



**PKW v Republic (Criminal Appeal 68 of 2020)
[2022] KECA 1318 (KLR) (2 December 2022) (Judgment)**

Neutral citation: [2022] KECA 1318 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 68 OF 2020
MSA MAKHANDIA, S OLE KANTAI & GWN MACHARIA, JJA
DECEMBER 2, 2022**

BETWEEN

PKW APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Nairobi
(Achode, J.) dated 26th June, 2017 in HC. CR. A. No. 456 of 2009)*

JUDGMENT

- 1 This is a second appeal from the conviction and sentence of the appellant, PKW, by the principal magistrate's court at Kiambu. The appellant was charged and convicted on two main counts – rape contrary to section 3 (1) as read with section 3 (3) of the *Sexual Offences Act* No 3 of 2006 and on the second count of sodomy contrary to section 5 (1) (a) (i) as read with section 5 (2) of the said act. He was convicted on both counts and sentenced respectively to 20 and 25 years, the sentences to run consecutively.
- 2 His appeal to the High Court was dismissed by Achode, J (as she then was) but the judge ordered that since the offences were committed in the same transaction the sentences run concurrently.
- 3 Being a second appeal we are mandated in law (section 361 (1) (a) *Criminal Procedure Code*) to deal with issues of law only and resist the temptation of dealing with matters of fact which have been tried by the trial court and been reconsidered by the High Court on first appeal – *Stephen M' Irungi & Another v Republic [1982-88] 1 KAR 360* where the following passage appears on the duty of this court in a second appeal like this one:

' Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings



of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.'

4. We visit the facts of the case purely to satisfy ourselves whether the two counts below carried out their mandate as required by law.
5. MWN (PW1 – W), a hairdresser in [particulars withheld], Kiambu county, left work on February 14, 2009 and went to a bar where she enjoyed some drinks. She left the bar at about 11 pm and on the way home she was accosted by two men, among them the appellant who she knew before and had seen him and the other man at the bar that night. There was electric light and she recognized the appellant who demanded money from her. She had none and the appellant forced her to the playing grounds of [Particulars Withheld] High School where he removed her clothes, sodomized and then raped her. He then fell asleep and she took the opportunity to go to Karuri Police Station where she made a report indicating that she had been raped and sodomized by the appellant. That report was received by corporal LW (PW4) of the said police station who took her to Karuri Health Centre for treatment. On their way from hospital they passed by the said [Particulars Withheld] High School playing grounds and they found the appellant still soundly asleep. He was arrested and taken to the said police station and charged with the said offences.
6. AKM, a government analyst examined exhibits presented to him which included the appellant's underpants and those of W and blood and saliva samples of the appellant. He found W's underpants stained with semen of group B Blood and saliva samples of the appellant were of group B. He formed the opinion that W had engaged in sexual activity with a man whose blood was group B.
7. Dr RM of Nairobi Women Hospital received W who told him that she had been sexually assaulted by the appellant. He treated and counselled her.
8. That was the case made out by the prosecution upon which the appellant was asked to answer and he chose to give an unsworn statement where he stated that on the material day he visited a bar where he found W who he bought some beers. He asked for sexual favours to which she agreed at a fee which he used to pay her in previous similar liaisons. They were going to her salon where she had a mattress but this time she demanded more money to buy condoms and food. Where he used to pay her Ksh 200 in the past this time he gave her Ksh 1000 instead of buying food and condoms she came back with police who arrested him and he was charged with the said offences.
9. The trial magistrate analysed the case by the prosecution and the defence offered and convicted the appellant, a conviction that was confirmed by the High Court on first appeal.
10. The appellant has raised 5 grounds of appeal in the home drawn amended supplementary grounds of appeal. He says that the High Court erred in law by not finding that elements of rape were not proved; that he was not supplied with witness statements; that the High Court did not carry out its mandate of re-evaluating evidence to reach its own independent conclusion; that the High Court should have found that W was not a credible witness and, finally, that the High Court should have found that the case was not proved beyond reasonable doubt.
11. The only issues of law we see here is whether the case was proved as required and whether the High Court, on first appeal, re-analysed the case to reach its own conclusions.
12. We have looked at the whole record and have considered written submissions filed by both sides and which the appellant, who was unrepresented, and Miss Margaret Matiru, learned counsel for the office



of director of public prosecutions, referred us to when the appeal came up for hearing on a virtual platform on October 3, 2022.

13 The learned judge in the judgment delivered on June 26, 2014 set out the offences the appellant was charged with including alternative charges. She summarized the evidence given before the trial court and submissions made before her by the appellant and the state. She found on the evidence that the appellant and W knew each other very well; she knew his name; there was no doubt that sexual activity took place that night in question but the question was whether sex was consensual or that it was forced on W by the appellant. She analysed the evidence by the government analyst who found that the appellant was blood group B and the spermatozoa found on W's underpants was that of the said group B. She found at paragraph 11 of the judgment:

' The evidence before me boils down to the word of the complainant against that of the appellant. 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 positive identification were difficult. Further, the court has to bear in mind that it is possible for a witness to be honest yet be mistaken. See – the decision of Hon Judges of Appeal Omolo, Githinji and Onyango Otieno, JJA in *Ogeto v Republic [2014] 2KLR.*'

14. The judge found that although the appellant had no duty in law to prove his innocence it was difficult to understand his case where he was waiting for W at her salon to engage in sexual activity when, according to the evidence of not only W but that of the police officer the appellant was found fast asleep in the playing grounds of Karuri High School at about 4 am on the material night.

15 Upon our own consideration we are of the same opinion as that of the judge. The simple case was that the appellant who was well known to W accosted her on her way home at a place that was well lit with electric light. He demanded for money; she had none and he forced her to the playing grounds of the said school where he sodomized and raped her. There was evidence that the two had consumed alcohol that evening. He fell asleep in the open fields after satisfying his sexual needs and he was found asleep at the scene of crime and arrested. There is no break in the concatenation of events and we find that the appellant was properly convicted. There is no merit in this appeal which we accordingly dismiss.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S ole KANTAI

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JUDGE OF APPEAL

GW NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed



DEPUTY REGISTRAR

