



**Director of Public Prosecutions v Guni (Sexual Offence  
E072 of 2021) [2022] KEMC 37 (KLR) (17 May 2022) (Judgment)**

Neutral citation: [2022] KEMC 37 (KLR)

**REPUBLIC OF KENYA  
IN THE KWALE LAW COURTS  
SEXUAL OFFENCE E072 OF 2021  
ZK KAGENYO, RM  
MAY 17, 2022**

**BETWEEN**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

**AND**

**SALIM ALI GUNI ..... ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused person was arraigned on the 14<sup>th</sup> day of December 2021 with an indictment of Attempted rape contrary to section 4 of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the 2<sup>nd</sup> day of November, 2021 at Jeza “A” village, Golini location, Matuga Sub county in Kwale county within Coast region intentionally and unlawfully attempted to cause his penis to penetrate the vagina of DAH without her consent.
2. In the alternative, he was charged with 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 2<sup>nd</sup> day of November, 2021 at Jeza “A” village, Golini location, Matuga Subcounty in Kwale county within Coast region intentionally and unlawfully caused his penis to touch the vagina of DAH without her consent.
3. The accused denied the charges and a trial ensued.
4. The DPP’s case was conducted by learned prosecution counsel Ms. Luseno and Ms. Lewa, holding her brief in her absence. The accused person was unrepresented. The matter was conducted in Kiswahili Language, the language of choice by the accused.

**DPP’S Case**

5. The DPP, to discharge their duty under section 107 of the *Evidence Act* called a total of 6 witnesses.



6. PW 1 was D.H.A, the complainant. She confirmed that she is an adult having been born on the 4<sup>th</sup> day of September 2003. She testified that on the 2<sup>nd</sup> day of November 2021, at around 1100 hours, she was heading to Kisanza dispensary for treatment when she heard a voice calling her, “mtoto wa mama”, a name by which she is known by and referred to by the accused only in the exclusion of all others.
7. At that time, the accused was herding some livestock by the path where PW 1 was passing by, a path down a seasonal stream of water, flanked by bushes which is a short cut to the dispensary.
8. When PW 1 heard the voice calling her, she looked behind to know the source of the voice and it is at that point that the accused came from the bushes to where she was standing. When he arrived, he offered to show the complainant the way as he knew of a more shorter route than the one PW 1 had elected to use, and he led the way following the proposed new route.
9. Along the way, as the two were walking, the accused started talking about love whereupon PW 1 found that unpalatable and replied to him that he was like a brother to her as he proposed that he wanted the two to have a relationship.
10. They continued with the journey despite her turning down his offer but according to PW 1, after she turned down the offer by the accused, the accused appeared discontented and angry.
11. Suddenly, the accused held PW 1’s hand and dragged her towards the thickets. The accused person pushed PW 1 deeper into the thickets and tried to lay her down forcefully. PW 1 did not just watch but she struggled with him to save herself.
12. PW 1 stated that, in the midst of this struggle, there passed a boy, an alumni of their school known to her as Yunus, who later would testify as PW 5. To contextualize the scene, PW 1 stated that before the arrival and passing by of Yunus, the accused had managed to lay her down, albeit forcefully.
13. PW 1 narrated that the accused aimed at undressing her and indeed struggled with her to satisfy these intentions. In the end he managed to raise her skirt and despite the resistance and struggles by PW 1, the accused managed to lower down her pantie and ultimately removed it fully. After he was done undressing PW 1, the accused lowered down the shorts he was wearing and PW 1 could see his nakedness. At this juncture, PW 1 stated that Salim, the accused, started trying to penetrate his penis into her vagina but he did not succeed as PW 1 closed her thighs tightly together. PW 1 continued with the struggle as the accused also tried to enter his fingers into her vagina, unsuccessfully though as she had jammed her thighs tight.
14. It was her evidence that she struggled with the accused person for close to 3 hours, ranging from 1100 hours to 1400 hours. According to her, a lucky moment happened where a person passed by and the accused, while shaken after spotting that person, shouted “mtu!” and after that exclamation he left. After the accused left, PW 1 too rose, wore back her pantie and sought her way back home where she found no one home, just as she had left it and due to fatigue, she just slept after soaking the clothes she had been wearing and taking a bath.
15. Asked whom she did share the ordeal with, PW 1 stated that she did not share it with her mother as the accused told her that her mother knows the accused so well, trusts him and would ultimately believe him and doubt her daughter.
16. Describing her relationship with the accused, PW 1 stated that she has been brought up by her step father who is a brother to the accused’s father. Two days after the ordeal, the accused approached PW 1 as she was leaving school and gave her 2 conditions, that is: that PW 1 either becomes the accused’s wife or she leave that homestead as she does not belong there, or she do drop from school.



