grounds of appeal and the submissions by parties and I find that the main issues for consideration are whether the prosecution proved its case beyond reasonable doubt.
  25. 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 v Oyier [1985] KLR 353 the Court of Appeal held that;
    1. 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.



2. 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.
3. 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. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof.
27. On the issue of penetration, PW1 gave a detailed and consistent account of how the appellant, who had offered to take her home claiming he also lived in Gachie, stopped his motorcycle in the middle of the road. When she attempted to walk away, he followed her, grabbed her left hand, stepped on her right foot, and pushed her to the ground. He then undressed her. PW1 testified that she tried to scream, but the appellant threatened her with harm if she did. He then put on a condom and proceeded to rape her. Her evidence was clear and remained unshaken under cross-examination.
28. PW1’s testimony was corroborated by the medical evidence of PW2, the Clinical Officer, who produced the medical examination report. PW2 confirmed that examination revealed fresh abrasions on the vulva, redness of the vaginal wall, and remnants of the hymen, which were consistent with recent penetration. Spermatozoa were also detected on the vaginal swab, further confirming sexual contact had occurred. The medical findings, taken together with PW1’s consistent narrative, supported the prosecution’s assertion that penetration took place.
29. On the issue of consent, the evidence clearly showed that PW1 did not consent to the sexual act. She stated that when the appellant undressed her, he threatened her, and despite her attempts to resist, he overpowered her. Out of fear for her safety, she asked him to use a condom, after which he proceeded to rape her. PW2’s medical findings of fresh abrasions at the vaginal entrance were consistent with forced penetration rather than consensual intercourse. The evidence, therefore, negates the possibility of consent.
30. Regarding identification, PW1 testified that although she did not previously know the appellant, she saw him clearly at Roselyn Heights, an area that was well lit. She further recognised him when he rode past her shortly after the incident and again when he was found pushing his motorcycle near the scene, with its lights still on. An identification parade was later conducted twice, during which PW1 positively identified the appellant while he stood at different positions. The court found her identification to be clear, consistent, and reliable.
31. Furthermore, the trial court duly considered the appellant’s defence and found it unconvincing when weighed against the complainant’s coherent and credible evidence. The court held that the defence did not cast doubt on the prosecution’s case, which had been supported by medical and corroborative testimony.
32. In light of the foregoing, I am satisfied that the prosecution proved beyond reasonable doubt all the essential elements of the offence of rape against the appellant. The appeal against conviction accordingly fails and is hereby dismissed.
33. On sentence, the appellant was sentenced to fifteen (15) years’ imprisonment. In doing so, the trial court considered all relevant factors, including the pre-sentence report, the appellant’s mitigation, and the fact that he was a first offender. The sentence imposed was therefore lawful and proportionate to



the gravity of the offence. I find no justification to interfere with the trial court's exercise of discretion in imposing the said sentence.

34. Accordingly, I find that the appeal lacks merit and is hereby dismissed in its entirety. The conviction and sentence are accordingly upheld.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 21<sup>ST</sup> DAY OF OCTOBER 2025**

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**D. KAVEDZA**

**JUDGE**

In the presence of:

Appellant Present

Mutuma for the Respondent

Karimi Court Assistant.

