



**Republic v Lokwawi (Sexual Offence E011 of 2023)  
[2025] KEMC 2 (KLR) (22 January 2025) (Judgment)**

Neutral citation: [2025] KEMC 2 (KLR)

**REPUBLIC OF KENYA  
IN THE MARALAL LAW COURTS  
SEXUAL OFFENCE E011 OF 2023  
AT SITATI, SPM  
JANUARY 22, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JOSEPH LOKWAWI ..... ACCUSED**

**JUDGMENT**

1. The accused person denied the main count of rape contrary to section 3(1)(b) of the *Sexual Offences Act* no. 3 of 2006. The particulars were that on 5th October, 2023 at 1800 hours in Maralal town within Samburu Central Sub-County of Samburu County, he intentionally and unlawfully inserted his penis into the vagina of C.L. (initials) without her consent.
2. In the alternative count, the accused denied the charge of committing an indecent act with an adult contrary to section 11(a) of the *Sexual Offences Act*. The particulars were that on 5th October, 2024 at 1800 hours in Maralal town within Samburu Central Sub-County of Samburu County, he intentionally and unlawfully caused his penis to touch the vagina of C.L. (initials) without her consent.
3. In these proceedings, the accused person represented himself while the Prosecution Counsel Moses Ndira conducted the DPP’s case.

**The DPPs’s Case**

4. PW1 C.L. (initials) told the court that on 5th October, 2023 she was in Maralal town when she met the accused person whom she knew by his alias “Lomdang”. She asked him to take her somewhere to relax because she usually collapsed due to epilepsy and was on medication that required rest. The accused agreed to her request and took her to a nearby house where there was a mattress. No sooner had she gotten inside than she fell down in epileptic fit and lost consciousness.



5. According to the complainant, when she regained consciousness, she found herself bleeding from the vagina and suspected that the accused person had raped her. This made her to seek immediate medical attention at the Samburu County Referral Hospital. Afterwards, she reported to the police and led the police to arrest the accused person.
6. In cross-examination, she told the court that she felt dizzy and asked the accused person to help her out as a good friend. In further questioning, she told the court that she did not scream as she was unconscious and further that she did not have in evidence her torn clothes.
7. In re-examination, she said that she asked him for help as she did not want to collapse in the middle to the town.
8. PW2 Clinical Officer Charles Leparmorijo told the court that on 06/10/2023 the complainant visited Samburu County Referral Hospital for medical examination. After due medical examination, the following were noted: Normal head, neck, thorax, upper limbs, lower limbs and abdomen. Normal genitalia – no lacerations and no bruises. Laboratory tests revealed pus cells which suggested possibility of an infection.
9. C.O. Leparmorijo added that the patient was given antibiotics and released. When the suspect was taken to the hospital for medical tests, pus cells were found on his genitalia and this convinced PW2 that the accused was linked to the complainant's infection. He produced the P3 Form and the treatment as P.Ex.1 (A-B).
10. In cross-examination, he told the court that the complainant and the accused were examined on the same day.
11. PW3 S/No. 113114 Police Constable Shadrack Musyoka testified as the investigating officer. He told the court that on 6th October, 2023 he recorded the complaint and witness accounts of the complainant. He issued the P3 Form which was duly filled.
12. PC Musyoka added that the complainant told the police that she had felt dizzy and asked the accused person to get her a place to rest at his house which was close to her shop in town. The I.O. told the court that the complainant said that she had known the accused person well as a porter who operated close to her shop.
13. In his inquiries, the I.O. added that she found the accused person on top of her and physically fought him off resulting in a torn blouse. She raised an alarm which attracted Good Samaritans forcing the accused person to flee. He produced the torn blouse in evidence and the investigation diary.
14. In cross-examination, PC Musyoka stated that on page 1 –last paragraph – the complainant had recorded that she screamed. He admitted that he did not secure any of the Good Samaritans to record their statements. He admitted that the accused person lived in a rented house but his landlord had migrated to Nairobi for prolonged medication. The I.O. affirmed that he did not escort the accused to the hospital for medical examination.
15. At that stage, the DPP closed their case. The court ruled that the accused person had a case to answer.

