



**Director of Public Prosecutions v Ziro (Sexual Offence E001 of 2022)
[2023] KEMC 286 (KLR) (1 November 2023) (Judgment)**

Neutral citation: [2023] KEMC 286 (KLR)

**REPUBLIC OF KENYA
IN THE KWALE LAW COURTS
SEXUAL OFFENCE E001 OF 2022
ZK KAGENYO, RM
NOVEMBER 1, 2023**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS REPUBLIC

AND

KONGA ZIRO ACCUSED

JUDGMENT

1. By way of an amended charge sheet, the accused person who was arraigned on 3rd January 2022 is facing charges of gang rape contrary to section 10 of the Sexual Offence [Act No. 3 of 2006](#)

The particulars are that on the 26th day of December 2021 at around 0200 hours at [Particulars withheld] village Mwatate location in Kinango subcounty within Kwale county in association with other two not before court one after another intentionally and unlawfully caused his penis to penetrate the vagina of MMM without her consent.
2. In the alternative, he was charged for the offence of committing an 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 26th day of December 2021 at around 0200 hours at [Particulars withheld] village, Mwatate location in Kinango subcounty within Kwale county in association with other two not before court intentionally and unlawfully touched the vagina of MMM with his penis against her will.
3. The accused denied the charges and a trial ensued. He conducted his case while in custody even though he had been granted a cash bail of Ksh. 50, 000/= or an alternative of personal bond of Ksh. 100, 000/= with one surety of similar amount.
4. The accused person was not represented. At all times of the trial, he was present in court. The matter was conducted in Kiswahili language, or its interpretation, the language of choice by the accused.



The Prosecution's case

5. The prosecution marshalled a total of 5 witnesses.
6. PW 1, MMM, the complainant informed the court that on the 25th day of December 2021, she marked her 18th birthday by attending a wedding night vigil at a place far away from her home. While at the wedding ceremony, she met with her boyfriend and they proceeded to a forest, away from the wedding venue where they had sex twice. After the duo had their sex peacefully, two men appeared, holding knives and threatened the boyfriend who cowed down and run back to the wedding venue and left behind his partner, the complainant. When left behind, the two men, in turns had sex with the complainant penetrating both her anus and vagina for a total 6 times each that she could keep count of, fatigue on their part being the only command to stop. After they were done, they let the complainant go, whereby she went back to the wedding venue where she stayed till dawn and went back home at 0600 hours where she briefed her mother, who took her to the police station and later to the hospital.
7. PW 5, HM, said that he knew PW 1 before and on the material night, they were at the wedding vigil venue. He told the court that they had conversed and agreed with PW 1 that when the departure time for home came to be, he do alert PW 1 so that they could go back home together. After that conversation, the two went and stood somewhere and just before they began their journey, 3 people appeared and threatened them and his adrenalin and testosterone ordered him to defend his lady, a battle that he miserably lost due to mightier opposite power from his adversaries. He described one of the men as having worn a boshori and a white shirt, the other man was wearing a boshori as well and the third one was wearing a buibui and ninja and was short in stature. He was however unlucky in that he did not recognize any of the three. According to him, one of the three men whistled and then drew a knife and said, "acha tuwamalize." On hearing that PW 5 rose and rushed to the village and called the neighbours and the complainant's relatives and they all went to the scene to look for the girl but all was in futility as they did not find the girl. Sad, confused and frustrated, PW 5 went back to the wedding venue and sat lonely at a corner in deep meditation. Just before he sank into deeper stress, PW 1 emerged and heroically came to him and gave him the pullover he had left behind when the assailants attacked them. He denied ever having sex with PW 1 on that night.
8. According to PW 2. ZMN, the complainant's mother, the complainant came to her in the early morning of 26th December 2021 and told her that she had been raped by 3 men whose age was in their twenties.
9. According to PW 3, NPS Officer of Service No. 104623, PC (w) Caroline Kwamboka, the complainant came to their station and told her that the previous night, as she was at a wedding ceremony, together with her boyfriend, they went to the forest and had protected sex and on their way back, they met with Buguta Ruwa and Konga Ziro who threatened her and the boyfriend and after the latter fled for his safety, the duo was left behind defiling the complainant where they did so three times each.
10. PW 4 the medical practitioner, Mr. Moses Kasyoki adduced medical evidence that there was penetration into the vagina of the complainant. There was no mention on the penetration into the anus of the complainant.
11. After the testimony by PW 5, the Prosecution closed its case.

Defence case

12. The accused person was placed on his defence under section 210 of the *Criminal Procedure Code*, and section 211 of the *Criminal Procedure Code* and Article 50 (2) (i) having been explained to the accused



person, he, in person, elected to defend himself by way of tendering sworn evidence without calling any witness.

13. DW 1, the accused, vehemently denied the accusations against him. He invited the court to see that those were strange charges as on the alleged time, even though the accused could not recall where he was in particular, he was nonetheless total sure that he was neither at the wedding nor at the forest committing the heinous acts.
14. After the testimony of DW 1, the Accused closed his case.
15. Having heard both parties at their full lengths, the court retired to make its decision.

