



**Njogu v Republic (Criminal Appeal 004 of 2021)
[2025] KEHC 13680 (KLR) (2 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 13680 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL 004 OF 2021
EM MURIITHI, J
OCTOBER 2, 2025**

BETWEEN

FRANCIS WAWERU NJOGU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Gichugu PMC S.O. No. 20 of 2020 in the Judgment of Hon. G. K. Odhiambo, Resident Magistrate, delivered on 9th February, 2021)

JUDGMENT

1. The Appellant was convicted and sentenced for the offence of rape contrary to section 3 of the *Kenya Act 2006 3 Sexual Offences Act* and sentenced to imprisonment for 10 years. Being aggrieved and dissatisfied with the Judgment of Hon. G. K. Odhiambo, Resident Magistrate, which was delivered on 9th February, 2021 in Gichugu SO No. 20 of 2020, appeals against the conviction and sentence on grounds that:
 1. That the trial magistrate erred in law and facts by relying on prosecution evidence which was not consistent and collaborative.
 2. That the trial magistrate erred in law and facts by not considering my mitigation and dismissed my defense which was not challenged by the prosecution.
 3. That the trial magistrate failed to consider that the prosecution failed to prove their case beyond reasonable doubts.
 4. That the trial magistrate erred in law and facts by not considering that no evidence of DNA was produced to corroborate the prosecution case.



Brief facts

2. The appellant was charged with rape contrary to section 3(1) read with sub section 3 of the *akn ke act 2006 3 Sexual Offences Act* no 3 of 2006.
3. The particulars of the charge are that; Francis Waweru Njogu, on the 5th of October 2020 at Kanjuu sub-location within Kirinyaga County, intentionally and unlawfully caused his penis to penetrate the vagina of GWG without her consent.
4. The accused person pleaded not guilty to the charges, and the matter proceeded for hearing. The prosecution called four witnesses in support of their case. After the close of the prosecution's case, the court did find that the prosecution had established a prima facie case against the accused person herein. Section 211 of the Criminal Procedure Code was explained to the accused person who elected to give unsworn statements. He called one witness in support of his defence.
5. He was convicted for rape on 9th February, 2021 and sentenced to 10 years imprisonment on 12th February, 2021.

Prosecution Case

6. PW1 – GWG testified that she knew the accused person as Waweru. He is a cousin. On 5 10 2020, she was at a birthday party at a club called Casino. She started feeling drunk, so she started looking for means of going home. She boarded Waweru's motorcycle, and they started their journey heading home. She narrated that when they reached a hilly place on the way home, Waweru told her that he wanted to go for a short call. She questioned Waweru why he was stopping at a deserted place. She told Waweru that she was not that drunk he should not attempt to do anything bad to her. Waweru went for a short call, and when he returned, he held her throat, fell her on the ground. She could not run as she was drunk. He removed her trouser and inner pants, and then Waweru removed his trouser. He removed his penis and inserted it in her vagina. She testified that she did not consent to sexual intercourse, and she struggled with Waweru, and when she was overpowered, Waweru raped her.
7. She lied to Waweru that there was another oncoming motorcycle, and Waweru stopped raping her. She boarded Waweru's motorcycle, and he dropped her at the gate to their home. She screamed for help, and she informed her brothers in law, Brian Waweru and Edward Munene and her mother in law of what had happened to her. She also called the sub-chief who is her aunt. She directed that she be taken to the hospital. She reported the incident at Gathoge police station and later went to Kimbimbi hospital.
8. On cross-examination, PW1 testified that she was taken home by the accused person at 1.00 AM and not at 3.00 AM. She stated that she was surprised on being raped by the accused. He pressed her throat so that she could not scream. PW1 further claimed that the accused person forcefully had sexual intercourse with her. He even tore her bag while she tried to remove her phone.
9. On re-examination- she insisted that she was not drunk. The accused raped her and took her home.

