



REPUBLIC OF KENYA



KENYA LAW
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**Kitsao v Republic (Criminal Appeal 47 of 2021)
[2023] KECA 82 (KLR) (3 February 2023) (Judgment)**

Neutral citation: [2023] KECA 82 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL 47 OF 2021
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
FEBRUARY 3, 2023**

BETWEEN

ALI MWARO KITSAO APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgement of the High Court of Kenya at Malindi
(R. Nyakundi J.) dated 7th November, 2019 in High Court Criminal
Appeal No 42 of 2018 Original Malindi CM Criminal Case 155 of 2016)*

JUDGMENT

1. The appellant, Ali Mwaro Kitsao has lodged this appeal against the judgement rendered by the R. Nyakundi, J. on September 7, 2019. The appellant had been charged before the Chief Magistrates Court at Malindi on March 4, 2016, with one count of the offence of rape contrary to section 3(1) (a) & (b), (3) of the [Sexual Offences Act](#). He faced the alternative count of committing an indecent act with an adult contrary to section 11(a) as read with section 6 of the [Sexual Offences Act](#). The appellant pleaded not guilty to both charges.
2. Six witnesses testified for the prosecution, while the appellant testified and called two witnesses. The prosecution evidence comprised the complainant PTM, who was PW2. She testified that on October 10, 2015, as she walked home from work, she met two people on a motor bike, and that one of them introduced himself as Charo, and promised to get her a job with a monthly salary of 9000/=, after which they exchanged phone numbers. PW2 testified that the next day Charo called her on phone after which they met at 2pm. That he rode with her on a motorbike towards the hospital then explained to her that he was going to use a short cut. That he then rode into some bushes where he stopped and forced her to alight from his motorbike. That he rained blows on her telling her that he must revenge because he knew her father and he had married her sister who ran away after poisoning his child.



3. She testified that he squeezed her throat, gagged her mouth and undressed her before he raped her. Her screams did not attract anyone but eventually when a man on a motor bike appeared, the appellant rode off. The man carried PW2 to the hospital where she was treated. PW2 reported the matter to PW5 PC Robert Kinuthia at Malindi Police Station. Eventually PW2 was called to Malindi Police Station where she identified the appellant as her assailant in an identification parade conducted by PW1.
4. PW3 was the father of the complainant. He told the court that he was a teacher. That on the fateful day his daughter, PW2 delayed returning home on time. That, a man and a woman escorted PW2 home and reported to him that she had been raped, and that they had taken her to hospital where she was attended. PW3 testified that the next day he escorted his daughter to Malindi Police Station where she made the report.
5. PW4, Mariam Charo was the woman who escorted the complainant home on the fateful day. Her evidence was that she was going to fetch firewood when she saw a man on a motor bike leaving the bushes. She then found the complainant crying with leaves on her head. On asking her what happened, PW2 told her that the man on the motor bike had raped her. PW4 escorted PW2 to the road, got a motor bike and rode with her to the hospital where she was treated.
6. PW6, Dr Ibrahim examined PW2 on October 14, 2015. He noted that the complainant had swollen eyes, tenderness of the right throat, and tenderness of the right thumb, a broken hymen and sperms in the urine. He concluded that the complainant had been raped. He produced the treatment notes and the P3 form as exhibits 4, 2 and 3.
7. In his defence the appellant told court that on the material day he was on duty from 7 am to 6 pm at his place of work. He said that he was arrested on 29th February 2015. He denied committing the offence. He called his employer DW2, Lucy Francis Fondo who testified that on the material day the appellant was at work as a guard, as evidenced by the register marked Dexh5. The appellant called the husband of his employer DW3, Michael Kingi who testified that he left the appellant as he left with his wife to take her to hospital that day. That he returned home at 6.30 am. DW3 stated that the appellant worked half day on the October 11, 2015 according to the duty roster.
8. The learned trial magistrate Hon Julie Oseko, in her judgement delivered on July 20, 2018 convicted the appellant of the charge of rape and sentenced him to 20 years imprisonment. The learned trial magistrate was satisfied with the evidence of identification by PW2, observing that the incident occurred during broad daylight, and due to close proximity with the appellant the complainant was able to remember him and to identify him in an identification parade that was held 5 months later. The court dismissed the appellant's defence of *alibi*, finding that none of the appellant's two witnesses could confidently confirm that the appellant did not leave their compound between 2pm and 3pm when the incident occurred. It was her finding that the defence evidence did not cast any doubt in the evidence of PW1 and PW4. The learned trial magistrate found that PW4 came to the rape scene soon after it had occurred and saw a man leaving the scene just before meeting the complainant crying, injured and complaining she was raped. That presence of semen in the complainant's vagina, confirmed sexual intercourse, and that the injuries noted as recorded in the P3 form indicative that the appellant did not consent to the act.
9. The appellant was dissatisfied with the decision of the learned magistrate and appealed to the High Court at Malindi. He raised five grounds of appeal, that the learned trial magistrate erred for convicting him based on the grounds: that the offence of rape was not proven; that the evidence adduced did not meet the required standard; that the sentence meted on him was excessive; that the trial court did not properly consider the evidence and the defence and submissions and therefore arrived at an erroneous decision; and that the evidence did not support the conviction.