17. On how the cat left the bag, PW 1 testified that, one day, her father who is a vegetables vendor, as he was coming home, she heard the accused talk to him and enquiring about PW 1's mother as he heard something that he wanted to share with her. Her father responded to him that he would not speak to her mother having by-passed her father and so the two had a sitting, outside PW 1's house but in the exclusion of PW 1. PW 1 did not know what the two discussed.
18. After the two summed up their discussion outside, PW 1's father got into the house and started interrogating PW 1 on the interaction with the accused on that fateful day, but according to her, her father based his interrogation on the version he had been told by the accused person but eventually PW 1 managed to tell her father her version which necessitated her father to summon her mother home to find a way forward.
19. A meeting between the two families, that is, the accused and his parents and PW 1 and her parents was convened where each party maintained a hard stance, PW 1 accusing the accused and the accused denying, bringing the meeting to a deadlock, necessitating PW 1's father to take it to the next stage being before the village elder.
20. At the village elder, the composition was as in the earlier meeting but in attendance was Yunus, PW 5, who PW 1 stated that he confided to the membership that the accused had threatened him and hence he declined to testify. Thereafter, the village elder passed his verdict that the Complainant be taken to hospital for examination. PW 1 and her parents went to Kwale hospital where the medics declined to examine her without a Medical Examination Report form, Form P3, necessitating them to report the matter to Kwale Police Station.
21. PW 1 identified her Form P3, Laboratory Request and Report Forms, A Post Rape Care Form, PRC form and a Medical Treatment Book.
22. She concluded by saying that she has known the accused for close to one year and that Yunus, PW 5, passed as she was struggling with the accused.
23. On cross examination, PW 1 stated that she did not know where Yunus was coming from nor where he was headed. It also emerged that there was an opened sachet of condom at the alleged scene of crime. It further emerged that, at the meetings at home, the accused alleged that PW 1, contrary to what she had said that it was the accused who was trying to rape her, it was Yunus who was with her at the locus in quo having sex.
24. Asked by the accused why she did not share with anyone, PW 1 stated that, reporting to her mother or the accused's wife would be an exercise in futility as the two would choose to believe the accused and ignore her.
25. At the end of the cross examination, there was no re-examination on the part of the DPP and PW 2, Janet Mwaka Mwanyiro was ushered in at the witness box.
26. PW 2 stated that, at the material time the offence is alleged to have been committed, PW 1 who is her daughter was living at Golini in Kwale while herself was living in Likoni. She testified on how her husband summoned her home and there was a sitting at home then at the village elder.
27. Her evidence, by and large was similar to that of PW 1 from the summoning stage to the police station stage save as to add that while at the meeting held at their home, there was in attendance an in-law called Said Kuza and that in addition to Yunus, the accused accused PW 1 of having affairs with other men within that area and on that day, he alleged that he rescued PW 1 from Yunus.



