



**Malika v Republic (Criminal Appeal 105 of 2019)  
[2025] KEHC 816 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 816 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL 105 OF 2019  
SC CHIRCHIR, J  
JANUARY 30, 2025**

**BETWEEN**

**KENNEDY ANYANZWA MALIKA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the judgment of the principal magistrate's court at Butere magistrate court delivered on 29th October 2010 by Hon. Ogembo (PM))*

**JUDGMENT**

1. The appellant was charged with the offence of Rape contrary to section 3 (1) (a) (b) (c) (3) of the [sexual offences Act](#) NO. 3 of 2006.
2. The particulars were that on the night of 10<sup>th</sup> and 11<sup>th</sup> September 2010 at xxxx village, xxxxx sub-location xxxxx district within Western province intentionally and unlawfully caused his penis to penetrate the vagina of LA by use of force and intimidation. ( xxx:particulars withheld)
3. He also faced an alternative charge of committing an indecent act with an adult contrary to section 11(1) of the [Sexual Offences Act](#),
4. The appellant was convicted on the first count and sentenced to serve life imprisonment.
5. The appellant was aggrieved by the judgment and filed the present Appeal challenging both the conviction and the sentence.

**Petition of Appeal.**

6. The Appellant filed a petition of Appeal, which he later amended as follows:-



- a. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant to serve life imprisonment but failed to note that the provision of section 3 (3) of the *sexual offences act*, the provision of article 50 (2) (p)(q) of *the constitution* and the policy guidelines on the sentencing 2016 and recent law developments followed by the superior courts on sentencing.
  - b. That the learned trial magistrate erred in law and facts by convicting and sentencing the appellant in a prosecution case but failed to note that the elements of the offence of rape were not fully proved.
7. The Appeal proceeded by way of written submissions.

### **Appellant's submissions**

8. On the first ground, the Appellant submits that the sentence was too harsh and excessive considering the prevailing circumstances at the time of the commission of the offence , and the law applicable to sentencing.
9. He further submits that there were no aggravating circumstances to warrant the maximum sentence prescribed under section 3(3) of the *sexual offences Act*. He further points out that under Article 50(2) (p) he ought to have benefited from the least severe form of punishment for the particular offence.
10. It is also submitted that the life sentence means Appellant has been denied the chance for reintegration back to society as his entire life will be spent in prison; that the recent trends emanating from the decisions of the court show that the courts are abandoning imposition of such harsh maximum sentence.
11. On the second ground, he submits that the elements of the offence were not proved beyond reasonable doubt. He cites penetration as such element that was not proved. He argues that the evidence of the complainant was lacking on the details on what transpired. In this regard the Appellant has relied on the case of Julius Kioko vs Republic (2015) e KLR to buttress his submissions on the need to provide detailed account of the rape ordeal.
12. It is further submitted that this was a case of a single eye- witness; that there was no corroboration , and the magistrate ought to have warned himself of the danger of convicting him on the evidence of a single witness. He points out that the evidence showed that the complainant was already pregnant and therefore she was sexually active, and the alleged evidence of recent sexual activity could be due to the fact that she had been having sex with her husband.
13. He finally submitted that the learned trial magistrate failed in basing his conviction on the identification by a single witness. This reliance on the identification by one witness , he submits, substantially dented the prosecution's case.

### **Respondent's submissions.**

14. On the sentence , it is the respondent's submissions that the sentence meted out to the Appellant was commensurate to the offence , considering the then pregnant condition of the complainant.
15. It is further submitted that the length in which the Appellant went to commit the offence, that is of getting other people to subdue the complainant was aggravating.



