



**Mutachi v Republic (Criminal Appeal E037 of 2023)
[2025] KEHC 2187 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 2187 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E037 OF 2023
SC CHIRCHIR, J
JANUARY 30, 2025**

BETWEEN

WYCLIFFE MUTACHI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising from judgment of Hon. R.S Kipngeno principal Magistrate
in Butali SPMC CRC NO. E32 of 2018 delivered on 14th June 2023)*

JUDGMENT

1. The Appellant, Wycliffe Mutachi was charged before the trial court with the offence of Rape contrary to section 3 (1) (a) (b) (c) (3) of the sexual offences Act NO. 3 of 2006.(The Act)
2. The particulars were that on 11th September 2018 in Kakamega North sub-county within Kakamega county intentionally and unlawfully caused his penis to penetrate the vagina of MN without her consent
3. He also faced an alternative charge of committing an indecent act with an Adult contrary to section 11(1) of the Act.
4. He was convicted of the main charge and sentenced to sentenced to 15 years imprisonment
5. The appellant was aggrieved with the judgment and filed the present Appeal challenging both the conviction and sentence.

Petition of Appeal.

6. The Appellant has set out the following grounds:



1. That the learned magistrate grossly erred in both law and fact in convicting him on evidence which did not meet the required standard
2. That the learned trial magistrate erred in law and facts by erroneously basing his conviction on evidence that was contradictory, inconsistent, uncorroborated, fabricated ,afterthought and malicious in nature.
3. That the learned trial magistrate erred in both law and facts by convicting and subsequently sentencing him on evidence that did not prove the offence beyond reasonable doubt as required by law.
4. That the learned trial magistrate grossly erred in both law and fact by failing to consider that there was no enough evidence to proof identification.
5. That the learned trial magistrate erred in law and facts by not appreciating and evaluating his plausible defense
6. That the learned trial magistrate erred in both law and facts by failing to consider that there was no proof of use of threat or force.
7. That more grounds to be adduced during the hearing of and after receiving the proceedings of the trial court.
8. The Appeal proceeded by way of written submissions

Appellant's submissions

9. The Appellant submitted that he was not properly identified; that an identification parade should have been conducted to confirm that the voice that the complainant heard was that of the his, and that in any event, the complainant's testimony was contradictory on how she allegedly identified him.
10. The Appellant further submits that he was not informed of his right to legal representation and failure to do so rendered the trial a nullity, pursuant to Article 50(2)(g) and (h) of *the constitution*.

Respondent's submissions

11. The respondent fully supported the Appeal. It is the respondent's submission that the complainant's evidence was contradictory and that there was no sufficient identification.

Evidence, in brief

12. PW1 was the complainant. She testified that on 11/19/2019 at 11.00 pm, she was asleep at her grandmother's house together with her siblings, T and her small brother, when she heard someone open the door . when she went to check up on it, a young man who had worn black jacket and a cap carrying a panga came in. He slammed her on the bed and placed a handkerchief in her mouth, pulled her skirt up and panty, and threatened her that if she screamed, she would know that he was Wycliffe Mutachi. He proceeded to rape her and when he was done, he took his panga and left.
13. She went and reported the incident to her father and when he came to the house he also saw the blood in her skirt, blouse and panty. At this point the witness was stood down , to allow the investigations officer procure the exhibits .
14. On being recalled , she stated that on 11/9/2018 at 11 p.m. she was asleep at her grandmother's house; that her grandmother had gone for a funeral; that she heard a knock and on going to open the door,



a man walked in. The man had an handkerchief, which he put in her mouth, pushed her to bed and raped her. She further stated that, she identified the accused , when he said he is Wycliffe Mukati. There was no light . She went to inform her father and because he had mentioned his name ,they went looking for him.

15. On cross- examination by the Appellant , she stated that she did not know him,; that she only came to know him when the Appellant said he was Wycliffe Mukati.
16. The two subsequent witnesses came after the event and therefore did not witness the incident
17. PW4 was the clinical officer who produced the complainant’s P3 form, Post Rape Care .On examination of the complainant, he found that her labia majora was bruised, the hymen was also bruised , she had blood stained public hair and a bloody discharge. The pregnancy test was negative. The P3, PRC and the laboratory results were produced.
18. At the close of the prosecution’s case, the Appellant was put on his defence.
19. I pose here to point out that at this point in the proceedings, the accused’s testimony is recorded twice . One being a sworn testimony and the other one being unsworn. The record shows that on 27/7/2022, the matter was before Honourable Z. Nyakundi. The Accused gave sworn statement. After the cross-examination the record reads: “ Defence hearing on 23/11/2022. Summons to issue to in- charge Namagara secondary”.
20. On 31/5/2023 the matter had been taken over by Hon. R.S Kipngeno. The Accused took the stand again and this time gave a unsworn statement .The recording of the accused’s testimony for the 2nd time was unexplained ,and was irregular in any event.
21. Nevertheless I have noted that the Accused statement in either record is consistent, he stated that he knew nothing about the rape; that he was picked from his house the same night and that the complainant did not identify him.

