

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. E034 OF 2025

ANDERSON KENGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. Nkurrurah Namunyak, Resident Magistrate, in Malindi Chief Magistrate`s Court Sexual Offence Case No. E53 of 2024 delivered on 2/4/2025)

JUDGMENT

1. The Appellant was convicted for the offence of rape contrary to Section 3(1)(a)(b) as read with Section 3(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 14th day of May, 2024 at (name withheld) in Magarini sub county within Kilifi County, he intentionally and unlawfully caused his penis to penetrate the vagina of L.M. (herein referred to as the victim) without her consent.
2. The appellant was sentenced to serve twenty years imprisonment. He was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal are that: -
 - 1) That the learned trial magistrate erred in law and facts by not establishing the element of penetration beyond the required threshold of the law.

- 2) That the learned trial magistrate erred in law and facts by failing to consider the Appellant's alibi defence.
3. The case for the prosecution is that the victim is mentally challenged. She was living with her mother, PW1. A couple, Festus Chigamba Jira PW2 and Janet Kavumbi PW3 were their neighbours.
4. It was the evidence of Festus PW2 and his wife PW3 that on the material day at around 4pm they were in their farm when they heard screams coming from the nearby bushes. They went to check what was happening.
5. Festus PW2 stated that he arrived at the scene and found a motor cycle on the road. The screams were coming from the bushes off the road. He quietly approached the scene and found a man lying on top of a woman. He asked the man what he was doing. The man rose up. His pants were dropped and he was half dressed with his private parts exposed. The girl was wearing a dress but it was raised up. He recognized her as the daughter of their neighbour. He knew her to be mentally challenged. He held the man and asked him why he was doing such a thing to the girl. The man said that he had not had sex encounter with a woman for a long time. He said he was sorry. He requested him to allow him to put on his pants which he did. He, PW2, started to take the man towards the girl's home. He did not know the man before. That when they reached PW2's farm, the man ran away. PW2's wife started to scream. He PW2 went

and picked the man`s motor cycle. He escorted the girl and the motor cycle to the girl`s home. He found the father to the girl at home. Her mother was called from the farm. He called the chief who sent elders and “Sauti women” to check on the matter. He handed over the motor bike to the village elder to take it to the chief`s office. They took the girl to the police station and then to hospital.

6. It was further evidence of PW2 that on the following day the man he had found raping the girl was taken to the police station by the chief. He identified the person, the Appellant, as the man he had found raping the girl.
7. The wife to Festus, PW3 gave similar evidence to that of Festus. She said that on getting to the scene she found her husband questioning a man. The victim who is their neighbour was there. She is mentally challenged. Her husband held the man and told him that they were going to take him to the girl`s home. That on the way she, PW3, was holding the man when he bit her and she let off her grip on him and he managed to run away. They took his bike and took it and the girl to the home of the girl. On getting there her husband called the village elder and they took the girl to Marafa police station. That on the following day they were at the police station when the chief arrived with the person they had arrested. She identified him as the person they had arrested. He was the Appellant.

8. The mother to the victim PW1 testified that she was on the material day in her shamba when she was called by Festus Chigamba who told her that there was an incident and she was required to rush to her home. She went to her home where she found Festus and a “Sauti woman”. She was told that her daughter, the victim herein, had been raped. Her daughter was there and was crying. They took her to Marafa dispensary where she was treated and then took her to Marafa police station. She was issued with a P3 form.
9. The case was investigated by PC Beth Kagendo PW4 of Marafa Police station. It was her evidence that she was allocated the case to investigate on 15/5/2024. That the victim was mentally challenged and was unable to communicate. She recorded statements from Festus PW2 and his wife PW3 who said that they caught the appellant red handed when raping the victim. The victim had already been taken to hospital. She was issued with a P3 form. The assailant, the appellant was later taken to the police station by elders. He was charged with the offence.
10. The victim`s medical documents were produced in court by Dr. Moses Rimba PW5 of Malindi sub county hospital. It was his evidence that the victim was first attended to at Marafa and her P3 form completed at Malindi sub county hospital by Dr. Ibrahim. That her examination revealed multiple lacerations on the labia and the hymen was freshly perforated. That the conclusion was that there

was penetration on a mentally challenged girl. Dr. Rimba produced the treatment notes, the P3 form, the Post Rape Care form and the girl`s disability card as exhibits, P.Exh. 1 - 4 respectively.