PW2 - Omondi Francis Ouma

10. He is a clinical officer attached to Kimbimbi sub-county hospital. He told the court that PW2 aged 22 years attended their facility on 5 10 2020 at about 8:50 AM with allegations that she had been raped by a Boda Boda rider who was known to her. The incident took place at around midnight and she was intoxicated.
11. He examined the genitalia of PW1. The external genitalia were normal with no stain or laceration seen. He examined the eternal genitalia, and he noted minimal blood. PW1 stated that she had just completed



her menses. The vagina walls were normal, the hymen was broken but not freshly broken, and no discharge was noted from the genitalia. They tested for pregnancy which was negative. PW2 testified that when they conducted a high vaginal swab, red blood cells, spermatozoa were seen. The presence of epithelial cells was an indication that there was friction on the genitalia. Red blood cells were also noted. There was penile penetration as spermatozoa were seen.

12. On cross-examination, PW2 testified that the lab findings showed the presence of spermatozoa from a male partner. He didn't find trauma signs.

PW3 Mary Wairimu Martin

13. She stated that she knew the accused person as a boda boda operator. PW1 is her daughter in law. She testified that she was asleep in her house on 5 10 2020 at about 3.00 AM when she heard someone crying. She stepped outside her house, and she found PW1 crying. PW1 told her that Weche had raped her while coming from a party. PW1 was intoxicated. She told her to go and sleep. She called the assistant chief and informed her of what had happened. She was advised to take PW1 to the hospital. Her son took PW1 to her grandfather's home in a motorcycle a few minutes past 3.00 AM. She told her that she was raped by Weche. On cross-examination, she stated that she was not at the scene of the crime.

PW4 –PC Koome

14. He is the investigating officer. He testified that on 5 10 2020 at about 4.00 AM, a rape case was reported at their station. The victim was taken to the hospital for treatment and examination on the same day. On 12 10 2020 he went to Kimbimbi sub county Hospital and collected all the forms filled by the doctor. The complainant knew the accused. PW1 informed her that she was a pillion passenger on the accused person's motorcycle and the accused person raped her while taking her home. She testified that PW1 was intoxicated at the time of the incident. He visited the scene after three days and did not see any disruptions. There is a house near the scene. If the complainant screamed, the people nearby would have heard her.
15. On cross-examination- he stated that the complainant did not avail her clothes to him. They sent her to the hospital so that she could be examined for rape.

Defence case

16. DW1- Francis Waweru Njogu in an unsworn statement stated that on 4 10 2020 at about 10.00 PM, he took PW1 to P.I town at a place called Estena, and at about 1.00 AM. She returned with another person to a club called Casino. She informed him not to go away as she wanted him to take her home. Around 3.00 AM, the complainant boarded the accused person's motorcycle, and the accused person took her home. The accused person said that the following day at about noon, he went to the bus stop where he was informed that the police were looking for him. He went to the home of PW1 where she had been married but he did not find her. He met her grandfather and informed him that PW1 had framed him. On 6 10 2020 her father approached his brother and requested for kshs, 20,000. He advised his brother not to give the money as he did nothing wrong. The complainant and her friends have a habit of framing him to extort his money.

DW2 Mary Wairimu

17. She testified that she knew the accused person as a Boda Boda rider. She was with Gladys during the day, and at night, they went to a club called Casino. She testified that they were at the club between 7.00 PM to 3.00 AM. She looked for a motorcycle to take PW1 to left the club and went to Estena, and she



returned and continued partying up to 3.00 AM. DW2 testified that she was the one who instructed Waweru to take PW1 home. Waweru then returned and took her home.

18. On cross-examination, DW2 testified that Waweru took PW1 at her boyfriend's place at Estena, and PW1 returned to the club at about 10.00 PM, where they continued to party at 3.00 AM. She testified that Waweru took PW1 home at about 3.00 AM, and she does not know what happened to GWG afterwards. The complainant knew the accused very well and they didn't have a grudge.

Appellant submissions

19. The appellant submits, PW1 stated that she had been held forcefully by the throat by the accused person. She did not say this to the Doctor who examined her. In fact, if her throat had been held forcefully the neck was supposed to reveal marks of fingers of the accused herein and she did not mention anything about her throat. This clearly reveals that PW 1 was lying before the court hence liable to perjury again.
20. PW2 the Clinical officer stated that the hymen was torn but not fresh. This meant that PW1 was engaging in sexual Intercourse even before she met with the accused person in the alleged day of the alleged offence. The clinician also stated that there were presence of spermatozoa but couldn't tell the owner of the said sperms from the vaginal discharge. This meant that the prosecution relied upon probability because on the day of the alleged offence the key witness had met with some other men apart from the accused person.
21. On DNA test, the appellant submits that PW1 had just met some other men so it was necessary to conduct DNA tests and samplings so as to know who possessed the traits of the sperms found in the vagina of the complainant. This is where the prosecution failed. For this reason, rape is not actionable per se. moreover even the clinical officer in all his professionalism did not say or indicate that it was the appellant who was the perpetrator of the act, he did not give evidence to link the appellant herein with the instant rape.

