Mbithi v Republic (Criminal Appeal E037 of 2024)
[2025] KEHC 9148 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9148 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E037 OF 2024

EN MAINA, J

JUNE 26, 2025

BETWEEN

ANTHONY MBITHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Conviction and sentence delivered on the 21st day of May 2024 in the Machakos Chief Magistrate's Court Sexual Offence No. 16 of 2023 by Hon. V. Ochanda, Senior Resident Magistrate)

JUDGMENT

1. The appellant was charged with the offence of gang rape contrary to Section 10 of the *Sexual Offences Act*. The particulars of the charge were that on 24th day of March, 2023 at Machakos Sub County within Machakos County, in association with another not before court, intentionally and unlawfully caused his penis to penetrate the anus of J.M.P. without his consent.

2. In count II, he was charged with the offence of committing an indecent act with an adult contrary to Section 11 [A] of the *Sexual Offences Act* the particulars of which were that on the same date and place he intentionally touched the anus of J.M.P with his penis against his will.

3. At the trial six [6] witnesses testified against the Appellant who was found to have a case to answer on 21/11/2023 and he choose to give sworn evidence and called one witness. After evaluating the evidence, the Trial Magistrate found the appellant guilty on the main charge and sentenced him to a term of imprisonment for fifteen [15] years.

4. Being aggrieved by the entire judgement, conviction and sentence, the Appellant has preferred this appeal via a Petition of Appeal on grounds that;

> " a The learned Trial Magistrate erred in both fact and law by convicting him on evidence that did not meet the minimum threshold upon conviction;
>
> b. The learned Trial Magistrate erred in law by sentencing him by virtue of the minimum mandatory sentence provisions of the *sexual offences Act*;
>
> c. The Trial Magistrate erred in law and fact by not considering the period he spent in custody as per section 333[2]of the *Criminal Procedure Code* before his conviction on 21st May 2024."

5. The parties to the appeal consented to canvass it by way of written submissions. On his part the Appellant relied on the submissions dated 28/02/2025 in which he submitted that PW1 never mentioned him explicitly but is candid that it is DW1 who sodomized him; that PW1's had started drinking at 9 am and he was not in the state of mind to comprehend the happenings; that PW1 assumed that he was sodomized by all the three accused persons collectively without evidence. It was further submitted that there are many medical factors that may cause the anal opening to be painful ranging from muscle spasms to constipation. To support this point, he relied on the cases of *Tokore v Republic* CA Criminal Appeal no 204 of 1987, *Akumu v Republic* [1954] 21 EACA, *Mohammed Elibite Hibuya & Another v Republic* , Criminal Appeal no 22 of 1996 [unreported] and *Mwangi v R* [1984] KLR 595.

6. While relying on the case of *Adedeji v the state* [1971] 1 ALL NLR, *Sekiroliko v Uganda* [1967] EA 53 and *Wangombe v Republic* [1980] KLR 149, the Appellant also submitted that his cogent evidence that he was not at the said bar and provided an alibi; that this evidence was not controverted by the Respondent.

7. Lastly, the Appellant urged the court to interfere with the sentence and exercise its discretion. The court was also urged to find that the sentence should run from the date of arrest on 16.04.2023 and in support of this contention, he relied on the case of *Ahamad Bolfathi Mohammed & another v Republic* [2018]eKLR . The Appellant took issue with the finding of the Supreme Court in the case of *Joshua Gichuki Mwangi* which he indicated he had considered and felt that the court failed to provide the rationale behind its conclusion on the mandatory sentences. He highlighted his submissions and stated that it was a witch hunt; that he was a barber and there was a family dispute; that he was never released on bond.

8. On its part, the Respondent relied on the case of *Ondieki v Republic*[2024] eKLR, *Ngetich v Republic* [2024] KEHC 318 [KLR], *Peter Musau Mwanzia v Republic* [2008] eKLR and submitted that the ingredients of the offence of gang rape; that is, penetration, identification and the Appellant was in the company of two others were satisfied. It was contended that the issue of an alibi was an afterthought; that he never alluded to the grudge between himself and PW1 that resulted after PW1 insulted him at the kinyozi during PW1's cross examination. To support the issue of an alibi, reference was made of *Karanja v Republic* [1983] eKLR.

9. The Respondent relied on the Supreme Court case SC Petition No. E018 of 2023 *R v Joshua Gichuki Mwangi and 4 others* and submitted that the sentence that was passed was sufficient and within the law.

Analysis and determination

10. As the first appellate court, I have carefully considered and evaluated the evidence adduced in the trial court so as to arrive at my own independent conclusion, albeit keeping in mind that unlike that court I did not see or hear the witnesses – [see the case of *Okeno v Republic* [1972] EA 32]. I have also taken into consideration the rival submissions, the cases cited and the law.

11. The Appellant was found guilty of gang rape under Section 10 of the *Sexual Offences Act* which provide as follows:

> " Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life."

12. The elements of the offence of defilement are: -

    a. Commission of the offence of rape or defilement.

    b. Offence is committed in association with another or others, or any person who, with common intention, is in the company of another or others.

13. Section 3 [1] and [2] of the *Sexual Offences Act* defines rape as;

    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.

    2. In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.

14. Section 43 [1] and [2] of the same Act provides as follows;

    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.

15. In order to establish whether the prosecution proved its case beyond reasonable doubt and whether to uphold or set aside the conviction, the court must first examine whether the elements of gang rape were satisfied. 14. From the above definition, the ingredients of the offence of rape include proof that the victim was not a minor, proof of penetration, proof of the perpetrator and proof that the consent was not freely given.

