



**Weru v Republic (Criminal Appeal 101 of 2017)
[2024] KECA 1235 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1235 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 101 OF 2017
J MOHAMMED, AO MUCHELULE & LK KIMARU, JJA
SEPTEMBER 20, 2024**

BETWEEN

JAMES MURIITHI WERU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against conviction and sentence of the High Court of Kenya at Nyeri (Mshila, J.) dated 15th February 2017 in)

JUDGMENT

1. The appellant, James Muriithi Weru, was convicted by the Chief Magistrate’s Court at Nyeri of rape contrary to section 3(1) (a) (b) and (3) of the *Sexual Offences Act* (No. 3 of 2006) and sentenced to serve 20 years in jail. His appeal against the conviction and sentence was dismissed by the learned A. Mshila, J. of the High Court at Nyeri. He felt aggrieved and came before this Court on second appeal.
2. In his grounds of appeal, the appellant complained that the first appellate court had erred in upholding the conviction that was based on evidence that was not credible and which had not established his guilt beyond reasonable doubt; that it had not been considered that the complainant’s evidence was not supported by medical evidence; that the provisions of section 125 of the *Evidence Act* had not been adhered to; that his defence had been improperly rejected; and that the sentence was excessive.
3. The evidence on which the appellant was convicted was that, the complainant J.W.N. (PW 1) was mentally challenged and was about 35 years old. At about 4.00pm he was returning home after buying food to cook. He met the appellant whom he knew. On the pretence that they were going to look for an axe, PW 1 was led into a house where the appellant told him that he was going to have sex with him. He got oil which he applied to PW1’s anal area before he penetrated him with his penis. He gave PW1 Kshs.100/= and asked him not to tell anyone about it. He went home, and did not talk about it. The next day, PW 2 BN was concerned that up to 11.00am PW 1 was still asleep. He woke him up



and asked why he was still sleeping. PW 1 responded that he was tired. It was not until 5.00pm that he disclosed that the appellant had raped him the previous day. Villagers were informed, and the appellant was arrested. He was subjected to mob beating and taken to Mihuti AP Post and later to Mukurweini Police Station.

4. PW 1 was medically examined at Mukurweini Hospital about 24 hours following the incident. His anal region had no tears or lacerations, and there was no discharge.
5. In defence, the appellant denied raping PW 1 or meeting him on the material day. He narrated how on this day he was busy with his normal chores, and called his father Gideon Weru Kanyoa (DW 2), his brother Simon Chege (DW 3) and wife Jane Wanjiku (DW 4), to support this case. His defence was unsworn.
6. During the hearing of this appeal before us, the appellant relied on his written submissions in which he urged us to find that there was no medical evidence to prove PW1's testimony that he had been penetrated through the anus; that his guilt had not been proved beyond doubt. Lastly, that the sentence imposed had been excessive.
7. Learned counsel Mr. Naulikha for the State supported the conviction and sentence, and asked us to agree with the learned Judge that the appeal had no basis in law and fact.
8. This is a second appeal. Under section 361(1) of the *Criminal Procedure Code*, our mandate is limited to the consideration of matters of law only. We will not interfere with the concurrent findings of facts arrived at by the two courts before unless they were not based on the evidence (*Chemagong v Republic* [1984]KLR 213).
9. PW 1 was mentally challenged. The appellant's complaint was that the provisions of sections 125 of the *Evidence Act* were not considered when dealing with his evidence. Section 125 of the *Act* provides as follows:-
 - (1) "All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether body or mind) or any similar cause.
 - 2) A mentally disordered person or lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them."
10. Before PW1 began to testify before the trial court, he was examined and this is what he stated:-

"I am WJ. I come from Mihuti. I do casual jobs like chopping wood and carrying firewood. I live with N. He is our family member. He is from our home. He is my brother. I attend Full Gospel Church Karundu. The pastor is W. I did not attend church yesterday. I know I should tell the truth. Those who lie will go to hell. We are in court. I will tell the whole entire truth."
11. The trial magistrate said the following about PW 1's incapacity:-

"J has some incapacity but is alert as to time and place and is well oriented. The court does not even for a moment doubt his truthfulness. Why? He clearly had no motive to falsely implicate the accused person....."



12. The learned Judge observed that:-

“PW 1 though mentally challenged gave sworn testimony after the trial court had examined him and found that his challenge was not severe as to impair his ability to give evidence....”

13. We consider that the learned Judge was alive to the fact that PW 1 was mentally challenged; that the trial court had properly inquired into the challenge as required under section 215 of the *Evidence Act*; and determined that he was not only fit to testify, but that he was well oriented in time and place. We dismiss the complaint that the provisions of section 215 of the *Evidence Act* were not considered by the learned Judge.

14. The question was whether, on the evidence, the learned Judge was satisfied, upon reconsideration, that the charge of rape against the appellant had been proved beyond doubt. According to PW 1, the appellant forcefully penetrated his anus using his penis. He did this after oiling his anus. Both courts were alive to the fact that the medical evidence did not reveal any tear or laceration to the anus, and that there was no discharge. The medical examination was about 24 hours after the incident. The learned Judge observed that –

“for there to be penetration it is not necessary that there be visible tears and lacerations.”

15. It is clear that when confronted with the fact that PW1’s testimony that he had been forcefully penetrated in his anus did not find medical support, the two courts resorted to finding out who between PW 1 and the appellant was telling the truth. They found that PW 1 had told the truth but that the appellant had not. The appellant’s complaint was that his testimony that he did not meet PW 1 on this day found support in the evidence of his father, brother and wife who had accounted for his movement on this day; and that these testimonies had not been taken into consideration.

16. We are concerned that the learned Judge, while accepting the findings by the trial court, did not consider that the court, in its analysis of the evidence, accepted PW 1’s truthfulness but did not consider the witnesses the appellant had called to support his defence that he at no time was with PW 1. The appellant in effect gave an alibi defence. The trial court did not indicate why it did not consider the witnesses’ evidence to be able to discount it. We find that the appellant was entitled to have the learned Judge subject the entire evidence, both the prosecution and the defence, to fresh reconsideration and evaluation. (See *Okeno v Republic* [2972] EA 32); and that had not been done. We do not think that, however truthful PW 1 was, the absence of any tear, lacerations and discharge was something to be taken lightly in the face of his evidence that this was a forced penetration, and given the vehement denial by the appellant and his witnesses.

17. Consequently, we find that the appellant was convicted on less than safe evidence. The appeal is allowed, the conviction quashed and the sentence set aside. The appellant is hereby immediately set at liberty unless he is otherwise lawfully held.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

