



REPUBLIC OF KENYA



**Shiundu v Republic (Criminal Appeal E015 of 2023)
[2026] KEHC 1166 (KLR) (9 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 1166 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E015 OF 2023
AC BETT, J
FEBRUARY 9, 2026**

BETWEEN

SAMUEL AMUKOYE SHIUNDU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgement and Sentence by Hon. T. A. Obutu (CM) in Mumias CM's Criminal Case No. E040 of 2021 delivered on 8th February 2023)

JUDGMENT

Background

1. The Appellant was convicted for the offence of rape contrary to section 3(1)(a)(3) of the *Sexual Offences Act* No. 3 of 2006, The particulars of the said offences were that the appellant on 3rd day of November, 2021 at around 2330 hrs at [Particulars Withheld] East Wanga in Mumias East Sub-County within Kakamega County, intentionally caused his penis to penetrate the vagina of 'CMK' without her consent.
2. He was further convicted for the second count of entering in a dwelling place with intent to commit a felony contrary to section 305(1) of the Penal Code and the particulars of the second offence were that on the 27th day of November, 2021 at around 0100hrs at [Particulars Withheld] in Mumias-East Sub-County within Kakamega County, entered the dwelling place of 'CMK' with intent to commit a felony namely rape.
3. The Appellant denied the charges and after a hearing in which the prosecution called seven (7) witnesses, he was convicted of the said charges and was sentenced to ten (10) years for count one and one (1) year for count two which sentences were to run concurrently.



4. The Appellant being aggrieved by the convictions and sentences and lodged this appeal in which he set out the following grounds of appeal:-
 1. That, the trial magistrate erred in law and facts by convicting me on uncorroborated evidence.
 2. That, the learned trial magistrate erred in law and fact by failing to appreciate that the offence could have been committed by other persons other than myself.
 3. That, the trial court erred in both law and facts by shifting the onus of proof from the prosecution to myself which was on itself a misdirection which would have otherwise led to a different verdict.
 4. That, the trial court erred in law and facts by convicting me on fabricated evidence without putting in mind that there was a grudge between the appellant and the minor's family.
 5. That, the trial magistrate erred in both law and misdirected himself in proceeding to try and convict me on a charge of rape without establishing whether there was consent, use of force or threats to the victim as required by the *Sexual offences Act*.
 6. That, more grounds to be adduced during hearing thereof and after receiving perusing the trial court proceedings.

Prosecution's Case

5. The complainant testified as PW1 and recalled on the night of 3rd November 2021 at around 11:30 p.m., while asleep alone in her house, she was suddenly awoken by someone touching her feet and face. She tried to fight back and scream. The assailant overpowered her, covered her face, climbed onto her bed, removed her underwear, and raped her. She recognized the attacker using her lamp as Samuel. The assailant did not use protection, and medical examination later recovered sperms. She informed her sister-in-law in Nairobi and her immediate neighbour. Her brother-in-law, Chrispinus Munyendo, and other neighbors responded but the assailant had already escaped. She was escorted to St. Mary's Hospital the next morning for medical examination after which the incident was reported at Shianda Police Station, and police visited her home to investigate.
6. The complainant further testified that on the night of 26th/27th November 2021 at about 1:00 a.m., she sensed movements in her house and lit her lamp but saw nothing unusual. PW1 testified that she remained vigilant and was attacked again by the Appellant, who attempted to assault her. She testified that she resisted, held him tightly, and screamed for help. Her brother-in-law responded and assisted in nabbing the assailant, who escaped. The incident was reported to the Village Elder and they proceeded to the Appellant's home where they found him unavailable. Police and members of the public later apprehended Samuel and took him to Shianda Police Station.
7. Cross-examined by the Appellant, the complainant denied owing him any money or ever giving him any work. She said that she was alone when he attacked her.
8. PW2 testified that on the night of 4th November 2021, her neighbour PW1 informed her that she had been attacked and raped and the assailant had already fled the scene. She contacted Chrispinus and the Village Elder who came and took the complainant to hospital and later, the complainant recorded her statement at the police station. PW2 said that the complainant was able to identify the assailant.
9. PW3, Michael Munyendo testified that on 27th November 2021 at around 1:00 a.m., he went out for a short call and heard screams from PW1. He went and found PW1 struggling with the Appellant. The complainant informed him that he should not harm the intruder as he was his nephew. As the



Appellant showed him where he had used to gain entry, he fled. They recovered shoes which they took to the Village Elder. They went to the Appellant's home where they found his house locked. He was able to identify the Appellant using a solar light as he knew him well. The witness said that he was with his wife that night.

