



Director of Public Prosecutions v Mwatela alias Mbui Binti & another (Sexual Offence E075 of 2021) [2022] KEMC 41 (KLR) (27 September 2022) (Judgment)

Neutral citation: [2022] KEMC 41 (KLR)

**REPUBLIC OF KENYA
IN THE KWALE LAW COURTS
SEXUAL OFFENCE E075 OF 2021
ZK KAGENYO, RM
SEPTEMBER 27, 2022**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS REPUBLIC

AND

MBUI MWATELA ALIAS MBUI BINTI 1ST ACCUSED

MANGALE DORCAS 2ND ACCUSED

JUDGMENT

1. Before the charge sheet was amended on 7th April 2022 1st accused person had been charged jointly with the 2nd accused person for the offence of gang rape contrary to section 10 of the [Sexual Offences Act](#). Upon the amendment of the charges, the charges against the 2nd accused person were suspended as he had not been arrested and hence this judgement regards the 1st accused person who henceforth, for the purposes of this judgement shall be referred to as the Accused person. He is now facing charges of gang rape contrary to section 10 of the [Sexual Offences Act](#) No. 3 of 2006.

The particulars are that on the 24th day of December, 2021 at around 1000 pm at [Particulars withheld] village in Kinango sub-county within Kwale county of Coast region, in association with others not before court, one after another intentionally and unlawfully caused their penises to penetrate the vagina of SKT 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 24th day of December, 2021 at around 1000 pm at [Particulars withheld] village in Kinango sub-county within Kwale county of Coast region, in association with others not before court, one after another intentionally and unlawfully caused their penises to touch the vagina of SKT without her consent.



3. The accused denied the charges and a full trial ensued.
4. The accused person was unrepresented. He was present in court all through the trial. The matter was conducted in Kiswahili Language, the language of choice by the accused. He conducted his case while in custody even though he had been granted bail and bond.
5. The DPP to prove their case lined up a total of 6 witnesses while upon being placed on his defence, the accused gave his sworn evidence without calling any witness for the defence.

The Prosecution's Case

6. PW 6, JN who is the complainant's husband testified in Court that on the night of 24th December 2021, while asleep together with his wife, at 2300 hours he heard a knock on his door and upon opening, three unknown people who did not utter a word started beating him up. As he was being beaten up, his wife walked out of the house fast and he was left alone in the house. Shortly thereafter, he equally walked out of the house into the forest to save his own life where he stayed there for about 30 minutes. Afterwards, he went back to his house and in the company of his uncle's brother namely Kambi, they started looking for his wife by walking around the neighbourhood asking of her whereabouts all in futility.
7. PW 3 SKT, the complainant herein, told the court that on 24th December 2021, at around 2200 hours, while asleep together with her husband, PW 6, in his house, some men entered their house and beat up her husband and herself. She identified Mbui and Mangale Dorcas. Mbui (the accused) and another told her that since those people would hurt her they pulled her to safety and took her to a forest. It is at the forest that one after the other raped her. Whereas the unnamed assailant and the accused person left after the rape, Mangale Dorcas remained behind and as he was holding the complainant, she dashed and run for her safety.
8. PW 4, Moses Migele Nyale said that on the eve of Christmas 2021, at around 0200 hours he heard a knock on his door and upon opening the door, he saw the complainant seated outside his house. She told him that she had been raped and he assisted her and reunited her with her family, that night.
9. PW 2, CDK, the complainant's sister told the court that on the 2021 Christmas day eve, while asleep, at around 0100 hours, she was called over the phone by PW 4 who told her that her sister was with him having been raped and she needed her help. PW 2 proceeded to the house of PW 4 where she rescued her sister and took her to Vigurungani Police Station and later at Kinango Hospital where she was examined.
10. PW 1, Clinical Officer Moses Kasyoki Mutuku said that on the 2021 Christmas day, he examined the complainant who had reported at his facility with a complaint of rape by 3 people.
11. PW 4, NPS Service No. 113421 PC(W) Elizabeth Mutanu conducted the investigations. She summed up the findings of her investigations from the time the matter was reported at the station at 0300 hours on the 2021 Christmas eve to the date of arresting the Accused person on 27th December 2021. Her investigations were heavily placed on the narrations by the witnesses in addition to the medical evidence.

The Defence Case

12. DW 1, the accused person told the court that on the 27th December 2021, while seated at the comfort of his house, police officers knocked and arrested him informing him that he had been arrested for the charges of stealing Ksh. 10, 000/= which he denied. Upon his arraignment, he was surprised that the



present charges which are alien to him had been pressed against him. He denied the knowledge of the events of the 24th December 2021, night where the complainant was attacked and raped.

Analysis and Determination.

13. The accused has been charged with the offence of gang rape under section 10 of the *Sexual Offences Act*, 2006 which provides thus,

Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

14. On its part, section 3 (1) of the *Sexual Offences Act*, 2006 defines rape in the terms thus,

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.

