



REPUBLIC OF KENYA



KENYA LAW
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**JKM v Republic (Criminal Appeal 58 of 2018)
[2025] KECA 242 (KLR) (14 February 2025) (Judgment)**

Neutral citation: [2025] KECA 242 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 58 OF 2018
MA WARSAME, S OLE KANTAI & WK KORIR, JJA
FEBRUARY 14, 2025**

BETWEEN

JKM APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Nakuru
(Joel Ngugi, J.) dated 8th August, 2018 in H.C.CR.C No. 18 of 2017)*

JUDGMENT

1. The appellant, JKM, was charged and convicted of rape against an 80 year old Woman in the sanctity of her home. As a result, he was sentenced to 20 years' imprisonment. The summary of the evidence against him is as follows:
2. PW1 testified that on 19th January 2014, the appellant, who was a neighbor well known to her, broke into her house at 10 p.m. and accosted her in her bedroom. Her phone rang and the appellant warned her not to answer it. He then proceeded to rape her vaginally, and anally for four hours. He thereafter inserted peppers into her anus and her vagina and threatened her before fleeing the scene and going into hiding.
3. PW2, AK, was woken up in the early hours of 20th January 2014 by a neighbour who told that her mother was unwell and calling for help. She went to the house and found her trembling in her bed, ill and unable to walk. PW1 told her that J, son of M had assaulted her. With the help of neighbours and family she was able to report the matter to the police and take PW1 to hospital.
4. Dr. Benard Busini, PW4 submitted a medical report that established that PW1, had been raped and suffered grievous harm. The report stated that she had lacerations on her anus and had suffered injuries to her urinal and anal areas.



5. Joel Kipng'etich testified that once PW1 filed her complaint against the appellant, they searched for him for two years without success. However, on 20th May 2016 the police machinery was set into motion when PW1's grandson chanced upon the appellant, seated at "Posta" in Molo, reported to the police station, which led to the appellant's arrest.
6. In his defence, the appellant testified that he was a casual labourer and that on the day that the crime was committed, he was working in Bungoma as a servant. He alleged that his aunt and sister had organized the job and that the employer-one SM even sent money for the journey on 16th January 2014. He travelled to Bungoma on 17th January 2014 and worked for S for two years. When the work terminated, he went back to Molo and was continuing with work at posta until his arrest on 20th May 2016 for a crime he did not commit.
7. The trial court considered the evidence adduced by the prosecution, rejected the appellant's alibi and observed, that the appellant had not called any witness to prove that he was in Bungoma and not in the vicinity when the crime was committed, especially in light of PW1's evidence who knew him well and identified him as the perpetrator.
8. Aggrieved, the appellant preferred an appeal before the High Court (Joel Ngugi, J. as he then was). The learned Judge upheld the appellant's conviction and allowed the appeal on sentence only to the extent that the prison term would run from 21st April 2016 when the appellant was taken into custody.
9. Aggrieved, the appellant is now before us on a second appeal and has raised the following grounds of appeal:
 - a. That the learned Judge erred by failing to find that the medical evidence produced was insufficient to support a conviction
 - b. That both courts disregarded the appellant's alibi defence
 - c. That the evidence produced was inconsistent and contradictory
10. At the hearing of the appeal, the appellant appeared in person while Mr. Omutelema, Senior Assistant Director of Public Prosecution, appeared for the State.
11. The appellant in his written submissions argued that the medical evidence did not link him to the crime committed. He stated that the medical report clearly indicated that there were no obvious tears or injuries on PW1's genitalia and no sperm was found on her clothes or on her body.
12. The appellant further submitted that the prosecution had not dislodged his alibi and that the burden of proving the falsity of his defence lay with the prosecution and not the defence. Reliance was placed on the case of *Karanja vs. Republic* (1983) KLR 501, where this Court held that:

"in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."
13. In opposing the appeal, the state submitted that the prosecution presented evidence before the lower court that proved the charge of rape beyond reasonable doubt. Counsel pointed out that there was credible evidence to prove that there was penetration, that the appellant was the perpetrator and that PW1 had bruises in her anus, an indication that she was raped. It was further submitted that the



appellant was properly recognised as he is a neighbour and a person well known to the complainant. We were therefore urged to dismiss the appeal.

