Anjere v Republic (Criminal Appeal E050 of 2022)
[2025] KEHC 11406 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11406 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E050 OF 2022

PJO OTIENO, J

JULY 31, 2025

BETWEEN

JONATHAN OMWANDA ANJERE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentencing of Hon. G.Ollimo(RM) in Butere SPMC SO Case No. 24 of 2020)

JUDGMENT

1. The Appellant was arraigned before the Resident Magistrate at Butere in Sexual Offences Case No. 24 of 2020 charged with the offence of rape contrary to Section 3(1)(a)(b), as read with Section 3(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on the 28th day of May 2020 at [Particulars Withheld] village, Khwisero Sub County, within Kakamega County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of RM by use of force.

2. In the alternative, the Appellant was charged with the offence of committing an indecent act with an adult contrary to Section 11(A) of *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were given to be that on the 28th day of May 2020 at [Particulars Withheld] village, Khwisero Sub County within Kakamega County, the Appellant intentionally and unlawfully touched the vagina of RM with his penis without her will.

3. The Appellant pleaded not guilty to the charges and the case proceeded to full trial with the prosecution calling a total of six (6) witnesses whose evidence can be summarized as below.

4. PW1 testified that the complainant was her daughter aged 19 years old and produced a Birth Certificate in that regard. She stated that on 28/5/2020 she was in the house when her other daughter, PW2, emerged and remarked, “Omwanda ana rape R to mean “Omwanda is raping R. She proceeded to the

scene which was behind her brother-in-law's pit latrine and found the complainant had left the scene though she found her on the foot path adjacent to her brother in law's house. The victim had worn a dress and on examining her she noted that her panty was on her knees and her private parts had semen. She reported the incident to Nyumba Kumi and then to Manyulia Police Post and later accompanied her daughter to Khwisero Hospital. She added that her daughter, the victim, had been suffering from epileptic fits since the age of two years and was on medication. She also stated that the Appellant calls her as mother and that she has never differed with the Appellant before the incident.

5. On cross examination she stated that she was informed by Joseph Omuchei and PW2 that the Appellant had fled but was later arrested by members of the public.

6. Voire dire examination was conducted on PW2 and upon the court being satisfied on her ability to tell the truth she stated that on the material date she had gone to collect Napier grass from the farm and on her way back home she found the Appellant lying on top of the complainant next to the pit latrine in her grandfather's compound. She screamed and the Appellant fled into a thicket. She informed her grandmother of what had happened and identified the Appellant as just a fellow villager. On cross-examination she stated that the Appellant had not only removed his own clothes but also the victim's clothes.

7. PW3, Joseph Omuchei gave evidence that on 28/5/2020 he was relaxing in his house when he heard PW2 screaming and remarking "Omwanda ana rape R. PW2 informed him that the Appellant was behind Babu's pit latrine and he immediately headed to the scene where he found the victim lying on the ground while the Appellant took off running. One Francis emerged and stated that he had spotted the Appellant enter into a maize plantation. They went and found him in a maize farm and on interrogating him why he had raped the complainant he stated that he was not on his right sense of mind. Other villagers arrived and threatened to beat the Appellant but the witness asked them to keep their cool. The Appellant was thereafter escorted to the police post. He stated that the appellant addresses him as father and that he had never differed with him.

8. On cross examination the witness told the court that he observed the Appellant take off and that he had personally arrested him at the maize farm.

9. PW4 was Francis Mukolwe, who testified that he was a village elder for [Particulars Withheld] village. On 28/5/2020, at about 2PM, he was at his homestead attending to cattle when he heard a child screaming while remarking, "Omwanda ana rape mama". He headed to the scene which was a maize farm near a pit latrine and the screaming child showed him the direction the Appellant had fled to. He entered the maize farm and found the Appellant who had already been apprehended by PW3. He then escorted the Appellant to the police post. He further stated that the Appellant was a neighbor and that he had never differed with him.

10. On being questioned by the court he stated that he met with PW1 on her way to his homestead where she had come to report the incident though he had already heard about the commotion.

11. PW5, a Clinical Officer at Khwisero Health Centre testified that on 28/5/2020 she examined the victim following an incident of rape and that she was visibly mentally retarded, her panty had white discharge that appeared like mucus and her hymen was missing. Laboratory investigations revealed epithelial cells in her urine but high vaginal swab, pregnancy and HIV tests were negative. No visible injury was observed on the victim. The Appellant was equally tested by urinalysis which revealed white blood cells in his urine.

