



**Njoki v Republic (Criminal Appeal E077 of 2022)
[2024] KEHC 3805 (KLR) (22 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3805 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E077 OF 2022**

GL NZIOKA, J

APRIL 22, 2024

BETWEEN

JOSEPH KAKOIYA NJOKI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the decision of; Hon. Daffline Nyaboke Sure, Senior Resident Magistrate (SRM), delivered on, 10th May, 2022, vide Engineer Senior Principal Magistrate’s Court Sexual Offence No. E006 of 2021)

JUDGMENT

1. The appellant was arraigned before the Senior Principal Magistrate’s Court at Engineer charged vide Criminal Case S/O No. E006 of 2022, 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 (herein “the Act”).
2. The particulars of the charge are that on 18th January 2022, at [particulars withheld], Kinangop Sub-County, Nyandarua County intentionally and unlawfully caused his penis to penetrate the anus of JNM by use of threats.
3. He was also charged in the alternative count, with the offence of; committing an indecent act with an adult contrary to section 11A of the [Act](#). That, on 18th January 2022, at [particulars withheld], Kinangop Sub-County, Nyandarua County intentionally touched the buttocks and anus of JNM with his penis against his will.
4. He pleaded not guilty and the case proceeded to full hearing. The prosecution case is that, PW1, “JNM” (herein “the complainant”), was walking home at around 10pm, when saw the appellant, jump from behind the bush ordered him to stop, threatening to harm him with a bottle, he had in his possession.



5. That the appellant ordered the complainant to lie down facing the ground and searched his pockets but did not find any money. That he then directed the complainant to walk on going over two fence and finally to a field near a tree.
6. The appellant then ordered the complainant to lie on the ground facing down and removed his right shoe, trouser and underwear, before sodomizing him while strangling him. That the appellant also bit the complainant's forehead in the process, and when the appellant had finished, he ordered the complainant to wait for him to return and went away.
7. The complainant reported the matter the next day and was treated at a hospital at Rwanyambo. Further, he was examined at Engineer County Hospital by (PW3) Dr. Patrick Kiluri who filled P3 form (prosecution exhibit 7) and concluded there was anal penetration.
8. In the meantime, the appellant was arrested by members of the public and taken to Rwanyambo Police Post. In the meantime, Corporal Wilson Nzioka (PW3), PC Omolo and the complainant visited the scene of the crime and recovered a right-side shoe (prosecution exhibit 4) and soda bottle (prosecution exhibit 5).
9. That Corporal Nzioka also noticed that grass at the scene of crime had been pressed down and he took photographs (prosecution exhibits 9a-c). That upon returning to Rwanyambo Police Post, Corporal Nzioka found that members of the public had collected clothes (prosecution exhibit 1, 2, 3 and 11) dumped along the road. That, the complainant identified the clothes as belonging to the appellant. The appellant was charged accordingly.
10. At the close of the prosecution case, the trial court placed the appellant on his defence. The appellant denied committing the offence and that the clothes produced in court belonging to him. He stated that, on 19th January 2022, he heard rumours that the Police were looking for him and presented himself at the police station and was arrested. He stated that his family had a land dispute which created many enemies, but could not confirm whether the complainant was involved in the disputes.
11. At the conclusion of the case, the trial court held found the appellant guilty on the main count, convicted and sentenced him to serve a term ten (10) years imprisonment.
12. However, the appellant is aggrieved by both conviction and sentence and appeals against it based on the following grounds verbatim reproduced:
 - a. That the learned trial magistrate erred in law and fact by convicting the appellant yet failed to find that his defence was cogent and believable.
 - b. That, the learned trial magistrate erred in both law and facts in failing to appreciate that the prosecution had failed to established their case to the required standard i.e beyond any reasonable doubt.
 - c. I pray to be supplied with a copy of the original trial court's proceedings and its judgement.
 - d. That further grounds shall be adduced at the hearing of this appeal.
 - e. That, I wish to be present during the hearing and determination of this appeal.
13. The appeal was disposed of vide written submissions. The appellant in undated submission argued that, his identification was not free from error. That, the incident occurred at night but the prosecution failed to lead evidence on the position, intensity and distance of the security lights to where the offence occurred.



14. Further, it is possible the complainant made an error while identifying the perpetrator taking into account the circumstances of the offence. He relied on the case of; *Peter Njogu Ndege v Republic* [2016] eKLR where the High Court stated that where there is a single witness who is subjected to a sudden and violent attack, there is a greater risk of mistaken identity and therefore courts must approach the sole identification with caution.
15. The appellant also relied the case of; *Maitanyi vs Republic* (1986) eKLR, *Michael Nganga Kinyanjui vs Republic* [2014] eKLR and *Abdalla Bin Wendo* in support of his submission on identification.
16. Furthermore, the appellant submitted that, the trial Magistrate did not warn herself of the dangers of relying on the evidence of a single witness and thus failed to analyse the evidence of identification as required by precedent thus prejudicing him. That, voice recognition is not reliable since family members have similar voices, and in other cases people can imitate the voice of others.
17. Lastly, the appellant submitted that, the prosecution failed to call the complainant's brother as witness which was fatal to the prosecution case. He urged the court to allow the appeal, quash the conviction and sentence and set him at liberty.
18. However, the respondent in submissions dated, and filed on 12th April 2023, opposed the appeal and argued that, penetration was proved to have been caused by the appellant. That, the complainant explained how the appellant attacked him, strangled, bit him on the face and sodomized him, which, evidence was corroborated by the medical evidence presented by (PW3) Dr. Patrick Kiluri.
19. Further, the complainant managed to positively identify the appellant with the aid of moonlight and security lights. That, the identification was by way of recognition as the complainant's brother has married from the appellant's family and therefore the complainant knew the appellant since he was a child.
20. Furthermore, the complainant recognized the appellant's voice when he threatened him, and that the incident took about an hour which is sufficient time to recognize the appellant.
21. The respondent submitted that, the appellant's defence was a mere denial as he failed to give a reason as to why the complainant would frame him and therefore did not rebut the prosecution evidence that was consistent, direct and clear.
22. Further, the trial court analysed the evidence by the prosecution and defence and concluded that the appellant committed the offence. The respondent urged the court to uphold the trial court's decision.
23. At the conclusion of the hearing of the appeal and in considering the appeal, I note that, the role of the first appellate court thereof is to re-evaluate the evidence afresh and arrive at its own conclusion, bearing in mind that the court did not have the benefit of the demeanour of the witnesses.
24. In that regard, the Court of Appeal in the case of; *Okeno vs. Republic* (1972) EA 32 thus observed: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya v R* 1975) EA 336 and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala v. R* [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's