### **The Defence Case**

16. Joseph Lokwawi gave an unsworn statement. He denied the charges. He stated that on the material date, he finished his turn-boy duties after which he took up security guard duties at a shop. While at his guard position, the complainant approached him. He stated that the complainant was positioning herself to lure clients for sex and this prompted him to chase her away from his location but she went



away in shame. A few days later, she returned with the police with a fabricated the story against him. He closed his defence.

17. The duty of the court is to determine whether or not the DPP proved the charges beyond any reasonable doubt on each and every ingredient of the charges before the court.

### Determination

18. On the law, the Court of Appeal in *Muchiri –v Republic* (Criminal Appeal 114 of 2020) [2023] KECA 865 KLR (7 July 2023) (Asike-Makhandia, AK Murgor & GW Ngenye-Macharia JJ.A.) highlighted the essential elements of the offence of rape:

26. “As regards the offence of rape, under section 3(1) of the Sexual Offence Act, the elements of the offence are set out as follows:

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 threat or intimidation of any kind.

27. In the case of *R v Oyier* [1985] KLR, 353, also referred to by the High Court, this Court outlined the ingredients of the offence of rape as follows:

- a. 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.
- b. To prove the mental element required in rape, the prosecution has 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.
- c. Where a woman yields through fear of death, or through duress, it is rape and it is not an 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.”

19. Relatedly, the Court of Appeal has held that in all cases of rape the credibility of the complainant is paramount whether there is corroboration or no corroboration. The superior court held as follows:

“The view urged by the appellants, namely that the evidence of the victim must be corroborated by medical evidence before it can be relied upon to convict them is the pre-2006 position and is the position articulated in the judgment of this Court in *Benjamin Mugo Mwangi & Another v. Republic* (supra), a judgment which was rendered on 19th October 1984. That position was changed by amendments to the *Evidence Act*, which were effected in 2003 and 2006.



The proviso to section 124 of the *Evidence Act* was introduced by the Statute Law (Miscellaneous Amendments) *Act No. 5 of 2003* and further modified by the Statute (Law Miscellaneous Amendments) *Act No. 3 of 2006*.

The combined effect of those amendments is that in a prosecution involving a sexual offence, the trial court can convict the accused person on the evidence of the victim alone if it believes the victim was truthful and recorded the reasons for that belief. In *Kassim Ali v. Republic (2006) eKLR*, this Court stated:

“...the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.”

20. The starting point is the testimony and evidence of the complainant. PW1 claimed that while in her shop she felt dizzy and called at the accused to escort her to his house but on arrival she fainted. She stated further that when she regained her consciousness, she found herself bleeding and immediately suspected that the accused had committed a sexual offence against her.
21. In the court’s considered view, this fresh bleeding would have been a consequence of the alleged forced penetration that would have caused lacerated vaginal walls at the very least but the clinical officer who examined her a very short time afterwards did not observe any lacerations or bruises to her genitalia meaning that her account was incredible.
22. During the cross-examination, she confirmed that she did not scream at all because she was in an unconscious state. Her testimony was, however, directly contradicted by PC Musyoka who said in his investigatory work that she raised an alarm which attracted Good Samaritans who went to her rescue from the subject house forcing the accused person to flee. So between the complainant who says she never screamed and the Investigator who says that she raised an alarm to an extent that passers-by intervened who should be believed? This irreconcilable contradiction casts the first dark Nimbus clouds of doubt over this case.
23. To cast further doubts on the case, the alleged Good Samaritans remained mysterious as admitted by PC Muysoka in his cross-examination by the accused person. Even the medical report to prove that she was an epileptic patient was not adduced in court by the Investigating Officer.
24. The court also analysed the evidence from the investigation diary noted that the first report was made in the following words:

“O.B. No.21/06/10/2023 AT 155hours: report made: To the station is one female adult namely (redacted) of nil mobile number and a resident of Milimani who do submit a report that yesterday 5th/10/2023 at around 1800hours someone known to her namely Lemodong attacked her and also tried to rape her, also she was robbed by the same person a handbag and now at the station seeking police assistance.”

