



**Muriira v Republic (Criminal Appeal E049 of 2022)
[2024] KEHC 778 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 778 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E049 OF 2022
EM MURIITHI, J
JANUARY 31, 2024**

BETWEEN

DENNIS MURIIRA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal against the conviction and sentence by Hon A.G Munene
PM in Maua SO No. E015 of 2020 delivered on 7/3/2022)*

JUDGMENT

1. The Appellant herein, Dennis Muriira was charged with the offence of rape contrary to section 3(1) (a) (b) (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 14/9/2020 at Athiru Gaiti Location in Igembe South Sub-County within Meru County, he intentionally and unlawfully caused his penis to penetrate the vagina of BN without her consent.
2. He denied the charges but upon full trial, he was convicted and sentenced to 30 years imprisonment.

The Appeal

3. On appeal, the appellant raised 6 amended grounds of appeal as follows: -
 1. The learned trial magistrate erred in both law and fact by sentencing the appellant to serve 30 years imprisonment without analysing the light used at the scene to identify the appellant.
 2. The learned trial magistrate erred in law and fact by failing to note that there was a grudge between the appellant and the husband of the complainant.
 3. The learned trial magistrate erred in both law and fact by failing to note that the key witnesses were not called.



4. The learned trial magistrate erred in both law and fact by failing to note that the investigation was shoddy.
5. The learned trial magistrate erred in law and fact by failing to note that the sentence was harsh and excessive in the circumstances of this case.
6. The learned trial magistrate erred in both law and fact by rejecting the appellant defense without giving cogent reasons.

Duty of Appellant Court_

4. The duty of this court as the first appellate court is to re-evaluate the evidence on record and draw its own independent conclusions, bearing in mind that it neither saw nor heard the witnesses and should make due allowance in that respect. (See *Okeno v R* [1972] EA 32).

Evidence

5. PW1, B.N and the complainant herein, gave sworn testimony that, “On 14/09/2020 at around 2.00 a.m, I was asleep in my house. A person started hitting my house. He is the accused. I started screaming. He was hitting the door. He got inside the house. I had worked up and went to my sitting room. I had a torch. He started strangling me. I lost consciousness. He took a Kikoi and wrapped it on my head. He then raped me. He also bit on the shoulders and on the head. I went to the home of one Katha. They opened for me and children. I then went to police station and then hospital. The police came to my home. They came at around 10.00 a.m. Photos of the scene were taken. I was treated and discharged. I was put on medication. Accused is son to my neighbour. I don’t know the reasons he did that to me. I left some forms at the hospital. 1. P3 – MFI – 1. 2. Treatment notes – MFI – 2. 3. PRC – MFI – 3. The person who did the said act is the one in the dock. I had not given him consent to have sex with me.”
6. On cross examination, she stated that, “I started screaming when you started knocking my door. My house is a wooden house. You hit the door, it got broken and you got inside. There are some neighbours. They did not come as you are related to the said neighbours who are near me. Other who are not related were far. Your relatives are on both sides. JK is my daughter. SK is my daughter. SK is my husband who we separated. K called my husband. K is in-law to the accused. I am sorry K is related to the accused. I crawled to K’s homestead. I slept there upto morning. I went there as I had no option. K did not witness the incident. I cant tell when Judy was called. I cant recall at what time Judy came as I was in pain. Judy Kathure did not find you on the scene.”
7. On re-examination, she stated that, “We did not have issues with kangentu.”
8. PW2 JK, testified that, “On 14/09/2020 I received a call from one K. He is neighbour to my mother. He told me my mother. He told me my mother PW1 was calling me and further informed me that the accused had broken into my mother’s house and assaulted her. He called me at around 6.00 a.m. I went to my mother’s home. I found my mother had injuries on the head. Left hand and the right thigh. These were the visible injuries. She had a swollen face and injuries on the neck. I called my father via phone. He came. There was blood on the door. My father is SK. My mother told me the accused came, started insulting her, broke the door and started assaulting her. That accused even had a matchbox which he was trying to light. At that point my mother did not tell me she had been raped. It is at the police station. She said she had been raped. We initially made a report at Athiru Police Post. We were then referred to Maua Police Station. At Maua we made a report and then took my mother to hospital. K’s place is not very far. Accused’s father homestead is the nearest. Other neighbours are far. There was no dispute before then between our families. I don’t live with my mother as I am married.”



