



REPUBLIC OF KENYA



**Njoka v Republic (Criminal Appeal E010 of 2024)
[2025] KEHC 7921 (KLR) (30 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7921 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL APPEAL E010 OF 2024**

RL KORIR, J

MAY 30, 2025

BETWEEN

KENNEDY JOMO NJOKA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

The Charge

1. The Appellant herein was charged with the offence of Rape contrary to Section 3(1)(a)(b) as read with Section 3(3) of the *Sexual Offences Act*, 2006, The particulars of the offence were that on the 6th day of May, 2022 at in Chiakariga Sub-County within Tharaka Nithi County intentionally and unlawfully caused his male genital organ namely penis to penetrate the vagina of JK by use of threats.
2. The Prosecution called a total of 4 witnesses and closed its case. The Appellant was placed on his defence wherein he gave a sworn testimony. At the conclusion of the trial, learned Trial Magistrate convicted the Appellant and sentenced him to serve 15 years imprisonment.
3. Aggrieved by the judgement and sentence of the trial court, the Appellant filed the present Appeal dated 4th April, 2024. His main ground is that the Prosecution case was not proved as the witnesses gave contradictory and inconsistent evidence.
4. Subsequently, the Appellant amended his petition and listed the grounds of appeal reproduced verbatim as follows:-
 - i. That the learned trial magistrate erred in both law and fact sentencing the appellant to serve 15 years' imprisonment without analyzing the light used at the scene to identify the appellant.
 - ii. That the learned trial magistrate erred in both law and fact by failing to note that the clinical evidence does not support the allegations of rape in this case.



- iii. That the learned trial magistrate erred in both law and fact by failing to note that the investigation was shoddy.
 - iv. That the learned trial magistrate erred in both law and fact by rejecting the appellant defense without giving cogent reasons.
5. Upon admission of the Appeal, the court directed parties to canvass the Appeal through written submissions. The Appellant filed undated submissions received in court on 18th February, 2025, while the Respondent filed submissions dated 17th March, 2025
 6. My duty as a first appellate court is to re-evaluate the evidence and come to my own conclusion. This duty was restated by the Court of Appeal in the case of *Kiilu & Another-v- Republic (2005) 1 KLR 174* thus:-

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weight conflicting evidence and draw its own conclusions.

It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusion. It must itself make its own finding. Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had advantage of hearing and seeing the witnesses.”

The Prosecution/Respondents Case

7. The Prosecution case in the trial court was that the Appellant (then Accused) went to the complainant’s house at about 11.00 p.m, removed her from her house, took her to the nearby shamba and raped her. The Complainant and victim of the offence (PW1) testified that the Accused woke her up and told her that he had been sent by the Assistant Chief to arrest her. That she left with him and when they got to her nephew’s shamba, the Accused asked her to sit down, then to lie down, removed her pants and penetrated her. That he then let her go back home.
8. PW1 stated that she called the Assistant Chief who told her that he had not sent anyone and advised her to report the incident to the police, which she did the next day and was also examined at Marimanti hospital. She stated that she knew the Accused as he was employed in the neighbourhood.
9. DM (PW2) testified that he was woken up by the Accused who asked the whereabouts of his parents. He told him that the father was away while the mother was sleeping. That the Accused called his mother and asked her why she was brewing alcohol. That the Accused left with his mother to Chiakariga Police Station to investigate the issue of B and her pregnancy.
10. PW2 stated that he went to report to his aunt JK that his mother had been taken to Chiakariga. When he came back to the house, he found that his mother had returned, while his sister B was missing. That when B came back she said that Njomo (Accused) had tried to defile her and she ran away. PW2 identified the Accused as the person who had appeared at their home and also whom B said had attempted to defile her.
11. Lilian Wahu (PW3) was the Clinical Officer at Marimanti Level 4 hospital. She testified that the complainant was examined at the facility and a P3 Form filed. She stated that the examination showed a broken hymen while the laboratory tests showed presence of epithelial cells indicative of foreign body



presence. She stated that she did not give any remedies as she examined the patient after 24 hours. She further testified that there were no conclusive remarks on whether or not there was penetration as the victim was 50 years' old and the vagina was normal.

