Maru v Republic (Criminal Appeal 120 of 2019)
[2025] KECA 2283 (KLR) (19 December 2025) (Judgment)

Neutral citation: [2025] KECA 2283 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 120 OF 2019

DK MUSINGA, PO KIAGE & GV ODUNGA, JJA

DECEMBER 19, 2025

BETWEEN

KIMAI NDIEMA MARU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Bungoma (Omondi, J.) dated 9th February 2015 in HCCRA No. 039 of 2010)

JUDGMENT

1. In this second appeal, the appellant challenges the dismissal of his first appeal by the High Court at Bungoma (H.A. Omondi, J.) as she then was), in a judgment dated 9th January 2015. In so doing, the High Court confirmed the conviction and life sentence meted on the appellant by the Senior Resident Magistrate's Court at Kimilili (Hon. Oigara) on 16th April 2010 for the offence of rape contrary to section 3(1) as read with section 3(3) of the *Sexual Offences Act*, No. 3 of 2006.

2. The particulars of charge, which we set out in full as we must pronounce ourselves on the propriety of the same as framed, were as follows:

> Kimai Ndiema Maru: on the nights of 17th and 18th December, 2008 at [Particulars Withheld] sub-location in Mt. Elgon district within Western province intentionally and unlawfully committed an act with his genital organ which caused penetration to VCK."

3. The appellant denied the charge and a trial ensued in which the prosecution called five (5) witnesses. PW1, VCK, testified that she was 35 years old and a maid at Kapsokwony. On 17th December, 2008 at 7 pm she was heading home just across the road from Kapsokwony Boys' Secondary School, where she had gone to fetch water. She was with another Violet when they met a man who claimed he was a police officer, and that they were violating a curfew. They asked for forgiveness with the other Violet

pleading that she had a child at home. She was allowed to leave. The man told PW1 to follow him and, according to her, "I then requested him that I am saved." They walked towards "the police" and he showed her a home he said was his. They went to a house next where he knocked and introduced her as his wife, to which she said nothing. That house belonged to one Solomon, and a lady opened for them. What next transpired is best captured in PW1's own words as recorded by the trial court;

> The lady organized for us a bed. Went to sleep. We were on same bed. The accused had told me or seduced me but I refused that I shall Wed in December, 2009. The accused forced me to bed. I gave in and went to bed. The house had the occupant, we were given one room after the children were moved to another room. I did not inform the others that the accused was not my husband. We went to bed at 8.00pm I had removed by top. I removed my under pant. The accused had sex with me. Once then slept. We slept I said he had sex with me in the morning. I woke up at 6.00 a.m. Went home."

4. When PW1 got to her house, she found some people there, including neighbours and the Assistant Chief, as the other Violet had reported the matter. She was advised to go to hospital and later to the police, which she did, and the man, the appellant herein, was arrested at the house where they had slept. During cross-examination she stated that she and the appellant had not agreed to have sex. However, it is the appellant who first went into the house and she followed him in. There were two other people in the house but she did not scream.

5. Solomon Kiboi (PW2), confirmed that on 17th December, 2008 the appellant, whom he did not know before, came to his house where he had visitors in the company of a woman who he said was his wife. There were about 10 people in the single-room house, some seated and others asleep. The appellant and his 'wife' sat on the bed and later spent the night before leaving early the next morning. On 21st December 2008 he was at home when police officers came enquiring after the appellant and asked him to inform them in case he saw him. He later saw the appellant on the road heading to Kapsokwony and told him the police were after him. He informed the area chief who arrested the appellant.

6. The Chief, Geoffrey Bera Barasa (PW4) testified that on 17th December 2008 at 7pm he was at home when a girl came and reported that she was with PW1 when they met a person who after saying he was a police officer, went with PW1. PW4 rode his bicycle to Kapsokwony police station where he reported the incident. They tried to look for PW1 but, as it was dark, they went home to sleep. In the morning, the complainant arrived and told him that the person took her to Chemoge and "had sex" with her. PW4 took her to the police station.

7. PC Richard Chelimo (PW5) was stationed at Kapsokwony Police Station, Crime Branch, and on 17th December, 2008 was on crime standby when PW4 came to report the incident of PW1 being taken by an alleged police officer. He confirmed the fruitless search and the return of PW4 in the morning in the company of the complainant, who recounted what had transpired, and how the complainant slept with and had sex with her at PW2's house, having been given a place to sleep as husband and wife. PW5 also confirmed the sighting of the complaint on 2nd June, 2009 by Solomon, who reported and had him arrested.

