



**Mulwale v Republic (Criminal Appeal E108 of 2024)  
[2025] KEHC 7056 (KLR) (27 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7056 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL E108 OF 2024**

**DR KAVEDZA, J**

**MAY 27, 2025**

**BETWEEN**

**ZACHARIA SHIVAIRO MULWALE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered by Hon. W. Lopokoiyit (S.R.M) on 26th September 2024 at Kibera Chief Magistrate's Court Criminal Case no. E081 of 2023 Republic vs Zacharia Shivairo Mulwale)*

**JUDGMENT**

1. The appellant was charged and after a full trial convicted for the offence of rape contrary to section 3(1) (c) as read with 3 of the *Sexual Offences Act*, No. 3 of 2006, and sentenced to serve life imprisonment on 26<sup>th</sup> September 2024. The particulars of the offence were that on the 15<sup>th</sup> June 2023 at Southern Bypass in Langata within Nairobi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of A.I.N without her consent. Being aggrieved, the appellant filed an appeal challenging his conviction and sentence.
2. 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 19<sup>th</sup> June 2023, at approximately 9:00 PM, the complainant, a 25-year-old resident of Ngong, booked a motorcycle ride via the Bolt app from Eastleigh to Ngong, using the rider's contact number 0787xxxx123. The rider suggested using the bypass for a quicker route and mentioned residing near Ngong. During the journey, he stopped, citing a puncture. He then alighted, seized the complainant, and began strangling her. Fearing for her life, she pleaded with him to stop. The rider beat her, tightly gripped her neck, and forcibly removed her clothing before raping her. He remarked on never having been with a Somali woman before. Distraught, the complainant feigned compliance to seek help. As they continued, she was in tears, and he sought her forgiveness.
5. Upon reaching Kabugi near Karen, the complainant escaped, alerted bystanders, and identified the rider. She contacted a friend, who accompanied her to a police station, and she was referred to Nairobi Women's Hospital. A medical examination by PW3 (John Njuguna) revealed facial injuries, a swollen cut upper lip, and a loosened tooth. A high vaginal swab confirmed sperm, with a torn but healed hymen noted. No STIs were detected. Three weeks later, the complainant identified the rider, Zacharia Shivairo, in three police identification parades, recognising his facial features despite his helmet. She noted the motorcycle was blue, per the Bolt app.
6. On cross-examination, the complainant stated the rider asked her to cancel the trip mid-journey. The assault occurred in a dark but open roadside area, illuminated by passing trucks, enabling her to see him. She confirmed no prior acquaintance with him and did not note the motorcycle's number plate, unaware of the impending danger.
7. On 17 July 2023, PW2 (Pamela Okello), a government analyst, received vaginal swabs from the complainant, swabs from the appellant, and the complainant's clothing (dress, blue biker, blue panty). Semen was found on all items, with DNA profiles matching the complainant and Zacharia Shivairo. The DNA report and profile were produced.
8. PW4 (Inspector Francis Gitau) from Langata DCI produced the ID parade report. PW5 (Constable Sifuna), the investigating officer, issued the complainant's P3 form and later learned of another attempted rape case involving the same rider on 9<sup>th</sup> July 2024 along the Southern Bypass. A Bolt letter confirmed the rider's status and a prior attempted rape complaint. The complainant identified him four times.
9. In his defence, the appellant claimed that his last trip on 15<sup>th</sup> June 2023 was at 7:00 PM, cancelled in Eastleigh, after which he returned home. On 9<sup>th</sup> July 2023, while riding in South B, his fuel ran out on the bypass. A patrol car stopped him, allegedly demanded money, and arrested him. He learned of another case at the station, denied the offence, and claimed the ID parade was flawed. He suggested the complainant took another ride and stated his Bolt account was closed for overcharging, not rape, producing reports. He confirmed seeing the complainant first at the ID parade.
10. The appeal was canvassed by way of written submissions which have been duly considered. In this appeal, the issue for consideration is whether the prosecution proved their case beyond reasonable doubt.
11. 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;

“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. 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. 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.”

12. Pursuant to the foregoing, I shall evaluate the evidence to determine if the offence of rape against the appellant was proven beyond reasonable doubt. The element of intentional and unlawful penetration was established by the complainant’s (PW1) consistent and vivid testimony. PW1 recounted how the appellant, under the pretext of a motorbike puncture, violently assaulted her by strangling and beating her, before undressing and raping her. Her detailed, coherent account evidenced physical resistance and distress, noting her failed attempt to escape.
13. Medical evidence from PW3 corroborated PW1’s testimony, confirming visible injuries, including a swollen lip and bruises consistent with assault. Vaginal swabs and clothing samples, tested by PW2, revealed semen, with DNA analysis conclusively linking it to the appellant, confirming penetration and his identity.
14. Lack of consent was evident. PW1 testified to non-consensual acts, describing being overpowered and terrified. Her emotional distress, observed at the hospital, aligns with *Republic v Oyier* [1985] KLR 353, where submission due to fear negates consent. The appellant’s mens rea was apparent, as his actions showed disregard for, or knowledge of, the complainant’s non-consent.
15. PW1 reliably identified the appellant by his facial features during the incident and in multiple identification parades. Her description of the motorbike and events was consistent. PW5 confirmed the appellant, a Bolt rider, had a prior similar incident, indicating a pattern.
16. The appellant’s defence of absence at the scene and a flawed identification parade was unconvincing, contradicted by PW1’s identification and DNA evidence. It did not rebut the otherwise credible and consistent prosecution evidence.
17. Accordingly, all elements of rape were proven beyond reasonable doubt. The trial court’s conviction was sound. This appeal against conviction is dismissed.
18. On sentencing, section 3 (3) of the Sexual Offence Act prescribes the penalty for the offence of rape as follows;

“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.”
19. The *Sexual Offences Act* provides for a mandatory minimum sentence of not less than 10 years but which can be enhanced to life imprisonment for the offence the appellant is convicted of. The court sentenced the appellant to life imprisonment.
20. As such, I find that the sentence was proper in light of the supreme court decision in *Petition E018 of 2023 Republic vs Joshua Gichuki Mwangi*. In the end, the appeal is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 27<sup>TH</sup> DAY OF MAY 2025**



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**D. KAVEDZA**

**JUDGE**

In the presence of:

Appellant Present

Mutuma for the Respondent

Tonny Court Assistant