### Summary of the evidence.

16. PW1 was the complainant. She testified that on 10/9/2010 at about 9.30 p.m. while at her house together with her sister-in-law, they were in bed when they heard a knock at the door and someone forcefully opening the door. A person entered the house, pulled her out of the bed and threatened to cut her with a panga if she made any noise. She further stated that he pulled her out and through the fence where there were two other men. The three forcefully pulled her further away from the house. Her clothes got soiled in the process. The clothes, consisting of a jean shirt and a blouse were produced in evidence.
17. She further testified that the Appellant took her to an abandoned house. He locked her inside for about five minutes as he went out. He came back with a mattress, Kerosene candle and match box. He lit the candle and at that point, he saw him well. He ordered her to remove her clothes and threatened to call the other men or cut her if she failed to comply. She claimed that he forced her to lie on the mattress and forcefully raped her, while the panga was on the mattress. She stated that he raped her for a long time and when it reached 5 am, he ordered her to leave.
18. She asked him to escort her as she was not familiar with the place. On the way, she met her mother and other women from the village who were out looking for her. When they came closer she shouted and told them that the accused was the one who had raped her. When the crowd were about to catch him, the accused removed his panga from the waist and threatened to cut them. He then ran away.
19. On cross-examination by the accused, she told the court that he saw the Accused well when he lit the candle; that when he escorted her at about 5am, daylight was approaching, and the people who were looking for her also saw him well. She further stated that one of the people in the crowd was a one Oronga; that Oronga is the one who identified the accused by his name, Kennedy.
20. PW2 was the sister-in-law of the complainant, the sister to her husband. She testified that she was sleeping in the same house with the complainant on the material night. She testified that they had just gone to sleep when she heard the door being knocked three times before it was forcefully opened. A man then entered the house. She hid under the bed. From where she hid, she saw the man pulling out the complainant and threatening to cut her with a panga. The man was holding the panga behind his back. The man ordered her to get out but she did not. The man then took the complainant away. After they left, she went to her mother's house and informed her of the incident. The mother told her that she too had heard the commotion. They started screaming and police officers from Msalaba came. They started searching for the complainant but did not find her. They resumed at 5 a.m. the following day. She followed the search team from behind. On the way, they met the complainant, and the accused walking behind her. Her mother started screaming, and one Oronga came. That Oronga attempted to arrest the accused, but the accused produced a sword and Oronga retreated. The accused ran away.
21. On cross-examination by the accused, she stated that she saw the accused and that he had worn a red shirt and a jacket.
22. PW3 was the complainant's mother-in-law. She told the court that she knew the accused well as they lived in the same village. On the material night she was preparing to sleep when she heard her son's house (husband to the complainant) being hit with stones. The complainant and PW2 had gone to sleep in the son's house. She screamed. PW2 went to her and informed her that the complainant had been taken away. The police arrived and they all started looking for the complainant. They searched for her the whole night, and the police advised them to go back. They resumed the search at 5am. On the road, they met the complainant. She was crying and her clothes and body were soiled. Then she saw the accused behind her. He wore a red shirt. Oronga who had joined them moved towards the accused and