16. From the evidence of PW1, he was sworn in before giving his testimony. That is prima facie evidence that he was an adult. Secondly, the medical evidence, particularly the P3 and the testimony of PW5, Dr. John Mutunga that the complainant was 25 years old. That was not contradicted. The fact that he was an adult and not a child was thus proven.

17. On the issue of penetration, Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

> " The partial or complete insertion of the genital organ of a person into the genital organs of another person."

18. In the case of *DS v Republic* [2022] eKLR, the court stated that;

> " Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration."

19. From the record, the offence was committed on 24.03.2023 in the 3rd Accused persons house. His evidence was as follows;

> " ...Danny held my hand. Sir Zero held my legs. Kimanga then sodomized me. He put his penis in the anus. Danny slapped me on the ear. He just lowered my trouser where I was sleeping. All of them sodomized me. They took turns sodomizing me. I lost consciousness. I woke up on the chair in the club."

20. With regard to the Appellant herein, the Complainant stated as follows when he was cross examined by the Appellant herein;

> " ..I knew you, I looked at you. There is a house adjacent to the club. That is where you came. I am the witness. I saw you doing this to me. I screamed. Danny slapped me.
>
> ....I told you to speak and sort."

21. The court heard that the victim was taken to a medical facility for examination, PW5, produced the PRC and P3 forms and testified that upon examination about 11 days after the incident, his anal opening was painful. Urine was okay. His conclusion was that the weapon was hands and penile shaft. He further stated that there was blood in the anal opening after the lab test and the anus was painful to touch.

22. On the issue of the injuries being caused by other factors such as constipation, from the record, this was not alleged before the Trial court and neither has any evidence been provided to prove that indeed

that was the case. I however find that if there was any other cause of the pain in the anus, then the medical doctor who examined the complainant would have found as such. Even so, this court can only consider that material which was placed before the Trial Court.

23. From the conclusion of the doctor, it is clear that there was penetration of the anus of the complainant. This corroborates the evidence of PW1.

24. On the identification of the Appellant, the complainant testified that he knew the accused persons. He identified the Appellant herein as Sir- Zero and also as his neighbour at home. By his own admission as he was presenting his case, the Appellant confirmed that he knew the complainant who was his neighbour where he was born. This settles the issue of identification.

25. The second element of gang rape is that the offence committed in association with another or others, or any person who, with common intention, is in the company of another or others. From the evidence of PW1, the offence was committed by three people whom he alleged sodomized him in turns.

26. As regards the issue of the alibi evidence that was presented before the court, the Appellant contends that he was at the Kinyozi and called one witness, his co-worker to confirm the same. Section 309 of the *Criminal Procedure Code* provides as follows;

> "If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."

27. This issue was discussed by the Court of Appeal in the case of *Karanja v Republic* [1983] eKLR where it rendered itself as follows;

> "The word "alibi" is a Latin adverb, meaning "elsewhere" or "at another place". Thus if an accused person alleged that he was not present at a place at the time an offence was committed, and that he was at another place so far distant from that at which it was committed, that he could not have been guilty, he is said to have set up an alibi. The appellant said in this case that he left Edgewood Farm at Subukia on February 7, that is the day of the discovery of the body, and the day after that stated in the information as the date of the offence. He did not in terms say that he was at Edgewood Farm on February 6, but Mr Odero submitted, the implication was that the appellant was saying that he could not have done the act charged because he was elsewhere at the material time. After consideration the judge rejected the appellant's account of how he was arrested on February 7, that is to say on the following day. We do not accept that the appellant's story amounted to an alibi on the facts of this case, but in any event it is a material factor that when charged initially the appellant did not put forward this story, but contented himself with little more than a denial. Nevertheless, we agree with the observations of the Court of Appeal for Eastern Africa in *R v Ahmed Bin Abdul Hafid* [1934] 1 EACA 76, and with those of the former Court of Criminal Appeal in *R v Little boy*, [1934] 2 KB 413, that in a proper case the court may, in testing a defence of alibi and in weighing it with all the other evidence, to see if the accused person's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for the investigation and prevent any suggestion of afterthought. This, indeed, is the object of the statutory amendments in 1982."

28. In this case, the defence of alibi came out at the point that the Appellant was put on his defence and I would agree with the Respondent that this was an afterthought otherwise he would have brought it out at the point of arrest. This did not come out in his evidence or that of the investigating officer.

29. As regards the sentence, the Appellant was sentenced to 15 years imprisonment. The section under which he was charged provides for a minimum of 15 years imprisonment which may be enhanced to life imprisonment as punishment. The sentence is therefore not excessive or harsh as alleged. It is a lawful sentence and I find no merit in the Appeal on sentence. It is worth noting that the sentences under the *Sexual Offences Act* are minimum sentence. I have also considered the case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa [ISLA] & 3 others [Amicus Curiae]* [Petition E018 of 2023] [2024] KESC 34 [KLR] which the Appellant takes issue with. The Apex court in this case rendered itself as follows with regard to sexual offences;

> " We therefore reiterate that, this court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute."

30. The Appellant was given the minimum sentence as prescribed by law. The upshot is that the case against the Appellant was proved beyond reasonable doubt and as the sentence is also lawful this court finds no reason to interfere.

31. The appeal is dismissed in its entirety and the conviction and sentence are upheld save that in order to take into account the period the Appellant spent in remand custody the sentence of imprisonment for fifteen years shall be computed to commence from the date of his arrest which as per the charge sheet is 16th April 2023.

32. In the end, the Appeal is found to be without merit and the same is dismissed.

JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 26TH DAY OF JUNE, 2025.

E. N. MAINA

JUDGE

In the presence of:

Ms Kaburu for the Respondent

Appellant in person [online] from Machakos Main Prison

Geoffrey – Court Assistant/Interpreter