28. On cross examination, PW 2 stated that PW 1 took her to the scene of the incidence where she saw a sachet of a condom and described that place as a place where obscenity is done.
29. After her evidence, PW 3, one Mohamed Said Muta took to the witness box. He stated that he is the father to the complainant. He recalled one day when the accused came calling to his house at around 2000 hours. In that house, PW 3 was with PW 1 and a younger boy aged 5 years. After the salutations, he stated that the accused asked the whereabouts of PW 1's mother where PW 3 responded to him that she was in Mombasa, and upon his response, the accused told PW 3 that he had something he wanted to discuss with him and upon hearing this, the two stepped aside for a talk.
30. It was PW 3's evidence that when they stepped aside, the accused informed him that he found the complainant with a young man namely Yunus Safari at the riverside. PW 3 on hearing this told the accused that he would deal with that issue and at that juncture they parted ways.
31. Back to his house, he picked a bone with her daughter who denied having been seen with Yunus on that material day as per the accused's version but instead she informed PW 3 that it is the accused, now turned saint who attempted to commit the atrocities on her.
32. He narrated how he later summoned his wife, how a meeting at his house and the subsequent one at the village elder's place was held without a solution and how they had ended up to the police station.
33. On the identification of the accused person, he described him as a neighbour who had not visited their house before and that he had known him for the longest time. He however stated that they are related on the ancestral lineage.
34. On cross-examination, he stated that the accused did not tell him the date or day that he alleged finding PW 1 with Yunus.
35. Having taken the evidence of the 3 witnesses, the DPP applied for an adjournment and a fortnight later, PW 4, Clinical Officer Mwajoto Nyamawi of Kwale Hospital was heard.
36. He stated that he examined the complainant one D.H.A on 22<sup>nd</sup> November, 2021. He stated that at that time she was 17 years old. He stated that he came to hospital on 22<sup>nd</sup> November, 2021. In his observation she was in fair general condition and she complained of having been defiled by brother-in-law. On that date, he said that he examined her and she was generally normal on her head, thorax, upper and lower limbs. The genitalia was normal. Her hymen was very intact. There were no lacerations nor abnormal fluid. He stated that they collected samples and conducted pregnancy test which was negative, external vaginal swab was normal and the VDRL test for syphilis and HIV test were both negative.
37. He stated that based on their observations, they did not have any evidence which would make them draw an inference of defilement. Upon an age assessment, the complainant was found to be 18 years, a test which was conducted by the facility's dentist.
38. As the maker of the documents, PW 4 produced a Form P3 bearing two dates by him being 22<sup>nd</sup> November 2021 and 29<sup>th</sup> November 2021 P. Exh 1, Laboratory Request and Report Form dated 29<sup>th</sup> November 2021 as P. Exh 2, A Post Rape Care Form bearing two dates by being 22<sup>nd</sup> November 2021 and 29<sup>th</sup> November 2021 P. Exh 1 and a Medical Treatment Book of diverse dates as P. Exh- 4. On re-examination, he stated that on asking the patient what had transpired, she said that she told him that she had been defiled by a brother-in-law.
39. After his evidence it was the turn for PW 5 Yunus Safari who told this court that he lives in Likoni and he is youthful and jobless. He said that he knew the accused person before the incident as a neighbour.



On 2<sup>nd</sup> November, 2021 at around 1300 hours he was walking home from the river where he had gone to take a bath. Along the way he found Salim the accused and a lady called Halima. He saw the two somewhere at the bush. They were around two metres into the bush from the path. PW 5 was just passing by when he saw them standing and he just walked his way. He stated that he left them there and later he recorded his statement with the police. He stated that at the time he was seeing them, they were fully dressed and did not hear them talking.

