



**Irungu v Republic (Criminal Appeal E036 of 2024)
[2025] KEHC 11935 (KLR) (6 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 11935 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E036 OF 2024
HI ONG'UDI, J
AUGUST 6, 2025**

BETWEEN

PETER KIMANI IRUNGU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the judgment delivered by Hon. Y. I. Khatambi Principal Magistrate in Naivasha CMCR (S.O) No.45 of 2020 on 27th March 2024)

JUDGMENT

1. Peter Kimani Irungu hereinafter referred to as the appellant was charged with the offence of rape contrary to section 3(1) (a) (c) as read with section 3 (3) of the sexual offences Act No.3 of 2006. The particulars were that on 13th July 2020 at around 2100hrs at YY restaurant Maai- Mahiu in Naivasha subcounty within Nakuru County, intentionally and unlawfully caused his penis to penetrate the vagina of MK by use of force.

He equally faced an alternative count of committing an indecent act with an adult contrary to section 11(A) of the sexual offences Act No.3 of 2006. He denied the charges and the matter proceeded to hearing.

2. The record shows that the court took the evidence of two witnesses on 27th July 2021. After that on several mention dates the appellant was not produced in court despite several production orders being issued. Thereafter there was issuance of several warrants of arrest from 8th February 2022.

On 28th February 2023 this was what transpired in court, in the appellant's absence.

Prosecution

The investigating officer is here. She will address the court.



NO.23xxx P.C Susan Njogu

I am the investigating officer. I have tried to trace the accused person in vain. I ask that we take a hearing date and proceed with the matter in his absence as I am the only remaining witness. He had been on a cash bail.

Prosecution

I agree, we can have the case set down for hearing. The accused voluntarily absented himself when he knew the matter was coming up for hearing.

Court

Noted. Hearing to proceed in accused's absence with warrant of arrest in force. Hearing on 25th May 2023.

J KARANJA – SPM

3. On 20th May 2023 the matter came for hearing in the absence of the appellant and the court proceeded to take the evidence of PW3 after which the prosecution closed its case. A ruling on case to answer was delivered on 24th October 2023 and the appellant was placed on his defence. Thereafter judgment was delivered on 27th March 2024 in the appellant's absence.

Between 25th May 2023 and 27th March 2024 there was no mention of the execution of warrant of arrest.

4. On 12th September 2024 the court noted that the appellant was present in court under warrant of arrest. The matter proceeded to the sentencing process. It is nowhere indicated if he was even asked to explain where he had been and why he was not attending court for record purposes.

He was on 15th October 2024 sentenced to ten (10) years imprisonment.

5. Section 206 of the Criminal Procedure Code deals with scenarios such as this on the one before the court. It provides as follows:

206. Non-appearance of parties after adjournment

- (1) If, at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court which made the order of adjournment, the court may, unless the accused person is charged with a felony, proceed with the hearing or further hearing as if the accused were present, and if the complainant does not appear the court may dismiss the charge with or without costs.
- (2) If the court convicts the accused person in his absence, it may set aside the conviction upon being satisfied that his absence was from causes over which he had no control, and that he had a probable defence on the merits.
- (3) A sentence passed under subsection (1) shall be deemed to commence from the date of apprehension, and the person effecting apprehension shall endorse the date thereof on the back of the warrant of commitment.
- (4) If the accused person who has not appeared is charged with a felony, or if the court refrains from convicting the accused in his absence, the court shall issue a warrant for the apprehension of the accused person and cause him to be brought before the court.



6. Articles 50 (2) (f) of *the Constitution* provides thus:

“Every accused person has the right to a fair trial, which includes the right-

(f) to be present when being tried unless the conduct of the accused person makes it impossible for the trial to proceed.

7. From what I have indicated hereinabove, it is clear that the application to have the hearing proceed in the absence of the appellant was made by the investigating officer and not the prosecutor. The prosecutor just endorsed it,

(ii) When the appellant was finally presented to court he was never asked by the court to explain his failure to attend court as required under Section 206 (2) of the Criminal Procedure Code.

iii) The procedure under section 206(1) of the Criminal Procedure Code covers offences that are not felonies. The offence of rape is a felony and there is no reason given as to why the trial court was in a rush to have such a serious charge to proceed in the appellant’s absence.

(iv) My finding is that this was a violation of the appellant’s right to a fair trial and under Articles 50(2) (f) of *the Constitution* of Kenya.

8. I find this to have been a mistrial. I therefore set aside both the conviction and the sentence and order for a retrial before any Magistrate besides Hon. J. Karanja (SPM) and Hon. I. Khatambi (SPM). In the event of a conviction the period the appellant has served sentence must be taken into account.

9. The appellant shall be produced before the Hon Chief Magistrate on 11th August, 2025 for plea taking. The matter should be heard and determined within nine (9) months from today’s date.

10. Orders accordingly.

JUDGMENT DELIVERED, VIRTUALLY DATED AND SIGNED THIS 6TH DAY OF AUGUST, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG’UDI

JUDGE