- the accused produced a panga threatening to cut Oringa The accused managed to escape. She stated that he clearly saw the accused; that he knew him before as he used to sit with other young men on a culvert which was near her home.
23. On cross-examination by the accused, she insisted that she knew the accused well; that the complainant could not have known him as she was not usually a Resident of the village.
  24. PW4 was Joseph Arunga. He testified that he was an Agent of Msamaria Mwema Buses. He knew the Accused well. That on 11/9/2010 at about 6.00 a.m. he alighted from the bus and saw a group of women who seemed to have been experiencing a problem. Upon inquiry, they told him that one of them had a daughter who had been kidnapped. He joined them in the search. As they walked on the road suddenly PW3 said "that is the lady". He observed that the lady was frightened and behind her was a man with a red shirt. PW3 started screaming and the man stopped. The complainant told them that the man is the one who had taken her away and raped her. He saw the man and noted that it was Ken. He picked two stones and approached him but the man produced a sword and threatened him with it. He retreated. He sought the help of some young men to help him in catching the accused but the men feared. The Accused got away. He proceeded to the police station and recorded a statement.
  25. On cross-examination he stated that his village and that of the accused was 4kms apart. He stated that he saw the complainant with dirty jeans and a blouse; that the complainant told them that it was the accused who had raped her; that he knew the Accused only as Ken and the Accused father as Hezekiah Malika, who was deceased by then and that the accused's father was his uncle.
  26. PW5 was the investigating officer. He testified that on 10/9/2010 while on patrol at Msalaba, an alarm was raised at Mandoli village. They went there and found a crowd. A house had been broken into. They interviewed the one who had been with the complainant and narrated to them what happened. They went on a search of the complainant. They checked bushes, abandoned houses and churches but the search was in vain. They also went to the accused house. The house was 2-roomed, and had no beddings. The following day at about 6.30am the Accused was taken to the station by members of the public.
  27. On cross-examination, he claimed that the accused had been implicated in similar other crimes and that he had been identified by the complainant who took him to where she had been taken the night before.
  28. The clinical officer testified as PW6. He examined PW1 on 13/9/2010 who reported to have been raped. He noted that her clothes had been soiled and had bruised her knee joint. Her private parts were swollen and had whitish discharge. she was pregnant. He concluded that there was forceful penetration. He produced the P3 form and treatment notes belonging to the complainant and also treatment chit for the Accused. The accused's treatment chits showed that he sustained bruises following assault by a mob on allegation of rape against the complainant.
  29. On cross-examination he confirmed that he examined PW1, but the accused was examined by a different medical officer.
  30. The Appellant was put on his defence at the conclusion of the prosecution's case and he gave unsworn statement and called no witness.
  31. The accused testified that on 14/9/2010, he was asleep at his home when the police went to his house and arrested him. He stated that the complainant was a neighbour, that she knew him well and that there was no way he would have committed such a crime as the complainant would have easily identified him.



## Analysis and determination

32. An Appeal to this court is by way of a retrial, and its mandate is well settled. It is to look at the evidence afresh, evaluate it and arrived at its own findings. ( see Kiilu & Ano vs Republic( 2005)1 KLR) while paying attention to the conclusions reached by the trial court. This court must also make allowance to the fact that the trial court had the benefit of seeing and hearing the witnesses first- hand.
33. I have considered the petition of Appeal, the lower court record and the submissions by the parties and find that the following issues arise for determination:
  - a. Whether the offence of rape was proved
  - b. Whether the sentence was excessive.

### Whether the offence of rape was proved.

34. Section 3(1) of the *Sexual Offences Act* provides that that a person commits the offence of rape if;
  - a). He or she intentionally and unlawfully commits an act which causes penetration with his or genital organs;
  - b). The other person does not consent to the penetration; or
  - c). The consent is obtained by force or by means of threats or intimidation of any kind.”
35. Thus the prosecution must prove that:the accused intentionally and unlawfully committed an act which caused penetration into the genital organ of another person; The other person does not consent to penetration; ;or the consent to penetrate was obtained by force or by means of threats or intimidation of any kind.
36. It was the evidence of the complainant that the Appellant forced his way to the house she was sleeping in. This was corroborated by PW2 who was in the house with the complainant. The complainant further testified that she was taken to an abandoned house. she was forced to spread the mattress, and remove her clothes. She was raped the entire night. At 5 am the perpetrator told her to leave.
37. The Appellant has faulted this piece of evidence, arguing that it is not descriptive enough on what actually took place; that the description will have indicated whether what took place was an act of rape. However, the victim herein was an Adult, not a young child, who otherwise may not be in a position to understand the act of sexual intercourse. In cases of children of tender years, it is the practice to help the child describe, in her own words, what the took place so as to enable the court determine whether penetration took place. In this case it sufficed that the complainant stated that she was told undress and she was raped.
38. Further the medical evidence presented by PW4, corroborated the complainant’s vagina was swollen. The remarks by the doctor on paragraph 6 of part 4 of the P3 form ( PExb. 4) is that “forceful penetration” took place. The Appellant’s argument that in any case the complainant was sexually active, evidenced by her pregnant state, is speculative as pregnancy is not indicative of a recent sexual activity. On the other hand a swollen vagina was certainly indicative of a recent sexual activity.
39. In a nutshell, am satisfied that penetration was proved.