14. We have considered the record, submissions by counsel and the appellant as well as the law. As stated by this Court many times before, we will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See *Chemangong vs R* [1984] KLR 611.
15. On the issue of whether the prosecution discharged its burden of proof, the legal position, which was rightly stated by the appellant is that the burden of proof lies with the prosecution. This principle was stated in the locus classicus case of *DPP vs Woolmington*, (1935) UKHL 1 where the court established the “golden thread” principle that, it is the duty of the prosecution to prove the appellant’s guilt in criminal trials and no attempt to whittle it down can be entertained.
16. It is common ground that PW1 was the only witness to identify the appellant as the perpetrator. Section 124 of the *Evidence Act* is clear that where a criminal case involves a sexual offence and the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if the court is satisfied that the alleged victim is truthful and record the reasons thereof. See *Arthur Mshila Manga vs Republic* [2016] eKLR.
17. The trial court found that PW1 was a reliable witness whose evidence was coherent, believable, unshaken and well corroborated. We see no reason to interfere with the same. PW1 gave a detailed description of the four hour ordeal and was able to recognize the appellant who was well known to her because they had been neighbours for more than three years. She was able to see him using the phone light when her phone rang and she was also able to recognise his voice, first, when he warned her not to pick up the phone when it rang on two occasions and second, when he threatened her not to disclose the rape to anyone. From the record, it is also evident that PW1 described the appellant to her daughter and the police as the perpetrator and the son of M. This was corroborated by PW2 and PW3.
18. On the issue of whether the medical evidence was sufficient to warrant the appellant’s conviction. Section 2 of the *Sexual Offences Act* defines penetration as “the partial or complete insertion of the genital organs of a person into the genital organ of another person.”. Needless to say, one of the ingredients for rape is penetration and not the presence of spermatozoa.
19. In the case of *Mark Oiruri Mose vs R* [2013]eKLR this Court stated that;

“...So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl’s organ....”

The medical report submitted by PW4 clearly states that PW1 had lacerations on her anus and had suffered injuries to her urinal and anal areas. Consequently, the appellant’s assertion that PW1’s injuries were not extensive enough and the condition of her genital organs did not reflect a four hour rape ordeal have no basis.

20. Again, the appellant’s complaint that there was no medical evidence presented to connect him to the offence is equally without merit. In *AML vs Republic* 2012 eKLR this Court upheld the view that, “the fact of rape or defilement is not proved by way of a DNA test but by way of evidence.” In *Kassim Ali vs Republic Cr Appeal No. 84 of 2005 (Mombasa)* (unreported) this 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 the oral evidence of a victim of rape or by circumstantial evidence.”



21. The complainant having identified the appellant as the perpetrator clearly nails him down as the person who assaulted her sexually on the night of March 19th January, 2014. The injuries on her urinal and anal areas also corroborate the version of the complainant. The semen not having been detected on the clothes or the vaginal smear of the complainant, would have no bearing in the matter as the case of the prosecution stands proved beyond reasonable doubt by the version of the complainant by her identifying the appellant and her medical condition.
22. Lastly, on the issue of the appellant's alibi defence, we have considered whether the appellant's alibi defence raised reasonable doubt in the prosecution case. The Appellant alleges that he was not at the scene of the crime when the offence occurred. In *Karanja vs Republic* (1983) KLR 501 this court held that the defence of an alibi should not just be mentioned in passing, and that cogent evidence must be given on it that raises a reasonable doubt that the accused person was not at the scene of the crime at the material time.
23. Even though the appellant stated that he was working in Bungoma from 17th January 2014 and that he was not in the vicinity when the crime was committed, he did not call any witness to confirm his alibi. Nothing would have been easier than to call his aunt, sister or former employer to attest to his version of events. The Appellant's statement is therefore not supported by any cogent evidence and is also not convincing, given that there was evidence adduced that he went into hiding after the commission of the offence. The prosecution's evidence as to the Appellant's identification and involvement in the offence was therefore not contradicted.
24. In the end, the prosecution's evidence dislodged the defendant's defence of alibi and placed him at the scene. The finding of the trial court and the High Court that the appellant was properly identified and convicted of the offence of rape was based on overwhelming evidence and cannot be faulted. This ground of appeal, therefore, fails.
25. The upshot of the foregoing is that we find that the conviction and sentence of the appellant is well founded in law. We hereby dismiss the appeal

DATED AT NAKURU THIS 14TH DAY OF FEBRUARY, 2025.

M. WARSAME

JUDGE OF APPEAL

S. OLE KANTAI

JUDGE OF APPEAL

W. KORIR

JUDGE OF APPEAL

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

Signed

Deputy Registrar

