



REPUBLIC OF KENYA



**KENYA LAW**  
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**Akunga v Republic (Criminal Appeal 23 of 2018)  
[2023] KECA 963 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KECA 963 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 23 OF 2018  
PO KIAGE, F TUIYOTT & JM NGUGI, JJA  
JULY 21, 2023**

**BETWEEN**

**JAMES MIRIERI AKUNGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Kisii  
(R.N. Sitati, J.) dated 5th June, 2014 in HCCRA No. 131 of 2012)*

**JUDGMENT**

1. The elderly wear the majesty of grey hair! They will have made their contribution to society and as they prepare for their final curtain call, deserve our reverence, love and protection. It is therefore difficult to think of a more depraved violation than a sexual assault of a weak and elderly woman of 80 years.
2. The two courts below believed this story. In her old age, AM is unable to work. She spends her time in and around her house at Nyosia. A humble home with two rooms, one bedroom and a sitting room. Very close to her house is the house of her sisters-in-law M1 and M2.
3. At about 10.00pm on 6<sup>th</sup> December, 2010, AM was rudely woken up from her sleep and raped by a young man known to her. As he would, he easily overpowered her and was able to sexually assault her for about two hours. The ordeal and torment left her injured and in pain. That man, the appellant, was a neighbour.
4. The following morning at about 10am, MC a daughter- in-law of AM visited her grandmother to find her in a state of despair. AM was lying on her back in bed, her legs sprawled wide apart. She was visibly in pain. On the blanket was faeces, semen looking discharge and blood. A scene from a horror movie! AM told her daughter- in-law that she had been raped by the appellant. But as a matter of urgency, the victim needed immediate medical attention.



5. At Keumbu Sub-District Hospital, Angela Onsongo (PW5), a clinical officer, received AM. PW5 noted that the victim was elderly and following hospital protocol in attending to a victim of sexual assault, she saw and attended to her in private. The victim had blood stains in her private parts and was in a lot of pain. Found in her was a substance which on being tested turned out to be spermatozoa. It was beyond peradventure that there had been penetration into her vagina.
6. Although the crime happened on 6<sup>th</sup> December, 2010, it was not until 28<sup>th</sup> March, 2011, three months later, that the appellant was arrested. Elijah Onsono Nyantenga (PW4), a member of the community policing at Kegati Location who arrested the appellant explained that the appellant left his home immediately after committing the crime and did not return until that date in March for his sister's funeral.
7. The trial court, as the appellate court, disbelieved the appellant's denial and testimony that he had left home on 10<sup>th</sup> October, 2010 to work and only returned when he was informed that the sub- chief was looking for him.
8. The appellant is currently serving a 30 year prison term after he was convicted of the offence of rape contrary to section 3(1) (a) of the *Sexual Offences Act* as read with section 3(3) of the same Act, a conviction and sentence that was upheld by the High Court.
9. This is a second appeal and our remit under section 361 of the *Criminal Procedure Code* is restricted to considering questions of law only. Of this remit, this Court in *Karani -vs- R* [2010] 1 KLR 73 stated:
 

“This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.” See also *Karingo -vs- R* (1982) KLR 213.
10. Second, an appellant on a second appeal is not permitted to raise grounds of attack not put forward in a first appeal unless with leave of the second appellate court. The policy reason for this rule is explained in *Republic v. Tribunal of Inquiry to investigate the conduct of Tom Mbaluto & Others ex-parte Tom Mbaluto* [2018] eKLR;
 

“Rule 104 of the Court of Appeal Rules, among others, prohibits an appellant from arguing, without leave of the Court, grounds of appeal other than those set out in the memorandum of appeal. The appellant did not seek leave of the Court to raise the new ground of appeal but rather belatedly, and literally from the blue, raised it in the written submissions. It needs no emphasis that submissions must be founded on the issues before the court and the evidence on record regarding the issue. A party is not at liberty to change the nature of his case surreptitiously at the submissions stage.”
11. We make those observations even before setting out the grievances of the appellant before us because the appellant seeks to complain on the manner in which the charge sheet at trial was amended, an issue not raised before the High Court and is therefore not properly before us. What is therefore left on the appeal on conviction is criticism that the appellant was not properly identified as the perpetrator of the heinous crime. Since there was concurrence by the two courts below that the identification of the appellant by way of recognition was safe, we approach the matter from the circumscribed position



that we are bound by that finding unless it is demonstrated that it was reached on no evidence or on a manifest misapprehension of the evidence.

