



REPUBLIC OF KENYA



**Torkoch v Republic (Criminal Appeal E042 of 2024)
[2025] KEHC 541 (KLR) (29 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 541 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL E042 OF 2024**

**RK LIMO, J
JANUARY 29, 2025**

BETWEEN

ABBAS TORKOCH APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. C.N. Njalale (Principal Magistrate) in Kitale Chief Magistrate’s Court Criminal Case No. E1569 of 2022 delivered on 15th May, 2024)

JUDGMENT

1. Abbas Torkoch, the appellant herein was charged with two main counts offences of Robbery with Violence contrary to section 296(2) of the Penal Code and Gang Rape contrary to Section 10 of [Sexual Offences Act](#) No.3 of 2006 vide Kitale CMCC No.E1569/2022. He also faced and alternative 3rd count of Committing and Indecent Act with an adult contrary to Section 11(A) of the [Sexual Offences Act](#).
2. The particulars in the 1st count are that on 8/5/2022 at around 2130hrs in Kinyoro Location within Trans Nzoia County with another not before court robbed GGN her mobile phone make “Bontel” valued at 2000/- and Kshs.5000 in cash while armed with a dangerous weapon.
3. In the 2nd count, the particulars of the offence are that on the same day and at the same place, the appellant jointly with another not before court intentionally and unlawfully caused his penis to penetrate the vagina of GGN without her consent.
4. The alternative count is not relevant in this appeal because the appellant was convicted upon trial on the two main counts.
5. A brief summary of the evidence tendered at the trial court shows that the complainant was at her home on 8/5/2022 at around 9.30pm, the material date and time, when the appellant went there and informed her that her husband was sick and in a bar. She stated that the appellant who she knew well,



- offered to accompany her to Cool Waters Bar where the husband was reportedly but that on reaching there they did not find him because he had left the joint earlier at 6pm.
6. She stated that the appellant informed her that he knew where the husband had gone and told her that he had gone with some two women to a bar in ADC. She stated that the appellant and his accomplice then took her to the purported bar but when they reached ADC they did not find any bar. She stated that the appellant and the accomplice, one Sammy grabbed and took her to a bushy area near a river next to a sugar plantation. She stated that she pleaded with the two not to harm her but they removed her jacket and took her phone, Kshs.5000/- cash in the jacket, some medicine and a bunch of keys. She stated the appellant and his accomplice then grabbed her and forcefully raped her in turns. She stated that the appellant then attempted to sodomize her but Sammy stopped him upon which they both warned her of dire consequences if she reported the incident to anyone.
 7. The complainant testified that undeterred, she reported the incident to her husband upon which she was rushed to St. Jude Health Centre and thereafter to Kitale Referral Hospital for treatment the following morning.
 8. She testified that as she was going about her errands on that same day she spotted the appellant and immediately alerted the police who proceeded to the scene and arrested the appellant.
 9. When pressed under cross-examination the complainant (PW1) insisted that she was able to recognize the appellant well because of lights at her home and the bar where he had taken her to look for her husband. She told the trial court that she knew the appellant well and knew his father by name and his sisters.
 10. She stated that she knew the appellant's father as Mzee Musa and that one of the appellant's sisters was called Milka. She further stated that her husband used to be asthmatic and sickly and therefore when the appellant went to her house and told her that her husband had fallen sick in a bar, she believed him and that, that was not the first time for the appellant to inform her that her husband had fallen sick in a bar and that explains why she carried medicine to wit ventolin and frannon tables to help her husband.
 11. She stated that it was the appellant who called her at her home and accompanied her to the pub where her husband had reportedly fallen ill but on reaching at the pub a bar attendant told her that the husband had left at 6pm and it was at that point one Sammy joined them and informed her that he had used a motorcycle to ferry her husband to another joint with 2 women. She stated that she then walked on foot with the appellant and the said Sammy after being told that there was a short cut and that is where she was attacked and raped.
 12. Nelson Lusiola (PW2), a clinical officer attached to Kitale Referral Hospital testified that the complainant (PW1) went to their facility and was examined by his colleague and the conclusion reached is that she had been assaulted and raped. He tendered the treatment notes as PExhibit 1, Referral Form as Pexhibit 2 and P3 Form ad PExhibit 3.
 13. PC Stephen Muli (PW3) a police officer based at Kinyoro Police Station testified and confirmed that on 10/5/2022 at 1900hrs the complainant reported a case of robbery, rape and indecent act. He stated that he was assigned to carry out the investigations and he issued a P3 Form to the victim. He testified that the complainant told him he knew the culprits well and that on 11/5/2022 he received a call from her that one of the suspects had been seen at Marambach.
 14. He stated that he together with a colleague proceeded to the place and arrested the appellant and that the appellant confessed to committing the offence when he was arrested. He stated that the appellant then led them to his home where he recovered a panga (PExhibit 9) and a Club (rungu) (PExhibit 10). The officer also tendered a jacket (PExhibit 5) that the complainant was wearing on the fateful night,