40. PW 5 not yielding to the answers the DPP anticipated, the DPP applied to have the witness stood down so that the DPP could have a thorough pre-trial conference with the witness. The application was not opposed by the accused and 5 days later PW 5 re-appeared in court ready to proceed.
41. PW 5 stated that in addition to what he had stated previously before being stood down, he wished to add that he was maintaining what he said on that date and that when he saw the two, he did not talk to them. He said that he went to the police station in honour of the summons by the police where he recorded the statement with the police station. He stated that he narrated to the police that he was walking from the river when he saw the accused and PW 1 and did not bother talking to them.
42. On cross examination he stated that he knew the accused as a herder and on that day, he saw the goats besides him. He stated that he did not know the relationship between the accused and PW 1 and that he did not see the condom that the accused was talking about. He further stated that he did not tell PW 1's parents as he had nothing to tell them. He stated that he was summoned at the Chairman's office where he testified there, testimony which was the replica of what he had just told the court. It was his evidence that at the Chairman's office, he did testify.
43. The last prosecution witness, PW 6 was the investigating officer, NPS Service No. 95728 Cpl (W) Irene Mueni of Kwale Police Station where she is stationed at the Gender Desk, one of the departments within the Police Station.
44. PW 6 told this court that on the 29<sup>th</sup> day of November 2021, a defilement case was reported at their station and she was assigned by the Station Commander to investigate on the same. She stated that she issued the complainant with a form P3 and referred them to the hospital and after they came back, she prepared the police case file.
45. According to PW 6, her investigations established that on the 2<sup>nd</sup> day of November, 2021, the complainant was heading to Kisazi dispensary, at around 1100 hours, along the way she met with the accused person herding goats. The accused called her by her names, Halima, and told her that he loved her so much. In response, she told him that she does not love him. Forcefully, the accused dragged her into the forest and ordered her not to scream. The victim however defied this order and she screamed and refused to open up her legs.
46. PW 6 stated that a person who was passing by that place heard the screams and rushed at the that place and found the accused attempting to defile the complainant.
47. The accused fled and left the complainant behind. PW 6 testified that on 10<sup>th</sup> December 2021 the accused person was arrested at Golini. As she concluded, she stated that she was able to establish that the complainant was an adult having been born on 4<sup>th</sup> September 2003.
48. On cross examination, she stated that the victim gave her the name of the perpetrator who she was able to identify very well.
49. After the end of the evidence by PW 6, the DPP closed her case. The court invited both the DPP and the Accused to make their respective closing submissions or arguments but they opted to rely on the



record in the file and invited the court to give the ruling under section 210 of the *Criminal Procedure Code*.

### **Defence Case**

50. The accused person was placed on his defence and section 211 of the *Criminal Procedure Code* and Article 50 (2) (i) of *the Constitution* of Kenya having been explained to the accused person, he elected to defend himself by way of tendering sworn evidence and calling 3 witnesses. A defence case was scheduled.
51. DW 1 was the accused who informed this court that his name is Salim Ali Guni. After the charges were read over to him, both the main and alternative, he told this court that he maintained his innocence and that on 2<sup>nd</sup> November 2021, he was on his normal duties of herding goats. He saw the Complainant herein and Yunus making out. He approached and when he got there, they tried to apologize to him. He decided to keep that to himself but as it would turn out later, he decided to disclose it to his wife under condition that she would not divulge this information to anyone, and in particular, the complainant's mother who resides in Mombasa.
52. One week later, DW 1 saw his uncle, PW 3, at a distance and satisfied himself that he was around. That evening, at around 2000 hours, DW 1 went to PW 3 and explained to him that he had seen PW 1 have sex with Yunus, PW 5. After divulging this information to PW 3, DW 1 stated that he left for his house.
53. The following day, DW 1 states that he received a Chairman's summons, served upon him by PW 3 requiring his attendance at the Chairman's office over the matter.
54. At the Chairman's office, DW 1 testified that he was interrogated whereby he denied the accusations levelled against him. He stated that Yunus was also interrogated and according to DW 1, Yunus denied ever seeing him at the scene of the crime. He further stated that, according to Yunus, he informed the Chairman that for him, he knew that all along he had been summoned about school related issues and not about the case at hand, neither did he know a thing about it. Upon the interrogations of the 2, they went home and their attendance was required the following day at the same venue.
55. On that following day, the complainant tabled her case before the chairman, and her agitated mother could not allow DW 1 have a rejoinder and at that juncture, the Chairman referred the parties to the hospital.
56. DW 1 believed that there is hatred against him thus catalyzing this issue.
57. On cross examination by the DPP, DW 1 stated that they live within the same homestead with the complainant, just about 80 metres apart. He stated that the complainant was apologizing to him as he had seen her having sex and she requested him not to tell anyone. He stated that he finally shared this information with PW 3 because he believed that what PW 1 was doing was not right as she was a school going girl.
58. DW 2 was the accused's wife. Her testimony was to the effect that the accused had told her that he had found PW 1 and PW 5 making out. She said that the accused then went to PW 1's parents and informed them and the matter escalated to the Chairman's office.
59. On cross examination she said she has known PW 1 for about 5 months since the offence is said to have happened. Before that she had known her for 2 years. She said that they do not live in the same house with PW 3 as hers is about 120 M away. On her the nature of her relationship with PW 1, she said that she knew that PW 1 is related with DW 1 from the family lineage but on her part, she was neither a friend to, nor had bad blood with PW 1 and that they have never quarreled.