11. In his defence the Appellant stated that sometimes in the month of April 2024 he was selling a goat. A person he came to learn is called Chigamba was taken to him by brokers to buy the goat. He paid for the goat and was left with a balance of Ksh.4,000/=. He gave him a date to go and collect his money. That on 6/5/2024 he went to his home to collect his money. That Chigamba told him that he did not have the money and they started to push. He started to abuse him and told him that he will teach him a lesson. He went back home. He then went for some work in Lamu. When he returned home he was arrested by police officers on 17/5/2024 and taken to the police station. He was told that he had defiled a minor. He denied it. He said that he did not know the victim herein and first saw her in court. He said that he does not know Janet Kavumbi PW3. He said that he was on 14/5/2024 at Malindi and Mjanaheri.
12. The Appellant called one witness, Merciline Kenga who stated that the Appellant had sold a goat to a person called Chigamba for Ksh.9,000/=. He was paid Ksh.5,000/= and the person was left with a balance of Ksh.4,000/=. That on 6/5/2024 he was called by the said person to go and collect

his money. She then heard that the Appellant had been arrested.

Submissions

13. The appeal was canvassed by way of written submissions. The appellant submitted that the case was full of contradictions and inconsistencies. That the medical evidence did not connect the age of the injuries to the date of the commission of the offence. That there was no evidence of penetration on the complainant.
14. The appellant submitted that the trial court did not consider his defence. That the case was a fabrication due to his differences with the aforementioned Chigamba and his family. He urged the court to allow the appeal.
15. The Respondent on the other hand submitted that the ingredients of the offence of rape under section 3 of the Sexual offences Act are intentional and unlawful penetration, lack of consent and identity of the perpetrator. That penetration was proved by Chigamba PW3 who found the Appellant in the act of having sexual intercourse with the complainant. That the Appellant did not dispute the evidence of PW3 that he left behind a motor cycle at the scene. That penetration was corroborated by the evidence of the doctor PW5 who found the victim with a freshly broken hymen. That

lack of consent was proved by the evidence of the mother PW2 that the victim was mentally challenged which evidence was corroborated by the evidence of the doctor PW5 as contained in the treatment notes that the victim had abstract reasoning. That PW5 produced a report proving that the victim is mentally challenged. That the mental illness rendered her incapable of consenting to sexual intercourse.

16. On the question of the identity of the Appellant, the respondent submitted that the appellant was identified by Chigamba PW3 as he stayed with him for a while before he ran away. That the incident occurred during the day and the Appellant left a motor cycle behind. It was submitted that it was not demonstrated that the victim was used to punish the Appellant for an offence he never committed.
17. It was submitted that the medical documents were produced in court by a qualified medical practitioner PW5 and the appellant did not discredit the medical evidence when he cross-examined PW5.
18. On the submission that the trial court did not consider the appellant`s defence, it was submitted that the Appellant`s defence was on his differences with Chigamba PW2 who is not the complainant in the case and is not even related to the victim. That the Appellant did not demonstrate any grudge between him and the victim. That the defence tendered by the Appellant did not discredit the prosecution evidence.

Analysis and determination

19. 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. This was the holding of the Court of Appeal in the case of **Okeno -v- Republic (1972) E.A 32** and which was reiterated in the case of **Kiloly & Another -v- Republic (2005) 1 KLR**.
20. I have considered the grounds of appeal, the record and judgment of the trial court and the written submissions filed by both the appellant and the respondent. The issue for determination is whether the charge of rape was proved against the Appellant beyond reasonable doubt.
21. The offence of rape is created by Section 3(1) of the Sexual Offences Act that provides as follows;

Rape

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.

(2) In this section the term “intentionally and unlawfully” has the meaning assigned to it in section 43 of this Act.

22. These elements were reiterated in the case of **Simon Kimiti David v Republic [2017] eKLR** where it was stated thus;

“Without corroboration, the essential elements of rape consist of the following:

(1) The act of intentional and unlawful penetration.

(2) The act of sexual intercourse was done and against the complainant’s will.

(3) The consent is obtained by force or by means of threats or intimidation.”