40. On the question of consent, sections 42 and 43(1) of the *Sexual Offences Act* provides as follows:

“42. For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.

43.

(1) An act is intentional and unlawful if it is committed—

- (a) In any coercive circumstance;
- (b) Under false pretences or by fraudulent means; or
- (c) In respect of a person who is incapable of appreciating the nature of an act which causes the offence.

(2) The coercive circumstances, referred to in subsection (1)(a) include any circumstances where there is—

- (a) Use of force against the complainant or another person or against the property of the complainant or that of any other person;
- (b) Threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or
- (c) Abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act

41. In *Republic v. Oyier* [1985] eKLR, the Court of Appeal held as follows:-

“The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.

To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.”

42. The evidence of the complainant and PW2 also prove that the sexual intercourse was not consensual. The perpetrator forced his way to the house and he threatened his victim with a panga if she screamed. Further at the abandon house where he had taken her, he told her to fully undress otherwise he would cut her or call the other men who they had earlier parted with. The complainant also told the court that the perpetrator placed the panga on the same mattress they were lying on, an obvious act of intimidation and threat to her life.

43. It is clearly evident therefore the complainant submitted to the sexual act under threat of violence to her person. In other words it was an act of rape as defined in the Act and not a case of consensual sexual intercourse.



44. Save to deny that he did not commit the crime , the Appellant did not raise the issue of positive identification. The complainant told the court that it was darkness all the way until they reached the crime scene. The Appellant then went out and came in with and lit a candle and he was able to see him properly.
45. The two spent a lot of time together to allow for positive identification. She was the one spreading the mattress. The following morning he escorted her, at her request. The time spent was adequate for positive identification.
46. Further PW2 , PW3 and PW4 saw the Appellant in the morning around 5- 6am. Pw3 and Pw4 told the court they knew the Appellant before. PW4 recognised him on the road as he confronted him.
47. I have noted the testimonies of the complainant, PW2, PW3 and PW4 on what transpired on the road on the morning after the incident and noted a commendable consistency on their testimonies in regard to the events on the road and what the Appellant wore at the time . They told the court that he was dressed in a red shirt or T-Shirt. Further their testimonies on what transpired were hardly shaken in cross- examination. I find their testimonies plausible on the fact of the identification of the accused.
48. I have considered the Appellant’s defence and noted that he did not tell the court where he was on that particular night. He dwelt on the events of the 14<sup>th</sup> September 2019 while according to the prosecution witnesses and indeed as per the charge sheet , the incident took place on the 10 and 11<sup>th</sup> September 2019. I find his defence a mere denial and evasive in any event.
49. Am satisfied that the prosecution proved the offence of rape against the Appellant and his conviction was therefore safe.

#### **The sentence.**

50. It is the Appellant’s case that the sentence was excessive. The Act prescribes a prison term of not less than 10 years for the offence of rape and which may be enhanced to life.
51. However the recent court of Appeal decision in Julius Kitsao Manyeso v Republic [2020] e KLR declared life sentence unconstitutional. In view of the said finding , I hereby set aside the life sentence imposed on the Appellant.
52. There was violence and threats to violence preceding and during the commission of the offence, a fact which the trial court correctly considered. The forceful and violent entry to the house, the threat to cut the complainant, the threat to call the other men, presumably to participate in the rape, placing the panga on the mattress as he raped the deceased were acts meant to intimidate and instil fear on the complainant. Further the appellant expressed no remorse. On being given a chance to mitigate he simply asked for the proceedings. His conduct was unrepentant. His behaviour, both before and after the crime aggravated his crime. The prosecutor however told the court that the appellant was a first offender. Being a first offender is a mitigating factor.
53. The aggravating factors in this case outweigh the mitigating ones.
54. I hereby sentence the Appellant to 30 years in prison. The sentence is deemed to have taken effect from 15<sup>th</sup> September 2010, being the date when he was first arraigned in court.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30<sup>TH</sup> DAY OF JANUARY 2025.**

**S. CHIRCHIR**  
**JUDGE.**

