Wanjiku v Republic (Criminal Appeal E031 of 2023)
[2025] KEHC 5263 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5263 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E031 OF 2023

AK NDUNG'U, J

APRIL 30, 2025

BETWEEN

DANIEL NDERITU WANJIKU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM
Sexual Offences Case No E044 of 2021 – Kithinji A.R-CM)

JUDGMENT

1. The Appellant, Daniel Nderitu Wanjiku, was convicted after trial of Rape contrary to Section 3(1) (a) (c) (3) of the *Sexual Offences Act*, No 3 of 2006. The particulars of the offence were that on 17/06/2021 at around 1900hrs in Laikipia central subcounty within Laikipia county, intentionally and unlawfully caused his penis to penetrate the vagina of AWA without her consent. On 27/03/2023, he was sentenced to ten (10) years imprisonment.

2. The Appellant filed a petition of appeal on 06/04/2023 and supplementary grounds of appeal alongside his submissions. He is challenging the conviction and the sentence on the following grounds;

    i. The learned magistrate erred by failing to note that the prosecution did not prove their case beyond reasonable doubt.

    ii. The learned magistrate erred by not appreciating that the complainant gave conflicting evidence.

    iii. The learned magistrate failed to note that there was no proper medical evidence linking him to the commission of the offence.

    iv. The learned magistrate erred by not appreciating that there was no proper identification of the Appellant as the assailant.

v. The learned magistrate erred by failing to note that his right to fair trial was infringed upon.

vi. The magistrate erred by failing to note that the complainant claimed to be drugged yet there was no medical evidence to prove her allegations.

i. In the Amended supplementary grounds of appeal he raises the following grounds; The learned magistrate erred convicting him on a case where identification was not conclusive.

ii. The learned magistrate erred convicting him based on medical evidence that was not conclusive on the matter of penetration of PW1.

iii. The learned magistrate erred convicting him while misapplying circumstantial evidence.

iv. The learned magistrate erred by applying wrong principles during sentencing by ignoring Section 333(2), *Criminal Procedure Code* and Para 7:10 of Sentencing Policy Guidelines.

3. The appeal was canvassed by way of written submissions. The Appellant submitted that PW1's testimony in chief did not mention whether she recognised her attacker by whatever features. On cross examination by defence counsel, she testified that she did not see the face of the person in the home. That she did not see the Appellant. Further, she alluded to have been raped by more than one person when she said that she did not know what they did to her. That the matter of being raped was not established by the medical evidence or any circumstantial evidence as the clinical officer testified that PW1 informed her that she was raped by one person which was contradictory to her testimony of being gang raped.

4. That she visited the hospital hours after the alleged sexual attack which was brutal and forceful according to her hence the medical report would have shown injury, inflammation, presence of spermatozoa, epithelial cells or some form of discharge. That it is a medical fact that following forceful sexual intercourse, epithelial cells or some form of laceration must be observed and he relied on the case Rongino Ezra Kemboi v Republic (2021) eKLR and Debis Okelo Mateba vs R (2015) eKLR. That it was observed that she had an old broken hymen and she confirmed that it was not her first time to have sex. That the clinical officer testified that he could not ascertain whether she was stupefied or drugged and that there was a possibility of penetration though he was not certain hence, penetration was not medically proved.

5. Further there was no evaluation of PW1's truthfulness and integrity in line with Section 124 of the *Evidence Act* and there was no mention of the said section by the court. That the trial court relied wholly on the fact that the Appellant did not deny owning the room he was found in begging the questions why he had to disown his rental house, why the burden of proof was shifted, what proof did the prosecution advance that PW1 was in the said house and not any other house, what proof that PW1 had not been elsewhere on the material time? That considering PW1's state of mind, it is not farfetched to deduce that she erred in pinpointing the exact house since the evidence was that there were other houses with different occupants. That it would be circumstantial evidence if she would have given the description of his house to the police. Nothing was recovered from his house belonging to the complainant, no features of his room was described and the matter of his motorbike was not mentioned when the case was reported. That for circumstantial evidence to have any probative value, the chain of events and the oral evidence must have pointed to him as the culprit and the court should not have relied on the weak prosecution's case to convict.

6. As to sentence, he urged the court to re-look at the sentence. That mandatory sentences have been frown upon by our courts as was held in Muruatetu case to be unconstitutional. Further, there are in conflict with Article 24, 27 and 28 of *the Constitution* especially where the sentences are harsh and ignore human dignity and mitigating factors and he quoted several cases on this. Further, section 333(2), *Criminal Procedure Code* was not complied with since the trial magistrate stated that time spent in custody was considered but the same was not considered in the prison's committal documents.