22. The Court of Appeal in the case of **Republic vs Oyieri (1985)** KLR set the mens rea of rape as follows:

The learned magistrate had the correct appreciation of the *mens rea* in rape. It is primarily an intention and not state of mind. Thus the mental element is to have intercourse without consent, or not caring whether the woman consented or not: *DPP v Morgan (1975)*

61 Cr Appl. R 136 HL. The prosecution must prove either that the complainant physically resisted, or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist; *Archbold Criminal Pleading Evidence and Practice* 40th Edn pp 1411 - 1412 paragraph 2881 and *R v Harwood K (1966) 50 CR App R 56*. So if a woman yields through fear of death or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact.

23. It is trite that rape can be proved by oral evidence or by circumstantial evidence that can be corroborated by medical evidence. In **Kassim Ali v Republic Criminal, Appeal No. 84 of 2005**, the Court of Appeal held that:-

“...the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence”.

24. The trial magistrate in his judgment found that penetration on the victim was proved by medical evidence as presented by the doctor PW5. That the intentional and unlawful act of the Appellant were proved by PW2 and PW3 who found the Appellant raping the victim. That the two

witnesses identified the Appellant as the perpetrator of the offence.

25. I have on my part considered the evidence adduced before the trial court. The fact of rape in this case was evidenced by the testimonies of Festus PW2 and his wife PW3 who stated that they heard screams in the bush and went to the place to check what was happening. That on reaching there Festus found the Appellant on top of the victim in the very act of having sexual intercourse with her. When PW3 soon after reached the place, she found her husband questioning the Appellant. The complainant was there and is the one who had been screaming.

26. There was no reason to disbelieve the evidence of the two witnesses as narrated by them. It is clear from their evidence they found the Appellant in the act of raping the complainant. The fact that the complainant was screaming means that she was resisting the sexual intercourse and she had not consented to it, if at all she was in a position to give consent.

27. The Appellant was taken to the police station on the following day where both PW2 and PW3 identified him as the person they had arrested for raping the victim and had ran away. The incident took place during the day. The two had stayed with him for some time as they led him towards the home of the victim`s parents. They had sufficient time to observe him and his appearance. They could not have

mistaken him for anybody else. In view of this uncontroverted evidence, the Appellant was positively identified as the person who was found raping the victim herein. Even without medical evidence, the evidence of PW2 and PW3 was sufficient to sustain a conviction against the Appellant.

28. The victim was examined at Marafa health centre and was found with a freshly perforated hymen. This aspect of evidence corroborated the evidence of Festus PW2 and his wife PW3 that they found the Appellant having sexual intercourse with the victim. Penetration on the victim was therefore proved.

29. The mother to the complainant testified that the victim is mentally challenged. This was corroborated by Festus PW2 and his wife PW3 who gave testimony that the the victim is their neighbour and that they knew her to be mentally challenged. The treatment notes from Marafa indicate that the victim was mentally challenged and could not respond to questions put to her. It was thereby proved that the victim was mentally challenged. Her mental status precluded her from consenting to sexual intercourse. Lack of consent was therefore proved.

30. The Appellant raised a defence that the case was fabricated by Festus Chigamba PW2 because he sold him a goat and declined to pay his balance of Ksh. 4,000/=. He said that he was on the material day in Malindi town. The

trial court considered the defence and found it untrue. In my view there was no figment of truth in the defence that the case was fabricated by PW2 over unpaid money. The Appellant never brought up the issue with Festus Chigamba when he cross-examined him in court. He never raised an issue with the prosecution witnesses that he was on the material day in Malindi and not at the scene of the incident. Consequently, the Appellant`s defence can only have been a made up story and an afterthought.

31. In view of the foregoing, I find the charge of rape to have been proved against the Appellant beyond reasonable doubt and the conviction is upheld.

32. The Appellant did not appeal against the sentence. There is thus no reason for me to interfere with the sentence meted on him. Consequently, the appeal is found to be without merit and is dismissed.

Delivered, dated and signed at GARSEN this 13th day of February, 2026

J. N. NJAGI

JUDGE

In the presence of:

Mr.Oluoch HB Miss Ochola for Respondent

Appellant - present virtually at G.K. Prison Malindi

Court Assistant - Rahma

14 days R/A

Original