Respondent submissions

22. On the issue of whether penetration happened, PW2 the clinical officer testified and provided medical documentation and further, informed the court that after conducting High vaginal swab, there was spermatozoa & epithelial cells showing that indeed there was penetration. There was no challenge on that evidence.
23. On the issue on whether it was the appellant who raped the victim. The victim gave evidence that it was the appellant who raped her and that she knew him very well as she had requested him to carry her with his motorbike. Further to this, the victim knew the appellant very well as that was not the first time they were interacting.
24. The appellant submits that the appellant was properly recognized by the victim since they knew each other well. They urge the Honorable Court to be guided by the decision in the case of Anjononi & others V S Republic (1980) KLR, the Court of Appeal stated as follows:

“Recognition of an assailant is more satisfactory, more reassuring, & more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another.”



Issues

25. The issue before the court on appeal whether the prosecution has proved the charge of rape against the appeal and whether the appellate court will interfere with the trial court's decision raises issues as follows:
- i. Whether the Appellants were properly identified.
 - ii. Whether the prosecution proved the charge of rape.
 - iii. Whether the sentence of 10 years was excessive.

Analysis

26. It is the duty of first the appellate court to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion of the matter bearing in mind that the trial court had the advantage of observing the demeanor of witnesses. (*Okeno vs. Republic* (1972) EA 32). The Court will consider the issue as a whole.

Whether the prosecution proved the charge of rape.

Determination

27. The Court has considered the evidence presented by the prosecution and the accused before the court as a whole as counselled by *Okethi Olale v. R* [1965] EA 555. It is noted that the complainant is the only witness to this incident and the accused denied having raped the complainant.
28. The ingredients of the offence of rape are clearly set out in section 3 (1) of the *Kenya Penal Code Act 2006* which provides as follows:

- “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.”

The offence requires intentional and unlawful penetration, without consent or with consent obtained by force, threats or intimidation.

29. The offence of rape only required that intentional and unlawful penetration without valid consent of the victim be proved. There is no requirement that the penetration is complete by the release of spermatozoa to that a conception must result. So that DNA enquiry as to the spermatozoa found inside the sexual organ of a victim or of a child conceived upon such penetration is unnecessary and immaterial. Rape may still be maintained by a person even after, as alleged in this case, consensual sex with her boyfriend. There is premium, therefore, that the accused alleges to have taken the complainant to her boyfriend earlier in the evening as testified by the accused and his witness DW2.



30. A fact may be proved by the evidence of one witness section 143 of the *Kenya Evidence Act 1963* and although the complainant is only witness of the alleged rape, as provided in section 143 of the *Kenya Evidence Act 1963* as follows:

“143. Number of witnesses.

No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

31. Medical examination evidence of PW2 confirmed non traumatic penetration and explained that:

“I concluded that there was no traumatic penetration of the genitalia. The vagina was normal. There was spermatozoa seen when HVS was done concluded that there was penetration but it was not traumatic. Epithelial cells were also seen when HVS was done. Epithelial cells show that there was friction on the genitalia. Red blood cells were noted. It's not a must for lacerations and tears to be present in a case of rape. It depends on the size of the genital organ. In her case it was not traumatic there was no laceration on the vagina. However, there was penile penetration as spermatozoa were seen.”

32. In this case, deferring to the trial court which saw and heard the witnesses, the appellate court is able to discern from the record of the trial proceedings that the complaint was in her testimony before the court of most lucid and detailed in her narrative as to what had transpired on the night of the alleged rape. Her evidence was clearly unshaken by the cross-examination by the accused.

33. The full text of the evidence of the complainant PW1 is set out below:

“PW1: Female Adult Sworn And States As Follows In Kiswahili kikutu

I'm GWG, resident of Gathoge. I'm employed by Kerocho Co LTD. I know the accused person he is called Waweru. He is my relative. My mother and his mother are cousins.

