**Mubweka v Republic (Criminal Appeal 29 of 2021)**
**[2023] KECA 748 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KECA 748 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CRIMINAL APPEAL 29 OF 2021**

**AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA**

**JUNE 22, 2023**

**BETWEEN**

**PATRICK JUMA MUBWEKA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (K.W. Kiarie, J.) dated 3rd July, 2015 in HC. CR.A. No. 38 of 2014)***

## JUDGMENT

1. The appellant in this matter was charged at the Chief Magistrates Court at Kiambu with the offence of robbery with violence contrary to section 296(2) of the *Penal Code* particulars being that on March 25, 2013 in Nairobi the appellant, while armed with a knife, robbed VAJ of her valuables being a mobile phone and cash and that at the time of the robbery he threatened to use actual violence against the said person. He was charged in the 2nd count with the offence of rape contrary to section 3(1)(a) and (c) as read with section 3 (3) of the *Sexual Offences Act* No 3 of 2006, particulars being that on the said day at the said place, he intentionally and unlawfully caused his penis to penetrate the vagina of the said VAJ without her consent. A trial took place where the prosecution called 5 witnesses and the appellant, upon being put on his defence gave a sworn statement but did not call any witness. The trial Magistrate evaluated the evidence and found that the prosecution had failed to prove the robbery with violence charge and the appellant was acquitted in count 1. On the second count, the trial Magistrate found that the rape charge had been proved to the required standard; the appellant was convicted of that charge and sentenced to serve 15 years imprisonment. His appeal to the high court of Kenya at Nairobi was dismissed in a Judgment delivered by Kiarie, J. on July 3, 2015. The appellant is dissatisfied with those findings and has filed this second appeal. Our mandate in such an appeal is limited to a consideration of issues of law and we must resist the temptation to consider matters of fact which have

been considered by the trial court and re-evaluated by the first appellate court. This Court had this to say of that mandate in *John Kariuki Gikonyo v Republic* [2019] eKLR:

> "(15) This being a second appeal as we have already stated, our jurisdiction is limited to matters of law only. In *David Njoroge v Republic*, [2011] eKLR, this court stated that under section 361 of the *Criminal Procedure Code*:
>
> > "Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also *Chemagong v Republic* (1984) KLR 213."

2. We shall visit the facts of the case briefly to satisfy ourselves whether the two courts below carried out their mandate as required by law.

3. VAJ (J - PW1) told the trial court that at the material time, she worked at a hotel as a waitress and knew the appellant as a regular customer. On March 25, 2013, the appellant informed her that he would introduce her to a potential employer for a better paying job as a waitress. The appellant requested PW1 to carry her certificates and that they would meet the potential employer in Runda, Nairobi. They then boarded a matatu for Kiambu town and alighted at a stage and the appellant informed her that they would take a walk to the employer's house. She stated that she became uneasy as it was taking long to reach the alleged destination and darkness was approaching. They diverted into a bushy path and at that point, she demanded that he should return her documents. PW1 further stated that the appellant pulled out a knife and threatened her, while pushing her further into the bush. J said that the appellant proceeded to rob her of her valuables, namely money and a mobile phone, and unsuccessfully tried to obtain money from her phone (M-Pesa), all while lying on her to pin her down.

4. He ordered her to undress while threatening her with the knife and he repeatedly raped her for 30 minutes. He ordered her to remain in place while he walked away, but got up and she ran off soon after. She got help from passers-by, to whom she described her assailant and the ordeal she had undergone. They chased after him and apprehended him. She was assisted and ended up at Runda Police Station where she gave a description of the appellant, who later appeared at the police station brought by those who had arrested him and he denied knowing her. She said that he later tried to tell the police that she was a girlfriend, which she denied.

5. PMG (G-PW2) was heading home at about 7.30 p.m. on that day when he met the appellant coming out of a bushy path; the appellant was, barely a minute later, followed by a lady, J , who was running and crying. She told him and his colleague that there was a man ahead in a suit who had robbed and raped her and they rushed after the man and caught up with him. G said that the appellant tried to flee and also tried to attack them with a knife but they overpowered him. They took him to Runda Police Station where they found J already at the police station.

6. Dr. Ken Mworia, PW3, was a medical officer at Kiambu District Hospital who testified that J had been received at the hospital complaining of being sexually assaulted by a person known to her. On examination, her underwear had multiple patches of discolouration. She was traumatized and had bruises on her vaginal introitus (external genitalia) and there was discharge. He produced the P3 form as part of the evidence.

7. PC Paul Langat, PW4, of Runda Police Station was the arresting officer who was at the station when the appellant was presented at the Police Station. He arrested the appellant while Corporal Linus Laitul (PW5) of the same station was the Investigating Officer who undertook investigations and recorded statements. He produced J 's underwear as part of evidence.

8. Upon close of the prosecution case the appellant was placed on his defence and gave a sworn defence. He stated that he knew J and that she called to meet him in town then suggested that they take a room. The appellant responded that he did not have money to hire a lodging and he tried to get to a friend in Runda to give him accommodation but the friend was unreachable. The appellant said that J got angry with him and that as he started to walk away from her, he was accosted by two men who arrested him. He said the charges were a lie and he never promised J any employment. The appellant told the court that J was a girlfriend but they had never had sex before.