12. The appellant, who appeared before us in person, submitted that the identification evidence of PW1, which was the sole identifying evidence, was in very difficult circumstances as affirmed by the first appellate court. It is asserted that it was at night, the source of light was not stated, the nature, strength and intensity of the light was not given. Moreover, that the identifying witness, elderly, admitted before the trial court that she had problems with her sight and was unable to see the accused during the trial conducted in broad day light, barely five (5) months after the alleged offence. On this the appellant contends that there was no evidence that the problems of eye sight were attributed to the assault. It was argued that the court ought to have probed into how the victim could have identified her assailant other than by sight especially when he, the appellant, was mono-eyed.
13. Training his guns on the High Court, the appellant contends that the learned Judge put a lot of premium on visual recognition rather than voice recognition yet on that the complainant, based on physical limitation of her age, could have been honestly mistaken. The decision of the Supreme Court of Uganda in *Bogere Moses and Another v. Uganda*, Criminal Appeal No. 1 of 1997 was cited.
14. We understand the appellant to be further arguing that any doubts would have been eliminated had the traces of spermatozoa found on the victim been subjected to forensic examination, like DNA, to link him to the offence.
15. Mr. Okango who appeared for the respondent did not make any response to the issue of identification or recognition raised by the appellant save to remind us that on a second appeal our concern ought to be restricted to points of law only.
16. How did the trial court connect the appellant to the crime? The trial court, observed:

“...She said that there was light on and she saw him with her own eyes. The trauma to her body after this incident was so great, that she has not been able to walk and see since...

I must address my mind to the issue of the victim’s inability to see the accused in court. She saw the accused on the night on the incident and referred to him as Peter Miriere her neighbor and son.”

17. On its part, the High Court, after appropriately laying out the approach which courts should take in considering evidence of recognition by a single witness held:

“ 36. In the instant case, though it cannot be denied that PW1 did not state in her evidence in chief the source of light she used to identify the appellant (She only stated there was light on in her room) nor did the trial court warn itself against convicting the appellant on the evidence of a single eye witnesses I am convinced beyond reasonable doubt that the appellant was recognized by PW1 as her assailant and that he committed the offence. I say so for the following reasons:-

37. First, the appellant was not a stranger to the complainant as she recognized him as his neighbour and so did PW3 and PW4. In *Peter Musau Mwanzia v. Republic* [2008] eKLR Court of Appeal at Nairobi (Tunoi, Bosire



and Onyango Otieno JJA) expressed themselves thus on the question of recognition:

“We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question.”

38. In the instant case, PW1 testified that the appellant was the son of her neighbor. PW1 knew the appellant as Peter, and she said she saw him with her own eyes when he entered her room. He stood where she lay down in bed. He then lay on her and raped her for about two hours. During the ordeal, the appellant covered PW1’s mouth.”

18. We cannot find any reason to fault these concurrent findings of the two courts. We observe that there was a finding, supported by the evidence on record, that at the time of the assault, the victim was able to see the assailant because there was light in her room. Whatever the reasons for her subsequent quick deterioration of sight, it does not diminish the strength of her evidence that she saw her assailant sexually assault her for over two hours. Important as well is that there was overwhelming evidence that the assailant was well known to the victim and so the evidence was that of recognition.
19. No doubt a forensic examination of the spermatozoa found in the victim may have added a significant layer to the strength of the prosecution case, yet we hold that the recognition evidence sufficiently and safely proved that the appellant was the perpetrator of this most despicable offence.
20. On sentence, the appellant argues that the sentence of 30 years imprisonment imposed against him is harsh, inappropriate and excessive for the offence of rape. Yet in doing so the appellant boxes himself into an intractable position. This is because, by dint of section 361 (1) of the Criminal Procedure Code, we cannot hear a second appeal on a matter of fact and the provision expressly declares that severity of sentence to be a matter of fact. Still had the law granted us a platform to review the sentence, we would have little hesitation in re-affirming it as appropriate and deserved. The abominable crime committed by the appellant on a helpless octogenarian calls for such a sentence, if not more.
21. In the end the appeal fails on both conviction and sentence.

**DATED AND DELIVERED AT KISUMU THIS 21<sup>ST</sup> DAY OF JULY, 2023.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

