



**Muthoni v Republic (Criminal Appeal 9 of 2017)
[2023] KECA 1532 (KLR) (15 December 2023) (Judgment)**

Neutral citation: [2023] KECA 1532 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 9 OF 2017
F SICHALE, FA OCHIENG & WK KORIR, JJA
DECEMBER 15, 2023**

BETWEEN

HENRY NJOROGE MUTHONI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Naivasha, Meoli J.), dated and delivered on 23rd February 2017) In (HC. CRA NO. 72 OF 2014)

JUDGMENT

1. Henry Njoroge Muthoni (the appellant herein), has preferred this second appeal challenging the dismissal of his first appeal by the High Court which he had lodged against his conviction and sentence that had been imposed by the Chief Magistrate's Court in Naivasha (Hon E. Kimilu the then *Ag. PM*) for the offence of gang rape contrary to Section 10 of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence were that on the 25th day of February 2014, at (particulars withheld), having a common intention to penetrate the vagina of BNN without her consent, the appellant was in company of Peter Watatua who intentionally and unlawfully caused his penis to penetrate the vagina of the said BNN.
3. The appellant denied the charge after which a full trial ensued with the State calling a total of 3 prosecution witnesses while the appellant gave an unsworn statement and did not call any witnesses. In a judgment delivered on November 14, 2014, Hon E. Kimilu found the appellant guilty and convicted him of the same and sentenced him to serve 15 years' imprisonment.
4. Being aggrieved with the aforesaid conviction and sentence, the appellant moved to the High Court on appeal and vide a judgment delivered on February 23, 2017, Meoli J, found the appeal to be devoid of merit and dismissed the same in its entirety, upheld the conviction and affirmed the sentence.



5. Unrelenting, the appellant has now filed this appeal vide an undated notice of appeal and a memorandum of appeal filed in court on March 3, 2017, raising 5 grounds of appeal some of which are overlapping. These were:-
- a). That I pleaded not guilty to the offence at trial.
 - b). That both the subordinate and high court erred in law when they convicted me in the present case yet failed to find that the evidence against me was weak and could not have sustained a safe conviction.
 - c). That both the subordinate and high court erred in law by failing to appreciate that the conviction was unsafe as the same was based on insufficient evidence owing to the prosecution's failure to summon key witnesses who could have given material evidence on what transpired at the scene and soon thereafter.
 - d). That both the subordinate court and the high court erred in law by failing to appreciate that the conviction was unsafe as the same was based on the evidence of a single prosecution witness whose evidence was materially contradictory and thus unreliable.
 - e). That both the subordinate court and the high court erred in law when they dismissed my truthful statement of defence."
6. The relevant facts in this appeal as narrated by the testimony of the prosecution witnesses are as follows; PW1 was BNN and the complainant in this case. It was her evidence that on February 25, 2014 at around 3pm, she had taken her mobile phone to the appellant's place of work "*kinyozi*" for charging. That at about 4pm, she went back to the appellant's place of work to pick the phone and found him with another gentleman and that at the rear of the "*kinyozi*" there was a studio which was open and the appellant told her to pick the phone at the studio.
7. While at the studio, she was held tightly from behind by the gentleman who was with the appellant and that she saw the appellant lock the door and increase the volume of the radio in the "*kinyozi*." The gentleman who was with the appellant then caused her to fall down, pulled out her skirt and panty and raped her. She tried to call their neighbor one Kariuki but the volume of the radio was high. She then went home and narrated the incident to one Mama Dave as there was nobody at home.
8. PW2 was Dr George Ngari, the medical officer in charge of Gilgil sub-district hospital. He produced a P3 Form in respect of PW1 who gave the history that she had been defiled by someone known to her. Upon examination, he found that she had no physical injuries, her labia majora was inflamed and her hymen was broken. Her inner wear had been stained and the degree of harm was classified as maim.
9. PW3 was PC Philip Awiti attached to Gilgil police station and the investigations officer in this case. It was his evidence that on 25th February 2014, he was in the office when PW1 accompanied by her mother came to report a case of rape at Langa Langa. PW1 narrated to him that she had taken her phone for charging in a "*kinyozi*" owned by the appellant and that when she went back to collect the phone, she was raped by the appellant's workmate and that further the appellant had locked the door while she was being raped and increased the radio volume to ensure that nobody gets to hear when she shouted for help. The appellant was later arrested by AP Officers and escorted to the police station while the other suspect remained at large. He subsequently charged the appellant with the offence of gang rape as aforesated.



