



**Yarrow v Republic (Criminal Appeal 4 of 2024)
[2025] KEHC 16072 (KLR) (6 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16072 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MANDERA
CRIMINAL APPEAL 4 OF 2024
JN ONYIEGO, J
NOVEMBER 6, 2025**

BETWEEN

ADAM HASSAN YARROW APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence by Hon. Mukabi Kimani – PM, delivered on 21.07.2023 in Mandera SPM’s Court in Criminal Case No. E011 of 2022)

JUDGMENT

1. The appellant was charged and convicted of the following charges:
2. Count I: Rape contrary to Section 3(1) as read with Section 3(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 03.04.2022 at around 1000hrs at [Particulars Withheld] in Mandera East Sub County within Mandera County, he intentionally and unlawfully caused his penis to penetrate the vagina of B.A.I. without her consent.
3. He faced an alternative charge of committing an indecent act with an adult contrary to section 11(A) of the *Sexual Offences Act* No. 3 of 2006. Particulars being that on 03.04.2022 at around 1000hrs at [Particulars Withheld] in Mandera East Sub County within Mandera County, he intentionally touched the vagina of B.A.I. with his penis against her will.
4. Count II: Assault causing actual bodily harm contrary to section 251 of the Penal Code. Particulars were that on 03.04.2022 at around 1000hrs at [Particulars Withheld] in Mandera East Sub County within Mandera County, he assaulted B.A.I., thereby occasioning her actual bodily harm.
5. Count III: Being unlawfully present in Kenya c/sec 53(1)(j) as read with section 53(2) of the Kenyan Citizenship and Immigration Act No. 12 of 2011. The particulars were that on 03.04.2022 at around 1000hrs at [Particulars Withheld]a in Mandera East Sub County within Mandera County, being



- an Ethiopian national he was found unlawfully present in Kenya without valid passport or permit authorizing him to stay in Kenya.
6. Having denied the offence, the matter proceeded to full trial. The trial court in its finding found the appellant guilty of all the three charges and consequently sentenced him as follows: on Count I, 10 years' imprisonment, Counts II and III, 1-year imprisonment each.
 7. The appellant was aggrieved by the convictions and the sentences and filed this appeal. The appeal raises the following grounds: -
 - i. That the learned trial magistrate erred in matters of law and fact in convicting and thereafter sentencing him yet the same could not be supported by any scintilla of evidence tendered before the trial court.
 - ii. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant based on inconsistent and contradictory evidence.
 - iii. That the learned trial magistrate erred in matters of law and fact by failing to take into account the appellant's defence and mitigation.
 8. The appellant prayed that the convictions be quashed, the sentences be set aside and he be set at liberty.

Submissions

9. The appeal was canvassed by way of written submissions of the appellant and those of the Prosecution Counsel, Mr. Stephen Kasyoka.
10. The appellant in his submissions urged that the prosecution's evidence was marred with contradictions and as such, the same could not support any conviction. That a case in point is that, PW1 stated that the appellant was arrested on same day by her husband and two other people while PW2 stated that the appellant was found in a group of other people and going by his identity, he was arrested.
11. It was contended that the complainant stated that the appellant apparently after raping her, ejaculated in her vagina which allegations were not corroborated by the medical report. He also decried the sentence meted out by the trial court to be severe given that the elements of the offence charged were not proved. In the end, he urged this court to allow the appeal, quash the conviction and set aside the sentence by the trial court.
12. On the other hand, Mr. Stephen Kasyoka urged that the prosecution proved to the required standards the elements of the offences charged. That the same was proved by the evidence of PW1 as corroborated by the evidence of PW4. It was submitted that there was absence of consent to the sexual activity on the part of PW1 and noting that section 42 of the *Sexual Offences Act* states that consent is obtained if a person agrees by choice and has the freedom and capacity to make that choice, in this case, consent was not obtained.
13. It was further contended that it was not to be denied that the appellant assaulted the complainant so as to subdue her into having sexual intercourse with him. That the foregoing notwithstanding, the appellant was found to be of Ethiopian origin and therefore, was in the country illegally. On sentence, it was urged that the same were within the provisions of the law and as such, this court was urged to uphold the same.