9. On cross examination, she stated that, “I only found my mother on the scene as the incident had only happened. K refused to come to court as you related. He called me to come and assist my mother. I took my mother to police station and to the hospital.”
10. PW3 SK, testified that, “On 14/09/2020 my child, JK came and called me. It was some minutes to 6.00 a.m. She told me my wife had been assaulted by one Muriira. I left the farm and went to my home. I found her, she had injuries. I took her to hospital. She had bite marks around the arms. He had also been raped her. This was what she told me. I took her to Nyambene Sub-County hospital. I cant recall the date of accused’s arrest. Accused is a son to my neighbour. We have no family dispute. Accused has married my sister.”
11. On cross examination, he stated that, “I only found the PW1 and my daughter on the scene. My daughter was also called. It is not true that I threatened you because of my poisoned chickens. I don’t have chickens. You went missing for 3 months. The Chief and the police were also looking for you. You harvest miraa. You can go to harvest miraa anywhere but you went into hiding. You were arrested during night when you came at Athiru factory. You were hiding the unused building of the factory. You are like my Sister’s son as my sister is married to your father’s mother.”
12. PW4 David Nyaga, a clinical officer at Nyambene District Hospital attended to the complainant on the material day and he produced her P3 form filled on 16/9/2020, treatment notes and PRC as exhibits in court. On examination, the complainant had multiple injuries, severely swollen face, swollen frontal part of the neck with multiple stretch marks, bite marks on the right upper limb and left wrist joint and a lot of tenderness around the hip joint and thighs. Although there was a lot of tenderness around the genital area, the complainant did not have any tear and HVS did not show the spermatozoa.
13. On cross examination, he stated that, “Complainant did not avail any weapon. I don’t know the person who did that. I examined the complainant and I confirmed the allegations. I had not examined her any other time. It was also important that you be examined. You were not to blame for not being examined. It is the I.O who can explain why you were not brought for examination.”
14. PW5 PC Makha Ahmed and the investigating officer herein testified that, “Accused is Dennis Muriira. On 14/12/2021 at around 10.50 a.m, I recorded the complainant. She reported that on 14/12/2021 at about 2.00 p.m while asleep in her house where she was alone. The houses door was forced open. She screamed. She decided the accused’s who is her neighbour when accused got a piece of cloth tied her neck to prevent her from screaming. She did not stop screaming. The accused then used his hands to strangle her. He forced her down and raped her. While struggling to free herself, the accused bit her on the hands. Accused then ran away after the incident. The complainant came out and went to inform the neighbours. The neighbours called the complainant’s husband and her children. They then proceeded to the station and made a report. I took the complainant to the hospital. She got treated. I later removed statements from the complainant and her neighbours. I then proceeded to the scene i.e the complainant’s house. I confirmed the door had been broken. There were blood stains between the door and the bed. We then proceeded to look for the accused. It took about 3 months to get the accused. The complainant’s recognized the accused and the accused was arrested and charged.”
15. On cross examination, she stated that, “I accompanied the complainant to hospital. I did not accompany her to hospital. You had right to be taken to hospital. The complainant screamed. The neighbours are not near the complainant’s home. The owners are not near. The complainant had injuries and that is how I confirmed the blood stains belonged to her.”
16. On re- examination she stated that, “I visited the scene. The nearest neighbours is the accused’s family. It is around 1KM from the complainant.”



17. When put on his defence, the appellant gave sworn testimony that, “I am conversant with the charges herein. On 15/07/2020 I had planted Sukuma wiki and I informed the villagers to lock the chickens inside. The complainants husband Stephen Kirima, ignored and he did not lock his chickens and by mistake the said chicken ate the Sukuma wiki which had pesticide and they died. He later came to me and told me that I had killed his chicken. In evidence he even alleged that I stole his miraa which is not true. I was fixed by the complainant’s husband and his family.”
18. On cross examination, he stated that, “On 14/09/2020 I was in my house. I live alone. I had rented a house at Athiru Gaiti town. The complainant is my neighbour. My rental place is far away from my parents home. I had planted Sukuma wiki at my father’s land. I was not at home at the material time. I cant get a witness as it was in the night. We did not have any other dispute with the complainant’s husband. The complainants and the husband live together though I am not sure.”

Submissions

19. The appellant urged that the evidence tendered by the prosecution was not sufficient to sustain a conviction. He faulted the trial court for sentencing him to 30 years imprisonment without testing the evidence of identification with care, and relied on *Maitanyi v Republic* [1986] KLR 198, *Cleophas Otieno Wamunga v R* [1989] eKLR and *Lesarau v Republic* [1988] KLR 783. He submitted that the sentence meted out to him was harsh and excessive in the circumstances, and urged the court to scrutinize the testimonies tendered, allow the appeal, set aside the sentence and set him at liberty.
20. The respondent submitted that it proved that the appellant indeed committed the offence and his contention that there existed a grudge between him and PW3 was not supported by evidence. It urged that the inconsistencies on the dates when PW5 testified were immaterial and cited *Twehangane Alfred v Uganda* [2003] UGCA. It urged the court not to interfere with the sentence meted out to the appellant because it was legal, and cited *Shadrack Kipkoach Kogo Eldoret Criminal Appeal No. 253 of 2003*.

Analysis and Determination

21. The grounds on identification of the appellant, failure to call key witnesses and shoddy investigations all trickle down to whether the ingredients of the offence were proved beyond reasonable doubt to secure a conviction.
22. Section 3 of the *Sexual Offences Act* defines rape to mean, the intentional and unlawful penetration of a person’s genital organ into another’s genital organ without their consent. It also includes a situation where the consent is obtained by force. The ingredients of the offence of rape therefore, include intentional and unlawful penetration of the genital organ of one person by another, coupled with the absence of consent.
23. In *R v Oyier* [1985] KLR pg 353, the Court of Appeal held as follows:-

“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.”