15. The DPP therefore was duty bound, through evidence, to prove the case against the accused person beyond any reasonable doubt that;

- a. The accused caused his penis to penetrate the vagina of the complainant. Bearing in mind the definition of penetration under section 2 of the Act which means, the partial or complete insertion of the genital organs of a person into the genital organs of another person;
- b. That this penetration was done without the consent of the complainant;
- c. That the accused was positively identified;
- d. That the accused caused the penetration in association of another; and
- e. Both the accused and that other, had the common intention.

16. These conjunctive elements had to be proved by the DPP beyond reasonable doubt as was restated in *Joan Chebichii Sawe -v- Republic* [2003] eKLR. This Court however reminded itself that beyond reasonable doubt does not mean that the DPP must proof 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.



Did the evidence by the DPP prove the element of penetration?

17. PW 1, the medical practitioner told the court that he examined the complainant on the 25th day of December 2021, which is a few hours after the incidence. His examination revealed that the patient had normal labia majora and labia minora. She had bruises on vaginal introitus i.e. multiple bruises on the surface of the vaginal canal. The complainant did not have any discharge at that moment. Upon conducting a high vaginal swab, PW 1 observed that there were epithelial cells sufficient to infer that there was penetration.
18. This observation by the medical practitioner demonstrated corroborated by the oral evidence of the complainant makes this court draw an inference that there had been penetration in terms of section 2 of the *Sexual Offences Act*, 2006 to the complainant.
19. Having found as such, the gravamen of the case lies on, who caused this penetration? Did the accused person penetrate the complainant?
20. This leads the court to the finding on identification of the assailant.

Positive identification of the assailant

21. PW 3 told the court that while asleep at around 2200 hours, some men entered their house and beat them up. She said that she identified Mbui (Accused) and Mangale Dorcas. It was her evidence that the accused and another unidentified person told her that those people would hurt her and that the 2 were willing to pull her out to safety. The three took her to a forest where one after the other raped her.
22. She told the court that in the house, they were attacked by many people and the 3 who raped her were part of them that she could identify and recognize. She said that, at that night, she could only recognize Mbui and Mangale Dorcas by names while the other she could not recall his name that night but came to recall so much later. She said that even though she could not identify the other members of the gang who attacked them that night, she could not have mistaken the 3 she identified as she knew them even by their voices.
23. On his part, PW 6, the husband to the complainant said that on that night, they were attacked by 3 people. His wife walked out fast and left him in the house. He said that he identified by recognition his attackers that night as Jumaa, Mwangi and Mbui who he clarified to be another Mbui and not the accused. He categorically stated that he only saw the three at that night.
24. The following day, when the complainant and PW 6 spoke over the phone, she told him that she had been raped by; Mwatela, Mangale and Mwero.
25. On his part, PW 4 told the court that when she came at that night, PW 3 told him that she had been raped by 3 men that she knew, who were; Mbui Binti, Mangale Dorcas and Mwero Ngoja.
26. While narrating the events to the investigating officer, the complainant told her that they were attacked by a crowd of about 10 men who were armed by sticks and clubs. She told the investigating officer that when she upon seeing the heavy assault on them, she walked out and run fast while 3 of the men who she mentioned to the investigating officer as; Mangale Dorcas, Mbui Mwatela and a third one who she said that she knew by face followed her to the forest.
27. This court posed a question to itself, at what point did the complainant know the name of the 3rd assailant? It appears that when she was narrating to the very first person who came to her help she knew the names of all the assailants, the following day while explaining to her husband she equally knew the assailants all the three by names but the same day while narrating to the investigating officer she only



knew of two. Equally, when testifying before court, she told the court that whereas at that time she did not know the name of the third assailant, she has now since established his name as Mwero Ngoya. Can this inconsistency be said as just a fanciful inconsistency that does not go to the root of the case. In Philip Nzaka Watu v Republic [2016] eKLR where the Court of Appeal held thus,

However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question. (emphasis mine).

28. I find that this inconsistency goes to the root of the case as if at all there is doubt on the identification and recognition of one of the assailants then there is need to assess the evidence as a whole in that line. There is no way that one would positively recognize a person immediately after the incidence and explain to the first responders but a few hours later tells the police that she does not know that person. This is a fact that goes to the credibility and veracity of the witness.
29. Turning on to the attackers and the identification of the attackers. PW 6 told the court that they were attacked by 3 men whom he could identify. Indeed, he mentioned them by their names. One of them shared a name with the accused person herein. It is not clear how he identified the three as, while it was at night, the source and strength of the lighting was not set out. In addition, he said that the attackers did not utter a word and hence it would definitely be difficult to recognize them by their voices. Be that as it may, he said that the number of the attackers were three.
30. On her part, the complainant, PW 3, told the court that the people who attacked them that night were many. She quantified the number to the investigating officer, PW 5 to about ten attackers. According to her, the accused and the other 2 were part of this gang and they are the only she recognized in that night attack.
31. From the descriptions by PW 3 and PW 6, the 3 who are said to have raped the complainant were well known to them as neighbours and childhood acquaintances. On his part, PW 6 equally, in his latter version of the evidence said that he knew very well those who attacked them in that night. To him they were three. There is no way that can be said that he could confuse those three that he recognized that night with the three narrated to him by the wife.
32. This court is faced with two versions. One by PW 6 of the attack by the three well recognized to him and that by the complainant of an attack by at least 10 of them where the three who she says that raped her were part of the gang. I find that 3 and 10 is such a considerable gap that one would not be said to be mistaken on their assessment. By virtue of the PW 6 removing the accused from the scene in the house, I make a finding that this court cannot without a doubt say that the accused was in that house attacking PW 3 and PW 6. That doubt in my opinion is not that which would be said to be a fanciful deflection to the course of justice.
33. Turning on to the medical evidence furnished in court. It was said that the attackers attacked PW 3 and PW 6 by use of sticks and clubs. It was said that both were beaten up by the gang. Naturally, such an attack would ordinarily leave a swelling or a bruise or a mark on the body of a human being. The examination at the hospital, as demonstrated at Section B of page 2 of the form P3 produced as P. Exh 1 appeared that there were no such injuries to be recorded by the medical practitioner. While this medical practitioner indicated as such on the P. Exh 1, he in passing, in P. Exh 3, the Form PRC