I recall on 5 10 2020 at about mid-night I was at a club called Casino. I was invited by the owner of the club. He is called Michael. We were having a birthday party for Michael's child.

There were some commotions in the club. I started falling drunk so I looked for a relative of mine to take me home. I stepped outside the club. I found Waweru outside the club. He had a motorcycle. I boarded his motorcycle and we left for home. We reached a hilly place on the way home. Waweru told me that he wanted to go for a short call. I asked him why he had stopped for a short call in a deserted place at night. I told him that I'm not drunk and he should not attempt to do anything bad to me. He went for a short call and when he returned he held me by the throat. He used his one hand. He fell me to the ground. I thought of running away but since I was a bit drunk I knew he will catch up with me.

I struggled with Waweru on the ground. He told me that "GI have liked you for a long time". As I was crying while on the ground he removed my trouser and inner pant. He unzipped his trouser. He removed his trouser. He lowered it to his knees. He then removed his penis and forcefully inserted his penis into my vagina. He started to have sex with me. He raped me (exact words used by the victim). I didn't agree to have sex with him. He overpowered me. There is nothing I could do. I lied to him that there is another motorcycle coming our way. He stopped raping me and he pulled his trouser and then boarded his motorcycle. I picked my things on the ground. I wore my trouser. I co-operated with him and he took me home. He dropped me at our gate. He told me that "Gnajuwa umenichezea lakini utaniona " I



rushed to our gate as I screamed calling out my mother's name. When I screamed my two brother in laws came out. They are called Brian Waweru and Edward Munene. They are in school. My mother in law Mary Wairimu also came out. I explained to them what had happened. I had a bag. I noticed that the zip for the bag was destroyed during the struggle. My mother called my grandparents.

I also called the sub chief who is my aunt. She directed that I be taken to

hospital. I didn't take a shower. I went to hospital. I was taken to our home by Brian Waweru. I went home I found a vehicle waiting for me. I boarded the cycle and I first reported to Gathoge police station. I was then taken to

Kimbimbi Health Center. I was examined, swabs were done on me. I was given PEP drugs. I returned to the station Gathoge police station then I returned home. This is my treatment note from Kibimbi. Its dated 5 10 2020 - MFI I.

I was issued with a P3 form. The form was filled at Kimbimbi hospital. This is the P3 that was issued to me. Its dated 12 10 2020 from Kimbimbi Sub County Hospital. I was not drunk that day. Waweru often carries me with his motorcycle. I'm his regular customer. I was not that drunk. I was able know what was happening.

Outside the club there are lights. There are LED lights which were bright. There were other people who were outside the club. There were other motor bicycles outside the club. I picked Waweru because he was someone I knew and someone I could trust. I'm a regular customer to Waweru. On 4 10 2020 I had also boarded Waweru's motorcycle at 8:00 pm. He took me to PIA town to see off a friend. I also boarded his motorcycle at midnight. I don't have any grudge with Waweru. I boarded his motorcycle he stopped the motorcycle. He held my throat. I fell down. I was on my knees. He went behind me. He pulled down my black jeans and my panty. He lowered them half way. He was behind me. We struggled with him. He started to push me to a thicket. I saw that my life was in danger. I told him that he should not harm me that but he can do what he wants. He pushed me to the ground. He made me bend while I was facing the ground and he removed his penis and inserted it in my vagina. I cooperated because I had no other option.

We struggled for about 5 minutes. I didn't agree to have sex with Waweru. I didn't even enjoy it. It was forceful sex. My vagina was painful after the intercourse. He didn't wear a condom. The incident occurred at a thicket next to a road. The road was hilly. One side of the road had paddy rice and the other side had a thicket. There was no light at the scene since there were no homes nearby.

Waweru lowered his trouser half way. I struggled with him before he raped me. Its Waweru who raped me because I boarded his motorcycle from Gathoge and didn't stop along the road. I was also talking to Waweru and he was also talking to me during the incident. When we reached at the scene he switched off his motorcycle headlights and he told me that he wanted to go for a short call. Its Waweru who raped me. He carried me as a pillion passenger. When we reached at the scene he was talking to me. I wasn't that drunk. I could see him well. I also knew Waweru for about 2-3 months. Waweru is also called Weche.