7. In rejoinder, the Respondent's counsel in her written submissions argued that the Appellant did not mention in his submissions about any perceived violations of his right to fair hearing to substantiate his claim of violation of Article 50 of *the Constitution*. As to whether the charge was proved, she submitted that the Appellant raped the complainant while she was in a state where she could not understand or appreciate the nature of the sexual act owing to her momentary loss of consciousness and in an altered status of consciousness based on PW'1 narration. Further, although she was subdued by whatever substance was administered to affect her consciousness, she could remember waking up naked with pain in her vagina with a man lying next to her which is circumstantial evidence that penetration had occurred. That she could recall the man pulling her back to the bed after she tried to leave, removing her underwear and forcefully trying to penetrate and raped her. That she testified that the man was stronger than her and he raped her. She further stated that they struggled as he tried to penetrate her vagina thus the context surrounding the phrase 'raped me' shows that penetration had occurred.

8. It is submitted that PW4 stated that based on what he had observed, there was a possibility that penetration had occurred and he produced the P3 and PRC forms which showed presence of pus cells. As to absence of epithelial cells counsel submitted that Section 2 of the *Sexual Offences Act* encompasses partial penetration and if there can be partial penetration, there can also be penetration without injuries or epithelial cells as was held in Mark Olruvi Mose v R (2013) eKLR and Republic v Kennedy Ouma Ochieng (2013) eKLR where in the latter case the court stated that when penetration and lack of consent is proved, it would still be rape notwithstanding the absence of epithelial cells. As whether PW1 had consented, she submitted that PW1 was not able to comprehend the nature of the sexual act by the fact that she could not recall how she found herself at the scene. PW3 also confirmed that PW1 looked shaken and dirty when she resurfaced. That whether the complainant was drugged during the act is not central to the determination of the case as the question is whether the victim consented, or was in such a condition to consent to it as absence of consent is the chief ingredient to the offence of rape. Further, he cannot receive absolution based on the fact that PW1 was not a virgin before he forcefully penetrated her. That the evidence of sexual history is barred under Section 34 of the *Sexual Offences Act*.

9. As to identification, she submitted that the circumstantial evidence unerringly pointed to the Appellant as the perpetrator for reasons that PW1 testified that when she located the keys to open the gate, she realised that the place was familiar; on the day she rescued herself, she was able to take PW3 to the house where she was raped; 3 days after, she was able to take PW5 and PW6 to the said house. Had she be mistaken, she would have showed them a different house from one she had showed PW3; PW5 and PW6 found the Appellant in the said house and nobody else was in that house; according to PW3, the house was about 600 meters from PW1's home which is a short distance which reduces the possibility of error; the Appellant did not deny owning the house and this is conceded in the submissions and that he was found in the house.

10. As to contradictions, counsel submitted that the assertion that PW1 alluded to gang rape by stating that 'I do not know what they did to me when I lost consciousness' is pedantic because nowhere else did PW1 state that there were several people as she was categorically referring to one man and not several men. Her narration to other witnesses was consistent about a single man being involved.

That the Appellant made no arguments on whether there were inconsistencies on whether penetration occurred, or whether consent was given and who the perpetrator was.

11. As to his defence, it is submitted that the Appellant did not attempt to give any conflicting version of the events that would cast doubt on the prosecution's case.

12. Regarding sentence, it is urged that the court on appeal ought not to lightly interfere with the sentencing discretion unless the sentence was manifestly harsh and as was held in R v Joshua Gichuki Mwangi & Others Petition No. E018 of 2023, Muruatetu case does not apply to minimum sentences under the *Sexual Offences Act*. That the trial court was also compliant with section 333(2) and it was not the trial court's shortcoming if his prison's documents did not reflect the remission.

13. This being the first appellate court, my duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See Okeno v Republic [1972] EA 32.

14. First, a recap of the evidence as follows; PW1, the complainant testified that on the material day at 7:00pm while coming from the shop going home and while at their gate, someone touched her and she lost consciousness. When she regained consciousness, she found herself in a home while naked in a bed. She was feeling pain in her vagina. She switched the torch on and she saw her clothes and there was someone sleeping on the bed. She woke up and wore her clothes and as she was going out, someone asked her where she was going and she said she was going for a short call. The house was one room and while she was outside, she noticed there were three rooms. The gate was locked so she went back to the house and sat on the bed and someone pulled her to the bed and started undressing her. He removed her underwear, they struggled as he tried to penetrate her vagina but he was stronger than her so he raped her. She woke up at around 8:00am and the person was not there. She wore her clothes and went out and at the gate, she saw the keys. While on the road, she noticed that the place was familiar. She headed home and she met her brother who asked her where she was and she led him to the place but they found no one. They reported and she was taken to the hospital. That when she took the police to the scene, they found the Appellant there. That she used to see him.