10. The learned R. Nyakundi, J. in a judgement rendered on November 7, 2019 dismissed the appeal, upheld the conviction and confirmed the sentence.
11. It is against this judgment that the appellant now appeals to this court. Three grounds of appeal have been raised; one that the offence of rape was not proved; two, that the identification of the appellant by the complainant was unreliable; and three, the sentence of 20 years imprisonment was excessive.
12. This being a second appeal from the decision of the trial court in Malindi Chief Magistrates criminal case No 155 of 2016, we are restricted to determining points of law and not of fact by dint of section 361(a) of the *Criminal Procedure Code* and explained by this court (Waki, Karanja & Kiage JJ.A) in the case of *Stanley N Muriithi & another v Bernard Munene Ithiga* [2016] eKLR as follows:

“...In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

We hasten to observe, however, that failure on the part of the first appellate court to re-evaluate the evidence tendered before the trial court and as a result, arriving at the wrong conclusion is a point of law.”

13. When this appeal came up for hearing on the virtual platform on July 25, 2022 learned counsel Mr Chimwada was present for the appellant, while learned prosecution counsel Mr Kirui was present for the state, holding brief for Mr Alex Gituma, principal prosecution counsel. The appellant was also present appearing virtually from prison.
14. Mr Chimwada relied on his written submissions as well as his bundle of authorities, both of which were undated. Counsel, in reference to the first ground of appeal that rape was not proved urged us to re-consider the legal issue of penetration. He urged that the court should not only consider whether penetration took place but also the circumstances under which it took place. Referring to the High Court’s finding, that penetration was proved on the basis of lab test results which revealed the presence of spermatozoa and epidural cells; cited *Benjamin Mugo Mwangi & another v Republic* [1984] eKLR for the proposition that presence of spermatozoa alone in a woman’s vagina is not enough to prove penetration; and that what was required was proof of penetration.
15. Mr Kirui relied on the filed written submissions by the learned principal prosecution counsel, Mr Gituma, whose brief he held. He did not wish to highlight them. In those submissions, counsel stated that by the time they filed their submissions, the appellant had not served them with theirs. He stated that therefore the submissions were based on the grounds of appeal as set out on the record of appeal.
16. In regard to rape, Mr Gituma urged that the ingredients of rape are set out under section 3 (1) of the *Sexual Offences Act*, and urged that the three important ingredients are prove of the identification of the offender, proof of penetration and lack of consent and or use of threats.
17. In regard to penetration, counsel urged that the key evidence relied on is the complainant’s own evidence which is usually corroborated by the medical report presented by a medical officer. That in this case, the complainant’s evidence was that the appellant forcefully had sex to her, and that the medical evidence adduced corroborated her evidence, exhibit 4, which showed that the victim’s eyes were swollen and tenderness on the throat and broken hymen. Counsel relied on the case of *Peter Mwiti Gichuru v Republic* [2020] eKLR for the proposition that where available medical evidence



arising from examination of the accused is welcome, but that such evidence is not mandatory or the only evidence upon which an accused person can properly be convicted for defilement.

18. We have examined the judgment of both the Magistrates Court and the High Court. On the issue of the ingredients of rape, the learned judge of the High Court considered the definition of penetration as set out under section 2 thus:

“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

19. The learned judge also considered the definition of rape under section 3 (1) thus:

“3. Rape

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.”

20. The learned judge also examined the issues around consent under section 42 and 43 of the SOA and then stated:

“Applying the above legal provisions to the present case I find that from the record the appellant (sic) PW2 testified that the accused told her that he knew her dad and had also married her sister who had poisoned his child ...The accused told her that he must revenge. He attempted to strangle her and beating her face with cloth he had, pushed her onto the ground and raped her against her will. The medical evidence of PW6 shows that the lab test results revealed the presence of spermatozoa and epidural cells... Regarding the element of consent, the complainant was adamant in her testimony that she did not consent to the act”

21. The learned judge was satisfied from the analysis that the complainant had not consented to the sexual act, and that the presence of injuries in the course of the attack on her by the appellant, which medical evidence confirmed, and PW4 corroborated established the two ingredients of rape. We find that there is no reason to fault the judge.

22. The learned judge considered the third ingredient which was that of the identification of the appellant as the perpetrator. Mr Chamwada relying on the case of *Benjamin Mugo Mwangi & another v R* (1984) eKLR submitted that the identification by a single witness was unreliable as it was not corroborated. He urged that the High Court erred in law in holding the evidence of PW2 and PW4 placed the appellant at the scene, while PW2 said that the appellant was wearing a helmet on the day in question. Mr Gituma on his part urged that the incident was committed in broad day light and from close proximity and further that, the complainant and the appellant met the day before and therefore that the evidence on identification was reliable.