12. The Investigating Officer was No.11XX36 P.C (PW4) Emmaculate Kimanzi of Tunyai Police Station. She testified that she found the complainant (PW1) aged 50 and her daughter B. aged 13 at the station at around 11.40 am on 7th May, 2022. That she interrogated them and escorted them to Marimanti Level 4 hospital where they were examined. She said that the PW1's inner wear (Prosecution Exhibit 2) was stained and she had dirt on her head and on her clothes. The Investigation officer further testified that the victim told her that the Accused pulled her into a thicket and had sex with her without her consent.
13. PW3 stated that the Accused disappeared and was arrested on 15th May, 2022 by the Assistant Chief and Police.

Defence Case

14. Placed on his defence, the Accused gave sworn testimony and did not call any witnesses. He stated that he was a builder and that on 6th May, 2022 he went to a construction site at Chuka upto 5.00p.m. That he continued with the construction work upto 13th May, 2022 when his father called him to attend a family meeting. That he got home on 14th May 2022 and his father informed him of a land issue because the person they had bought land from was demanding more money. That when they disagreed the seller threatened that one of them would end up in jail.
15. The Accused stated that he did not know JK, the complainant; and insisted that the case was fabricated due to a land dispute.
16. As earlier stated, the Accused was convicted and sentence to serve 15 years' imprisonment.
17. I have considered his grounds of appeal, the evidence as recorded by the trial court and the respective submissions of the parties. The main issue for my determination is whether the Appeal is meritorious. Further, all the grounds of Appeal and issues arising therefrom must necessarily be determined within the ingredients of the offence being;
 - i. Whether penetration was proved
 - ii. Whether the Appellant was properly identified as the perpetrator, and
 - iii. Whether there was lack of consent.

The Law

18. The offence of rape and the ingredients of the same are provided for in Section 3(1) of the [Sexual Offences Act](#) No.3 of 2006 as follows:-
 - 3.(1) 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.



(i) Proof of penetration

19. The Appellant submitted that there was no proof of penetration. He stated that medical evidence did not prove penetration as the clinical officer did not connect him to the offence; that the Clinical Officer's evidence was that "there are no conclusive remarks on penetration because the vagina was normal, and the patient was a 50 year old woman."
20. The Prosecution/Respondent on the other hand submitted that the victim's testimony was corroborated by medical evidence as PW3 found dirt on the victim's hair and clothes and a white discharge and presence of 'epithelial cells'.
21. Section 2 of the *Sexual Offences Act* defines "penetration" as the partial or complete insertion of the genital organs of a person into the genital organs of another person."
22. I have considered the evidence of PW1. She described how the Appellant led her to the shamba and made her lie down and penetrated her. Her evidence that she was led out of her home was credible for reason that PW2 who was her child testified that the Accused took his mother away out of their home in the night. Upon examination at the hospital, the clinical officer (PW3) stated that the complainant had not changed clothes and there was dirt and grass on her hair. PW3 also found a broken hymen, white discharge and epithelial cells. She produced the P3 Form.
23. I have looked closely at the evidence of PW3 and the P3 Form(Exhibit 1). She stated that the victim had dirt and grass on her hair. This crucial evidence was not captured on the P3 Form. The remark made on the P3 Form on the General appearance of the victim was 'Well Kempt.' There was no mention of the grass and soil on her head, and dirt on the clothes which would demonstrate that. She lay on the ground in the shamba.
24. I have noted that PW3 did not make any conclusive remarks in the P3 Form as to whether or not there was penetration. Her explanation was that 'the vagina was normal and the patient was a 50 year- old woman'
25. From the above, the medical evidence was not helpful at all. Although the clinical officer testified to having noted the presence of epithelial cells, which was indicative of sexual activity, she did not produce the treatment notes showing the laboratory results. Her evidence of the physical appearance of the victim was also not in tandem with what was recorded in the P3 Form. There was also no PRC Form which would have detailed the examination.
26. The Court can however convict on the sole evidence of the victim as mandated by Section 124 of the *Evidence Act*. It provides:-

“Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of alleged victim 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.” [Emphasis added.]



