



REPUBLIC OF KENYA



KENYA LAW
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**Gwage v Republic (Criminal Appeal 26 of 2024)
[2025] KEHC 4936 (KLR) (28 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4936 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 26 OF 2024
DR KAVEDZA, J
APRIL 28, 2025**

BETWEEN

NELSON GWAGE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered
by Hon. A. Mwangi (C.M) on 28th November 2023 at Kibera Chief
Magistrate's Court Criminal Case no. 77 of 2023 Republic vs Nelson Gwage)*

JUDGMENT

1. The appellant was charged and after a full trial convicted for the offence of rape contrary to section 3(1) (c) of the *Sexual Offences Act*, No. 3 of 2006. He was sentenced to serve five (5) years imprisonment.
2. Being aggrieved, the appellant filed an appeal challenging his conviction and sentence. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He urged the court to quash his conviction and set aside the sentence imposed.
3. As this is the appellant's first appeal, the role of this appellate court of first instance is well settled. It was held in the case of *Okeno vs Republic* [1972] EA 32 and further in the Court of Appeal case of *Mark Oruri Mose vs R* [2013] eKLR that this court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.
4. On 4 September 2018, SWN (PW2), the complainant, received a call from the appellant known to her through Facebook, promising a surprise. Having previously given him her job application documents, she agreed to meet at his residence. There, the appellant forcibly pulled her inside, threw her onto his bed, and began caressing her. When she attempted to flee, he padlocked the door, pocketing the key.



5. The complainant called her sister (PW1), but the appellant seized and switched off her phone before returning it. He demanded sexual intercourse, threatening gang rape if she refused, and forcibly penetrated her vagina without a condom. The complainant's screams prompted him to stop, after which he provided water and soap for her to clean herself. He then escorted her to a motorbike stage. At home, the complainant reported the incident to her family and led police to the appellant residence, identifying him during his arrest. She noted apologetic text messages from him, promising a job, but her phone was formatted due to a virus; screenshots were retained as evidence.
6. During cross-examination, the complainant admitted visiting the appellant's home willingly but cried after being pushed onto the bed. He played loud music after locking the door, and she removed her clothing under duress, with the appellant stopping when she cited stomach pain. On re-examination, she confirmed he caressed her breasts and buttocks and attempted to kiss her.
7. PW1 the complainant testified that she received a distressing call from the complainant, hearing her cry. PW1's pleas went unanswered, and the call went silent for ten minutes. She alerted their mother, and they reported the incident to Kabete Police Station. At 8 p.m., the complainant returned, alleging rape by the appellant, who promised a job. On cross-examination, PW1 acknowledged consensual sex could become non-consensual but believed the encounter was non-consensual. She did not record the call or identify the male voice. On re-examination, she upheld the non-consensual nature.
8. PW3, the complainant's mother, learned from PW1 that the complainant was being raped. She heard her daughter's cries over the phone amid loud noise. The five-minute call ended after two to three minutes. Advised by Safaricom, PW3 reported to the police. The complainant disclosed rape by the appellant, who met via Facebook. PW3 aided in locating his residence, leading to his arrest. On cross-examination, she confirmed hearing the cries and noted Nelson provided a towel, water, and soap. On re-examination, she reiterated her daughter's distress.
9. PC Nancy Gathoni (PW4) recorded the complainant's statement, confirming her acquaintance with the appellant. The complainant led the police to his residence. No clothing was provided, and Gathoni did not see the alleged texts. Neighbours heard no screams, being absent. PW3's statement was delayed. The PRC form noted clean clothing, not submitted.
10. John Njuguna (PW5) from Nairobi Women's Hospital examined the complainant, who reported forced penetration by a known friend. No physical injuries were found, but vaginal laceration and white discharge with pus cells were noted. Her hymen was absent, and she was pregnant. P3 and PRC forms were produced as exhibits. On cross-examination, he confirmed no clothing was provided, and the complainant did not identify the pregnancy's father. On re-examination, the complainant reported being coerced to the appellant's residence and forcibly penetrated.
11. In his sworn defence, the appellant testified that In 2017, he met the complainant at a Kangemi house party, and they began dating. In August 2018, she informed him of her pregnancy, claiming he was responsible, and expressed her desire to terminate it. Unable to afford the Ksh.10,000 abortion fee, the appellant alleged she urged him to find a solution. He claimed he was framed to conceal her pregnancy from her father.
12. On the day in question, they met and went to his single-roomed, iron-sheet house, where screams would be audible to neighbours. The appellant maintained that she had visited before and was already pregnant. He denied raping her, stating he escorted her home and paid her fare. During cross-examination, he refuted claims of playing loud music, asserting neighbours would have heard it.
13. The trial court found him guilty of the offence charged and convicted him accordingly.



14. I have considered the grounds of appeal and I find that the main issues for consideration are whether the prosecution proved its case beyond reasonable doubt and whether the sentence was harsh and excessive in the circumstances.
15. The main 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, coupled with the absence of consent in the case of Republic vs. 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.”
16. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof.
17. On the element of penetration, the complainant (PW1) testified that on the material date, the appellant lured her to his house under the pretence of securing employment, forcibly pulled her inside, locked the door, and engaged in sexual intercourse. This account was corroborated by PW5, who tendered medical evidence documenting blunt-force trauma to PW1's genitalia and a missing hymen. PW4, an expert, concluded that these injuries evidenced penetration. The medical and testimonial evidence conclusively establishes penetration.
18. On consent, it is trite law that consent obtained through fear, duress, or force is invalid. PW1 stated she yielded only after the appellant threatened her with gang rape, compelling compliance out of fear for her life. PW5's medical evidence of blunt trauma at the vaginal entry further indicated a forced encounter. No evidence suggests consensual intercourse, and the appellant's threats vitiated any purported consent. The prosecution proved a lack of consent beyond reasonable doubt.
19. On identification, PW1 testified to knowing the appellant through prior Facebook communication spanning over a year, having exchanged numbers and met on the material date following his job offer. The appellant admitted knowing PW1 and claimed a prior relationship, negating any mistaken identity. This mutual acknowledgment confirms positive identification.
20. The appellant's defence of a consensual relationship and allegations of being framed lack evidential support and are outweighed by the prosecution's cogent evidence, including PW1's testimony, medical corroboration, and the appellant's admissions. The totality of the evidence demonstrates that the prosecution discharged its burden, proving all elements of rape. The trial court's findings were well-founded, and the conviction is safe.



21. The appellant was sentenced to five (5) years imprisonment. Section 3(3) of the *Sexual Offences Act* provides for a minimum of ten years imprisonment, extendable to life imprisonment. Sentences serve to punish and rehabilitate offenders, deterring criminal behaviour. The trial court exercised discretion and imposed a five-year sentence. The sentence, though lenient, I find no reason to interfere.

22. In the premises, the appeal is dismissed in its entirety for lacking in merit.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 28TH DAY OF APRIL 2025.

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Mr. Chebii for the Respondent