indicated bruises on upper limbs at the part under the heading: Genital Examination of the Survivor without giving any further details. This court is at a loss try to discern whether indeed the medical practitioner observed the injuries as at the time of the observation and recording on that part, what was under observation was the genitals of the survivor and at the rightful part of the statutory documents before him, he indicated as N/A. I note that both the P3 and the PRC were dated by hand as executed on 24th December 2021 while date-stamped as 25th December 2021. Given that the Form P3 was issued by the OCS Vigurungani Police Station On the 25th December 2021, I take an assumption that such an error by the medical practitioner was an inadvertent error in the course of work.

34. Turning on to PW 6 and the attack on him, it was said that he was attacked by the attackers by use of clubs and sticks. Equally, just as observed about PW 3, such an attack given the nature of the attack would naturally leave some marks on his body such as bruises, swellings or any such other body reaction however minute. PW 3 reported to the police station the day after the fateful night. It is my opinion that medical evidence that would corroborate the case theory on the attack at night would go a long way in the such of truth and justice than its omission. There was no proposition that any assault charges had been preferred against the known attackers neither was there any medical evidence on PW 6. Whereas this case was not about assault and injuries on PW 6, the relevance of such corroborating evidence in this case cannot be gainsaid.
35. PW 6 stated that when they were attacked, they screamed and neighbors responded promptly in response. In the absence of such medical report, it is my opinion that corroborating evidence on such attack would aid the demystification of the truth as it is the alleged attack that sired the alleged rape and hence forming a chain of events.
36. PW 6 further testified that the accused person confided to him that he was the one who had raped the complainant, a statement that he made while other people were listening. None of such other people came to testify as persons who heard the accused brag on having raped the complainant.
37. Turning onto the defence of the accused, he denied the knowledge of the offence and in particular on what happened to PW 3 and PW 6 on the 2021 Christmas eve. He said that indeed the case if at all it was true, would be based on selective prosecution akin to persecution as the other alleged assailant Mangale Dorcas was roaming freely. Indeed, as he was testifying that day, he said that the said Mangale Dorcas was with him at the holding cells together with PW 6 who had been jointly arrested by the police for a totally different offence. The nature of our judicial system would not allow the court to go on a discovery mission on a party's case and hence without evidence from the accused or the accused moving the court appropriately, that fact remained unproven. Be that as it may, if his allegation on oath were anything to go by, then it would be a sad state of affairs as there are unexecuted Warrants of Arrest as old as as from 28th December 2021. I implore the investigating officer to track n the prisoner movement book of the 22nd August 2022 to satisfy himself on the status of the said Mangale Dorcas.
38. Nonetheless, I find the denials by the accused person as worth of consideration. He said that he was a relative to PW 6. PW 6 on the other hand said that he knew the accused quite well. If at all the accused was at the scene of the attack, PW 6 would not have confused him. PW 6 was categorical that the Mbui he saw that fateful night was not the Mbui in court and therefore I make a finding that it is doubtful that Mbui was present at the alleged night attack on the PW 3 and PW 6.
39. On the allegation that the accused was arrested for the offence of stealing as opposed to the present charges, there was no evidence to prove the same as even though PW 6 was present at the time of the arrest, the accused did not interrogate him during cross examination on the reason of his arrest neither did he question any other such witness nor provide the extract of the entry at the occurrence book records that had him detained at the police cells after arrest.



40. The upshot of the foregoing, I find that the DPP has not proven the case against the accused beyond reasonable doubt. The identification of the accused person as the perpetrator is doubtful and as such cannot be said to have been placed at the scene of the alleged crime.

Disposition

41. 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.

42. Accordingly, 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 27TH DAY OF SEPTEMBER 2022.

KIONGO KAGENYO

RESIDENT MAGISTRATE

In the presence of:

Mr. Felix- Court Assistant

Ms. Faith Luseno, Prosecution Counsel, for the DPP

Mbui Mwatela alias Mbui Binti – Accused