10. PW4 Cosmas Tatuli Simwa, a Clinical Officer at Makunga, who testified and produced the P3 and Post Rape Care (PRC) forms on behalf of his colleague Gregory whom he said he had known for three (3) years and was well versed with his handwriting and signatures. He stated that on 4th November 2021, PW1 reported to the facility with complaints of having been raped the previous night. On examination, she had swelling and redness in both eyes, forehead injuries, and pain in the neck, ribs, stomach, and hip joints. He testified that her private parts were sore, tender, lacerated, and had discharge. A Post Rape Care (PRC) form and P3 form were filled and swabs were taken for analysis at the Government Chemist. He produced the treatment notes, the PRC form, and P3 form as exhibits.
11. PW5 testified that she together with her husband had rushed at PW1's house on 27th November 2021 after her husband heard noises. She was able to identify the Appellant who had been restrained by PW1. There was solar light. They recovered his shoes and a ladder.
12. PW6 Chrispinus Munyendo, testified that on 4th November 2021 at around 12:30 a.m., PW1 who is his in-law called him and informed she had been raped by two people. He mobilized transport and they took her to hospital. The matter was reported and later he heard that the Appellant had been arrested.
13. PW7, PC Joshua Murathi attached to Shianda Police station investigated the matter and recorded witness statements and arrested the Appellant.

The Defence Case

14. The Appellant gave a sworn statement and stated testified in his defense that on 26th October 2021, he was leaving school at about 4.30 p.m. when the complainant called him to assist in taking care of the house. He went at 9.30 p.m. and on entering the house he found a man and the complainant and the man started calling him a thief. He then ran away. He was later to be arrested and charged for the offence. He denied the charges.

Appellant's Submissions

15. The Appellant submitted that there were contradictions and inconsistencies in the prosecution evidence. He argues that PW1 stated that when he assaulted her at night and could not identify her attacker while PW4, a Clinical Officer, said that the complainant alleged that she was raped by unknown persons. He also submitted that PW3, who was the complainant's relative, said that the attacker was known to her and that he was her nephew. This is in contradiction to the prior statements. The Appellant posited that the incongruent statements raises doubt regarding the identity of the assailant.
16. The Appellant submitted that the sentence was disproportionate and submitted that the sentence of 10 years is harsh considering the conflicting evidence and unclarified circumstances of the incident. He argued that Section 33 of the *Sexual Offences Act* requires courts to consider the surrounding circumstances of the offence, which the trial court allegedly ignored. He also argues that the court also failed to utilize DNA evidence as required under Section 36(1) of the Act, despite the availability of biological samples for comparison.



17. The Appellant argued that the case was not proven beyond reasonable doubt because the Investigating Officer did not produce critical physical evidence such as photographs of the alleged entry point to the complainant's house.
18. The Appellant further argued that there was selective evaluation of evidence and that the trial court allegedly relied heavily on the prosecution's evidence while disregarding his defence which indicated a family grudge, given the complainant is his aunt. He claimed that the complainant fabricated the case in a bid to conceal her own misconduct with another man on the material night.
19. The Appellant cited violations of rights under Articles 27, 28, and 50 of *the Constitution*.
20. He argued that his right to be treated equally and fairly as an accused person was disregarded, especially given his youthful age (18 years) and the fact that this was his first offence.

