



REPUBLIC OF KENYA



**KENYA LAW**  
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**Githiga v Republic (Criminal Appeal E018 of 2025)  
[2026] KEHC 4940 (KLR) (16 April 2026) (Judgment)**

Neutral citation: [2026] KEHC 4940 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CRIMINAL APPEAL E018 OF 2025  
LN MUTENDE, J  
APRIL 16, 2026**

**BETWEEN**

**JOHN KIHUNYO GITHIGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. John Kihunyo Githiga, the Appellant, was charged with the offence of Rape contrary to Section 3(1) (a)(b) as read with Section 3(3) of the *Sexual Offences Act*.
2. The particulars of the offence were that on the 20<sup>th</sup> April, 2019, at Rurii Trading Centre within Nyandarua County, intentionally and unlawfully caused his male organ namely penis to penetrate the vagina of T.M.K. by use of force without her consent being a person with mental disabilities.
3. In the alternative he faced the charge of Committing an Indecent Act with an adult contrary to Section 11(A) of the *Sexual Offences Act* No. 3 of 2006. Particulars of the offence being that on the 20<sup>th</sup> April, 2019, in Rurii Trading Centre within Nyandarua County, intentionally touched the vagina of T.M.K. with his penis against her will and being a person with mental disabilities.
4. He was taken through full trial, convicted and sentenced to twenty (20) years imprisonment for the main charge of rape.
5. Aggrieved, he appeals against both the conviction and sentence on grounds that; the act of rape was not proved beyond reasonable doubt; that the Complainant was a stammerer but not insane hence had a right to conjugal relationship and marriage that was their intention. That at the time the Complainant was 20 years old and they had agreed to marry but her uncle interfered and caused him to be prosecuted, an act that denied him the right to cater for his daughter and her mother, by being incarcerated.



6. Briefly, facts of the case were that PW2, SGK, the Complainant's maternal uncle learnt from his mother who lives with the Complainant that her stomach (abdomen) was protruding. They asked the Complainant what was wrong and she told them that the Appellant had sex with her. He informed his other brother PW3, AK and they escorted the Complainant to hospital for examination and it was established that she was pregnant. The matter was reported to the police and the Appellant was arrested. Investigations were conducted which resulted into the Appellant being arrested and charged.
7. Upon being placed on his defence the Appellant stated that he had a consensual sex with the Complainant and the child sired out of the relationship was his. However, her uncles enticed her to incriminate him. He denied having committed any offence as the coitus was voluntary.
8. The appeal was canvassed through written submissions. It is urged by the Appellant that none of the witnesses availed was present during the act and the Complainant did not scream to alert anyone which meant there was mutual consent between them. That had the uncles of the Complainant not interfered they would have married as planned. That he is ready and willing to take up his responsibility as the parent of the child.
9. The appeal is opposed by the Respondent through learned prosecution counsel, Ms. Mumba. It is submitted that the prosecution proved the act of penetration having occurred and that the Complainant did not consent to the sexual act as the victim was mentally challenged hence had no mental capacity to give free consent; and, that identification was not in dispute.
10. This being a first appeal, the primary duty of the court is to re-examine evidence adduced at trial and scrutinize the findings bearing in mind that it did not have the opportunity of seeing or hearing witnesses to assess their demeanour, then form its independent conclusions. This, was summed up in *Okeno v Republic* (1972) EA 32 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 (*Pandya v. R.*, [1957] E. A. 336) 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. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). 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; it must make its own findings and draw its own 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, see *Peters v. Sunday Post*, [1958] E. A. 424.”

11. It is contended that ingredients of rape were not proved beyond reasonable doubt. Section 3(1) of the *Sexual Offences Act* 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.
12. It is not in dispute that sexual intercourse occurred between the Complainant and Appellant. The victim was involved in coitus. She was subjected to mental examination. A pregnancy test done



confirmed that she was seventeen (17) weeks 2 days pregnant. And, the Appellant acknowledged being the father of the child that was ultimately sired. He acknowledged having penetrated the victim as stated, an act that resulted into conception. Therefore, the issue to be considered is whether there was consent.