Analysis and determination.

22. I have considered the memorandum of Appeal, the lower court record and the submissions by both parties. This is a first Appeal and this court is mandated to review the evidence as presented in the lower court, evaluate it and arrive at its own conclusion.
23. The fact that the complainant was raped was clearly proved. However the identification of the perpetrator is a key issue in this Appeal.
24. The complainant’s testimony was that she heard a knock and when she opened she saw a man standing , he had a panga , was wearing a jacket and a cap. She stated that she did not know the accused , and that she only identified him when the accused told her if she screamed she would know he is William Mukati. She repeated this assertion at cross- examination.
25. When she first gave her testimony she stated that a solar lamp was on , but during the recall, she stated that there was no light but she arose and put the lamp on. It is not known at what point she lid the lamp , but from the chronology of her testimony there was no light at the point of attack. Further it was the complainant’s case that she did not know the Accused . That she only came to know him upon self-identification by the accused .
26. I have anxiously considered this piece of evidence . This is a case of identification by one witness and the identification was through what I would call self- identification by the perpetrator of the crime.



27. In *Cleophas Otieno Wamunga vs Republic* [1989] eKLR, the court had this to say about identification:

“Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.....”

28. In regard to identification by one witness, the court in the case of *Abdalla Bin Wendo V R* (1953)20 E.A. C.A. stated:

“subject to certain exceptions it is trite Law that a fact may be proved by the testimony of a single witness but this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification, were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or / direct, pointing to guilt, from which a judge or jury can positively conclude that the evidence of identification though based on the testimony of a single witness can safely be accepted as free from any possibility of error”

29. In *Roria V Republic* (1967) E.A. at 573 also held: “A conviction resting entirely on identity invariably causes a degree of uneasiness...

That danger is of course greater when evidence against an accused is identification by one witness though no one would suggest that a conviction based on such identification should never be upheld, it is the duty of this Court to satisfy itself that in all the circumstances it is safe to act on such identification.”

30. With the above guidance in mind , I now tuern to consider the identification in this case. This is a case in which, according to the complainant, the perpetrator identified himself . She went on to state that she did not know him, save for what the perpetrator himself told her. She further told the court that since the perpetrator stated his name, she accompanied her father and the chief to the Accused’s home.

31. Thus the nature of identification in this case is self- identification by the perpetrator himself. It is a very odd and unusual scenario. I find it hard to believe that a perpetrator of a crime , who had chosen to attack under the cover of darkness, wearing interalia a cap,(definitely to disguise himself), would arrogantly disclose his identity to the victim . Could it be that this self- identification was deliberate on the part of the perpetrator ? could it have been his way of deflecting his identity just in case, by any chance, the victim may have seen him?

32. There is no dispute that the complainant in this case was raped but as to who raped her in my view remains unknown. Whether the lamp was on or not is a non- issue in this case , because the complainant’s testimony was that she only came to know him by the perpetrator stating his name . Her testimony was also silent on whether she saw the perpetrator at the point of the rape ordeal. She could not even identify him through his voice because, again, according to her testimony, she had no previous knowledge of him.

33. I have also taken note of the fact that the respondent has raised doubts on the positive identification of the Appellant and is in support of this Appeal.



34. . It is my finding that the perpetrator of the crime was not positively identified. Considering that the only evidence available was identification, the said identification was not safe to be a basis of conviction.
35. I have read the conclusions of the trial court in regard to this issue of identification. According to the trial Magistrate this case of self- identification was a case of daftness on the part of the accused, which made him disclose his name in the “course of excitement during the ordeal”.
36. This conclusion in my view, was speculative, and in any event, in the absence of other direct or circumstantial evidence identifying the Appellant as the perpetrator, it was unsafe to base the conviction solely on the alleged self- identification by the perpetrator.
37. Consequently having arrived at the conclusion that the Appellant was not positively identified as the perpetrator of the crime , I don’t consider it necessary to delve into the other issues raised by the Appellant in this Appeal.
38. The Appeal succeeds, and consequently the lower court Judgment is hereby quashed and sentence set aside. The Appellant shall be set free forthwith, unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF JANUARY 2025.

S. CHIRCHIR

JUDGE.

In the presence of :

Godwin – Court Assistant.

Ms. Kagai for the Respondent

The Appellant, in person.