25. In this first report, the complainant clearly said that there was an “attempt to rape her” but in court she completely changed the narration and report when she said that the rape actually took place. The value of a first report has been discussed in a number of authorities including *Terekali s/o Korongozi & Another –V- Rex (1952)EACA 259* recently applied in *Bernard Gathiaka Mbugua & 4 Others –V- Republic (2016)eKLR* where it was ruled thus:

“Evidence of first report by the Complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may



be gauged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others...”

26. If her first report was that it was an attempt to rape her, why would she in the same vein state that she was bleeding from a completed act of rape? The clinical officer did not observe any lacerations or bruises to her genitalia consistent with forced vaginal penetration.
27. It was notable that PW1 complained further that the offender was one Lemdong not Joseph Lokwawi. It was not clear if Lemdong and Lokwawi (present accused) are one and the same person. Her change of story was probably driven by consultations with others because she does not explain why there is such a huge change in her narration of events.
28. The next entry in the Investigation diary was OB N. 46/11/10/01/2023 at 1825hours that reads as follows:

"Action taken: prisoner in- PC Musyoka, PC Moses, PC Nzui, PCW Hellen all do book and take action against one Joseph Lokwawi a Samburu male adult to be charged with rape vide a report submitted at OB21/06/2023 refers. Searched and placed in lawful custody by PC Gitonga appearing normal." signed by No. 113114 PC Musyoka.
29. This entry OB 46/11/10/2024 is critical when compared with the entry in the P3 Form. Section "D" of the P3 Form produced by Clinical Officer Leparmorijo reads as follows: "male accused of any Sexual Offence". Paras. 5 and 6 therein shows that there was an observation of pus cells in the section for "male suspect" examined by the medical expert. How can this be true if as of 06/10/2023 the accused person herein had not yet been arrested and had not even presented himself in any hospital for this examination? This line of the DPP's evidence strongly suggested fabrication of evidence against the accused person. The court's finding is based on the comparison of the entry made in Section D with Entry 46 of the investigation diary.
30. In that section "D", the Clinical Officer recorded that on 06/10/2023 the male suspect was medically examined and pus cells seen in his genitalia indicative of an infection. This evidence is suspicious because as per Entry O.B 46/11/10/01/2023 the accused person was only arrested on 11/10/2023 .meaning that he was not available for medical examination on 6/10/2023. It is humanly impossible to medically examine a patient who is not present before the clinician.
31. Taken together with the change of narration in the First Report of "tried to rape" to that actual rape when she testified in court, the purported medical examination of a non-existent patient leads to the strong conclusion that this case was possibly a manufactured one as captured in the unsworn statement of the accused person.
32. The court's belief of the possible frame up is fortified by a further analysis of the Investigation Diary. In the said diary, nowhere is it indicated that either PC Musyoka or any other police officer escorted the suspected to the hospital for medical examination. Without such an entry, at what point in time then did the present accused person get escorted to the hospital for examination by C.O. Leparmorijo as per his testimony? The Court is persuaded to view this as a case of a phantom medical examination of the suspect.
33. The court's considered view is that the evidence was most probably manufactured to the prejudice of the accused person. The Accused person's unsworn statement pleaded fabrication and it appears that this defence holds water and is accepted as creating reasonable doubt in the court's mind.



34. Having found the foregoing doubts in the DPP's evidence, it is the judgement of the court that the DPP's evidence was incredible due to fabrication and this doubt favours the defence. The result is an acquittal of all charges under section 215 of the Criminal Procedure Code. He is set at liberty unless otherwise lawfully held. Right of appeal is 14 days.

**DATED, READ AND SIGNED AT MARALAL LAW COURTS THIS 22ND DAY OF JANUARY, 2025**

**HON.T.A. SITATI**

**SENIOR PRINCIPAL MAGISTRATE**

**MARALAL LAW COURTS**

Present

DPP Ndira

Accused Person

Lepikas Court Assistant