Analysis and determination

14. This being a first appeal, it is the duty of this court to re-evaluate and re-analyse afresh the evidence adduced at the lower court and draw its own independent conclusions while bearing in mind that it neither saw nor heard any of the witnesses testify and give due allowance for that. [See the case of *Okeno vs Republic* (1972) E.A 32 which was reiterated in the case of *Kiloly & Another vs Republic* (2005) 1 KLR].
15. I have carefully considered the grounds of appeal, the record together with the written submissions filed by both parties herein. Issues that form the grounds of appeal are; whether the prosecution established the elements of the offences charged to the required standard of proof of beyond reasonable doubt; whether the court convicted based on contradictory evidence; whether the court considered the appellant's defence and whether the sentence meted out was harsh and excessive in the circumstances.
16. PW1, B.A.I stated that on 03.04.2022 at 10.00 am, she was herding her goats at her mycorebi farm when she suddenly dosed off. That she was woken up by a strike on her back and waist but due to exhaustion, she fell down and lost consciousness. She stated that the appellant raped her and further ejaculated in her as she later felt sperms drift from her vagina. It was her evidence that the appellant wore a green cap, black watch and had a walking stick. She further stated that upon the appellant leaving, she called her husband who equally called for MM, a taxi driver and two more people. That the said people embarked on a search that led to the arrest of the appellant. She further stated that the appellant was a stranger to her prior to the occurrence of the incident in question. On cross examination, she reiterated that indeed the appellant raped her.
17. PW2, MMA, husband to PW1 testified that on the material day, PW1 informed him that she had been raped. That he called for a taxi driver by the name, Isaack Muhidin together with another person with whom, they drove to mycorebi where they found PW1. He stated that they started following foot prints of the assailant pursuant to the descriptions given by pw1 on how the assailant was dressed. That they managed to get the suspect (appellant) at a place known as Gilma. That upon arresting him, he confessed having raped PW1 as he sought not to be harmed. That they tied him with a rope and thereafter took him to the scene where PW1 identified him as the person who indeed raped her. Consequently, they took him to the police station.
18. On cross examination, he stated that PW1 gave them descriptions of her assailant and in so doing, the said descriptions matched the appellant. That they followed footprints that led them to the appellant who seemingly looked dirty.
19. PW3, Isaack Muhudin, a taxi driver testified that on 03.04.2022, he was in town at about 10 a.m. near cereal board when he received a call from PW2 informing him of an incident at Mycorebi and thereby requesting for his assistance. He stated that upon rushing to the said place, PW2 told him that his wife, PW1 had been raped and that PW1 knew her assailant. He stated that they started following some foot prints which led them to a riverside where they came across the appellant. According to him, the appellant adorned a green hat, held a walking stick and further had a black watch. Further, that the appellant confessed to them of what he had done and therefore, they arrested and took him to the police station.
20. On cross examination, he stated that the appellant confessed raping PW1 and further, that he was ready to face the law.
21. PW4, Dr. Abdiaziz Adan Hussein testified on behalf of Dr. Fozia who examined PW1. He stated that upon physical examination of pw1, there was a small bruise on the left upper arm slightly dark in