15. On cross examination by Appellant's counsel, she testified that she did not know how many people held her. That she used to see the Appellant but she did not know him and had not spoken to him before. He operated a boda boda. He was not her boyfriend and she did not know what they did to her when she lost consciousness. That she did not see the face of the person in the home and she did not see the Appellant. That she heard people behind her and she did not know where the Appellant was living. There was a blue motorbike outside the house but she did not know the owner and was not sure whether it belonged to the Appellant. There were three houses in the compound and she did not know whether they had occupants. That she did not know the compound she found herself in but she knew the road. That she did not know the Appellant before the incident.

16. PW2, the complainant's mother testified that she went home from work and she inquired where the complainant was and she was told that she had gone to the shop at 7:00pm and had not returned. She started looking for her through phone and through her classmate. She did not return until the following day. She asked her through the phone where she was and she informed her that she was with a man she did not know. She advised her to report since she was raped and she later met her in the hospital. That she informed her that she was raped by a man who used to ferry her in a boda boda and he was arrested when the complainant showed the man to the police and his home. That she had no grudge with the Appellant.

17. On cross examination, she testified that the complainant was present when the Appellant was arrested. The complainant did not know the Appellant. That she told her that she was raped by one person and

it was her first day to sleep outside. She testified on re-examination that the complainant showed the police where she slept and the Appellant was found there.

18. PW3, complainant's brother testified that on the material day, the complainant went to the shop and did not return. When PW2 returned, they looked for her to no avail. She returned on the 2nd day at around 10:00am looking shaken and dirty. When he asked her where she was, she offered to take him and she told him that she was raped after being stupefied and that she found herself with the Appellant. That the Appellant was a boda boda rider and they did not find anyone in the home. They reported and she was taken to hospital. On the following day, the complainant took the police to the Appellant's home and he was arrested. That he knew the Appellant since he had ferried him with his boda boda and had no grudge with him.

19. On cross examination, he testified that when he met the complainant on the following day, she informed him that she found herself in that home where she was raped. The home was about 600m from their home. There were other houses but there were no people. The complainant told him that she did not know the Appellant prior.

20. PW4, the clinical officer testified that on genital examination, there was no injury to labia minora or vagina, hymen was broken with old tear. On lab test, PITC was negative, VDRL negative, there was presence of pus cell on urinalysis and on vaginal swab, there were no spermatozoa. He produced the P3 and PRC form as Pexhibit 1 and 2 and lab report as Pexhibit3.

21. On cross examination, he testified that the incident was a day before. That on lab examination, there were pus cells and there was no evidence of stupefying/drugging. Hymen was broken but old. There was a possibility of penetration but he was not certain.

22. PW5 PC William Serem testified that he was ordered to accompany other officers to arrest a suspect of rape. Early morning of 21/06/2021, they proceeded to Kiambiriria and complainant led them to a certain home. They knocked on the door and after identifying themselves, the Appellant opened and he was identified by the complainant.

23. PW6, the investigating officer testified that he escorted the complainant to hospital and recorded the witness statement. That the complainant told him that she was abducted and taken to a home where she was defiled. He visited the scene on 19/06/2021. On 21/06/2021, the Appellant was arrested upon identification by the complainant. That he collected the complainant's marron skirt, Pexhibit4 and her cream pant, Pexhibit5. Complainant said that she knew the Appellant prior to the incident.

24. On cross examination, he testified that the complainant said she was covered on the face and there was a motor cycle in the compound where the Appellant was arrested. That she did not know who abducted her but she was able to identify the Appellant in the house when she woke up. That the Appellant alleged in his statement that he was in a relationship with the complainant whereas the complainant said she was not in a relationship with him. That she identified the Appellant during the arrest. He testified on re-examination that the complainant led them to where the Appellant was arrested. It is only the Appellant who was in the house.

25. The Appellant in his sworn defence testified that he is a chief and that he did not understand the charges.

26. On cross examination he stated that he did not commit the offence.

27. That was the totality of the evidence before the trial court. I have had occasion to consider the evidence as recorded at the trial court. I have taken cognizance that unlike the trial court, I did not have the

advantage of seeing or hearing the witnesses testify and have given due allowance for that fact. In addition, I have considered the applicable law, submissions on record and case law cited.

28. The Appellant was charged with rape. The main ingredients of the offence of rape created under section 3 (1) of the *Sexual Offences Act* include intentional and unlawful penetration of the genital organ of one person by another, coupled with the absence of consent. It follows therefore that the prosecution was required to prove the following;

    i. Penetration which is supposed to be intentional and unlawful;

    ii. Lack of consent; and

    iii. Identity of the perpetrator.