Analysis and Determination

16. The accused has been charged for the offence of gang rape whose elements are penetration without the consent of the other and such penetration being done in group of more than one person.
17. On penetration, the medical practitioner proved before this court that there was penetration into the vagina of the complainant. The complainant testified that just before the alleged penetration by the accused and his company, her boyfriend had penetrated her twice. Into her vagina In my view, it would be difficult to distinguish any subsequent penetration as non-consensual or by who and the much the court could do is to rely on the other forms of evidence to establish whether indeed there was subsequent penetration by the accused and co..
18. One of the ports of call is the oral evidence by the complainant that she was so penetrated even into her anus by the two, in turns and so senselessly they did that only their drained energies halted their heinous acts. In my view, the absence of such observations by the medical practitioner, a few hours after such grueling anal penetration called for an in-depth analysis for the evidence on record.
19. The court interrogated the evidence by PW 1 and PW 5 at length and the veracity of the same. Guided by the standards of a witness set by the Court of Appeal in Joseph Ndungu Kimanyi v Republic [1979] eKLR when it held that;

In our opinion the evidence of the complainant does not come up to the minimum standard which we require before upholding a conviction in a criminal case. We lay down the minimum standard as follows. The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

20. I have considered the evidence of PW 1 and PW 5 and I have reasons to believe them as untrustworthy witnesses for among other reasons, the following;
 - a. PW 1 told her mother that she was raped by 3 men while she told the investigating officer and this court that she was raped by 2 men. The metamorphosis of a version which is expected to be of just one form casts doubt on the credibility of the PW 1 as a witness;
 - b. PW 1 told this court that she had had sex with PW 5 these were facts withheld to her mother and when PW 5 testified before this court denied ever having sex on that night with PW 1. Whom do we believe and why the selective disclosure of facts. How much more is undisclosed by the duo and why the non-disclosure? and



- c. PW 1 says that they were attacked by 2 people while PW 3 states that they were attacked by 3 people. Again, is there a fabrication of facts which has terribly gone wrong?
21. It is to be noted that when the charges were registered in the first place on the 3rd January 2022, the prosecution presented a charge sheet with 3 named accused persons as 1. Konga Ziru; 2. Buguta Ruwa; and 3. Hamisi Chibenyu.
22. It is to be noted that PW 1 stated that her boyfriend was the Hamisi Chibenyu, who is the 3rd Accused. For no good reason, the said 3rd accused person was introduced as a witness on 17th October 2022 by the same party who introduced him, through the charge sheet as an accused person. However, it seems that at the juncture he was introduced as a witness, there was a deliberate withholding of his Chibenyu name and introduced as Hamisi Mrina.
23. Save as for sanitizing his late introduction as having feared for his life, there was no explanation how an accused was converted to a state witness neither was there any application or disclosure to that effect.
24. In my very honest opinion, the act by the state to charge an accused in absentia, concealing his fullname and behind the court's back presents the said suspect as a witness is such a mockery to the court processes and the criminal justice system as a whole.
25. On the identification of the accused person herein as the perpetrator, I note that both PW 1 and PW 5 stated that they did not know the accused before the incident. PW 1 stated that she was sure that it was the accused because she knew him by his name as she heard his name being mentioned at the scene of crime. In my very honesty opinion, identification on that basis would be too skewed and full of error.
26. The circumstances in which the offence was committed, and the suspected assailant arrested called for an identification of a suspect compliant with Chapter 42 Paragraph 7 of the National Police Service Standing Orders which was lacking and accordingly any subsequent dock identification was worthless as was held in *Gabriel Kamau Njoroge –vs- Republic (1982-1988) 1KAR 1134*, thus,
- A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade.”
27. In the end, I find it very unsafe to find the accused person guilty of the offence as the evidence is based primarily on untrustworthy witnesses being PW 1 and PW 5 and secondly that the identification of the accused was skewed and there is no iota of evidence linking him to the offence.

Disposition

28. Having found so, this court hereby dismisses the case against the accused person and forthwith acquits him under Section 215 of the *Criminal Procedure Code* for the main count of gang rape proscribed under section 10 of the *Sexual Offences Act*, 2006 and for the alternative count therein of committing an indecent act with an adult as proscribed under section 11 (A) of the *Sexual Offences Act*, 2006.
29. Accordingly, I order that the accused be set at liberty forthwith unless he is otherwise lawfully held.

JUDGMENT WRITTEN, DATED AND SIGNED AT NAIROBI ON THIS 1ST DAY OF NOVEMBER, 2023.

KIONGO KAGENYO

RESIDENT MAGISTRATE



This Judgment has been Delivered in Open Court at Kwale on this 9th day of January, 2024, by Hon. C.K Auka in accordance with the provisions of section 200 (1) (a) of the *Criminal Procedure Code*, upon the transfer of Hon. Kiongo Kagenyo (Mr.) (RM), to Milimani Small Claims Court effective 11th September 2023.

In the presence of:

Mr. Khamis, the Prosecutor

Mr. Hud, the Court Assistant

The accused