27. In this case, the trial court did not indicate either in the proceedings or on the record why it believed the complainant. Probably, It was not necessary to do so since the court found corroboration in the medical evidence presented by PW3. However, upon review, I have found the medical evidence inconclusive. I must therefore revisit the evidence of the Complainant to test its veracity.
28. I have revisited the evidence of the victim as recorded. She stated that she was woken up by the Accused who told her that the chief had sent him to arrest her for ostensibly being an illicit brewer. That she left with him and a short distance away, some 60 metres away from the her house, he told her to sit, then told her to lie down, then penetrated her without her consent, then let her go back home. The Complainant also testified that the Accused asked her to go back to the house and call her daughter, which she obliged.
29. Cross – examined by the Accused, the Complainant stated “that you asked me to go call my daughter that you wanted to send her. I did not know that you would do any harm to her.” In the view of the court, the statement by the Complainant that after being raped, she called out her daughter to the rapist without sounding any alarm over her daughter’s safety was not credible.
30. 30. From my appreciation of the evidence above, and the circumstances of the offence, I find that it was as likely as it was not, that the Complainant was penetrated by the Appellant. The evidence as a whole was inconclusive. I am not satisfied that the element of penetration was proved to the required legal standard.

(ii) Identity of the perpetrator

31. For a conviction to ensue, the Prosecution must positively link the Accused to the offence. The evidence of identification of the Accused must be proved beyond reasonable doubt.
32. The Accused submitted that the incident took place at night around 11p.m. and therefore the evidence of identification was not credible. He contested that he was not positively identified as the perpetrator. The Respondent on the other hand submitted that the identification of the Appellant was proper and there was no chance of mistaken identity. That PW1 and PW2 had prior knowledge of the Appellant it was therefore a case of recognition.

It was common ground that the offence occurred at night, at around 11.00p.m. For this reason I have analyzed the identification evidence with circumspection. The Court of Appeal in *Wamunga vs. Republic* (1989) eKLR expressed itself as follows:-

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.....”

33. In this case, PW1 told the court that the Appellant went to her house to woke her up and asked her to go with him; that he had been sent by the Chief to arrest her. That they left together, walked a short distance before the Accused raped her at her nephew’s shamba. She stated that she was able to identify the Accused because she flashed her torch on him.
34. PW2 on the other hand told the court that the Accused first talked to him when he answered the knock on their door. He asked first for the whereabouts of the father, then the mother. That when the Accused asked PW1 to go with him, PW2 asked if he could accompany her. Both PW1 and PW2 knew the Appellant by name Njomo. They knew him as he lived in the same village, where he herded his sister’s goats.



35. From the evidence of PW1 and PW2, I am persuaded that the two knew the Appellant and recognized him when he went to their home at night. Even though it was night and they only had a torch on, he spent substantial time first in their compound and, secondly; while walking away with the PW1. While at the shamba, he told PW1 to sit, lie down, penetrated her and told her to go and call her daughter. This shows that they interacted for a while, ruling out any possibility of mistaken identity.
36. The Investigating Officer (PW4) also testified that PW1 and her daughter BA who was not called as a witness identified the Appellant by name when they made a report at the police station. She stated that the Appellant could not be arrested immediately as he went into hiding and was only traced and apprehended on 15th May, 2022.
37. This evidence in my view is more of recognition than identification. In the case of Peter Musau Mwanzia vs. Republic (2008) eKLR, the Court of Appeal expressed itself as follows:-

“We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.....”

38. It is my finding that the Appellant was properly identified by the prosecution witnesses. His identification, though under unfavourable circumstances was free from error. My analysis of the evidence has shown that he interacted with the witnesses for a considerable period of time. They not only knew him by name, they knew his home which was his sister’s house. This was a case of recognition not identification. Further there was evidence that he disappeared after the incident denoting a guilty mind.

iii. Whether the Appellant penetrated the complainant without her consent

39. The Appellant’s 1st, 2nd and 3rd grounds of appeal state that the offence was not proven and the investigations were shoddy. In his written submissions, he persisted that he was not properly identified as the perpetrator.
40. The Respondents on their part submitted that the Appellant forcefully had sex with the complainant without her consent.
41. Section 42 of the *Sexual Offences Act* defines consent as;

2. Consent

For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.

43. Intentional and unlawful acts

- (1) An act is intentional and unlawful if it is committed -
- (a) in any coercive circumstance;
 - (b) under false pretences or by fraudulent means; or



- (c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence.
- (2) The coercive circumstances, referred to in subsection (1)(a) include any circumstances where there is -
 - (a) use of force against the complainant or another person or against the property of the complainant or that of any other person;
 - (b) threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or
 - (c) abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act.”

42. I have already found that the ingredient of penetration was not conclusively proven. I proceed however to examine the evidence that would denote lack of consent if there was penetration.

43. In the Republic vs Oyier (1985) eKLR, the Court of Appeal held as follows:-

“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 or not caring whether the woman consented or not.