- colour. On vaginal exam, no bruise, cut, nor redness was noted and that the hymen was not intact. That with all the indications, the hymen was broken sometime back. On psychological assessment, PW1 was fit without any disorder, was oriented on time and place and that her judgment was perfect with average intelligence. According to him, the complainant was presented with a history of attempted sexual assault by an unknown person thus leading to her being assaulted.
22. It was stated that the vaginal exam was normal and that there were no lacerations in external genitalia but for a bruise on her upper left arm measuring 4 by 6 cms. The head, chest, lower limbs were normal and the age of the injury was about 2 days. That the probable weapon used was a walking stick. The injury was thus classified as a harm.
23. On cross examination, he stated that it could not be ascertained that the complainant was raped going by the observations. On re-exam, he stated that noting the age of the complainant, there was a possibility that she was assaulted but not raped. That there was no evidence of trauma penetration and as such, the act could have been an attempted rape.
24. PW5, No. 104765 PC Isaack Oduor Attuk, the investigation officer testified that upon being assigned the case herein, he was thus tasked to investigate the same. That he found that the complainant was a 54-year-old woman who while grazing her goats was approached by a man who allegedly enquired if she had seen his camels. On responding to the negative, the man demanded for sex and upon the complainant refusing, the appellant remained adamant. It was his evidence that the appellant tripped the complainant and upon her fall, the appellant raped her. He stated that the appellant was dressed in a green cap, black watch and grey shirt. That following that description coupled with following the foot prints from the scene, the appellant was easily arrested.
25. He stated that upon interviewing the appellant, he found that he was in the country illegally as he was an Ethiopian. According to him, the allegations by the complainant were confirmed by the information filled in the P3 Form. After the said investigations, he charged the appellant herein formally. On cross examination, he stated that the appellant had demanded to have sex with the complainant but upon refusal, he raped her.
26. DW1, Adan Hassan Yerow testified that he resided at Dole, Ethiopia and eked a living as a casual labourer. That on the material day, he was at a farm near Neboi pruning trees when 2-3 people approached and told him that there were footprints that led to the farm and if at all he had seen them. Thereafter, the people left for the river side but later, the said people returned while armed with a stick and MM started assaulting him as he coerced him to tell whoever had invaded the farm. That the said people tied him and then escorted him to the police station on the subject allegations. He denied committing the offences herein and instead averred that he had been framed.
27. Additionally, he stated that prior, somebody had been searching for a lost camel and that PW1 enquired but he told her that he had not seen the animal. It was his case that PW1, PW2 and PW3 were relatives and that he was simply framed.
28. Section 3(1) of the *Sexual Offences Act* states that a person commits the offence of rape if;
- i. he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
 - ii. the other person does not consent to the penetration; or
 - iii. the consent is obtained by force or by means of threats or intimidation of any kind.



29. The main ingredients of the offence of rape are captured under Section 3 (1) of the *Sexual Offences Act* as the intentional and unlawful penetration of the genital organ of one person by another coupled with the absence of consent.
30. The prosecution was, therefore, required to establish penetration, lack of consent and that the appellant was the perpetrator of the act.
31. On the issue of penetration, the doctor in this case did not find evidence to corroborate the evidence of the complainant on the offence of rape. In fact, he stated that, it could not be ascertained that the complainant was raped going by the observations. On re-exam, he stated that at the age of the complainant, there was a possibility that she was assaulted but not raped. That there was no evidence of trauma penetration and as such, it could have been an attempted rape.
32. However, it must be noted that lack of medical evidence is not fatal to a charge of rape as the offence can be proved in other ways such as by way of oral evidence of the victim or by circumstantial evidence. This position was fortified by the holding of the Court of Appeal in *Martin Nyongesa Wanyonyi vs Republic Criminal Appeal No. 661 of 2010 (Eldoret)*, citing *Kassim Ali vs Republic Criminal Appeal No. 84 of 2005 (Mombasa)*, where the court stated that:
- “The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence”.
33. It is clear from the evidence on record that the only direct evidence on record is that of the complainant. The alleged offences took place in the bush where the complainant was grazing goats. Ordinarily, it was most probable that there were no people from whom to expect corroboration. The accused person was not known to the complainant before. Therefore, in my opinion, pw1 had no reason to fabricate a case against a stranger. Why would pw1 a married woman pick up her phone to call out on her husband alleging of having been sexually assaulted by a stranger?
34. After pw1 called out on her husband, she described to him and some other people that the man who raped her was wearing a green cap, black watch and grey shirt. Upon following footprints from the scene, they led them up to where the appellant was. He was then arrested and taken to where the complainant was for confirmation that the person arrested was the culprit which pw1 did affirmatively. From this evidence and taking into account circumstances under which the appellant was arrested, I have no doubt just as the trial court did by holding that the complainant was attacked by the appellant on the material day.
35. In the instant case, it cannot be fully stated that there was lack of medical evidence but that, the medical finding did not support the allegations by the complainant. Of importance to note is the fact that the medical doctor who examined the complainant stated that there was no evidence of trauma penetration and as such, it could have been an attempted rape.
36. Even for a moment, considering that the incident herein was that of attempted rape, the law provides that:

Attempted rape

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.



