



**Parmuya v Republic (Criminal Appeal E035 of 2021)
[2024] KEHC 10067 (KLR) (25 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 10067 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL APPEAL E035 OF 2021
SN MUTUKU, J
JUNE 25, 2024**

BETWEEN

JACKSON PARMUYA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

Background

1. Jackson Parmuya, the Appellant, was charged alongside Joshua Saita with the offence of Gang Rape Contrary to section 10 of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on the 16th Day of March, 2020 in Kajiado South Sub-County within Kajiado County in association with others not before court, intentionally and unlawfully caused their penises to penetrate the vagina of EA without her consent.
2. They faced an alternative charge of committing an Indecent Act with an adult contrary to section 11(a) of the *Sexual Offences Act* No. 3 of 2007. The particulars are that on the 16th Day of March, 2020 in Kajiado South Sub-County within Kajiado County intentionally touched the vagina of EA with their penis against her Will.
3. They were both tried, and each convicted of the main charge of gang rape and sentenced to 15 years imprisonment.
4. The Appellant is aggrieved by the conviction and the sentence and preferred this appeal. He had filed initial grounds of appeal on 23rd March 2021 in which he accused the trial court of:
 - a. Convicting him on evidence which did not prove the offence beyond reasonable doubt.
 - b. Shifting the burden of proof to him.



- c. Failure to consider his defence.
5. The appellant filed amended grounds dated 17th October 2023 together with his submissions and raised the following grounds of appeal:
 - a. That the learned trial magistrate erred in law in not considering that the plea was not taken as required by the law occasioning prejudice to the appellant.
 - b. That the learned trial magistrate erred in law and fact in convicting the appellant without observing that the record of the trial court did not show the language used by the witnesses.
 - c. That the learned trial Magistrate erred in both law and facts connecting the appellant on the defective charge sheet.
 - d. That the learned trial magistrate erred in law in not considering material inconsistencies and contradictions.

Appellant's submissions

6. The Appeal was canvassed through written submissions. The Appellant's submissions were filed on 17th October, 2023. He has submitted that the plea was not taken as required by procedure in that the charge was not read and explained to him, therefore this is a fatal mistake, and the trial should be declared a nullity.
7. He submitted that the trial court failed to indicate the language used by witnesses (PW1) (PW2) (PW3) and that the record is silent on this. He relied on *Fredrick Kizito v Republic* Criminal Appeal No. 170 of 2007 [2007] eKLR, where the court stated as follows:

“This and several other cases we have handled before, show the grave danger inherent in the failure by the trial court to record the essential details in proceedings before it, for instance, the name of the officer trying the case; the prosecutor and his rank; the court interpreter or clerk and the language or languages of the proceedings; the language used by each witness; that judgment was pronounced; the date thereof and in whose presence et cetera. These are as important as the evidence and form part of the fair process of justice, the omission of which might affect an otherwise sound conviction.”
8. While relying on *Albanus Mwasia Mutua v. Republic* Criminal Appeal No. 120 of 2004, he submitted failure to indicate which language was used by the witnesses, the trial court violated his constitutional.
9. He submitted that the charge was defective in that the particulars of the offence showed that the offence was committed on 16th March, 2020 but the complainant (PW1) on cross examination stated that she was raped on 15th March, 2020. It is his argument that he was put on his defence for a date which is unknown, and which led to his conviction and sentence; that this illegality is so grave that it vitiated the entire proceedings as seen in the case of *Joel Karungo & another v Republic* (1989) No 342.
10. He submitted that there were material inconsistencies and contradictions in the testimonies of PW3 who stated that when they arrived the lady was down, and one person was on top of her and when he heard them he woke up and ran away and that PW5 stated that the complainant was just next to Parmuya. The Appellant relied on *John Mutua Musyoka v Republic* (2017) Criminal Appeal No. 11 of 2016
11. He also submitted that the prosecution did not prove their case to the standard required. That the age of the complainant was not established, that penetration was not proved and that the complainant lied



about men raping her without condoms and yet no spermatozoa were found during the medical test, that the complainant was brought to the hospital on 14th March 2020 before the alleged incident took place, that the doctor refuted the allegation that the complainant was raped by two men in the report.

12. It was his case that the sentence was excessive. That he was sentenced to 15 years in prison. He argued that the trial court failed to consider his mitigating factors in that he is a first offender. He urged the court to be given a benefit of doubt as per the sentencing guidelines. He relied on the case of *Philip Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) where it was held that in the extent that *sexual offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of the *Constitution*.