I have been a customer to Waweru for about 3 months. I knew him through friends. People said that he was a good rider as he would take you home even when it rains. I didn't know that he is my relative until my grandmother who told me that Waweru is my relative after he had raped me. Waweru is the one seated at the dock.

Hon G.K Odhiambo - RM



16.11.2020

Cross Exam By Waweru In Kikuyu

I left the bar and I told you to take me home. I was not totally drunk. You had taken me to PIA town on 4 10 2020. You took me home at 1:00 am. You

didn't take me home at 3 :00 am.

I was surprised why you raped me as you had come here severally. You pressed and I couldn't scream. When we arrived at the scene, you stopped motorcycle and went for a short call. When you returned you held me by throat I couldn't run.

You took me to our home after the incident. You forcefully had sex with me. You even tore my bag when I was removing my phone. It's not my first time to get home late. I have my home. I was attending my friend's birthday party. My mother in law was not even aware that I'm coming to her home.

Hon GK Odhiambo - RM

16.11.2020

RE-Exam

I was not totally drunk. I was able to get out of the club. I was able to know the person who carried me as Waweru. I was not drunk as he suggests. I left the club at 1:00am. He took me home at 2:00am. He took me to a friend's home at about 8:00pm. I was meeting the friend to get money for the party. I took another motorcycle from PIA to Casino Club. That is where the party was being held. I didn't fix the accused person with the charges. He raped me. About lateness I have mv own home. I didn't fix Waweru. He raped me and he is the one who took me home.

Hon G.K Odhiambo - RM

16.11.2020

Court: Victim is a small bodied lady as compared to the accused person who is averagely built in body size.

Hon G.K Odhiambo - RM

16.11.2020”

34. PW3, the mother in law of the complainant confirmed the report by PW1 as follows:

“GW is my daughter in law. I recall on 5 10 2020 at about 3:00 am I was at home asleep. I heard someone crying. I stepped out of the house and I found G crying. She told me that she was at a party at Gathoge. She told me that she had been raped by a man called Weche. She was intoxicated. I told her that she should sleep and we will talk about the matter the following day. I saw that she was a bit drunk. She was not totally drunk. We called the Assistant Chief. She advised us that we take G to hospital. I didn't have means to take her to hospital. We called the grandfather who advised us that we should take G to his home.

We took G to her grandfather. It's my child who took G to his grandfather's home at about a few minutes past 3:00 am. He used a motorcycle. G was then left at her grandfather's home. She was later taken to the police station and later to hospital. I was left at home. G told me that she was raped by Weche. I didn't know the name Weche but I later came to know that Weche is also called Waweru wa Niogu. That is the name that I know. I know Waweru. When G told me his other name of Waweru I was able to know who the person was. Waweru is a



boda-boda operator. I found G at her house seated at the floor of her table room she was crying. Waweru is the one seated at the dock.”

35. The Defence of the Accused DW1 (supported by DW2) was given unsworn and therefore could not be tested by cross-examination by the prosecution but he admitted being present with the complainant but denied alleged rape suggesting frame up and sexual intercourse with another person as follows:

“DW1: Male Adult Do State As Follows In Kikuyu

I’m Francis Waweru Njogu, resident of Gathoge village. I’m a boda-boda operator. I do understand the charge that I am facing. I recall on 4 10 2020 at about 10:00 pm, I was with G. She told me to take her to P.I town. I left her at a place called Estena at about 1:00 am, G and another person came to a club called Casino. She told me not to go away. That she will need to be taken home.

At about 3 :00 am G boarded my motorcycle and I took her home she told me that she didn’t have money and she will pay me the following day. I agreed she entered her home.

The following day at about noon I took my motorcycle and went to the bus stop. I was informed that the police were looking for me. I went to G’ home. This is where she had been married. I didn’t find her at home. I didn’t find anyone in the compound. Only found dogs that blocked my way. This was about 2:00 pm. I went to her father’s home and informed her grandfather that G had framed me. The grandfather to G informed me that they will call me to talk about the issue. They didn’t call.

On 6 10 2020 G’ father approached my brother and he told him that we should give them 20,000 -. I advised my brother not to give the money since I didn’t do anything wrong. I told my brother that even if he pays them I will not refund the money since I didn’t do anything wrong.