37. In the case of Daniel Simiyu Wanyonyi v Republic [2019] eKLR it was held that:

“...when a court of law is faced with any charge on an attempted offence, care has to be taken to ensure that the attempt, as opposed to mere acts of preparation, is proved since however strong the evidence may be if it only relates to actions in preparation to commit a certain crime, that cannot justify a conviction on an attempted charge. In the circumstance or clarity purposes, the evidence must be led which goes beyond the preparatory stages and right to the doorstep of possible commission of the offence. It ought to be demonstrated that the accused had committed the last act to the actual commission of the specific offence attempted. Likewise, the intention to commit the crime must also be proved”.

38. In the case of Stephen Nguli Mulili vs Republic [2014] eKLR, the Court of Appeal [Githinji, Karanja & J. Mohammed, JJ.A.] stated as follows:

“The standard of proof required is “proof beyond reasonable doubt”.

39. As already noted above, there was no evidence to support the charge of rape. The prosecution through the medical evidence did not demonstrate that the complainant was penetrated taking into account that she was taken to hospital almost immediately. In my view, the act of committing rape was not completed. However, it was demonstrated that the appellant went beyond preparatory stages by lying on her thus commencing the journey of committing the offence of rape.

40. In my view, it was the complainant’s resistance that saved the situation. This is demonstrated by the injuries sustained as confirmed by the medical evidence. Just like the trial court did observe from pw1’s general demeanour that she was coherent and consistent, I have no doubt to discredit her. Under section 124 of the [evidence Act](#), a court can safely convict based on the evidence of a single witness in a sexual offence without necessarily requiring corroboration as long as the court is satisfied that such witness is truthful. See Arthur Mshila Manga v Republic (2016)e KLR where the court of appeal held that;

“From both the evidence of PW3 as well as the P3 form, which we have carefully perused, other than noting absence of hymen and consequently an open vagina, Jenliza never expressed any opinion that the JM had been defiled, or defiled the previous day. There was nothing on record to suggest that JM had lost her hymen the day before Jenliza examined. The medical evidence having failed to confirm that JM was defiled, the only other evidence of defilement was that of JM. It is trite that under the proviso to section 124 of the [Evidence Act](#), a trial court can convict on the evidence of the victim of a sexual offence alone. (See Mohamed v Republic (2008) KLR G&F, 1175 and Jacob Odhiambo Omuombo v Republic (supra). However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief.”

41. Considering the trial court’s conclusion that pw1 was truthful, am convinced that the evidence of pw1 was sufficient to find the accused person guilty of the offence of committing an indecent act which is the alternative count in respect to count 1.

42. On Count II, it was visible from the evidence by PW4 that the complainant had a bruise on her left upper arm. Similarly, from the P3 Form, the said injury was measured at 4x6cm in size and that the injury was categorized as a harm. From the foregoing, it was not to be denied that indeed the appellant was placed at the scene as a review of his evidence showed that he came in contact with the complainant. This is so when he stated that the complainant was allegedly searching for a lost camel.



43. Section 251 of the Penal Code stipulates that:

Assault causing actual bodily harm

Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.

44. From the finding of the trial court, which finding I also agree with, I uphold conviction on the said count.

45. On count III on being in the country, illegally, the appellant in his own statement conceded to being an Ethiopian. From his defence, he did not demonstrate that he had the requisite documents to enable him stay in Kenya. The trial magistrate having convicted him of the said charge, I am equally in agreement that the said conviction was safe and therefore, I hereby uphold the same.

46. On the issue of sentence, the Supreme Court of India in the case of Antony Pereira vs State of Maharashtra (2 AIR 2012 SC 3802) stated that: -

“70. Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done”.

47. From the finding of the trial court, the appellant was sentenced to 1-year imprisonment in regards to Counts II and III. In my view therefore, the court exercised its discretion which discretion was equally not opposed by the respondent.

48. Having found that count I was not proved to the required standard, I hereby quash the conviction and substitute it with a conviction for the offence of committing an indecent act with an adult contrary to section 11 (A) of the *sexual offences Act* being the alternative count hence substitute the sentence of 10 years with that of 5 years imprisonment. The same shall run concurrently with the sentence of 1 year each for counts two and three from the date of sentence by the trial court.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 6TH DAY OF NOVEMBER 2025

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J.N.ONYIEGO

JUDGE