- a night dress (PExhibit 6) a pair of shoes (PExhibit 7), a torn white pant (PExhibit 8) and a receipt of a stolen phone (PExhibit 4).
15. When placed on his defence, the appellant gave a sworn testimony and denied committing the offence. He stated that he only came to know the complainant after he was arrested. He stated that none of the items stolen from the complainant was found in his possession. He denied having a friend called Sammy who was reported to have been an accomplice. He wondered why the said Sammy was not presented in court. He insisted that the panga recovered from his house was used to cut napier grass adding that his house was broken into and the same recovered in his absence.
 16. When pressed under cross-examination he stated that he did not know the complainant and had not had a dispute with her to make her frame him falsely over a serious charge. He stated that Marambach is near his home and denied knowledge that the complainant lived around the same place.
 17. He stated on the material date and time he was sleeping in his house. He added that he had no dispute with the complainant and that she had no reason to frame him.
 18. The appellant's mother Judith Chepkemoi (DW2) testified that her son (the appellant) did not commit the offence. She stated that she knew the complainant who to her stayed far from their home. She stated that the complainant went to their house on 8/5/2022 with police officers and broke into the appellant's house and took away a club and a panga.
 19. When pressed under cross-examination she stated she was not sure if the appellant was home during the material date watching Television.
 20. The trial court evaluated the evidence tendered and found that the evidence tendered by the prosecution was sufficient to sustain both the principal counts and convicted him on both counts. In Count 1 the trial court sentenced him to serve 40 years while in Count II he was sentenced to serve 15 years in count 2 in jail with both counts directed to run consecutively.
 21. The appellant feeling aggrieved filed this appeal against both the convictions and sentences. He raised the following grounds in his petition of appeal namely:-
 - i. That he was not accorded a fair hearing.
 - ii. That the conviction was merely on speculation and suspicion rather than hard evidence.
 - iii. That the prosecution did not prove beyond doubt that he committed the offence and that he was not positively identified.
 - iv. That the trial court erred by relying on medical records that were insufficient to prove the offence of rape.
 - v. That the trial court erred by shifting the burden of proof to him instead of the prosecution.
 - vi. That the trial court erred by wrongly evaluating the evidence and coming to the wrong conclusion.
 - vii. That the trial court erred in sentencing by relying on a biased probation report.
 - viii. That the trial magistrate failed to consider his mitigation.
 22. In his written submissions dated 16/8/2024 done through learned counsel Ms Jason Kimani & Co Advocates, the appellant contends that he was not accorded a fair hearing because the trial magistrate never considered his defence of alibi. He faults the trial court for holding that alibi was only raised at