8. Even though the evidence of the appellant given on oath when he was placed in his defence was a denial of the whole incident, we think that there was overwhelming evidence that the appellant did have penetrative sexual intercourse with the complainant. He did, as a matter of fact, go to the house of PW2 and a bed was made ready for him and the complainant where they slept until morning and they did have carnal connection. The evidence of Phillip Koro (PW3), who examined PW1 at the Mt. Elgon District Hospital and filled the P3 Form on 18th December, 2008 was that her labia majora and labia minora were inflamed, and she had a sticking discharge from her vagina. A high vaginal swab

confirmed the presence of live spermatozoa. His final remarks in the P3 Form were a gratuitous "from the medical examination, she was actually raped." We say this was gratuitous because the most a clinical officer could say by way of conclusion is that there had been sexual intercourse. His characterization of the same as "actual rape," a legal conclusion, was beyond the scope or ability of his examination.

9. The appellant's complaints before us, and on which the appeal stand or falls, is that the offence of rape was not proved beyond reasonable doubt. To decide this point we need to start with a decision on whether the charge as framed disclosed the offence of rape.

10. Section 3(1) of the *Sexual Offences Act* (SOA) sets out the elements of the offence of rape on these terms:

> 3(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."
>
> (Our emphasis)

11. It is, therefore, plain that for a person to be guilty, he must have intentionally and unlawfully committed an act that causes penile penetration without the consent of the person penetrated or whose consent is obtained by force, threats or intimidation. Proof or penetration without free consent of the victim constitutes actus reus of the offence of rape. See Smith & Hogan, Criminal Law Cases & Materials 17th Edn, P 531.

12. That being the case, the drafting of the charge against the appellant, in order to be faithful to section 137 of the Criminal Procedure Code which sets out the rules for the framing of charges and information, needed to contain those elements of the offence of rape. That is a fundamental requirement that finds its basis, not only on statutory procedural law, but is the very essence of a fair trial as defined under Article 50 (2) (b) which requires that an accused person has the right to be informed of the charge, with sufficient detail to answer.

13. With respect to both courts below, we are not satisfied that the charge as we have already set it out earlier in the judgment disclosed to the appellant the offence of rape. It was alleged that he intentionally and unlawfully committed an act with his genital organ that caused penetration to the complainant. The absence of consent is what could have rendered the act of penetration a rape, but the same was not charged and we think that this rendered the charge sheet fatally defective.

14. The charge sheet apart, we have carefully scrutinized the record to determine whether the omission to charge the element of lack of consent notwithstanding, the evidence itself proved the absence of consent. This was necessary in order for us to determine whether the omission or error in drafting the charge is one that would have been curable under section 382 of the Criminal Procedure Code as one not occasioning miscarriage of justice. Having done so, however, what does emerge is that the sexual encounter between the appellant and the complainant is not one that could be said to be without the latter's consent.

15. When the appellant accosted the complainant with the other Violet, he was alone and unarmed. He did not use any threat against them, nor did he restrain the appellant in any way. He said he was a policeman but that was all. When the other Violet pleaded to be allowed to go, that plea appears to have been readily acceded to and she went on her way. The appellant and the complainant then walked

a considerable distant of about 3km before they got to PW2's house. There is no indication that the complainant could not walk away at any time, had she so wished. Nor is there any suggestion that she sought any intervention from any person. In cross examination she admitted that as they walked, she was free.

16. When they got to Solomon's house, where there were about ten people, she was introduced by the appellant as his wife but she did not protest or deny that statement. It is he that first entered the house and she followed. He did not pull, force or coerce her to get into the house. By the time a bed was being prepared for them, she must have known this was not a police station and the man intended to have sex with her but, again, she did not protest. She told the trial court that the appellant had tried "to seduce" her but she said she was "saved" and was due to wed the next December, so she knew what he wanted of her. It is telling that she says "she gave in and went to bed," removed her top and her 'under pant' and he had sex with her. Even though she says he forced her to remove the clothes by ordering her to, there seems to be nothing on the record to suggest reluctance, refusal or protest by her, nor was there any force or coercion employed by the appellant. It is the duty of the prosecution to prove beyond reasonable doubt on a rape case that the girl or woman did not consent and that the crime was committed against her will. (See Nakholi vs. Republic [1967] EA 337.