60. Even though the accused had promised to call 3 witnesses, he opted to close his case after the testimony of his wife.
61. The Court invited the parties to put in their closing arguments but none opted to put in any, opting to rely on the record in the court file.
62. Having heard both parties at their full lengths, the court retired to make its determination.

### **Analysis and Determination**

63. The accused person has been charged with the offence of attempted rape which is proscribed by section 4 of the *Sexual Offences Act* and the alternative count therein of committing an indecent act with an adult which is proscribed by section 11A of the *Sexual Offences Act*. Section 107 of the *Evidence Act* places the burden of proof of all the accusations against the accused person on the DPP. This burden hardly shifts to the accused who on the other hand is to be presumed innocent until the contrary is proven.
64. The standard to which the DPP is to discharge the burden of proof is beyond reasonable doubt as was restated in *Joan Chebichii Sawe -v- Republic* [2003] eKLR, that the prosecution must prove the guilt of the accused person beyond reasonable doubt. This Court however reminded itself that beyond reasonable doubt does not mean that the DPP must prove every single element or accusation to perfection beyond a shadow of doubt. In his undoubted wisdom, Lord Denning shed light to this in the case of *Miller -v- Minister of Pensions* [1947] 2 ALL ER 372 where he held that;

That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt but nothing short of that will suffice.

65. Section 4 of the *Sexual Offences Act* defines the offence of attempted rape as;

Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life.

66. In the case of *Abraham Otieno vs Republic* [2011] eKLR Kisii H.C Criminal Appeal No 53 of 2009, Asike Makhandia J (as he then was) tells us what would constitute the offence of attempted rape as follows;

For an offence of attempted rape to be deemed to have been committed under the section, the prosecution must prove that the culprit acted in such manner that there was no doubt at all as to what his intention was. The intention must be to rape. It must be shown that he was about to rape the victim but was stopped in tracks and or in the nick of time. The intention to rape must be manifest. Such intention can be manifested for instance by word of mouth or conduct of the culprit. If the culprit proclaims his intention to rape and directs his efforts towards that goal for instance, by holding the victim or pushing her to the ground, undressing her, removing her pants if at all and also unleashing his male genital organ in preparation thereof but does not go the whole hog because of factus



interveniens, that would be good evidence of attempted rape. Alternatively, if the culprit without expressing his intentions verbally gets hold of the victim, fondles her, removes her clothes including her pants and also undresses himself in preparation thereof but for one reason or another something happens which compels him stop, again that would be good evidence of attempted rape.