Respondent's Submissions

21. The Respondent opposed the appeal and urged this court to re-evaluate the entire evidence on record, as mandated of a first appellate court, citing *Okeno v. Republic* [1972] EA 32 and reaffirmed in *Nicholas Kiprotich Rono v. Republic* [2022] eKLR.
22. The Respondent submitted that the conviction for the charge of rape it was required to prove penetration, positive identification of the perpetrator, and lack of consent. On penetration, its submissions were that the complainant gave a clear and consistent testimony that she was raped. This was corroborated by PW4, a Medical Officer, who observed that there was soreness, lacerations, and discharge from the complainant's genitalia - symptoms of recent forced sexual activity.
23. As to identification, the complainant stated that she used the Sun King portable lamp to illuminate the room and identified the Appellant who was known to her. The complainant's brother-in-law also confirmed the identification. This amounted to recognition, which is more reliable than identifying a complete stranger.
24. In respect to consent, the Respondent submitted that, the complainant said that she resisted, fighting and screaming, and that the Appellant threatened to kill her. The Respondent cited *Republic v. Oyier* [1985] KLR 353 to buttress the argument.
25. The Respondent argued that the complainant testified that on the night of 27th November 2021, she heard movements in her house, struggled with the Appellant, and held onto him until PW3 arrived. PW3 corroborated that he found the appellant inside the complainant's house and confirmed that entry had been gained through a space in the wall above the door. This was deemed sufficient proof of unlawful entry with felonious intent.
26. The Respondent submitted that the Appellant alleged that the trial court improperly shifted the burden of proof and relied on fabricated evidence due to a grudge with the complainant's children. The Respondent refuted this, asserting that the burden remained on the State throughout, and the evidence was corroborated by both medical testimony and an eyewitness who testified as PW3. The Respondent contended that no material contradiction or motive to fabricate was established.
27. The Appellant submitted that sentencing lies within the discretion of the trial court and should only be interfered with where an error in principle is shown. The Respondent submitted that in the case, the court considered the probation report, mitigation, and relevant sentencing provisions. There was no indication of misdirection or error in sentencing.



Analysis and determination

28. This being a first appeal, the duty of the court is to extensively review and analyse the evidence afresh so as to arrive at its own independent conclusion while bearing in mind that unlike the trial court, it neither heard nor saw the witnesses testify. See *Okeno v. Republic* [1972] EA 32.
29. Since the Appellant raised a constitutional issue, I will first deal with it as it goes to the root of the appeal. The Appellant argues that he had just turned 18 years and ought to have been accorded equal benefits of the law. However, he did not specify how the trial court violated his rights under the cited Article of *the Constitution*. The argument is unfounded as the proceedings clearly show that the proceedings were conducted in a language that the Appellant confirmed he understood and he was furnished with copies of the charge sheet, the covering report, witness statements, the P3 form and Post Rape Care form immediately after taking plea. Additionally, Mr. Ojuo who acted for him informed the court while seeking review of the bond terms that he had attained the age of 18 years in June 2021 and was a student. Further, the Appellant was granted ample opportunity to cross examine the witnesses, which he did. In my view the Appellant was accorded a fair trial within the meaning of Article 50 of *the Constitution*.
30. The offence of rape is established through three elements:-
- That there was penetration.
 - That there was positive identification of the Appellant.
 - That there was lack of consent. See *Republic v. Oyier* [1955] KLR 353.
31. On the issue of penetration and consent, there was sufficient evidence through the P3 form and the Post Rape Care form that there was penetration and that there was no consent to the act of penetration. PW4's evidence was that the complainant presented herself at their facility with multiple injuries to her body and sore, tender and lacerated private parts. The injuries were not concomitant with consensual sex. They were more likely to have been caused by a violent sexual attack. The Clinical Officer who prepared the P3 form concluded that there was actual penile vaginal penetrative sex.
32. The complainant's evidence was that she resisted the sexual encounter. The evidence is corroborated by the P3 report that shows that she suffered injuries during the encounter.
33. The main contention by the Appellant was that he was convicted on uncorroborated evidence and that the learned Magistrate failed to appreciate that other persons than himself could have committed the offence.
34. From the complainant's evidence, it is apparent that the person(s) who raped her on 3rd November 2021 was/were unknown to her. She stated as follows:-
- “I heard something touching my feet. I thought it was a cat and started kicking my feet. I then felt a touch on my face. I was assaulted severally and I was fighting and screaming for my life. I tried to put on the sunning light. I had seen him and recognized as Samuel.... He then raped me. I called my immediate neighbour Chrispin Munyendo. My brother-in-law took me to the St. Mary's Hospital in the morning... Again when he came in ... were able to identify him with the brother-in-law...on the attack and suffered injuries.”
35. PW2, to whom the complainant made a report immediately on 4th November 2021 between 1.00 to 2.00 a.m., did not say that the complainant named her assailant. More significant is the evidence of Chrispin Munyendo, PW6, who testified that on the 4th November 2021, at about 12.30 a.m., the



complainant called him and informed him that she had been raped by two people whom she did not name and that later, he was informed that the suspect had been arrested.

