



REPUBLIC OF KENYA



**KENYA LAW**  
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**Asava v Republic (Criminal Appeal E037 of 2023)  
[2025] KEHC 7811 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7811 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL APPEAL E037 OF 2023**

**JN KAMAU, J**

**MAY 29, 2025**

**BETWEEN**

**RICHARD ASAVA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon S. Manyura (RM) delivered at Hamisi in the Senior Principal Magistrate's Court in Sexual Offence Case No 69 of 2021 on 11th August 2023)*

**JUDGMENT**

**Introduction**

1. The Appellant herein was charged with the offence of rape contrary to Section 3(1) (a) (c) (sic) as read with Section (3)(3) of the [Sexual Offences Act](#) No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent adult with a child contrary to Section 11(A) of the [Sexual Offences Act](#).
2. The Learned Trial Magistrate, Hon S. Manyura (RM) convicted him on the main charge of defilement and sentenced him to seven (7) years imprisonment.
3. Being dissatisfied with the said Judgement, he lodged an appeal herein. His Petition of Appeal was dated 27<sup>th</sup> December 2023 and filed on 28<sup>th</sup> December 2023. He set out five (5) grounds of appeal.
4. His undated Written Submissions were filed on 5<sup>th</sup> November 2024 while those of the Respondent were dated 27<sup>th</sup> November 2024 and filed on 28<sup>th</sup> November 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.



## Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify, and thus make due allowance in that respect.
7. Having looked at the Appellant's Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issue that had been placed before it for determination was whether or not the Prosecution proved its case beyond reasonable doubt.
8. The court therefore dealt with the said issues under the following distinct and separate heads.

### I. Identification

9. The Appellant did not submit on this issue. The Respondent averred that the Appellant was a Boda Boda rider and he used to carry PW 1 and that he used to call her after retrieving her number from the Mpesa messages. It stated that the Appellant's identification by PW 1 was by way of recognition. It relied on the case of *Anjononi & Others vs Republic* (1976-80) 1 KLR 1566, 1568 where it was held that recognition was more reliable than identification.
10. The Appellant's evidence was that the Complainant, HN (hereinafter referred to as "PW 1") was his girlfriend and they lived together at [particulars withheld] Village from 17<sup>th</sup> September 2021 until 15<sup>th</sup> October 2021 after she allegedly overheard him speaking to the mother of his children and left him never to come back.
11. As he and PW 1 knew each, his identification was not in issue as it was by recognition as had been correctly pointed out by the Respondent herein.

### II. Proof of Prosecution's Case

12. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases was proof beyond reasonable doubt, this court considered the pertinent ingredient of the offence of rape, which hinged on the consent of the victim.
13. In his Petition of Appeal, the Appellant admitted having had a relationship with PW 1. He, however, submitted that the evidence that was adduced by the Prosecution witnesses was inconsistent and had material contradictions and thus urged this court to disregard the same.
14. He questioned where she was treated because she had testified that she first sought treatment from Serem Hospital but was referred to Jumuia Hospital because doctors were on strike and that she sought treatment in a hospital that she could afford because Jumuia Hospital was expensive. He pointed out that she did not disclose which affordable hospital she sought treatment.
15. He also questioned how the Clinical Officer, Foy Agwona (hereinafter referred to as PW 2) filled the P3 Form yet PW 1 had wished the Trial Court to rely on a P3 Form that was filled at Serem Hospital. He asserted that she contradicted herself when she said that she went to a place that she could afford to have the P3 Form filled as Jumuia Hospital was expensive. He sought to know which P3 Form