12. On cross examination she stated that they examined the Appellant on 3/6/2020 and that the white blood cells were an indication that an infection was forming. She further stated that some discharge from the complainant's vagina resembled semen.

13. PW6, the Investigating Officer testified that on 28/5/2020 he received a call from the area chief concerning a rape incident. He visited the scene in the company of one PC Nduati and met with the victim's mother who made a formal report. The team advised the mother to escort the victim to hospital. Shortly thereafter two village elders namely Francis Mukolwe and Shadrack Sunguti escorted the suspect to the station.

14. On 30/5/2020, alongside PC Nduati the witness visited the scene which was behind a toilet in a maize farm. He established that the victim's home was a kilometer from the suspects home. He also established that the victim was an adult having been born on 9/9/2001.

15. Upon cross examination, the witness told the court that he visited the scene in the absence of the Appellant and that the scene was photographed, which photos he could avail if asked by the court. The witness added that when arrested the Appellant had a battery he was going to charge.

16. The evidence of PW6 marked the close of the Prosecution case with the court ruling that a prima facie case had been established and the Appellant was put on Defence.

17. At the defence hearing, the Appellant stated that on the material date at about 1PM he had gone to cut grass for cows at a maize plantation when he heard a child scream "amekimbia ameingia kwa mahindi" (to mean, he has fled to the maize plantation). He decided to go there and investigate. He met a village elder and mother to the victim standing by the roadside. He went to them and informed them that the allegations leveled against him were untrue and asked them to escort him to hospital for examination. He was however arrested and put in the police cells. The record is not clear whether the evidence was sworn or unsworn but it is clear that the Appellant was never put to any cross-examination.

18. By its judgment delivered on 25/5/2022, the trial court convicted the Appellant for the offence of rape contrary to Section 3(1)(a) and (b) as read with Section 3(3) of the *Sexual Offences Act* No. 3 of 2006 and sentenced to fifteen (15) years imprisonment.

19. Both conviction and sentence aggrieved the Appellant who then lodged the instant appeal premised on the grounds that: -

    a. That the learned trial magistrate grossly erred in both facts and law in presiding over a trial that seriously offended article 50(2) of the *Constitution* of Kenya.

    b. That the learned trial court grossly erred in both law and facts in presiding over a trial and basing a harsh sentence on me without observing that I was not subjected to medical corresponding investigation as enshrined under section 36(2) of the *Sexual Offences Act* No. 3 of 2006.

    c. That the learned trial magistrate court grossly erred in both law and fact in basing a conviction and sentence on me on an uncorroborated evidence.

    d. That the trial magistrate grossly misdirected herself by finding that penetration had been proved even in the wake of flimsy and inadequate evidence.

    e. That the learned trial magistrate grossly erred in both law and fact in basing conviction even after the medical evidence established that there was no any link to the crime.

20. Though the appeal was directed to be canvassed by way of written submissions, only the Respondent's Submissions are in the file. In those submissions, the Respondent posits that the offence of rape was properly proved against the Appellant beyond reasonable doubt in that; the element of penetration was proved through circumstantial evidence from PW1 stating that on rolling up the victim's dress she noticed that her panty was on her knees and her private parts had something that looked like semen. PW2 found the Appellant lying on top of the victim and that it was the evidence of PW5, the Clinical Officer that the victim's pant had a white discharge that appeared like mucus and her hymen was missing. Laboratory investigations revealed epithelial cells in her urine hence a diagnosis of rape was noted.

21. On the element of lack of consent, the Prosecution submits that the complainant had no mental capacity to give consent to the sexual act as she was mentally challenged a fact that was confirmed by the Clinical Officer and the trial Magistrate. The decision in Peter Wanjala Wanyonyi v Republic (2021) eKLR was cited, while quoting the Proviso to Section 42 of the *Sexual Offences Act* and the decision of the Court of Appeal in Republic v. Oyier [1985] eKLR, for the proposition that consent is an essential element of rape and that a person is said to consent if he or she agrees by choice, and has the freedom and capacity to make that choice. One without mental coherence is not able to give consent.

22. On the last limb of identification of the Appellant as the perpetrator, the Respondent submits that the same was proved by PW2 who caught the Appellant, whom she knew as a fellow villager, lying on top of the complainant. It is then argued that the Appellant was also identified by PW3 who responded to screams by PW2 and rushed to the scene where he found the Appellant running away and lying on the ground. PW3 stated that he knew the Appellant well and that he addressed him as father.