Respondent's submissions

13. The Respondent's submissions were filed on 1st August, 2023. The Respondent has submitted that for an offence of gang rape to be proved, the prosecution has to prove rape/defilement occurred, that the assailant was in association with another or other persons in committing the offence of rape or defilement or that the assailant did not per se commit the offence of rape or defilement, but with common intent was in the company of another or others who committed the offence.
14. It was submitted that penetration has to be proved; that section 2 of the *Sexual offences Act* defines "penetration" as partial or complete insertion of the genital organs of a person into the genital organs of another person; that, secondly, it has to be proved that the penetration was not consensual.
15. It was submitted that this court, sitting as the first appellate court has a duty to examine all the evidence, re-evaluate it and arrive at its own independent decision always being alive to the fact that it did not have the benefit of observing witnesses as they testified.
16. It was submitted that the complainant gave a vivid account of how she was raped by the accused persons; that her testimony was further corroborated by that of PW2 and PW3 who were officers on duty on the night of the incident and that the testimony of PW4 also concluded that the complainant had been sexually assaulted.
17. It was submitted that the narration of the complainant showed that the Appellant was with another person who was identified as Saita and that both the Appellant and his associate were arrested at the scene of crime.
18. It was submitted that the complainant kept referring to the accused persons by their names; that the accused persons were people well known to her; that she has known the Appellant since childhood as her neighbor; that on the material night, they were drinking together at the club before she decided to go home; that though it was night, she was able to identify her attackers as there was moonlight and that the other prosecution witnesses PW3 and PW4 corroborated the complainant's testimony that there was moonlight on the material night.
19. On whether there were inconsistencies and contradictions by the prosecution witnesses, the Respondent submitted that there were none. It was submitted that PW2, PW3 and PW5 corroborated the events as narrated by the complainant in her testimony; that they heard a scream on the night of the incident and that PW1 was found naked, being raped by the Appellant. Further, PW4 corroborated PW1's testimony that she was raped through the medical evidence he produced in court and that the testimony of the prosecution witnesses remained consistent during cross-examination by the Appellant.



20. The Respondent argued that contrary to the Appellant’s assertions, the trial court in its judgement keenly analyzed the evidence on record as well as the facts of the case; that the trial court also considered the sworn evidence of the appellant and that the trial court was not convinced by the Appellant’s defence.
21. On whether the sentence was merited, the Respondent argued that the sentence is provided for under section 10 of the *Sexual Offences Act*; that the trial court considered the Appellants mitigation and sentenced him to serve 15 years imprisonment and that before sentencing the Appellant, the court considered the seriousness of the offence as enumerated. It was submitted, further, that this being an appellate court it should not unnecessarily interfere with the sentence, see *Bernard Kimani Gacheru v Republic* [2002]eKLR, where it was held that:
- “It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”
22. The Respondent further relied on the Court of Appeal decision in *Ogolla s/o Owuor v Republic* [1954]EACA 270, where it was held thus:

“The Court does not alter a sentence unless the trial judge has acted upon wrong principles or overlooked some material factors.”

Analysis and Determination

23. This is the first appeal. I am required to evaluate and consider all the evidence adduced before the trial court afresh and arrive at my own independent decision. I have cautioned myself that I did not observe the witnesses when they testified and therefore, I am not able to comment on their demeanor. I will therefore give allowance to that.
24. The ingredients of the offence of gang rape are stated under section 10 of the *Sexual Offences Act* which provides that Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment to life.
25. For gang rape to be committed, there must be someone in association with another person or others or any person who with common intention is in company of another or others; there must be penetration of the victim, which is defined as the insertion of a genital organs of one person (in this case, the culprit) into the genital organs of another person (in this case, the victim).
26. The evidence as presented before the trial court was that Everlyne Adhiambo (PW1) had been drinking in a club. At the same club were the Appellant, Saita and another person in different table drinking. At around 11pm on 15th March 2020 PW1 left to go home. She was alone. She saw the Appellant following her. She asked him whether he was escorting her home. The Appellant told her to shut up. He hit her



- on the forehead with a rungu. She fell and lost consciousness. When she regained consciousness, she found herself in a forest. She was gagged. She was able to see clearly due to the moonlight. She saw Seuri holding her neck and mouth while the Appellant was holding her leg. Saita was on top of her raping her.
27. She testified that the three men raped her in turns. Police rescued her and took her to Loitoktok Sub County Hospital. She testified that she did not have a panty or even skin tights she had been wearing when she got to hospital and that she was also very dirty. She stated that she knew the Appellant well as they were neighbours and knew each other from childhood.
 28. PW2 Sergeant Amon Muthanga Lamrock a police officer stationed at Entarara Police Post stated that on 16th March 2020 at about 2:00am he was on patrol with Nelson Muchiri (PW3) and Johana Rono (PW5) when they received a call from an informer. He reported that he could hear cries from someone near his home. The officers went to the scene. They flashed their torches and saw the Appellant on top of PW1 who was half naked and foaming in the mouth. The Appellant was between PW1's legs and on seeing the police officers he stood up and started zipping his trousers.
 29. The police arrested him at the scene. The others ran away. Police gave chase and arrested Saita. The police also collected a lady's panty, light jacket, a black marvin hat, and grey skin tights greyish. These items were produced in evidence as exhibits. The evidence of PW1 was corroborated by that of PW3 and PW5.
 30. The complainant was examined by Antony Nyaga (PW4), a Clinical Officer at Loitoktok Sub-County Hospital on 16th March 2020. According to the evidence of PW4, the complainant had torn and dirty clothes and did not have her underpants. She was smelling of alcohol and was foaming in the mouth. She had bruises on her legs, knees and lower limbs. He classified the degree of harm as grievous harm and the probable weapon was a penis. He concluded that she had been sexually assaulted. He however stated that there were no visible bruises on her labia majora and minora and that she did not have any discharge or spermatozoa. He produced the P3 form as an exhibit.
 31. I have also read the defence of the Appellant. He testified that that he is a farmer and that on 14th March 2020 he was arrested in a raid at Entarara at 10:00pm while watching a video at Entarara. He stated that PW5 had a dispute with him over a piece of land. He stated that on 16th March 2020 he was taken to a room in a police station where his finger prints were taken and that on 17th March 2020 he was brought before court and charged with gang rape.
 32. I have read the entire record of the trial court. I have understood the evidence. I have understood the reasoning of the trial magistrate in her judgment. The evidence shows that the victim of this offence was attacked and sexually assaulted by people from her neighbourhood. They were known to her from childhood. She had seen them at the club where she was drinking before she decided to go home. They had followed her. Besides, the police officers, PW2 and PW3, testified to finding the Appellant and the other co-accused at the scene. The Appellant was arrested at the scene. He did not have a chance to escape.
 33. The Appellant claims that the charge was defective because the date of the offence is shown in the particulars of the offence as 16th March 2020 but the complainant testified that she was raped on 15th March 2020. I have considered this evidence. It is true that the complainant started by testifying that on 15th March 2020 she was in a club drinking before she went home and was followed by the Appellant and others. She is also captured in evidence stating that the rape took place from 11.00pm to 3.00am.