findings should be supported. In doing so, it should make allowance for the fact that, the trial court has had the advantage of hearing and seeing the witnesses”

25. Be that as it were, the appellant was convicted of the offence of rape created under section 3(1) of the Act, which states as follows: -

- “(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.”

26. Pursuant thereto the elements of the offence of rape are unlawful penetration, lack of consent, and the perpetrator of the offence.

27. Further, the Court of Appeal in the case of; Republic v Francis Otieno Oyier [1985] eKLR in dealing with the issue of; “*mens rea*” in rape charge which the prosecution is required to prove stated that:

“The learned magistrate had the correct appreciation of the mens rea in rape. It is primarily an intention and not state of mind. Thus the mental element is to have intercourse without consent, or not caring whether the woman consented or not: *DPP v Morgan* (1975) 61 Cr Appl. R 136 HL The prosecution must prove either 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; Archbold Criminal Pleading Evidence and Practice 40th Edn pp 1411 – 1412 paragraph 2881 and *R v Harwood K* (1966) 50 Cr App R 56.”

28. To revert to the first element of penetration, it is defined under section 2 of the Act “as the partial or complete insertion of the genital organs of a person into the genital organs of another person” and the term genital organs is defined to include the anus.

29. Furthermore, section 43 of the Act deals with circumstances where penetration is intention and unlawful and states 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.”

30. In the instant matter, it was the evidence of the complainant that the appellant led him to the bush and sodomised him severally and that out of excitement in the course of the act bit him on the forehead.
31. That, he was treated at Rwanyambu and produced the treatment notes in support thereof. In the same vein, Dr. Patrick Kiluri who produced the P3 and Post Rape Care form testified that, upon examination of the complainant, he noticed that he had strangulation marks on his neck, bite marks on the frontal aspect of the head, teeth bite, bruises on the lateral aspect of the anus, anal spectre tender and generalised tenderness on the anal spectre and concluded there was anal penetration.
32. The afore medical evidence corroborates the complainant’s evidence that he was sexually assaulted through anal penetration.
33. It is the complainant’s further evidence that he did not consent to the sexual act. That the appellant literally threatened him with harm and indeed was armed with a bottle which he threatened to use if the complainant refused to engage in the unlawful sexual act or screamed to attract attention.
34. It suffices to note that when the Police Officers visited the scene the soda bottle was indeed recovered the subject and was confirmed by the complainant as the one the appellant was armed with. As such the rape was without consent.
35. The other issue to consider is whether it is the appellant who committed the offence herein. It was the complainant’s evidence that, he first saw the appellant in the bush and as he was passing by the appellant called him “*devil*” stopped him and led him to the scene of crime.
36. That, all through there were county security lights and he was able to recognise the appellant. It is also noteworthy that Corporal Wilson Nzioka who visited the scene also confirmed that there were security lights along the road up to the scene of crime, thus corroborating the complainant’s evidence.
37. Furthermore, it was the evidence of the complainant that, the whole incident took over one hour and that the appellant was well known to him as the appellant’s mother and his brother’s wife are sisters and he knew the appellant as Joseph Kakoiya. That the appellant’s voice was familiar and he recognised it.
38. It suffices to note that, the analysis of evidence in cross examination of the complainant clearly reveals that the appellant did not displace the prosecution evidence. At no time did the appellant deny having blood relationship with the complainant and/or being known to him before the incident herein.
39. To the contrary the appellant merely made a mere denial of the offence at the defence stage and introduced the issue of land dispute at that stage, which he did not put to the complainant. It is clear that the appellant’s defence is an afterthought.
40. In the given circumstances, the trial court well guided in finding that the prosecution proved the case beyond reasonable doubt and I find that there was adequate evidence to ascertain the conviction and I uphold the conviction.



41. As regards the sentence meted out I find that, I find that it is lawful and legal and therefore find no cause to interfere with the same.
42. The upshot is that, the appeal herein has no merit and I dismiss it in its entirety. The appellant has a right of appeal within 14 days.

DATED, DELIVERED AND SIGNED ON 22ND DAY OF APRIL 2024.

GRACE L. NZIOKA

JUDGE

In the presence of:

Appellant virtually

Mr Abwajo for the Respondent

Ms Ogutu; Court Assistant