10. The appellant in his defence gave an unsworn statement and called no witnesses. He denied having committed the offence and testified that on February 25, 2014, PW1 had brought her mobile phone to his “*kinyozi*” for charging. PW1 came back to pick the phone at 1:00pm. That, at around 7:00pm, he heard PW1’s mother saying that PW1 had been defiled and that when Peter Watatua (his colleague) heard that PW1 had been defiled he escaped through the back door. PW1’s mother followed him while shouting but they did not manage to apprehend him.
11. It was his further evidence that PW1’s mother then called the assistant chief who allowed him to close his business to go and search for his colleague. They went to all the places they suspected he could be but they did not find him. He was later arrested and taken to the police station for further interrogation and subsequently charged with the current offence of gang rape C/S 10 of the *Sexual Offences Act*.
12. When the matter came up for plenary hearing on June 7, 2023, the appellant appeared in person while Miss Kisoo learned State Counsel appeared for the respondent. The appellant in his brief address to the Court fell short of withdrawing his appeal and submitted that he was arrested in February 2014 and that he was in remand for a period of 9 months which period was not taken into account by the trial court. In a brief rejoinder, Miss Kisoo for the respondent agreed with the sentiments by the appellant that indeed his trial took a period of 9 months and that the period of 9 months was not indicated to have been taken into account. Consequently, she admitted that the appellant was entitled to have this period computed.
13. We have carefully considered the record, the rival oral submissions by the parties and the law. The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of Section 361 (1) (a) of the *Criminal Procedure Code*, we are mandated to consider only matters of law. See *Kados v Republic* Nyeri Cr Appeal No. 149 of 2006 (UR) where this Court rendered itself thus on this issue:

...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ...”

In *David Njoroge Macharia v Republic* [2011] eKLR it was 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 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 also *Chemagong v Republic* [1984] KLR 213).”
14. The facts in this appeal are rather straightforward. As alluded to earlier, when the appeal came up for plenary hearing on June 7, 2023, the appellant fell short of withdrawing the same, his main concern being that the period of 9 months that he was in custody was not taken into consideration. The evidence on record in this case which we have reproduced above was overwhelming and remained largely uncontested by the appellant.
15. PW1 gave a vivid description of the events of that fateful day on February 25, 2014 when she had taken her mobile phone to the appellant’s place of work “(Kinyozi)” for charging. When she went back to collect it, she was held tightly from behind by a gentleman who was with the appellant. She saw the appellant lock the door and increase the volume of the radio so that her voice could be drowned by the loud noise from the radio. The said gentleman caused her to fall down, pulled up her skirt and defiled her. The evidence of PW1 was further corroborated by the evidence of PW2 the doctor who produced



- the P3 Form which showed that indeed PW1 had been defiled and that her hymen had been broken. PW3 the investigations officer, gave a vivid account of the events of that day as narrated to him by PW1.
16. Additionally, the identity of the appellant was not in question and in his testimony he testified and corroborated PW1's evidence that indeed PW1 had brought her phone to his place of work ("*kinyozi*") for charging and that she was well known to her as a neighbor.
 17. From the circumstances of this case, we are in agreement with the concurrent findings by both the trial court and the High Court that the prosecution established the offence of gang rape against the appellant beyond any reasonable doubt and that there was overwhelming evidence to sustain a conviction against the appellant for a charge of gang rape.
 18. Accordingly, we hold and find that the appellants' conviction for the offence of gang rape was safe and sound, which conviction we hereby uphold and consequently, dismiss the appellant's appeal on conviction.
 19. On the sentence, the appellant was sentenced to 15 years' imprisonment which is the minimum sentence provided for under Section 10 of the *Sexual Offences Act*. The appellant submitted that he was arrested in February 2014 and that he was in remand for a period of 9 months which period was not taken into consideration of the time of sentencing. The State conceded as much.
 20. The record show that the appellant was first arraigned in court on February 27, 2014, whereupon he pleaded not guilty and was subsequently released on bond of Kshs 500,000/= with a surety of a similar amount or a cash bail of Kshs 100,000/=. There is no evidence on record to suggest that the appellant paid this bond/cash bail and in absence of the evidence to the contrary it would be safe to assume that he was not released from custody. Indeed, the State has not disputed this fact. The trial Court subsequently sentenced the appellant on November 14, 2014 and rendered itself thus;

"I have considered nature of the offence and accused mitigation however this offence has a minimum sentence. Accused is hereby sentenced to serve 15 years' imprisonment."
 21. From the above excerpts from the judgment of the trial court, it is evident that the period that the appellant had spent in custody as provided for by Section 333 (2) of the *Criminal Procedure Code* cap 75 of the Laws of Kenya was not taken into account in computing sentence. That section provides as follows;

Subject to the provisions of section 38 of the *Penal code* (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody." (Emphasis ours).
 22. From the circumstances of this case, the trial court clearly fell into error when it failed to take into consideration the period of 9 months that the appellant had spent in custody. Accordingly, we order that the sentence of 15 years' imprisonment meted out on the appellant on November 14, 2014, shall run from the date that the appellant was first arraigned in court on February 27, 2014. The appellant's appeal only succeeds to that extent. His appeal on conviction is hereby dismissed.
 23. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 15TH DAY OF DECEMBER, 2023.



F. SICHALE

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JUDGE OF APPEAL

F.A OCHIENG

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