- the defence stage stating that it was upon the prosecution to prove that he was present at the crime scene at the material time. He relies on *Waka Evans Amira –vs- Republic (2021)eKLR*.
23. He contends that the trial magistrate erred by failing to warn itself on the element of identification and the fact that the prosecution's case in that regard rested on the evidence of a single witness. He submits that there was a possibility of error on the part of the complainant in positively identifying him.
 24. He submits that the medical evidence and in particular the treatment notes shows that the complainant did not name the appellant as the culprit and asserts that the incident was still fresh on her mind at the time which should have enabled her to name the appellant without hesitation.
 25. He contends that the nature of the light at the complainant's home was not revealed and in his view it was difficult to establish if the intensity was sufficient for the complainant to recognize or identify him.
 26. He wonders why the complainant's husband was not called and yet, he was the cause of the complainant going out at night to look for him and that there was no evidence that the husband was asthmatic. He points out that none of the workers at Cool Waters Pub was called to testify.
 27. He submits that none of the items stolen from the complainant was recovered from him adding that the panga and the club (rungu) found in his house were his tools of trade.
 28. He contends that there was no evidence of vaginal swab to confirm that he raped the complainant.
 29. He faults the trial court for relying on medical evidence tendered and his contention is that the medical evidence does not support the charge because it shows that the complainant was treated on 9/5/2022 while the incident occurred on 8/5/2022. According to the appellant there was unexplained inordinate delay by complainant to seek treatment. He also submits that there is no reason why the incident was reported on 10/5/2022.
 30. On sentence the appellant contends that the sentences in both counts were excessive but is reserved regarding what this court can do in light of the recent decisions and directions given by the Supreme Court in the now famous case of *FRANCIS KARIOKO MURUATETU-VS- REPUBLIC*.
 31. The respondent though the ODPP has opposed this appeal vide written submissions dated 14/11/2024 done by learned counsel Jackylne Kiptoo.
 32. The state submits that the prosecution was able to prove all the ingredients of both offences in the 2 counts of robbery with violence and rape.
 33. On the 1st Count of robbery with violence, the respondent submits that the complainant was robbed violently by the appellant in the company of another and that the appellant was armed with a panga. The state contends that it was able to prove the element of robbery while being armed and the fact that the robbery was committed by more than one person.
 34. The state further points out that in respect to the 2nd count of gang rape, there was sufficient evidence that the appellant and his accomplice gang raped the complainant after grabbing her forcefully and spreading her legs before raping her in turns.
 35. It further submits that there was lack of consent on the part of the complainant.
 36. This court has considered this appeal and the responses made. The issues cropping up for determination are as follows;-
 - i. Whether there was sufficient evidence that the appellant was the person who violently robbed the complainant.



- ii. Whether the prosecution established and proved the elements of gang rape against the complainant.

In respect to the 1st count of robbery with violence, the appellant contends that he was not positively identified, that nothing was recovered from him and that he was subjected to an unfair trial.

37. On the question of an unfair trial, this court has perused through the proceedings from the lower court and has noted that the appellant was duly represented by counsel during trial and at no stage did he raise any issue of unfair trial or questioned the process in the entire trial. He has also not clearly stated which unfairness arose from trial. The issue of whether or not the defence of alibi was considered or not touches on the weight or the merit of the prosecution's case against the appellant rather than the process.
38. The appellant claims that the burden of proof was shifted to him but I have re-evaluated the evidence tendered and the judgment of the trial court and find that the claims of shifting the burden of proof is unfounded.
39. One of the critical issues before the trial court was the question of identification and whether the appellant was positively identified. This court has evaluated the evidence tendered during trial and finds that the complainant and the appellant are persons who come from the same locality. The complainant stated that she knew the appellant's father by name. She said he was known as "Mzee Musa". She knew one of the appellant's sisters.
40. The appellant contested that fact but his own mother who testified as DW2 stated that she knew G (the complainant) and recalled seeing her going to her home with police officers where the appellant was arrested. The mother stated that the complainant resided far from where they lived but did not disclose the distance between but what is clear is that the complainant and the appellant knew each other well prior to the incident.
41. It is also uncontested that the complainant had no grudge or differences with the appellant. This fact was stated by the appellant in his sworn evidence and confirmed by his mother DW2. It is evidently clear that there was nothing to suggest that the complainant was motivated by any other thing but what happened to her during the fateful night.
42. The complainant in her evidence in chief gave a vivid account of what transpired during the material date and time. She stated that she was at her house at around 9.30pm when she heard a knock at the gate and on going to check she found out that it was the appellant who she knew by name. She says there was lights in her home and besides that they went to Cool Waters Bar at Marambach Centre with the appellant and one Sammy. They went inside the pub to inquire about her husband who was reported to have fallen sick.
43. The appellant has raised the question of intensity of the lights both at complainant's home and the pub but during the trial, the appellant was satisfied with evidence given that there was lights in both places. The fact that the appellant went and reported that the complainant's husband had fallen sick, appears to confirm the complainant's testimony that her husband was sickly and used to suffer from Asthmatic attacks and that could explain why she took some medication (ventolin and frannon tablets) with her when she was told her husband was sick. It is apparently clear that the appellant knew the husband well including the fact that he had a medical condition and hence the reason why he used the same condition as a bait to get the complainant out that night with ulterior motives which crystalized later.
44. This court finds that the trial court evaluated the evidence with respect to identification and reached the correct conclusion. This court finds that the element of identification was established and proved



