Mwikya v Republic (Criminal Appeal E026 of 2024)
[2025] KEHC 16065 (KLR) (4 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16065 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E026 OF 2024

NIO ADAGI, J

NOVEMBER 4, 2025

BETWEEN

ISAAC MUEMA MWIKYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and judgment of D.N. Sure (PM) in S.O. No. E028 of 2022 at Kangundo Law Courts delivered on 17/4/2024)

JUDGMENT

A. Introduction

1. The Appellant Isaac Muema Mwikya was on 21/7/2022 charged in the Chief Magistrates Court at Kangundo with rape contrary to Section 3(1) as red with Section 3(3) of the *Sexual Offences Act*. The particulars of the offence were that on 16th July 2022 in Tala Location of Matungulu Sub-County within Machakos County intentionally and unlawfully caused his penis to penetrate the vagina of INR (name withheld) by use of force.

2. In the alternative, the Appellant was charged with the offence of Committing an Indecent Act with an adult contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the alternative offence were that on 16th July 2022 at Tala Location of Matungulu Sub-County within Machakos County intentionally and unlawfully touched the vagina of INR (name withheld) with his penis against her will.

3. The Appellant pleaded not guilty to the main charge and the alternative charge and the matter was set down for hearing. The prosecution called five witnesses in proving its case.

4. The Appellant gave unsworn defence evidence and was called one witness.

5. Upon considering the evidence placed before the trial court, the Appellant was convicted of the offence of rape contrary to Section 3 as read with Section 3(1) of the *Sexual Offences Act* and sentenced to 10 years imprisonment on 17th April 2024 convicted the Appellant and sentenced him to 10 years in jail sentence running from 27/07/2022.

B. Petition of Appeal & Amended Grounds of Appeal

6. Being dissatisfied with the decision of the trial court, the Appellant lodged the instant appeal against both the conviction and sentence in his undated Memorandum of Appeal raising three grounds of appeal as follows:-.

   i. That learned trial magistrate erred in both fact and law by convicting the Appellant on evidence that didn't meet the minimum threshold to uphold a conviction.

   ii. That the learned trial magistrate erred in law by sentencing the Appellant by virtue of the minimum mandatory sentence provisions in the Sexual Offence Act.

   iii. That the trial magistrate erred in law and fact by not considering the period the Appellant spent in remand custody as per section 333(2) of the Criminal Procedure Code before his conviction on 17th April 2024

7. The Appeal was canvassed through written submissions. The Appellant's submissions are undated whilst the Respondent's submissions are dated 13th May 2025.

8. The Appellant opened his submissions by stating that a lot of sexual offence cases in our day-to-day life have emerged. Most of our prisons are 60% full of sexually related cases. This may sound hypothetical and unrealistic. Those of us inside prisons can attest to that. This has been brought up by letting the boy child become the targeted in matters of love affairs. Many cases have ended up leaving the young men beast of burden leaving their feminine colleagues neither untouched nor charged. Most of these cases reach the point of conviction due to lack of proper investigations or from personal differences like grudges that emanate in between the parties or even family matters where the African slogan states that, "Homes are like a gizzard that contains filthy but outside looks pleasant". The parties in this case are no exception because as it would emerge later that they were distant relatives.

   Most of young men being naive in matters of law and lacking representation in court, end up being convicted.

9. The Appellant argued his appeal through his comprehensive submissions which I do not wish to reproduce and prays that this mighty honourable Court do exercise an independent scrutiny to this case and give true justice out of the legal rule of ex-debito justiciae.

10. On the other hand, the Respondent in opposition to the appeal and in responding to the grounds of appeal, submitted that the evidence produced during trial to prove penetration and lack of consent was sufficient to prove the ingredient to the required standards.

C. Analysis and Determination

11. This being a first appeal to the High Court, I am enjoined by the now settled principle regarding the duty of the first appellate court which was well captured by the Court of Appeal in Kiilu & Another V Republic, [2005] 1 KLR 174, where the Court stated thus:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the

evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

12. The court is not involved in finding evidence to support the conviction. It is involved in wholesome review of evidence and reaching its own conclusions. Guided by the above principle, I have carefully and exhaustively perused and considered the trial court's record, the evidence presented before the trial court, the judgement, the Memorandum of Appeal and the written submissions filed on behalf of the Parties.

13. I have also keenly read the proceedings and judgment of the trial court. Having done so, I find that the issues arising for my determination are:-

    i. Whether the prosecution proved the charge of rape.

    ii. Whether the Appellant was properly identified as the rapist.

    iii. Whether the trial court considered the period the Appellant spent in remand custody under Section 333(2) of the CPC,

    iv. Whether the sentence of 10 years was excessive.

i. Whether the prosecution proved the charge of rape.

14. The offence of rape is provided for under Section 3 of the *Sexual Offences Act* which provides that:

> "(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."

15. From the prosecution's case, the alleged incident herein arose on 22nd July 2022 when PWI went home and found PW2 was not jovial and did not receive her normally. She became concerned and decided to talk with her in the presence of their mother, PW3, and Aunt, and that is when PW2 told them she had been raped.

16. PWl told the court that they reported to Kangundo police station and they were referred to the hospital where she was examined and treated. PW3 stated that the medical report confirmed penetration.

17. PW4 produced the P3 form and the treatment notes and stated that she examined PW2 on 25th July 2022 and noted the following:

    i. Normal external genitalia

    ii. Whitish discharge noted

iii. Hymen inflamed but intact and with injuries

iv. Tenderness on the vagina

v. No spermatozoa seen

18. I have considered the above and find PW4 established PW2's vagina was inflamed and though the hymen was intact, it had injuries and was inflamed. PW4 did not say what the whitish discharge was.