34. I have read the evidence of both PW2 and PW3. They told the court that they went to the scene at about 2.00am. Obviously, 2.00am would mean the following day, which would be 16th March 2020. I find no defects in the charge. The evidence has explained the two dates, and I am satisfied with it.
35. I also find no contradictions or inconsistencies in the evidence of the prosecution witnesses. I find that the evidence of PW1 was corroborated by that of PW2, PW3 and PW5. The police found the complainant at the scene of crime and that she was half naked and that the Appellant was caught in the act of raping her. PW4 saw the complainant looking dirty and with no underpants. He confirmed that she had been sexually assaulted, although she did not have visible injuries in her genitalia.
36. The trial court is empowered under section 124 of the *Evidence Act* to convict an accused person on the evidence of the victim alone in sexual offence cases. See *Stephen Nguli Mulili v Republic* [2014] eKLR where the Court stated in regard to section 124 of the *Evidence Act*:
- “As a general rule of evidence embodied in Section 124 of the *Evidence Act*, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section make an exception in sexual offences and provides as follows:
- “Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”
37. I find that the evidence of the prosecution witnesses is sufficient to find the charge of gang rape proved beyond reasonable doubt. It is therefore not true as claimed by the Appellant that the evidence was contradictory and inconsistent or that he was convicted on evidence that did not prove the case beyond reasonable doubt. I also did not find shifting of the burden of proof from the prosecution to the Appellant. This claim by the Appellant is not backed by evidence.
38. The allegation that the trial magistrate did not consider the defence of the Appellant is not true. The trial magistrate considered his defence and found it to be mere denial.
39. The Appellant claims that the language of witnesses was not recorded by the trial magistrate and that the plea was not taken according to procedure and therefore his constitutional rights were violated. I have read the entire record of the lower court. It clearly shows that in all the days the matter was in court either for mention or for hearing, the coram of the court specifically captured the language the court used as either English or Kiswahili. Although the record of the court does not specifically show what language each witness was using, I have no doubt in my mind that they were using either English or Kiswahili. Besides, the record shows that interpretation in either of those two languages was available through the presence of the Court Interpreter.
40. The record shows that the Appellant cross examined all the witnesses and his cross examination shows that he understood their evidence.
41. The record of the lower court shows that the charge was read to the Appellant in Kiswahili and every element thereof was stated by the court to him in the language he understood. The language used was Kiswahili. He responded in Kiswahili “Si kweli” translated as “It is not true”. In the leading case in this area of plea-taking, *Adan v. Republic* [1973] EA 445, the procedure for taking plea is set out clearly in the following terms:



- (i) the charge and all the essential ingredients of the offence should be explained to the accused in his language he understands;
- (ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;
- (iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;
- (iv) if the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered;
- (v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.”

42. I am satisfied that there are no errors in plea-taking in this matter and that the Appellant understood the charges facing him and he responded to them appropriately. This was captured procedurally as required.

43. Regarding the issue of harsh sentence, the trial court exercised its discretion in the matter. The sentence meted out to the Appellant was the minimum sentence provided under section 10 of the *Sexual Offences Act*. I have no reason to disturb that discretion without evidence that the trial magistrate exercised that discretion injudiciously.

44. I find no merit in this appeal. All the grounds of appeal advanced by the Appellant have collapsed. Consequently, this appeal is dismissed. This court upholds the conviction and sentence of the trial court. The Appellant shall continue serving the sentence handed to him by the trial court.

45. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 25TH JUNE 2024.

S. N. MUTUKU

JUDGE

In the presence of:

Mr. Jackson Parmuya the Appellant

Ms. Akunja for the Prosecution/Respondent