beyond reasonable doubt. It could have been hard for the complainant to have gotten out of her house at night on foot with a total stranger. She knew the appellant for certain and the appellant used that familiarity to trick her out at night to get the opportunity to commit the offence.

45. The evidence tendered indicates that the appellant was in the company of one Sammy. The complainant gave a vivid account of what happened to her when they reached a deserted place near sugar plantation. The appellant was seen by the complainant armed with a panga and though the appellant contends correctly that the evidence of a single witness should be treated with caution, this court is satisfied upon evaluation of the entire corroborating evidence given by a clinical officer Nelson Lusiola (PW2) and the investigating officer (PW3) that the prosecution's case in respect to count 1 was proved beyond doubt.
 46. On the question of gang rape, this court finds that the prosecution tendered sufficient evidence to prove that the complainant was gang raped by the appellant and one Sammy who is still at large.
 47. The appellant in his own testimony confirmed that the complainant had no grudge and there was no reason for her to frame him.
 48. He contends that the complainant took too long a time to seek treatment but this court finds that the incident occurred on the night of 8/5/2022 and she sought treatment in the morning of 9/5/2022. There was no inordinate delay because of what she told the trial court. There is no significant inconsistency. The P3 Form (PExhibit 3) Section 'A' also clearly gives a history of the incident and that the patient (complainant) was sexually assaulted by 2 persons "known to her". The medical report also confirms that the complainant looked frightened which shows that she was traumatized by the incident. This was a woman who had been gang raped by 2 men who did not use protection and in the age of AIDS and other STIS it is understandable why the lady looked 'fearful' because who wouldn't?
 49. This court has perused the treatment notes (PExhibit 1) and court finds that contrary to what the appellant contends, the complainant clearly indicated that she had been gang raped by 2 persons whom she could identify. The narrative in the treatment chart is in tandem with what the complainant stated in her testimony in court.
 50. This court finds the contention by the appellant that the prosecution's case was weakened by failure by the prosecution to call the complainant's husband or a waiter at Cool Waters Pub, to be unfounded. This is because the prosecution are at liberty to avail witnesses they find will prove their case. The defence can only fault the prosecution for not calling a witness if it can establish that the specific witness was likely to give adverse evidence. There is no suggestion in this appeal that, that was the case.
 51. This court finds that the prosecution's case against the appellant on the 2 counts was simply overwhelming and finds that conviction by the trial court on both convictions was safe. The same is upheld.
 52. On sentence, this court finds that the penalty prescribed under Section 296(2) of the Penal Code is death penalty. The appellant was sentenced to serve 40 years imprisonment which means that the trial court was quite lenient to the appellant.
 53. In respect to Count II that is gang rape, Section 10 of *Sexual Offences Act* No.3 of 2006 provides for a minimum sentence of 15 years and a maximum of life imprisonment. The trial court meted out the minimum sentence which again I find to be very lenient. Had the respondent sought for enhancement, the appellant would have been unlucky in this appeal because the sentence could have been enhanced.
- In the end this court finds no merit in this appeal. The same is disallowed. Conviction and sentences are upheld.



DELIVERED, DATED AND SIGNED AT KITALE THIS 29TH DAY OF JANUARY, 2025.

HON. JUSTICE R.K. LIMO

KITALE HIGH COURT

Judgment delivered in open court in the presence of: -

Nafula holding brief for Kimani for appellant.

Rop for the State.

Chemosop/Duke – Court Assistants.