13. In *Republic v Oyier* [1985] KECA 55 (KLR) the Court of Appeal held that the prove of mens rea is to have intercourse without consent or determining whether the victim has consented. It delivered itself thus;

“...lack of consent always remains an essential element of the crime of rape and so it should be specifically dealt with.

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.”

14. Section 42 of the *Sexual Offences Act* provides thus;

For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.

15. Section 44(1)(2)(e) of the *Sexual Offences Act* provides thus;

1) If in proceedings for an offence under this Act, it is proved—

a) that any of the circumstances specified in subsection (2) existed; and

b) that the accused person knew that those circumstances existed,

the complainant is to be taken not to have consented to the act unless sufficient evidence is adduced to raise an issue as to whether he or she consented, and the accused is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he or she reasonably believed it.

2) The circumstances are that—

(e) because of the complainant’s disability, the complainant would not have been able at the time of the commission of the act to communicate to the accused whether the complainant consented;

16. The Complainant lived with her maternal grandmother as well as her uncle PW2 who stated that the Complainant had mental issues such that she had to drop out of school. On cross – examination he said that the Appellant could not be capable of marrying the Complainant as she had mental issues.

17. PW3 on being cross – examined stated that the Appellant knew that the Complainant was mentally unstable therefore they could not have agreed on anything.



18. The Complainant was subjected to examination by Dr. Emmanuel Amadi, a Consultant Psychiatrist on 13<sup>th</sup> July, 2022. It was stated that the Complainant, aged 26 years attended Rurii Primary Special School. And, that she exhibited traits of intellectual disability. Her judgment and abstract thinking was stated to be poor.
19. The Appellant was stated to have been working at the home of the Complainant's grandmother where he was engaged in digging trenches. The issue of the mental state of the Complainant through the mental status assessment conducted showed the Complainant's ability to understand and decide was established to be poor. Due to the mental challenges it was unlikely that she could consent to the act.
20. In her testimony the Complainant narrated how the act was committed. Pointing at the Appellant, she said he did something bad to her. That she had gone to fetch firewood with Muthoni when the Appellant followed her into the bush and held her from behind, removed her panty, and his clothes and made her lie facing upwards. He touched her vagina that she referred to as 'kasusu' and did bad manners to her by inserting his penis into her vagina. She further stated that in the result she conceived and gave birth to a child.
21. On cross – examination she denied the allegations that they were lovers. That he had coitus with her for one (1) week and he said that they should continue engaging in sexual intercourse. She denied the allegation that she wanted to be his wife. On re – examination she said the act was committed only once and she was aware that the Appellant had a wife with children.
22. The Complainant had limitations in intellectual functioning. Evidence adduced was appreciated by the trial court which observed that the demeanor of the Complainant clearly showed that her understanding of the act as well as its consequences was not apt such that she could not have engaged in consensual sexual intercourse following a legal consent.
23. The contention of the Appellant is that he was the Complainant's lover whom he desired to marry as a second wife. This allegation does not legally justify his action. The Complainant was not able to give a legal consent. Alleged future matrimonial intentions cannot be a defence in a non-consensual sexual activity.
24. On the question of sentence, Section 3(3) of the [Sexual Offences Act](#) provides thus;

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.
25. The Appellant abused a person with disability, a vulnerable victim who was oblivious of alleged marriage plans and made her carry a burden of conceiving. Other than stating that he should be out of prison to care for the Complainant and the child, just like he had nothing to state in mitigation, he has not expressed change of behavior as expected by a person who is rehabilitated. For that reason, the sentence meted out was commensurate to the offence committed.
26. The upshot of the above is that the appeal lacks merit, accordingly it is dismissed in its entirety.
27. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16<sup>TH</sup> DAY OF APRIL, 2026.**

.....

**L.N. MUTENDE**



**JUDGE**