67. In our present case, the evidence of PW 1 is that the accused person lured her by offering a better route than she had in mind, he went further to seduce and propose to PW 1 and when PW 1 turned his offer down, he unleashed the latent beast that was inside him. he forced her into the forest, stripped her naked and unleashed his penis ready to penetrate into her vagina. According to PW 1, there were two factus interveniens, firstly her struggles and closing of legs and secondly the passing of the person the accused shockingly said, mtu. To that extent, the evidence of PW 1 could establish the offence as charged. This is the evidence, the basis by which the charges against the accused are cast.
68. However, this court after analyzing the evidence of PW 1 in its entirety and harmoniously with the rest of the prosecution witnesses, and appreciating the defence by the accused, finds the prosecution evidence shaken and unable to stand the test of beyond reasonable doubt. This is as the court found grave inconsistencies that were unexplained and they were going to the crux of the case
69. Whereas PW 1 stated that Yunus, PW 5, when he was passing, he found PW 1 and the accused struggling at the alleged scene of crime and whereas the apparent not my circus, not my monkey attitude by PW 5 could be understood as a choice not to interfere with other people's business, his evidence in court dislodges allegations by PW 1 as he stated that he saw the two within 2 metres from him and they were just standing. It is evident therefore that when Yunus was passing, he did not see any struggle.
70. Further it was the evidence of PW 1 that the struggle started at 1100 hours. On the other hand, it was the evidence of PW 5 that he passed by that place at 1300 hours, 2 hours into the struggle. It is this court's firm opinion that any reasonable person, in his right senses would notice a person in distress having struggled with another human being and of different gender for two hours. Were the parties sweating, panting and/or dirty? Was the place disturbed Yunus was such a person and his not noticing such struggles negates the existence of the same. In addition, it appeared that PW 5 and PW 1 were familiar to each other for instance by the former being an alumnus of the latter's school, this court is disturbed that even with the eminent saving grace after the two hours struggle, why didn't PW 1 make a distress call to Yunus when she saw him?
71. The court noting this, started questioning the credibility of PW 1. The court noted again that whereas PW 1 testified before court that the accused threatened Yunus making him not testify before the village chairman, it was PW 5's evidence on oath that what he testified before court is the same information, he gave to the village Chairman. PW 5 stated that he testified before the village chairman. This court therefore finds the allegation by PW 1 that PW 5 was threatened and silenced by the accused as questionable and doubtful.
72. Further, PW 1's evidence invited this court to question her credibility where she solely impeached herself by demonstrating how those closest to her would choose not to believe her and instead would choose to believe the accused instead. She verily told this court that she could not report the matter to her mother as her mother would not believe her anyway. This court is at a loss imagining how a child would believe that her own mother would not believe her and yet expect an external party to believe her in toto, without an iota of doubt.



73. Further, PW 1 stated that the other intervening factor that made the accused stop his actions was the presence of another person whose presence shook the accused and he fled. The court notes that neither PW 1 who said that she saw him nor the investigating officer accounted for this very crucial witness. Was he known to PW 1? Why was he not summoned as a witness?
74. The court further notes that PW 1 stated that she struggled with the accused in the thickets, in the forest. she maintained that the struggle was for 3 hours, the court wonders how there were no physical injuries or healed scars such as scratches by sticks or thorns. However, the court warns itself against proceeding on conjectures. Be that as it may, this court got perturbed by the medical evidence produced before it. The court found the forms P3, P. Exh 1 and PRC, P. Exh 3 questionable. This is particularly because, for instance, whereas it is said that the P3 was issued by the Police Station on 29<sup>th</sup> November 2021, the medical practitioner PW 4 executed it on section B on the 22<sup>nd</sup> November 2021 7 days before it was issued and on part D on 29<sup>th</sup> November 2021. The same applies to the form PRC that the same medical practitioner executed it on the 22<sup>nd</sup> November 2021, 7 days before the matter was reported. In his evidence, the medical practitioner, PW 4 stated that PW 1 went to the hospital on 22<sup>nd</sup> November 2021 which is however inconsistent with the flow of events by the PW 1 and the investigating officer who says that the matter having been reported on 29<sup>th</sup> November 2021, PW 1 went to hospital on that day. These observations shake the credibility of such a witness and the mere fact that he would testify that he saw a patient even before the patient allegedly visited their facility, the court questions the evidence the medic collected which would be either inculpatory evidence or exculpatory evidence or both, which would aid this court administer justice from a point of truthful facts.
75. In making its finding on the credibility of the PW 1 and PW 4, the Court was 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.