9. The appellant was convicted as we have seen.

10. The appellant is now before us on a second appeal through a homemade "memorandum of appeal" where he says in the 5 grounds set out that the high court erred in convicting him when penetration had not been proved; that the High Court erred in not finding that provisions of Section 211 *Criminal Procedure Code* had not been explained to him; that the high court erred in not finding that section 124 *Evidence Act* was not properly applied; that his defence was wrongly rejected; and

> " That, I will adduce more grounds during the hearing of the appeal and after being served with the copy of proceedings."

He prays that the appeal succeeds in its entirety.

11. When the appeal came up for hearing before us on a virtual platform on January 24, 2023, the appellant was present from Kamiti Prison and was represented by Dr Samuel Sungi while learned State Counsel Miss Margaret Matiru appeared for the office of the director of public prosecutions.

12. Dr Sungi informed us that he had filed supplementary grounds of appeal and written submissions. There is one ground set out in the supplementary grounds of appeal to the effect that the judge of the high court erred in law for failing to evaluate the evidence relied upon to convict the appellant. The appellant states that there are rules of practice to guard against the danger of conviction upon uncorroborated testimony particularly where children are involved or accomplices and in sexual offences. According to the appellant the nature in which sexual offences are committed necessitates that testimony be corroborated. Since the appellant was acquitted on the robbery with violence charge, he could not be convicted of rape, says the appellant. The case of *Benjamin Mugo Mwangi and another v Republic* (1984) eKLR is cited for the proposition that even presence of spermatozoa in a woman's vagina is not conclusive proof that she had sexual intercourse nor is absence of spermatozoa in her vagina proof of the contrary. Proof of penetration is required to prove that sexual intercourse had taken place. It is submitted for the appellant in conclusion that neither the trial magistrate nor the Judge on first appeal warned themselves of the dangers of acting on uncorroborated testimony to found the conviction.

13. In opposing the appeal Miss Matiru relied on written submissions where the history of the case is given and our mandate in a second appeal identified. It is submitted for the respondent that the age of the victim was proved and the case of *Charles Wamukhoya Karani v Republic* Criminal Appeal No 72 of 2013 cited where it was identified that the critical ingredient forming the offence of defilement are age of the complainant, proof of penetration and positive identification of the assailant. We note in passing

that the offence in respect of the appeal before us was not defilement; it was rape and that definition of the offence of defilement is not applicable here.

14. It is submitted for the respondent in respect of penetration that there was medical evidence to prove that rape had taken place. The other submissions are probably in respect of grounds of appeal set out in the homemade grounds which learned counsel for the appellant did not address and it is safe to assume that they were abandoned as counsel for the appellant only addressed the one ground set out in the supplementary grounds of appeal.

15. We have considered the record of appeal, submissions made and the law and this is how we determine the appeal.

16. The only ground of appeal raised, and which we consider an issue of law, is whether the high court on first appeal evaluated the evidence to reach its own conclusion in the matter before it.

17. The appellant was charged and convicted of the offence of rape, a conviction which was upheld by the high court on first appeal.

18. The high court in the Judgment appealed from traced the history of the case and found that J and the appellant were well acquainted as the appellant was a frequent customer at the bar or hotel where J worked as a waitress. He promised her a better paying similar job at a different establishment and she fell for the idea. It was while they were going to the alleged new job that the appellant lured J into the bush where he drew out a knife, threatened her with it and proceeded to rape her. He left her there but she escaped, met two people, including G (PW2) where she narrated the ordeal and the appellant was arrested near the scene a few moments later. The Judge found that J had given a description of the appellant leading to the arrest and that:

> " ... The evidence of the Complainant, that of PMG (PW2) and the defence of the appellant place him at the scene at the time of the alleged offence..."

19. The Judge found the bruises in J 's vaginal area were caused by the forced sexual intercourse complained of; that the P3 form indicated that the bruises were a few hours old.

20. The offence of rape occurs when a person intentionally and unlawfully causes penetration with his or her genital organs; the other person does not consent to the penetration, or, the consent is obtained by force or by means of threats or intimidation of any kind. J 's testimony on to how the rape occurred was straight-forward. She and the appellant knew each other very well and it was J 's case that she fell for the promise by the appellant of a better paying job that she agreed to accompany him to the new job place but that was not to be as the appellant lured her to the bush and raped her while threatening her with a knife. She reported the matter immediately after the ordeal giving a description of the appellant and he was arrested within the area while waiting to board public transport to escape from the scene. J 's testimony that she had been raped was corroborated by the evidence of the doctor who examined her and found bruises caused by sexual activity and, like the learned Judge, we reach the conclusion that the same were caused by forced sexual penetration. J did not consent to such activity and in those circumstances the ingredients making the case of rape were satisfied. The judge reached the correct conclusion in dismissing the appeal. We find no merit in this appeal which we dismiss in its entirety.

**DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE, 2023.**

**A.K. MURGOR**

**.....**

**JUDGE OF APPEAL**

**S. ole KANTAI**

**.....**

**JUDGE OF APPEAL**

**.....**

**M. GACHOKA, CIArb, FCIArb**

**.....**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**