29. The evidence on record by PW1 was that someone touched her and she lost consciousness and when she regained her consciousness, she found herself in a house naked and her vagina was in pain. There was a man lying next to her and she dressed up and walked outside but the gate was locked. She returned to the said house and the man pulled her and started undressing her. She struggled but he was stronger than her and he penetrated her vagina.

30. As to the proof of lack of consent, the case of Republic vs. Oyier[1985] KLR 353 set the essential elements in proving lack of consent and held as follows;

> " 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."

31. From her narration, it is clear that there was no consent. That is, she did not consent to the act of penetration.

32. As to whether penetration was proved, PW4 the clinical officer testified that her genetalia was normal, hymen was broken with old tears and there was presence of pus cells. Nothing else unusual was noted. On cross examination, he testified that there was a possibility of penetration but he was not certain. The Appellant in his submissions argued that the evidence by PW4 did not support the evidence that there was penetration and the fact that the complainant was examined hours after the alleged ordeal, there ought to have been some sort of evidence that she was raped for example the presence of epithelial cells or spermatozoa. He further argued that the trial court did not also state or mention whether the complainant was a truthful witness and did not mention section 124 of the *Evidence Act*.

33. I have considered the issues raised. It is trite law that the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by

circumstantial evidence (see Kassim Ali v Republic Cr Appeal No. 84 of 2005 (Mombasa)(unreported) thus;

> " the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

34. This is in line with the proviso to Section 124 of the *Evidence Act* which provides that a trial court can convict on the evidence of the victim of a sexual offence alone provided that the trial court believe or be satisfied that the victim is telling the truth and secondly, it must record the reasons for such belief. The said section provides;

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

35. To my mind, Section 124 can only be complied with if the reasons are recorded in the proceeding indicating that the court is satisfied that the alleged victim is telling the truth. The court in Robert Wekesa Simiyu v Republic [2019] eKLR held that;

> " There are no strait-jacketed reasons that must be recorded. What matters most is the impression made on the trial magistrate by the overall evidence of the witness. Those are the reasons he must record."

36. I have perused the judgment of the learned magistrate and when he was considering whether penetration was proved, he was convinced that the complainant was raped on the material night. He stated that he tested her evidence which he found to be coherent and consistent and she was able to give a clear picture on how the incident happened. The trial court was thus in compliance with Section 124 of the *evidence Act*. Further, PW3 testified that when he met her, she seemed shaken and terrified about what had happened to her.

37. As to the fact that there were no epithelial cells that were seen on examination, it is my view guided by the case of Kassim Ali (supra), Fappyton Mutuku Ngui vs. Republic [2014] eKLR, among others that even without such presence still penetration can be proved depending on the evidence tendered and going by the definition of penetration in law. The evidence of the victim and that of corroborative witnesses or circumstantial evidence is usually enough to establish sexual offences such as rape and defilement.

38. Regarding identification, PW1 was able to identify the house where she had been held and where she had been penetrated by the Appellant who was a boda boda operator. She used to see him and knew he was a boda boda operator. PW3 also knew the Appellant as he had ferried him before in his (appellant's) business. Though she lost consciousness after being stupefied, she was able to take witnesses including the police to the house and the Appellant was found there.

39. While the Appellant bears no burden to prove his innocence, the mere denial in his defence fails to dislodge the prosecution's evidence and the direct and circumstantial evidence irresistibly points to his guilt.

40. Regarding sentence, the Appellant was sentenced to ten years imprisonment. That sentence is provided in law. It was therefore upon the Appellant to demonstrate that the sentence was manifestly excessive, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. The court in Shadrack Kipkoech Kogo vs R Eldoret Criminal Appeal No. 253 of 2003 laid a clear basis upon which an Appellate court can interfere with the sentence passed by a trial court. The Appellant has not demonstrated any of those factors. The trial court while sentencing him considered his mitigation and did not consider extraneous matter nor did it fail to consider relevant matters..

41. The Supreme has affirmed the legality of the mandatory sentences in the Sexual offences in its recent decision in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024). The court stated;

> "We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law.....
>
> 68. Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence.

42. A look at the sentencing proceedings and the sentence itself in the matter clearly shows no infraction of the principles enunciated above to warrant interference with the sentence.

43. Further, the trial court complied with Section 333(2) of the *Criminal Procedure Code* and held that the sentence imposed was less the 2 years he had spent in custody.

44. With the result that the appeal herein lacks merit and is dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF APRIL 2025.

A.K. NDUNG'U

JUDGE