On a date that I can’t recall I told the police that I will be available as I had nowhere to go. I returned to my daily boda-boda activities. On 15 10 2020, I was summoned by the police to the station. I had a motorcycle. I called my rother who came to the station. I gave him the motorcycle. I was later placed in the cells. My finger prints were then taken. In the month of October 2019 a friend to G framed me that I had assaulted her. The matter is in court one. The said lady told me that I should give her 20,000 so that she can withdraw the matter. G and her friend have a habit of framing me on 10 10 which is a holiday so that they can get money from me. That is all that I wish to inform the court. They all thought that I have money.”

Identification of the accused and proof of intentional and unlawful penetration, without consent

36. There is no question that the complainant and the accused were together on the accused’s motor cycle on the night of 4 12 2020 as the accused took her home. It is what happened on the way home that is disputed. PW1 testified that she knew the accused person as Waweru and that she boarded Waweru’s motorcycle, and they started their journey heading home. She questioned the accused why he was stopping at a deserted place. The accused went for a short call, and when he returned, he held her throat, fell her on the ground. She could not run as she was drunk. He removed her trouser and inner pants, and then Waweru removed his trouser. He removed his penis and inserted it in her vagina. DW1 denied raping the complainant and stated that around 3.00 AM, the complainant boarded the accused person’s motorcycle, and the accused person took her home. DW1 confirmed that the Waweru had taken the complainant home.



37. On the issue of identification of the perpetrator of the rape, the Accused's evidence attempted to raise a doubt by reference to an alleged sexual intercourse presumed to have occurred with the complainant's boyfriend who he said the complainant had gone to see off earlier in the evening, and DW2 was the witness of the fact, and hence the call in his submissions for a DNA testing to establish to who the spermatozoa found in the complainant's genital organ belonged.
38. The evidence of the complainant is clear, consistent and the claim that the accused had earlier in the night presented the complainant to her boyfriend with possibility of sex between the two does not diminish the cogency of the evidence of his forceful penetration of the complainant (PW1) while on the way home at the end of the drinking session. That the complainant might have had sex with her boyfriend as alleged by the Defence did not preclude rape by the accused subsequently.
39. Moreover, the absence of spermatozoa does not negate penetration. The core question in this case is whether there was intentional and willful penetration of the complainant by the accused without her consent, despite any alleged prior sexual intercourse the complainant may have had with any other person.
40. In observing the respective physical able bodiedness of the accused against the complainant, the trial court observed on record as follows:
- “ Court: Victim is a small bodied lady as compared to the accused person who is averagely built in body size.”
41. This observation of the court serves to lend support to the allegation that the accused had overpowered the complainant and penetrated her only to release her on the fear of being found in the act, when the complainant told him that another rider was coming upon them. The Defence witness DW2 confirms that the accused had taken the complainant home on his motor cycle.
42. The evidence of the complainant is, in any event, well corroborated by the independent evidence of the mother to who she made a first opportunity report upon being dropped at home by the accused motor cycle rider. PW3 said the complainant told her that “she had been raped by a man called Weche.” As PW1 testified “Waweru is also called Weche.”
43. In terms of section 165 of the *kenya act 1963 46 Evidence Act*, it is provided for proof of consistency that:
- “ 165. Proof of consistency by former statements.
- In order to show that the testimony of a witness is consistent any former statement made by such witness, whether written or oral, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.”
44. The South African case *Khene v S* (CA 39 2022) [2023] ZANWHC 168 (15 September 2023) the Court explains the essence of evidence of first report as follows:
- (19) In relation to the evidence of first report the following was stated in Milton, in South African Criminal Law and Procedure Vol II 3 ed that:
- “It is not mandatory that there should be evidence that the woman has complained that she has been raped. However, if she has, such [a] complaint is admitted in evidence to show consistency and to negative a defence of consent, but not as proof



of their contents nor to corroborate the complainant.”..... The purpose of admitting evidence of a complaint is that it serves to rebut any suspicion that the woman has lied about being raped. The corollary is, of course, that should a woman not complain, or not complain timeously, the conclusion may be drawn that she is lying in her evidence that she was raped. The conclusion may well be unfair to the victim, since women may hesitate to complain of rape for reasons of shame, embarrassment or fear.””

