



**Muthama v Republic (Criminal Appeal E023 of 2024)  
[2025] KEHC 3910 (KLR) (Crim) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3910 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYANDARUA  
CRIMINAL  
CRIMINAL APPEAL E023 OF 2024  
KW KIARIE, J  
MARCH 27, 2025**

**BETWEEN**

**JOSEPH MWANGI MUTHAMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O. Case No. E044 of 2023 of the Senior Principal Magistrate’s Court at Ol Kalou by Hon. Judicaster Nthuku–Principal Magistrate)*

**JUDGMENT**

1. Joseph Mwangi Muthama, the appellant herein, was convicted of the offence of rape contrary to section 3(1) as read with section 3 (3) of the *Sexual Offences Act* No.3 of 2006.
2. The particulars of the offences were that on the 2<sup>nd</sup> day of August 2023 [Particulars Withheld], Mirangine Sub-County within Nyandarua County, he intentionally and unlawfully caused his penis to penetrate the vagina of N.W.K. without her consent.
3. The appellant was sentenced to serve ten years’ imprisonment. He was aggrieved and appealed against both conviction and sentence. He was represented by Martin Gathumbi & Company Advocates. He raised grounds of appeal as follows:
  - a. The learned magistrate erred in law and fact by sentencing the appellant even though the complainant was willing to forgive and withdraw the matter against the accused person in light of the alternative dispute resolution provided by *the Constitution*.
  - b. That the learned magistrate erred in law and, in fact, by convicting the appellant on an offence that was not proved beyond reasonable doubt that is required by law.



- c. That the learned magistrate erred in law and fact in convicting the appellant to serve sentence, yet there was no evidence of penetration or partial penetration, and if indeed penetration occurred, the trial court did not prove that there was no consent from the complainant.
  - d. That the learned magistrate erred in fact and law by meting out an excessive sentence on the accused person despite overwhelming evidence showing that the accused person and the complainant were in a relationship, thereby raising reasonable doubt against the prosecution case.
  - e. That the learned magistrate erred in fact and law, sentencing the appellant and meting an exclusive sentence.
4. The state did not file any grounds of opposition or submissions.
  5. This is a first appellate court. As expected, I have analysed and evaluated all the evidence adduced before the lower court. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of *Okeno vs Republic* [1972] EA 32.
  6. The ingredients of the offence of rape are set out in section 3 of the *Sexual Offences Act*, which states as follows:

A person commits the offence termed rape if—

    - (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her 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.
  7. N.W.K. (PW1) is the complainant in this case. Her evidence was that she was going to a funeral. The appellant, whom she knew, was also attending the same funeral. He offered to show her a short route. When they were inside a forest, he expressed his interest in having sex with her. When she declined, he raped her.
  8. Her grandmother, R.M. (PW2), testified that the complainant found her at the funeral. She had a bruised face. She informed her that a boy had raped her. She identified the boy as Muthama.
  9. Joseph Ndungu Gatheca (PW5) is a clinical officer at Ol Kalou Hospital. He examined the complainant on August 2<sup>nd</sup>, 2023. He observed bruises on the nose and lacerations on the vulva. The hymen was broken, but this was old. He concluded that there was vaginal penetration.
  10. The evidence of R.M. (PW2) and Joseph Ndungu Gatheca (PW5) corroborated that of the complainant that she was raped and who did it.
  11. Joseph Mwangi Muthama, the appellant, argued that he was in a relationship with the complainant but was charged when he declined to marry her. The complainant denied having a relationship. He did not confront her with facts about the alleged intended marriage. The learned trial magistrate was justified in dismissing this line of defence.
  12. The appellant contended that the complainant intended to forgive and withdraw the charge against him. The proceedings do not bear this out. The only person who could have approached the court for withdrawal of the charge is the complainant, not the probation officer, through a report. I, therefore, find no such an intention was expressed to the court for consideration.



13. The appellant contended that the sentence in respect of rape was manifestly harsh. An appellate court would interfere with the trial court's sentence only where there exists, to a sufficient extent, circumstances entitling it to vary the trial court's order. These circumstances were well illustrated in the case of *Nillson vs Republic* [1970] E.A. 599, as follows:

The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James Vs. REX* (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R Vs. Shershewcity* (1912) C.CA 28 T.LR 364.

14. Section 3 (3) of the *Sexual Offences Act* Provides:

A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

15. The appellant was sentenced to ten years' imprisonment. I am not persuaded that the learned trial magistrate acted upon any incorrect principle or overlooked any significant factor. The circumstances of this case were unfavourable for leniency.

16. The appeal lacks merit and is dismissed.

**DELIVERED AND SIGNED AT NYANDARUA THIS 27<sup>TH</sup> DAY OF MARCH 2025**

**KIARIE WAWERU KIARIE**

**JUDGE**