17. We find it most concerning that the element of lack of consent, essential for a conviction of rape, received scant attention by the courts below. They both seem to have proceeded on the misapprehension that so long as coitus was established, then the offence of rape was committed, which is an unfortunate misdirection. The trial court dealt with the matter rather peremptorily, with no enquiry as to consent, as follows;

> The accused has denied committing the offence. He however confirmed his arrest. I have considered the evidence of both sides I am persuaded that he accused committed the offence. Though the accused met the CPL at 7.00 p.m the complainant was able to fully see the person who forced her to have sex after he introduced himself as a police officer then enforcing curfew orders. I find the prosecution evidence cogent unshakable even at cross examination and shall so find the accused guilty of rape contrary to section 3(1) as read with section 3 of the sexual offences. The complainant evidence is corroborated by that of PW2 where the alleged complainant slept and the medical evidence. ROA 14 days."

18. The learned judge fared no better. She identified the issues for determination as being;

> " a. Whether the police charge sheet was defective thus ought to be struck out;
>
> b. Whether the medical report was sufficient without corroboration to implicate he accused;
>
> c. Whether the appellant's constitutional rights were violated."

19. It is clear that she did not consider consent to be an issue for determination yet, as we have already adumbrated, it is an essential ingredient to the charge of rape. The omission amounted to a grave non-discretion and her finding that the charge was an defective was erroneous. The matter is compounded by the learned judge's conclusion, in dealing with the charge, that;

> In this instance, the charge sheet states the offence of raped, which is defined under section 3(1) of the Sexual Offenses Act as an act which causes penetration into the victim's genital organs."
>
> (Our emphasis)

20. With respect, an act that causes penetration of a victim's (or another person's) genital organs is not in and of itself, rape. The penetration must be intentional and unlawful as defined under section 43 of the SOA without the consent of the person penetrated. The understanding of the offence of rape stated by the learned judge essentially criminalizes all acts of coitus and cannot be the law. That was the position adopted by this Court in Daniel Nyareru Achoki vs. Republic [2000] eKLR in which the Court held that:

> " This definition [section 139 of the Penal Code] makes it clear beyond paradventure that it is lack of consent on the part of the woman or girl that is at the core of the crime of rape. Indeed, lack of consent is so vital that even if there be an apparent consent obtained by force, personation etc., a charge of rape would still lie against the ravisher.
>
> A fortiori, if there is consent, there cannot be rape. So a charge of rape must allege in its particulars:-
>
> i. That the act of sexual intercourse was unlawful;
>
> ii. That the act of sexual intercourse was without the consent of the woman or girl.
>
> We suppose it is the lack of consent which makes the act of carnal knowledge unlawful, but the section uses both expressions, that is, "unlawful" and "without consent" and the prosecution would be well advised to use both. Whether the charge be one of rape under section 140 or attempted rape under section 141 of the Penal Code, the particulars must nevertheless state that the attempted unlawful carnal knowledge was without consent of the woman or girl.
>
> The particulars of the offence of attempted rape upon which the appellant was convicted did not state that the attempted carnal knowledge was unlawful and was without consent...That charge did not disclose an offence known to the law and the appellant was wrongly convicted of it. The alternative charge of indecent assault, however, remained and still remains on the record. Both the magistrate and the superior court made no findings on it. It is accordingly still open for us to make findings thereon."

21. The SOA has elaborate provisions regarding consent, (Section 42), evidentiary presumptions about consent (Section 44); conclusive presumptions about consent (Section 45) as well as what unlawful and intentional acts entail (Section 43) in the context of that statute, and trial courts would do well to familiarize themselves therewith and incorporate or at least be informed by them in their analysis so as to arrive at proper conclusions on the question of consent or the lack of it in offences such as rape.

22. We have said enough to show that the offence of rape was not proved in this case and the conviction of the appellant is unsustainable, notwithstanding the urgings to the contrary by Ms. Mwaniki, the learned Assistant Director of Public Prosecutions.

23. In the result, the same is quashed and the sentence set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF DECEMBER, 2025.

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR