



REPUBLIC OF KENYA



KENYA LAW
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**DMG v Republic (Criminal Appeal E010 of 2024)
[2025] KEHC 900 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 900 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E010 OF 2024
AN ONGERI, J
JANUARY 24, 2025**

BETWEEN

DMG APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from Voi Magistrate's Court Sexual Offence Case No. E004 of 2020 delivered by Hon. D. Wangeci (PM) on 18th March 2021)

JUDGMENT

1. The Appellant was convicted with the offence of rape contrary to Section 3(1) (a)(b)(3) of the [Sexual Offences Act](#) No. 3 of 2006 and he was sentenced to ten (10) years imprisonment.
2. The particulars of the charge were that on 9th January 2020 at 0500hours at Sofia area near Railway crossing at Voi within Voi Sub County in Taita Taveta County, the Appellant had carnal knowledge of C.C without her consent.
3. The Appellant was acquitted of the alternative charge of indecent assault.
4. The prosecution evidence in summary was that the Appellant who is a cousin to the complainant offered to give the complainant a lift to town. When they reached the Railway crossing, he rode in the bush where he told the complainant that he wanted to have sex with her.
5. When the complainant refused he pushed her down, undressed her and had sexual intercourse with her and he abandoned her in the bush and left with his motor cycle.
6. The complainant dressed herself and went to the road when she was assisted by a good samaritan.
7. She reported the matter to the police and she was treated at Moi County Referral Hospital.



8. The complainant was examined by the Clinical Officer attached to Moi County Referral Hospital who confirmed the complainant's hymen was missing and there was spermatozoa and red blood cells showing there was trauma.
9. The Appellant in his defence said he carried two girls to town on the material day.
10. He said one paid him and the other did not pay him and he had an altercation with her. He later learnt in the evening that an incident of rape had been reported by the girl with whom he had an altercation.
11. The trial court found the Appellant guilty as charged and sentenced him to ten (10) years imprisonment.
12. The Appellant has now appealed to this court on the following grounds:-
 - i. The learned trial Magistrate erred in both law and fact when she misdirected herself.
 - ii. The learned trial Magistrate erred in both law and facts when she shifted the burden of proof from prosecution to the Appellant.
 - iii. The learned Magistrate erred in law when she considered the evidence adduced by prosecution full of massive contradiction.
 - iv. The learned trial Magistrate erred in law in convicting the Appellant on poor investigation adduced by prosecution.
 - v. That the learned trial court Magistrate erred in law fact by convicting him the Appellant to 10 years imprisonment without considering that the sentence meted on him was harsh and excessive.
 - vi. That the learned trial court Magistrate erred in law fact by convicting him the Appellant to 10 years imprisonment without considering the period spent in remand custody prior to conviction and sentence as requires Section 33 of the CPC.
 - vii. That the learned trial court Magistrate erred in law fact by convicting the Appellant to 10 years imprisonment without considering his reasonable defense.
13. The parties filed written submissions as follows:- the appellant submitted that there was contradictions in the testimonies of the witnesses. The complainant and the investigating officer both gave opposing testimonies as to where the appellant met the complainant. The appellant argued further that the P3 form that was produced indicated that there were no injuries on the upper limb and that the complainant's genitalia was normal. There was no indication of puss cells, yeast or T Vagalis which indicated that the complainant had not engaged in sexual intercourse as she claimed. The appellant consequently urged the court to allow the appeal.
14. The prosecution alternatively submitted that they proved their case beyond reasonable doubt. On penetration the prosecution argued that the complainant testified that the appellant forcefully threw her in the ground and raped her. This was further supported by the testimony of PW\$ a clinical officer who told the court that the complainant was examined at Moi Hospital. It was observed that there was no injuries. There was however whitish vaginal discharge. A high vaginal swab was done and spermatozoa was noted. Red blood cells were also noted which was a sign of trauma.
15. On Absence of consent the prosecution submitted that the complainant testified that the appellant took her to a deserted bush on the false claim that he wanted to relieve himself. He then forcefully removed her clothes and raped her. There was no consent given to the appellant. it was also cleat that



the appellant has a predetermined mind on what he was going to do. He deviated from the route the complainant was going and went a different direction.

16. On identification the prosecution submitted that the appellant was well known to the complainant as they were cousins. Thus, there was no doubt of the identification of the appellant. The prosecution consequently argued that having proved the ingredients of rape they proved their case beyond reasonable doubt and thus the appellant was correctly convicted.
17. This being a first appeal, the following is the duty of the first appellate court:- In *Kisumu Criminal Appeal 28 of 2009 David Njuguna Wairimu V – Republic* [2010] e KLR where the court of appeal stated:

“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.
18. The issues for determination in this appeal are as follows:-
 - i. Whether the prosecution proved the elements of rape.
 - ii. Whether the sentence was appropriate.
19. The key ingredients of the offence of rape created in section 3 (1) of the *Sexual Offences Act* include intentional and unlawful penetration of the genital organ of one person by another, without consent. In the case of *Republic v Oyier* [1985] KLR 353 the Court of Appeal held that;
 1. 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.
 2. 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.
 3. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact.”
20. I find that there is evidence that the Appellant had carnal knowledge of the complainant without her consent.
21. The Appellant who is a cousin to the complainant was well known to the complainant.
22. I find that the Appellant was properly identified by the complainant.
23. I find that the conviction herein is secure and the sentence lawful.
24. I dismiss the appeal and uphold both the conviction and sentence.



DATED, SIGNED AND DELIVERED THIS 24TH DAY OF JANUARY 2025 VIRTUALLY AND IN OPEN COURT AT VOL.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Maina

The Appellant – present