- the Prosecution intended to rely on to charge him and why they called a Clinical Officer from Vihiga County Referral Hospital to testify against him. He averred that this was intended to frame him for the offence.
16. He further submitted that PW 1 contradicted herself when she testified that she was raped by a person who was not well known to her whereas the brief details in the P3 Form showed that the person who raped her was unknown to her. He also made some submissions relating to the issuance of the P3 Form and the date that she was asked to seek medical treatment but this was not clear to this court.
  17. He further pointed out that she did not provide any evidence to corroborate her assertions that he was to show her a vacant house or give the number that they communicated with.
  18. He also averred that the injuries that she sustained were not consistent with the evidence of PW 2 because if she had been raped, then there would have been proof of lacerations. He questioned PW 2's competency as she did not state her experience and faulted her for not having separated the fluids she found when she examined PW 1 and her evidence was a matter of imagination.
  19. It was his submission that PW 1, PW 2 and PW 3 were not credible witnesses. In this regard, he relied on the case of *Ndung's Kimanyi vs Republic* [1979] KLR 283 where it was held that witnesses should not create an impression that they were not straightforward.
  20. He argued that the burden of proof lay on the Prosecution to justify the inference of guilt on his part and thus prove its case beyond reasonable doubt and urged this court to allow his Appeal.
  21. On its part, the Respondent submitted that the Appellant did not negate that charge of rape and that even if he and PW 1 were cohabiting, it did not guarantee sexual intercourse.
  22. It submitted that her evidence was corroborated by medical evidence and that PW 2 could tender the evidence by virtue of Sections 71 and 72 of the *Evidence Act* as she was familiar with the exhibits and that she completed the P3 Form using documents that PW 1 presented to her.
  23. It was evident that the submissions that the Appellant made to this court were materially different from the evidence that he and his witnesses adduced. He seemed to have abandoned his defence that PW 1 had consented to having sex with him. This was a red flag to this court as it made him look like dishonest, an observation that the Trial Court also made in its decision.
  24. There were also inconsistencies in his presentation to this court. He had stated that he used to stay with PW 1 as he was also going to school, a position that was also reiterated by Paul Kadili Malonga (hereinafter referred to as "DW 3"). As evidence had been given that he was a boda boda rider who had taken advantage of PW 1 who was his customer, the least he could have done to assist himself was to produce documents to show that he was at school. This could have persuaded this court to give benefit of doubt that his primary position in life was that of a student and not a boda boda rider who had lured PW 1 and raped her in the pretext of showing her a vacant house.
  25. This court noted that PW 1 was the only identifying witness. Having said so, under Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya), a trial court could convict a person on the basis of uncorroborated evidence of the victim if it was satisfied that the victim was telling the truth.
  26. Notably, the proviso of Section 124 of the *Evidence Act* states that:-

“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 (emphasis).”

27. Even so, a trial court was required to exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person’s word against the other. Other corroborating evidence could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful. Other corroborating evidence could be proof of penetration, which was dealt with later in the Judgment herein.
28. Even so, PW 1’s evidence was corroborated by the medical evidence of PW 2 and it was not necessary that she had to have lacerations for the offence of rape to have been proven.
29. Although the Appellant admitted that he was married and at the same time was in a relationship with PW 1, and the community also indicated that there could have been a relationship between the Appellant and PW 1 as per the Probation Report dated 11<sup>th</sup> August 2023, his evidence and that of his witnesses, Pastor Kawai (hereinafter referred to as “DW 2”) and DW 3 was not credible as to proof of his relationship with PW 1. DW 3 testified that the Appellant and PW 1 lived together for two (2) months while the Appellant told the Trial Court lived together from 17<sup>th</sup> August 2021 until 13<sup>th</sup> October 2021.
30. Assuming that the Appellant and PW 1 were living together as the Appellant, DW 2, DW 3 and the community had suggested, none of them could testify as to the circumstances relating to the Appellant raping PW 1. The Appellant’s evidence that he was in a relationship with PW 1 was immaterial.
31. What was of concern to this court was for PW 1 to have demonstrated lack of consent which could be withdrawn even if it had been given previously.
32. Section 42 of the [Sexual Offences Act](#) provides as follows:-

“For the purpose of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.”
33. The Appellant’s submissions on who tendered in evidence the P3 Form was also rendered moot as the same showed that there was presence of spermatozoa. PW 1 reported the incident on the same date it occurred and sought medical attention within twenty four (24) hours. He had already conceded that they knew each other a fact that was indicated in the P3 Form which had indicated that she had been raped by a person known to her.
34. Accordingly, this court found and held that the Prosecution had proven its case to the required standard, which in criminal cases, was proof beyond reasonable doubt that the Appellant defiled PW 1 on the material date. The alibi inference that the Appellant adduced did not displace that of the Prosecution.
35. In the premises foregoing, Grounds of Appeal No (1), (2), (3), (4) and (5) of the Petition of Appeal were not merited and the same be and are hereby dismissed.



### **III. Sentencing**

36. The Appellant did not raise any grounds challenging his sentence. This court did not therefore find it necessary to analyse the Respondent's Written Submissions in that regard but suffice it to state that the Appellant escaped with a slap on the wrist for the offence that he committed as the last prescribed sentence under Section 3(3) of the *Sexual Offences Act* Cap 63A was ten (10) years which could be enhanced to life imprisonment. The court did not enhance the same as it had not warned him of the possibility of an enhancement of the sentence so that he could make an informed decision on whether he wished to continue with or withdraw his Appeal.

### **Disposition**

37. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal dated 27<sup>th</sup> December 2023 and filed on 28<sup>th</sup> December 2023 was not merited. The conviction and the sentence be and are hereby upheld as they were both safe.

38. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 29<sup>TH</sup> DAY OF MAY 2025**

**J. KAMAU**

**JUDGE**

