



REPUBLIC OF KENYA



**Ingimba v Republic (Criminal Appeal E016 of 2022)
[2024] KEHC 9207 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9207 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL E016 OF 2022**

JN KAMAU, J

JULY 30, 2024

BETWEEN

WYCLIFF INGIMBA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of Hon M. Ochieng (PM) delivered at Hamisi in
Principal Magistrate's Court in Criminal Case No 170 of 2020 on 14th September 2022)*

JUDGMENT

Introduction

1. The Appellant herein was charged with two (2) counts of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code Cap 63 (Laws of Kenya) and one (1) count of the offence of gang defilement contrary to Section 10 of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
2. He was tried and convicted by the Learned Trial Magistrate, Hon M. Ochieng (PM) who sentenced him to fifty (50) years imprisonment on Count I and Count II for the offence of robbery with violence and fifteen (15) years on Count III for the offence of gang defilement. She directed that the same run consecutively.
3. Being dissatisfied with the said Judgement, on 4th November 2022, he lodged the Appeal herein. The same was of even date. He set out sixteen (16) grounds of appeal.
4. His Written Submissions were dated and filed on 11th December 2023 while those of the Respondent were dated 7th March 2024 and filed on 15th March 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.



Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.
7. Having looked at the Appellant's Petition of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-
 - a. Whether or not the Prosecution proved its case beyond reasonable doubt; and
 - b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.
8. The court dealt with the said issues under the following distinct and separate heads.

I. Proof Of Prosecution Case

9. The court dealt with the above issue under the following distinct and separate heads.

A. Robbery With Violence

10. Grounds of Appeal Nos (1), (2), (3), (4), (5), (6), (7), (8), (13) and (15) were dealt under this head.
11. The Appellant submitted that the Trial Court did not properly evaluate the evidence before it thus reaching an erroneous decision. He asserted that evidence in criminal proceedings had to be beyond reasonable doubt and that the threshold was so high that any doubt case negated a conviction.
12. He agreed that the offence of robbery with violence was committed where the offender was armed with a dangerous and offensive weapon or instrument or he was in company with one or more person or persons or at immediately before or immediately after the time of robbery, the offender wound, beat, struck or used other personal violence to any person.
13. He contended that the said circumstances did not exist merely by word of mouth as there had to be concrete evidence as robbery with violence was a serious offence. He asserted that the investigating officer and the prosecution had to be satisfied that the investigations conducted and the exhibits recovered before charging any offender were enough to prove the charge beyond reasonable doubt.
14. He reproduced John Asembekha (hereinafter referred to as "PW 1")'s evidence and argued that no panga was produced in court as an exhibit even after thorough investigations by the police were conducted, no names of other suspects were mentioned and that no P3 Form and/or medical examination report and treatment notes were produced to prove harm or violence. He added that although PW 1 claimed that his phone was stolen, no receipt was produced to prove the same.
15. He further contended that if PW 1 knew the Appellant well, he need not have participated in the identification parade and would have named him while making his report at Mudete Police Station.