23. On whether the Appellant ought to have been subjected to medical examination they submit that the same is not mandatory but at the discretion of the court.

24. On the whether the sentence meted was harsh, the Prosecution submits that the sentence prescribed for the offence of rape under Section 3(3) of the *Sexual Offences Act* is imprisonment for a term of not less than ten years but which may be enhanced to life. They argue that sentencing is at the discretion of the court and that an appellate court can only interfere with the discretion of the trial court where the court overlooked some material factors or acted on the wrong principle.

25. The Respondent lastly contends that the sentence of 15 years was within the law since the complainant was mentally challenged when she was raped by the Appellant.

Issues, Analysis and Determination

26. The court has dutifully perused the grounds of appeal, the record availed including the judgment of the trial court as well as the submissions by the Respondent and discerns the issues that arise for its determination to be; -

    a. Whether all the ingredients of the offence of rape, including the lack of consent of the victim, were proved beyond reasonable doubt?

    b. Whether the failure to subject the appellant to medical examination was detrimental to the prosecution's case?

    c. Whether the appellant was convicted and sentenced on uncorroborated evidence

    d. Whether the trial violated the appellant's right to a fair trial under article 50(2) of the *Constitution* of Kenya, 2010

e. Whether the sentence meted on the appellant was harsh and excessive

Whether the element of penetration was proved by the prosecution beyond reasonable doubt against the appellant

27. As defined, the offence of rape is essentially having sex with another without their consent. The lack of consent may be proved by the documented or verbalized position of the victim showing that she did not consent to the sexual act. Where the victim lacks capacity to give consent, then no consent can be inferred or proved to have been given but the prosecution has the duty to prove the incapacity depriving the victim of the ability to give consent. That is the reason one cannot be deemed to have raped a child.

28. Flowing from the foregoing, the court is of the learning that every time the prosecution prefers the charge of rape against an accused, it invites upon it the duty to prove not only the elements of penetration of the victim by the accused but also the fact that the penetration was against the will and wishes of the victim.

29. Accordingly, the first consideration for this court, while executing its duty on a first appeal, is whether there was proof that there was never consent of the victim or that such consent could not have been given owing to the mental capacity of the victim.

30. In the determination by the trial court, it had this to say on the requisite consent: -

> " It is apparent from the evidence of the clinician that the survivor was mentally challenged. A mentally challenged person is not capable of giving consent. It is thus clear that the penetration of the survivor's genitalia was done without her consent."

31. It is to this court clear that the decision on consent was firmly grounded on the evidence of the Clinician. It thus behoves the court to scrutinize what that evidence was.

32. The records capture the witness to have told the court that the physical examination of the minor revealed a mentally retarded teenager. That is the sole evidence about the mental capacity or status of the survivor. The court takes the view that the mental capacity, status or retardation of an individual is a question of medical determination. It requires an expert to determine one retarded and to what level or extent. It is not enough to take mere reputation of retardation as the evidence of inability to give consent. It is never a dogma that those with mental challenges have no sexual needs and even desires to create and establish families through which they give birth to children. The threshold must be established medically if the subject of assessment has the mental age of an eighteen years old.

33. All it requires is an assessment by an expert to assess the victim of a crime of rape to avail a professional report on the mental capacity of the victim establishing the mental abilities in relation to capacity to make rational and independent decisions including those which concern emotions. The court does not consider one qualified as a general Clinician to fit the bill as an expert for purposes of determining the mental capacity. To the extent that there was no expert opinion on the mental status of the victim and with the prosecution having failed to avail the evidence from that victim, the court finds that there was never proof of want of consent to the sexual activity. It thus follows that an essential ingredient of the offence of rape was never proved. That failure is fatal to the conviction thereby reached because without it, there could as well be a reasonable doubt whether the consent was indeed given.

34. With the finding that an essential ingredient of the offence was not proved, it becomes a foregone conclusion and the other issues for determination as isolated become moot and not demanding

consideration by the court. The inevitable consequent is therefore that the conviction must be upset. It is quashed and the sentence grounded upon it set aside.

35. Let the Appellant be released forthwith and set at liberty unless otherwise lawfully held.

Right of Appeal, fourteen (14) days explained.

DATED AND SIGNED THIS 12TH DAY OF JUNE, 2025.

PATRICK J O OTIENO

JUDGE

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 31ST DAY OF JULY, 2025.

S. MBUNGI

JUDGE

In the presence of:

Appellant in Prison online

Ms. Osoro for the DPP online

Court Assistant: Fred Owegi