45. The complainant’s mother-in-law PW3 testified as to receiving the complainant at 3.00am as follows:

“GW is my daughter in law. I recall on 5 10 2020 at about 3:00 am I was at home asleep. I heard someone crying. I stepped out of the house and I found G crying. She told me that she was at a party at Gathoge. She told me that she had been raped by a man called Weche. She was intoxicated. I told her that she should sleep and we will talk about the matter the following day. I saw that she was a bit drunk. She was not totally drunk. We called the Assistant Chief. She advised us that we take G to hospital. I didn’t have means to take her to hospital. We called the grandfather who advised us that we should take G to his home.”

46. The complainant shortly thereafter made a first report at the Gathoge Patrol Police Base the same night where, as testified by the Investigations Officer PW4 –

“I recall on 5 10 2020 at about 4:00am, a case of rape was reported at our station. The complainant was sent to the hospital on the same day. The in charge Corporal Kimurgor minuted the case to me on the same day. It was reported that Francis Waweru raped G.”

The complainant subsequently led the Police to arrest the accused on 14 10 2020.

47. It is no Defence that the prosecution did not challenge the statement of the accused which was given unsworn and therefore in accordance with the rules of the court could not cross-examined on. It was held in the leading case of *Amber May v. R* (1976-80) KLR 1118 that the unsworn statement of an accused is the lowest evidential value, although it be used in the court’s consideration whether a reasonable doubt is raised, as follows:

“An unsworn statement made by an accused person in a criminal case (in accordance with section 211(1) of the Criminal Procedure Code is not evidence as that expression is generally understood and hence, although it should be taken into consideration in relation to the whole of the evidence, it has no probative value and the rules of evidence (eg as to the exclusion of hearsay) cannot strictly be applied to it.

R v Frost, R v Hale (1964) 48 Cr App Rep 284 and *R v Coughlan* (1977) 64 App Rep 11 applied.”

48. There was no evidence at all from the prosecution or the Defence that the complainant and the accused had a disagreement that would explain a false charge of rape on the accused, who was in the complainant’s testimony a second cousin as son of her mother’s cousin. The allegation of a frame up charge is not supported by any evidence before the court. Indeed, PW1 told of prior good relations with the accused as a reason for seeking him out to take the complainant home and DW2 confirmed that the complainant “G knew Waweru very well. They don’t have a grudge. G has been Waweru’s friend and customer. They were in good terms. I have never heard that G filed any case against Waweru”.



49. On the whole evidence before the Court, the Court accepts the evidence of the complainant as to the rape by the accused and rejects the unsworn statement of denial by the accused in view of the corroboration by the witness PW3 who received the complainant when she was crying and at this earliest opportunity reporting that she had been raped by the accused. The court finds that the complainant was raped on her way home by the person who took her home by his motor cycle and that the accused was properly identified as the person who raped the complainant, which fact was at first opportunity relayed to the complainant's mother-in-law and subsequently to the Police Officer PW4 in a first report of the incident. The Court finds the evidence of the complainant PW1 to be corroborated by the evidence of PW3 and PW4, and the conviction on this evidence is safe.
50. The trial court properly considered the evidence before it presented by the prosecution as well as the Defence and rightly held that the inconsistencies in the evidence of the prosecution as to the age of the complainant as 21 or 22 years or the exact time of the rape, whether she left the club at 1.00am or 3.00am were minor inconsistencies in the circumstances of this case, relying on the Court of Appeal decision Philip Nzaka Watu v. R (2016) eKLR and Tanzanian case of Dickman Elia Nsamba Shapwata & Another v. The Republic CR. APP. No. 92 of 2007 cited therein.

Whether the sentence of 10 years was excessive.

51. Section 3 (3) of the *akn ke act 2006 3 Sexual Offences Act* provides that “(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.” The sentence of imprisonment for ten (10) years passed on the accused was the bare minimum and cannot be said to be excessive.

Orders

52. Accordingly, for the reasons set out above, the Court finds that the appellant's appeal from both conviction and sentence for rape contrary to section 3 (1) and (3) of the *akn ke act 2006 3 Sexual Offences Act* does not have merit and it is dismissed.

Orders accordingly.

DATED AND DELIVERED THIS 2ND DAY OF OCTOBER 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

The Appellant.

Mr. Mamba for the DPP respondent.

