



REPUBLIC OF KENYA



**Abubakar v Republic (Criminal Appeal E074 of 2022)
[2024] KEHC 2244 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2244 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E074 OF 2022
A. ONG'INJO, J
FEBRUARY 29, 2024**

BETWEEN

HUSSEIN ATHUMAN ABUBAKAR APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Judgment of Hon. D Odhiambo Resident Magistrate
on 15th September 2022 in Shanzu Senior Principal Magistrate's Court
Sexual Offence No. 60 of 2018, Republic v Hussein Athuman Abubakar)*

JUDGMENT

1. The Appellant Hussein Athuman Abubakar was charged with offence of rape contrary to Section 3(1) (a), (b) and (c) as read with Section 3(3) of the Sexual Offences Act No. 3 of 2006 in Shanzu Sexual Offence Case No. 60 of 2018.
2. Particulars were that Hussein Athuman Abubakar on 11th day of March 2018 at Mombasa County intentionally and unlawfully caused his penis to penetrate the vagina of D.M. aged 32 years without her consent.
3. The trial Magistrate found the Appellant guilty after weighing the sole evidence of the complainant with the evidence of the Appellant and his witness. The Appellant was convicted and sentenced to serve 5 years jail term.
4. The Appellant was dissatisfied with the conviction and sentence and he preferred the appeal herein on the grounds dated 29.09.2022 and filed on 3.10.2022 by Ms. Birir & Co. Advocates as follows: -
 - i. That the learned Magistrate erred in law & fact by not considering the evidence preferred by the prosecution and the same was inconsistent and insufficient to sustain a conviction and sentence.



- ii. That the learned Magistrate erred in law & fact by believing the evidence of PW1 without corroboration facts.
- iii. That the learned Magistrate erred in law & fact by not taking into account that the investigating officer was never called to testify hence it was unsafe to convict the Appellant on the sole evidence of PW1.
- iv. That the learned Magistrate erred in law & fact by not considering the evidence of DW2 who indeed testified that the Appellant & PW1 were lovers.
- v. That the learned Magistrate erred in law & fact by failing to take it into account that in the absence of a medical report, it was unsafe to convict and sentence the Appellant for 5 years.
- vi. That the learned Magistrate erred in law & fact by not taking into consideration & evaluating the Appellant's defence evidence.
- vii. The Appellant also said the sentence was excessive.

Prosecution's Case

- 5. The complainant, the only prosecution witness in this case, testified that on 11.3.2018, she went to Nakumatt Nyali and on the way home, she used a tuktuk whose driver she knew. She said she saw him on that day in a photo and that they were alone and she could identify him. The complainant then identified the driver as the accused in court. The complainant further said that she knew him as he was her neighbour. That she was going home on that day in the evening and he started forcing her to have sex with him. That he told her that he wanted to be her boyfriend but she refused and that he started beating her. That he bit her arm and slapped her. That he closed her mouth using his hand and that they were in the house.
- 6. The complainant informed court that they alighted from the tuktuk and he forced her to enter his house. She said that the accused's house was small with a sitting room, kitchen and bedroom and that the accused started beating her in the sitting room and dragged her to the bedroom. That he told her not to say anything or make noise. That he removed her trouser and panty at the same time while she was on the bed. That he also removed his trouser and innerwear, and raped her for 10 minutes. That he then forced her to stay in his house up to 10.00 pm because he wanted her to stop crying and that he had locked the house from outside. That the accused released her after 10.00 pm and that she went to her friend's house who stays in the same building. That her friend asked why she was crying and she explained what had happened. That she then called the person in charge of deaf people and reported to Bamburi Police Station then went to Coast General Hospital. She produced her ID as ExP3.

Defence Case

- 7. The accused, Athuman Abubakar said the complainant was his girlfriend and that they had been together for long. That they had gone to the VCT for purposes of continuing their relationship and that he had the documents he used at the hospital. That they visited different places and people used to see them together. That she disagreed with his wife and she said she would teach him a lesson.
- 8. DW2, RG said she knew Hussein and D were lovers and that they used to spend time together. That they had gone to D's home and even her father knew them. She said that the complainant did not want the accused to be with other girls.



Submissions

9. Mr. Ngeno Advocate for the Appellant made brief oral submissions arguing grounds 1, 2 and 3 collectively. He said the sole evidence of the complainant was contradictory and that the same corroborated the Appellants evidence that the complainant took him to see her father as they were friends and it was therefore not true that she did not know the Appellant.
10. It was submitted that the Appellant was accused of rape when he refused to marry the Complainant. Mr. Ngeno argued further that Medical evidence and evidence of the Investigating Officer was not produced and it was unsafe to convict the Appellant.
11. The Respondent did not file submissions to oppose the appeal.

Analysis and Determination

12. This being the first appellate court, I am guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”
13. After considering the grounds of appeal, Records of the trial court, submissions, grounds of opposition and circumstances of the case, the issues for determination are as follows: -
 - i. Whether evidence of the prosecution was inconsistent and insufficient to sustain conviction and sentence
 - ii. Whether it was unsafe to convict the appellant on the sole evidence of the complainant which was not corroborated by the investigating officer who was never called to testify
 - iii. Whether it was unsafe to convict and sentence the appellant in the absence of a medical report
 - iv. Whether the defence evidence was considered
 - v. Whether the sentence was excessive
14. This court being 1st Appellant court has re-evaluated the evidence on record and find that the complainants evidence has more than meets the eye. It is not understood why she said in her evidence in Chief that she did not know the Appellant. She does not expound how she settled on the Appellant as the tuktuk driver to take her home and not any other. She has not disclosed if she paid any fare to the tuktuk rider who turned out to be her neighbour.
15. At what point did the Appellant start forcing her to have sex with him. PW1 did not explain how they got into the Appellant’s house from the tuktuk and whether she was the only neighbour to the Appellant so that when she was being forced into the Appellant’s house no one else was there to see her being dragged into the Appellant’s house where she was allegedly raped.



16. Why did the Complainant refuse to leave the appellant's house? When she left she said she went to her friend's place. That friend stayed in the same building. Who is that friend of the Complainant who lived in same building where the complainant was allegedly raped?
17. The complainant went to Coast General Hospital where she was treated but again the P3 form, PRC form and treatment notes were not produced by the prosecution. It is not explained why they were not produced. The investigating officer did not also attend to testify.
18. The Complainant's denial that she knew the Appellant when they had gone with him to VCT and on the material day ate chicken and chips before going back to the house makes this court have doubts as to her evidence. She admitted in cross examination that she was aware the appellant had issues with his wife and that she used to harass her. She even said that appellant used to go to her house at mid-night.
19. This court finds that the evidence of the complainant was not sufficient to warrant conviction of the Appellant. This Appeal has merit and it is allowed.

Right of Appeal 14 days explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 29TH DAY OF FEBRUARY 2024**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Etropia – Court Assistant

Mr. Ngiri for the State

Mr. Birir Advocate for Appellant

Appellant present in person