76. The court considered the defence of the accused person. He rode on the theme that his good intentions to protect PW 1 brought him misery. His defence was that, he found PW 5 and PW 1 making it out and it is after reporting to her parents that PW 1 changed the story against him. in considering his defence, I weighed the conduct of PW 1 and that of PW 5. Firstly, I observed that PW 5 was economical with the truth and very conservative with what he told the court. He told the court what he wanted it to hear and withheld that which he sieved through and decided not to give. This court observes this even though PW 5 was neither declared hostile nor a refractory witness, but the act of the DPP standing him down to enable her do a thorough pre-trial conference with him sent a strong message to the court that he was not yielding to the answers that the DPP had, answers which the DPP must have been extrapolating from the witness statement he had recorded. Secondly, in the part of PW 1, the court noticed that she sat with this issue until the accused disclosed to her father. She did not point out the accused ever threatening her with dire consequences if she ever shared with anyone. What she added as the ultimatums given to her by the accused person about marriage or vacating that homestead would indeed catalyze her reporting to her parents but she never did. There was no threat at all that hindered her from reporting before the accused took it upon himself. Thirdly, PW 1 was so protective of Yunus



to the extent of stating before court that the accused threatened and silenced him not to testify before the village chairman, statement which ultimately was negated by Yunus by stating that he did testify.

77. The accused person brought the issue of a condom that was found at the locus in quo. PW 1 confirmed that there was such a condom at that place. What is in conflict was, who was standing there where the condom was. On one part, PW 1 states that it was herself and the accused while on the other part, the accused states that it was PW 1 and PW 5 making it out. However, getting to the evidence of PW 2, she stated that she visited the alleged scene of crime and she described that place as a place where obscenity is done, which was understood to mean that people engage in open air sex in that area. With this fact in mind, and based on the two versions, one by the accused and the other by PW 1, and considering the protective nature of PW 1 towards PW 5, and further considering the conduct of PW 5 in terms of withholding information, the court posed a question to itself, thus, who between the two is the court to believe? Was it a coincidence that the identified scene happened to be one where sexual sins are committed? These were random questions which the court did not endeavor to get answers as either way it would be an answer harsh to one party but nonetheless, these questions raised reasonable doubts in the court's mind.
78. I found the defence by the accused as plausible but I disagreed with him that this case was necessitated by hatred but the closest it could be is misrepresentation of facts from a single instance, which could not be said to be vengeful but spiteful.
79. Finally, the court got bothered with the evidence of PW 6 viz a viz PW 1. It goes without saying that the substance of the case must have been narrated to PW 6 by either PW 1, PW 5, the accused or the unnamed person who passed by. From the evidence of PW 6, it can only be inferred that either PW 1 withheld information before court, or PW 6 exaggerated the information she was given or there was withholding of evidence and not brought to court. I say this because the vivid description given by PW 6, the investigating officer, is not found with the complainant even though it appears to form the substratum of the prosecution case. For instance, the investigating officer told the court that the complainant screamed and it is her screams which made a passerby to rush to that scene and rescued the complainant from the accused. This person was not presented as a witness neither did the complainant testify as having been rescued in such a manner.
80. The upshot of the foregoing is that I find the case and evidence against the accused person vis a viz the defence by the accused person as raising reasonable doubts.

### **Disposition**

81. 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 Attempted rape which is proscribed by section 4 of the *Sexual Offences Act* and the alternative count therein of committing an indecent act with an adult which is proscribed by section 11A of the *Sexual Offences Act*. I order that the accused be set at liberty forthwith unless he is otherwise lawfully held.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KWALE ON THIS 17<sup>TH</sup> DAY OF MAY 2022.**

**KIONGO KAGENYO ZACHARIA**

**RESIDENT MAGISTRATE**

In the presence of:

Mr. Felix- Court Assistant.



Ms. Faith Luseno, for the DPP

Salim Ali Guni-Accused