23. As to the identification of the appellant, undoubtedly, evidence of identification requires scrutiny to ensure that it is free from possibility of error, or mistake as pronounced by the court in Wamunga v Republic [1989] KLR 424. See also Ogeto v Republic [2004] KLR 19, where the court stated:
- “It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the court has to bear in mind that it is possible for a witness to be honest but to be mistaken.”
24. The learned High Court judge scrutinized the evidence of the complainant the sole eye witness, and the circumstances of lighting at the scene of the attack, the proximity at which the complainant saw the appellant, and the length of time the complainant was with the appellant and was convinced that the identification was safe. He found that the complainant’s evidence was clear that the appellant removed his helmet at the scene of rape and so she had an opportunity to see the appellant face at close proximity. Further that the fact she had seen him the day before in broad day light, and was able to pick him out in an identification parade gave credence to her evidence.
25. We agree with the learned High Court judge’s analysis and conclusions on the issue of identification. The learned judge tested with the greatest care the quality of identification, taking into scrutiny all the relevant elements of lighting and distance at which identification was made, and came to the conclusion that the appellant was properly identified by the complainant.
26. In regard to the alibi defence, Mr Chamwada urged that the courts below erred in rejecting that defence, that the courts ought to have presumed that the appellant was at work the whole day since he was a guard. He relied on the case of Atbuman Salim Atbuman v R (2016) eKLR for the proposition that by setting an alibi defence, the appellant did not assume the burden of proving the truth, that the burden to disprove the alibi and prove the appellant’s guilt lay throughout on the prosecution.
27. Mr Gituma, citing Erick Otieno Meda v R [2019] eKLR urged that an *alibi* defence should have been introduced at an early stage to enable it to be tested, especially during cross- examination.
28. The learned trial magistrate and the learned High Court judge both applied the correct principles when they considered the alibi defence; that the defence does not shift the burden of proof against the accused person. Also considered was the ideal time when an *alibi* defence should be raised, which is at the time of plea taking, but which was raised at the defence stage. The learned judge weighed the evidence of the appellant and his two witnesses against the prosecution evidence and found that the *alibi* defence did not shake the prosecution evidence against the appellant.
29. We agree with this finding. The way to deal with an alibi defence is not to shift the burden of proof to the accused person, or to require the accused person to prove that the alibi is true; but the correct principle to apply is to weigh alibi defence against the prosecution evidence and test whether the defence has created any doubt in the prosecution case. If any doubt is created as to the veracity of the prosecution evidence, then the accused person should be given the benefit of doubt. In this case. See Karanja v Republic [1983] KLR 501
30. In this case, the evidence of identification remained strong and unshaken. The complainant’s evidence also received material corroboration, both in the evidence of PW4, who saw a man leaving the area where soon thereafter she found the complainant crying, soiled, and complaining of rape; and, from the medical evidence. We find no reason to differ with the concurrent findings of the courts below.
31. In regard to the sentence, Mr Chamwada pointed out that section 3(3) of the SOA provides for a 10 years sentence and that therefore 20 years meted on the appellant was excessive. Counsel cited the case



of *Reuben Witaba v R* (2017) eKLR for the proposition that a maximum sentence was improper for a first offender. Mr Gituma on his part cited the case of *David Mutai v R* [2021] eKLR and urged that the legal position was that even an appellate court cannot interfere with the exercise of discretion in sentencing unless it is established that there was an error in the application of sentencing principles. He urged that the sentence meted out to the appellant was commensurate with the seriousness of the offence and should therefore be upheld.

32. In *Wanjema v Republic* (1971) EA 493 this court stated as follows regarding interference with sentencing:

“ [The] appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case.”

33. The complaint raised against the sentence is that it was excessive, based on the fact the minimum sentence prescribed under section 3(3) of the SOA is 10 years. Nothing else was raised in that regard. We have seen the ruling on sentence by the learned trial magistrate. The prosecution treated the appellant as a first offender. The trial court called for mitigation which is recorded as follows:

“ Accused is 20 years old. He is young, is 1st offender. He has a family when suffering (sic). He is remorseful and prays for a lenient sentence.”

34. The ruling on sentence put into consideration the mitigation of the appellant, and the escalating and prevalence of the offence in the country, the negative impact on the complainant and her future as a young woman, and was of the view that a deterrent sentence was appropriate to make in order to serve as a warning to other young men. We find that the sentence meted to the appellant was legal. We find no reason to disturb it.

35. There is nothing on record to show that the learned judge erred in upholding the sentence. As stated before, severity of sentence is a question of fact and in a second appeal our jurisdiction is confined to matters of law. In *M K M v Republic* [2018] eKLR this court faced with a similar

“ appeal” rendered itself thus: -

“Indeed, we need to state quite categorically that the practice now seeming to gain traction and notoriety, of second appeals against severity of sentence only being presented as mitigation statements or the like, has no foundation in law, is contrary to statute and should stop. It is also worth recalling, that when all a person presents on a second appeal is a mitigation, there really is no appeal because an appeal under our rules is based on a memorandum of appeal.”

36. Having considered this appeal, we have come to the conclusion that the same is for dismissal. We find no merit in this appeal and we dismiss it in its entirety.

DATED AND DELIVERED AT MALINDI THIS 3RD DAY OF FEBRUARY, 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA



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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