36. A perusal of the P3 form that was issued to the complainant on 4th November 2021 shows that the complainant presented herself to the police with a report of having been gang raped. In Part II paragraph 2 of the P3, the general medical history states as follows:-

“Reports history of having been physically assaulted and raped by an unknown people to her on 3/11/2021 at 10.00 p.m. extending to 4/11/2021 at 12 midnight at her home in Musangano Village.”

37. It is quite clear that as at 4th November 2021, the complainant did not know who had raped her. If she had known, she would have informed her neighbour. PW2 who was the first responder, and the brother of PW6, who assisted her to the hospital. Considering the fact that the Appellant is a nephew whose house was close to the complainant's and the witnesses, it would not have been difficult for the complainant to identify him to the responder who came to her aid, and if not, to disclose his name to the police officer who recorded her complaint.
38. Moreover, the initial complaint was that the complainant was assaulted and raped by two persons unknown to her. Try as we may, this court cannot find an iota of evidence to sustain a conviction. In fact, the Appellant ought not to have been placed in his defence, as no prima facie case had been established in respect to the charges of rape.
39. So why was the Appellant convicted? A review of the record reveals that the Appellant was convicted because he was captured by the complainant in her home on 27th November 2021.
40. According to the complainant, the Appellant broke into her house on the night of 26th/27th November 2021 and when he grabbed her, she held him and screamed then her brother-in-law came and held him but he managed to escape. The complainant's brother-in-law who testified as PW3 corroborated her evidence. He stated that he identified the Appellant using a sun king lamp. This evidence was further reinforced by the evidence of PW5. PW5 was PW3's wife who reiterated that she identified the Appellant using the D-light. D-light is a brand name for a portable solar lamp as is the sun king.
41. Upon review of the evidence, I find that the Appellant was properly identified on the night of 26th and 27th November 2021. He was well known to the three witnesses as he was a nephew to PW3. He lived within close proximity of the three and by his own admission, interacted with the complainant on that date.
42. The identification of the Appellant was identification by recognition which was held in the case of *Anjanoni v. Republic* [1980] KLR to be the most reliable form of identification.
43. The circumstances under which the identification was done was also favourable. Although it was at night, the evidence was that there was solar lighting in the house and that the Appellant was properly identified. In any event, the Appellant conceded that he was at the scene, albeit for a different reason than alleged by the prosecution. Identification was therefore foolproof.
44. It is the Appellant's apprehension on the night of 26th/27th November 2021 that led to the subsequent charges and conviction for the offence of rape and for entering a dwelling house with the intention to commit a felony. As earlier held in the judgement, the conviction for rape was made in error as it was based on speculative evidence following the positive identification of the Appellant in the complainant's house on 26th November 2021.



45. In his defence, the Appellant denied that he committed the offence and stated that he was a victim of the complainant's ploy to cover up for her affair with another man. However, his defence did not dislodge the prosecution's case. He did not explain why his aunt and uncle would side with the complainant to frame him for entering her house. Also, he claims that he went to the complainant's house at 9.30 p.m. However, the evidence place him in the grip of the complainant inside her house at around 1.00 a.m. when he slipped out of her grasp and escaped.
46. The evidence regarding the second count was credible and consistent. The Appellant could not explain what he was doing in the complainant's house at such an ungodly hour. If indeed he had been assaulted by the complainant and her man friend, he ought to have reported the assault to the police. Additionally, his uncle PW3 and his wife would not have testified against him. Their evidence went unchallenged and was sufficient to warrant a conviction for the second count.
47. In the end, the court finds that the conviction for the charge of rape was unsafe and makes the following orders:-
- a. That the conviction for the offence of rape contrary to Section 3(1) (a) and (3) of the *Sexual Offences Act* is hereby quashed and the sentence set aside.
 - b. The order convicting the Appellant for entering a dwelling house with the intent to commit a felony contrary to section 305(1) of the Penal Code and the one year sentence is upheld.
 - c. Since the Appellant has served the one year term in full, he is hereby set at liberty unless otherwise lawfully held.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA, THIS 9TH DAY OF FEBRUARY 2026.

A. C. BETT

JUDGE

In the presence of:

Appellant in person

Ms. Chala for the Respondent

Court Assistant: Polycap