19. Section 2 of the Sexual Offenses Act defines

> " penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person "

20. Based on the foregoing definition of penetration, it is my understanding that there has to be a breakage, opening or tear of the hymen in order that the genital organ of another person may be inserted in whether partially or complete. In this case the hymen was intact which means neither partial or complete insertion would have taken place [emphasis mine].

21. After considering PW4's findings, I am not convinced that penetration took place whether partially or complete when the hymen was intact. In my view PW4 created a gap in the prosecution evidence with regard to the proof of rape. In the circumstances of this case, it is my considered view that offence of attempted rape would have sufficed.

22. Accordingly, I find that the offence of rape was not proved to the required standard.

ii. Whether the Appellant was properly identified as the rapist.

23. The Appellant in his unsworn defence case testified that he was a Mason. In July 2022, they were repairing a house in Kitunduni. They completed the repairs on 16/7/2022 and went home. On 25/7/2022, police vehicle came to their homestead and he was arrested but he did not know why. He saw 2 girls and the allegation was that he had defiled one of them which he denied. He was charged but still he denies.

24. DW2 was Joshua Maveke, also a Mason. He testified that the father of the Appellant is his cousin. On 26/7/2022, they were repairing a house. There was a girl who was coming to the house. He would send the Appellant for cement outside, water and he would bring it until they finished the work. After a week, the girls father came and asked about the girl. DW2 did not witness anything. The girl's father is also his cousin from his father's side. He wanted to know where the Appellant lived and he showed him. DW2 stated that he was surprised with the issue because he was with the Appellant throughout the construction.

25. On cross-examination, he insisted that they finished the repair work on 16/7/2022. He did not know what happened prior to the construction and that they used to go to the site with the Appellant.

26. PW1 testified that PW2 opened up and told them Fundi raped her.... fundi told her to bend over and inserted his penis on her vagina. The Appellant told PW2 he would get a bike and come for her to finish sleeping with her, PW1 noticed PW2 was afraid of the sound of the bike. She is mentally unwell. She knew it was Isaac (Appellant) because PW2 called him by name. PW1 did not know the Appellant but PW2 did and was able to point him out. On further cross-examination, PW1 stated that the Appellant used to arrive earlier than the contractor and had time to commit the offence.

27. On the above, PW2 in her testimony in chief stated that she was collecting rubbish and burning when Isaac (Appellant) was repairing Shosho's house. He was with another man. He told her to remove her

pant. He touched her breasts and told her to bend over. He lowered his trouser and inserted his penis on her vagina.

28. But on cross-examination PW2 changed and stated that the Appellant was alone.

29. From the prosecution's evidence, the alleged incident herein arose on 22nd July 2022 when PWI went home and found PW2 was not jovial and did not receive her normally. The Charge Sheet gives the date of the incident as 16th July 2022. The Prosecution did not explain the discrepancy in the said dates or seek to amend the Charge Sheet. The Appellant was thus jeopardized as it was not clear whether he had to defend himself over an incident that occurred on 16th July 2022 or 22nd July 2022

30. On the foregoing, I find the evidence of PW1 and PW2 to be inconsistent and unreliable. Further whereas PW1 testified that the Appellant used to arrive earlier than the contractor and had time to commit the offence, DW2 stated that they used to go to the site with the Appellant. Having already found that the offence of rape was not proved, it follows that the Appellant could not have been the rapist.

31. I am guided by Ali Mwaro Kitsao v Republic [2019] eKLR where the court stated that to succeed on a charge of rape the prosecution must prove have the following:

> " From the foregoing, in order for the conviction on a charge of rape to be sustained, the prosecution had not only to place the appellant at the scene of the crime but also show that the complainant had positively identified the accused person. In addition, it was for the prosecution to show that the accused had intentionally and unlawfully caused penetration of the genital organ of the complainant without her consent."

32. There is a doubt in my mind as to whether indeed the Appellant raped the complainant (PW2). The benefit of that doubt has to be given to the Appellant and I do so. In effect the conviction for rape cannot be sustained.

iii. Whether the trial court considered the period the Appellant spent in remand custody under Section 333(2) of the CPC,

33. The Charged Sheet shows that the Appellant was arrested on 26th July 2022 and arraigned in court on 27th July 2022. While sentencing the Appellant, the trial Magistrate stated that "the sentence will start running from 27th July 2022" This clearly confirms that the Trial Court did take into account the time spent in custody by the Appellant. This ground of appeal is therefore is unfounded.

iv. Whether the sentence of 10 years was excessive.

34. The Appellant was sentenced to 10 years imprisonment.The Prosecution indicated that the Appellant had no records and that the sentence was specific and prayed the law takes it cause. The Appellant in mitigation state he was the eldest child and in their homestead such reports were rampart and he was fixed. The Trial Court in its ruling considered the lad and the circumstances of the offences.

35. Section 3(3) of the *Sexual Offences act* provides that:

> " 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."

36. In Republic v Joshua Gichuki Mwangi SC Petition No. E018 of 2023 the Supreme Court held that the minimum mandatory sentences in the *Sexual Offences Act* were Constitutional thus the courts are

bound by the minimum mandatory sentence as provided for by law. The sentence was proper and within the law.

D. Disposition

37. In view of the foregoing, I find that there was no sufficient evidence for convicting the Appellant for the offence of rape herein therefore:

    a. The appeal herein is upheld. The conviction of the Appellant is hereby quashed and the 10 years sentence imposed on him set aside.

    b. The Appellant is set at liberty forthwith unless otherwise lawfully held.

    Orders accordingly. File closed.

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 4TH NOVEMBER 2025

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 4TH NOVEMBER 2025

NOEL I. ADAGI

JUDGE

In the presence of

Appellant in person

Ms. Agatha Abang for State

Milly -Court Assistant