24. On whether there was an intentional, unlawful and non-consensual penetration of the genital organ of PW1 by the appellant, PW1 stated that she was sleeping in her wooden door house in the dead of night when, “A person started hitting my house. He is the accused. I started screaming. He was hitting the door. He got inside the house. I had worked up and went to my sitting room. I had a torch. He started strangling me. I lost consciousness. He took a Kikoi and wrapped it on my head. He then raped me. He also bit on the shoulders and on the head...The person who did the said act is the one in the dock. I had not given him consent to have sex with me.”
25. That evidence was corroborated by PW2, PW3, PW4 and PW5. When PW2 went to the complainant’s home, at around 6.00 am, she saw visible injuries on the complainant’s head, left hand, right thigh, neck and face. PW3 arrived home from the farm where he found his wife, the complainant herein, with injuries and bite marks around the arms. PW4 stated that when he treated the complainant on the material day, he noted that she had multiple injuries, severely swollen face, swollen frontal part of the neck with multiple stretch marks, bite marks on the right upper limb and left wrist joint and a lot of tenderness around the hip joint and thighs. PW5 visited the scene and ascertained that the complainant’s door had indeed been broken and there was blood stains between the door and the bed. She affirmed on cross examination that the complainant had injuries and that was how she confirmed that the blood stains belonged to PW1. Those injuries cannot possibly be said to have resulted from a consensual sexual encounter.
26. It is not disputed that the incident herein took place at 2.00 am and the circumstances for identification may have been difficult. However, the evidence of PW1 was that of recognition as opposed to identification. PW1 used a torch to recognize the appellant who was a son to her neighbour. The test of recognition was laid down by the Court of Appeal in *Peter Musau Mwanzia v Republic* [2008] eKLR, as follows:

“We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr. Mutuku refers to as basis for recognition.”

PW2 testified that she learnt of the incident from Kangentu, who is a neighbour to the complainant. The appellant in his sworn defence admitted that the complainant was his neighbour, although he had rented a house far from his parent’s home.

27. This court agrees that K and K were key witnesses who ought to have been called to testify. On the flip side, there is evidence that they could not have voluntarily agreed to testify for the obvious reason that they were related the appellant. It is said that Kangentu was the appellant’s in-law and the complainant’s next door neighbours were the appellant’s relatives. This court is thus satisfied that even if the said witnesses were compelled to come to court to testify, their said testimony would have little or no probative value to the prosecution’s case. The record shows that summons were severally issued to the said Kangentu, which he did not honour. Besides, the corroborative and consistent testimonies of the prosecution witnesses were sufficient to sustain a conviction.



28. Accordingly, the prosecution proved that, it was the appellant who had intentionally and unlawfully caused his genital organ to penetrate that of the complainant, by force.
29. The appellant's defence that he was framed by the complainant's husband, PW3 due to an existing grudge, was duly considered by the trial court when it rendered thus, "Accused in the defence says he was fixed. He says that he had sprayed his Sukuma wiki with pesticide. Complainant's husband did not heed the warning. His chicken died, hence the reason he was fixed...On cross examination he confirmed that they did not have any other dispute save for the alleged issue of the dead chicken. On the issue that he was fixed by the complainant's husband due to the dead chicken, accused did not avail any of the witness from this even to confirm the story. The complainant's evidence is more credible. It is supported by medical evidence. I find accused's defence not credible and further find the charge herein has been proved beyond reasonable doubt."
30. This court finds no nexus between the alleged poisoning of PW3's chicken on 15/7/2020 and the commission of the offence herein on 14/9/2020.
31. On sentence, the minimum prescribed sentence for the offence of rape is 10 years imprisonment, which can be enhanced to life imprisonment. In sentencing the appellant to 30 years imprisonment, the trial court took into account the vicious manner in which the offence was committed, the mitigation and the remand period.
32. The need to punish the appellant for his crime and particularly the violent manner in which the same was committed cannot be gainsaid. Nonetheless, this court finds that the sentence of 30 years imprisonment for an offence whose prescribed minimum sentence is 10 years was manifestly excessive and harsh in the circumstances.
33. The record reveals that the appellant was incarcerated the entire period of trial and the trial court was mandated by the provisions of section 333(2) of the *Criminal Procedure Code* to factor in that period during sentencing.
34. The upshot from the foregoing analysis is that the appeal on conviction is devoid of merit and the same is hereby dismissed.

Orders

35. Accordingly, for the reasons set out above, Court allows the appeal and makes the following orders:
 1. The appeal from conviction is dismissed.
 2. The appellant's 30 year's sentence is set aside and substituted with an imprisonment for ten (10) years.
 3. The sentence of imprisonment for ten (10) years shall commence from 6/12/2020, when he was arrested and detained to await his trial.

Order accordingly.

DATED AND DELIVERED ON THIS 31ST DAY OF JANUARY, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. Masila Principal Prosecution Counsel for the State.



Appellant in person.