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.”

44. In the case of Peter Wanjala Wanyonyi vs Republic (2021) eKLR Kimaru J. (as he then was) illuminated consent as follows:-

“The burden of proof lies upon the prosecution to prove that the sexual intercourse was without the consent or against the will of the complainant. A woman is said to consent only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power, to act in a manner that she wants. Consent may be either expressed or implied depending upon the nature and circumstances of the case.”

45. The victim’s evidence was that she was woken up by the Accused on the pretext that he had been sent by the Assistant Chief to arrest her. She followed him out of the safety of her home without protest. That the Appellant told her to get down to the ground, which she complied. He penetrated her and told her to go back home.

46. It appears to the court that the complainant did not put up any resistance. The test however, as shown in the Wanyonyi case (supra) is not whether she resisted the Sexual intercourse but whether she consented to it. The evidence would suggest that she did not consent. This is because the Accused deceived her that he had been sent to arrest her only to turn the fake arrest into a sexual encounter where he threatened her not to raise any alarm.

47. It is my finding from the above evidence that the sexual activity, if it occurred, lacked consent. It appears to the court that complainant knew the Appellant well enough to trust him and follow him out. It is also possible that she was, as the evidence of PW2 suggests, engaged in illicit brewing and was ready



to go along with the Appellant's deception to avoid the consequences of arrest. Such circumstances would, if true, point to lack of consent.

48. As I conclude this judgement, I must point out aspects of the evidence that was disturbing and which pointed to either shoddy investigation or lack of diligent prosecution. I noted with concern that PW2 testified that the Appellant woke him up and asked for the whereabouts of the father, then the mother. He said that "The said person also asked mum why she was brewing alcohol. He and mother went to Chiakariga Police Station to investigate the issue of B and her pregnancy."
49. PW2 further stated: "I went to JK to tell her that my mother had been taken to Chiakariga. when I came back from J's I found B had already gone. She came back later shortly, but my mother came back earlier than B. When my mother was escorted to Chiakariga, I was with B when I went to report to my aunt J, I left B at home. When I came back, my mother had returned, but my sister B was not at home. She came back shortly thereafter and said that Njomo had wanted to defile her but she ran away."
50. It appears to the court that either the Appellant was a trusted person well known to the family, or was a complete threat who beat the family in to quiet submission to his evil plans. Why didn't PW2 raise an alarm? Why didn't their aunt whom he reported to take any action? Why did they not accompany their "arrested" mother? The evidence failed to answer all these questions which were critical to bolstering the prosecution case.
51. Secondly, and even more disturbing is the evidence of the Complainant that after the Appellant had raped her, he told her to go and call her daughter and she did, and the daughter went to meet the Appellant outside and was defiled. The narration by the complainant of how the Appellant led her to the shamba and penetrated her would have been believable if she had not added that the Appellant asked her to call the daughter and she proceeded to do so. If she had just been raped, why would she entrust her daughter to a rapist by calling her.? Was the Complainant actually raped by the Appellant? And if she was, why would she send her daughter to a rapist?
52. In answer to the Appellant's question in cross-examination she stated "I did not ask my daughter to run away because I did not know or believe that you could do her any harm." This statement raises a red flag as to whether the complainant was of full mental capacity when she entrusted her daughter to a rapist. No evidence was led to that effect or to demonstrate the danger she faced if she did not expose her daughter. These observations cast doubt in the mind of the court on the veracity of the present charge.
53. I observe, from the submissions of the parties that the Appellant was duly charged and convicted of the offence of defilement of the minor in Criminal Case No E012 of 2022 where he is currently serving a 20 year jail term.
54. In the end, it is my conclusion that the evidence against the Appellant raised deep suspicion that he raped the complainant. As the evidence of penetration was not proven to the required legal standard, I shall, as the law mandates, grant the Appellant the benefit of the doubt. It is my conclusion that his conviction was unsafe.
55. In the final analysis, I quash the conviction and set aside the sentence.
55. For clarity, the Appellant is not set at liberty as he is lawfully serving sentence arising from the related case in Marimanti P.M's Court Criminal Case No E012 of 2022.

Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED AT CHUKA THIS 30TH DAY OF MAY, 2025.

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R. LAGAT-KORIR

JUDGE

Judgment delivered in the presence of the Appellant present acting in person at Meru G.K. Prison, Prosecution Counsel Ms Rukunga for the respondent; Muriuki (Court Assistant).