- He pointed out that PW 1's evidence that one of the assailants had rasta was ambiguous as he ought to have said it was him who had rasta.
16. He further submitted that Faith Imali (hereinafter referred to as "PW 3") did not produce a receipt of her phone that was allegedly stolen and medical documents to show that she was hit on the stomach while pregnant and that she attended hospital at Mbale.
 17. On its part, the Respondent invoked Section 295 and 296(2) (sic) and submitted that the fact that there were no treatment notes for PW 1 did not harm the Prosecution's case as there was enough corroboration from the other witnesses who were consistent.
 18. A perusal of the proceedings of the lower court showed that on 21st March 2020, at 10.00 pm, PW 1 was with his three (3) daughters namely Hope, Ruth Idayi (hereinafter referred to as "PW 2") and PW 3 at his hotel next to his home when they were attacked by three (3) assailants. He stated that two (2) of them got inside the hotel, slapped him with a panga and told him that they had been sent to him to get Kshs 100,000/= from him.
 19. He further testified that they robbed him of his phone ITEL, Kshs 5,500/= and PW 3's phone. He informed the court that one of the assailants slapped PW 3. They told them that she was pregnant and they left her. They took PW 2 with them. He was emphatic that solar lights were on and he could recognise the Appellant herein as he attended his church.
 20. He told the Trial Court that after the Appellant and his fellow assailants left, PW 3 ran home to tell her mother what had happened. They raised an alarm and one Peter came to their rescue. They went to look for PW 2 and found her at the road having been defiled and was bleeding. He said that she had been forced to drink alcohol.
 21. PW 2 and PW 3 evidence corroborated that of PW 1. Phinias Ayodi Ingundi (hereinafter referred to "PW 4"), the Assistant Chief testified that on the material night of 21st March 2020, he was called and informed that PW 1's house had been broken into. When he went at the scene the next day, PW 3 indicated to him that she could identify one of their attackers as the Appellant herein. He stated that on 22nd March 2020, the Appellant went to his office and as he had been mentioned (sic) he arrested him.
 22. Emmanuel Kindagasi (hereinafter referred to as "PW 5") was the clinical officer who examined PW 2. He stated that her hymen was not intact and there was evidence of sexual intercourse. He produced treatment notes, P3 Form and Post Rape Care (PRC) Form as exhibits in court.
 23. No 21785 James Tai (hereinafter referred to as "PW 6") carried out an identification parade and PW 1, PW 2 and PW 3 identified the Appellant as having been part of the gang that broke into their hotel and robbed them on the material night.
 24. No 78986 Sgt Dan Owiti (hereinafter referred to as "PW 7") was the Investigating Officer. He produced PW 2's Birth Certificate.
 25. On his part, the Appellant testified that on the material night he was at home. He watched television with his father, Hudson Ludeya Ichminwa (hereinafter referred to as "DW 2") and went to sleep at 11.00 pm. DW 2 corroborated his evidence.
 26. Notably, the Appellant, PW 1, PW 2 and PW 3 were not strangers as they hailed from the same area. They also attended the same Church where PW 1 was a Pastor. The lighting from the solar light at the hotel was conducive for positive identification of the Appellant herein as having been one of the attackers on that material night. That was sufficient time for PW 1, PW 2 and PW 3 not to have been mistaken about his face.



27. This court was satisfied that PW 1, PW 2 and PW 3 positively identified the Appellant as having been one of the attackers on the material night. His argument that the Prosecution needed to adduce other evidence to corroborate the existing evidence therefore fell on the wayside.
28. Section 295 of the Penal Code stipulates that the elements of robbery with violence are :-
- a. That the offender is armed with any dangerous weapon or offensive weapon or instrument;
 - b. That the offender is in the company of one or more persons;
 - c. That or if at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.
29. It was evident from the evidence PW 1, PW 2 and PW 3 that the Appellant was in the company of others during the attack. PW 1 confirmed having seen the Appellant and his accomplices armed with pangas and a knife. They slapped him and PW 3 with a panga and defiled PW 2. They robbed them of their phones and money. It was immaterial that no receipts of the PW 1 and PW 3 did not adduce in evidence receipts of their phones. It was punitive to expect people to keep receipts of their phones to prove that they own the said phones.
30. It was also immaterial that the names of the other assailants who were in the company of the Appellant herein were not mentioned. Indeed, it was placing very huge burden on witnesses to know the names of their attackers as proof that they had been attacked. PW 4 stated that the Appellant had been mentioned and that is why he went to his office where he arrested him.
31. The chain of events was unbroken. the Prosecution established beyond reasonable doubt which was the required standard of proof in criminal cases that the Appellant herein was guilty of the offence of robbery with violence.
32. The Trial Court thus proceeded correctly when it found that all the ingredients of proving the offence of robbery with violence had been satisfied and hence convicted him accordingly.
33. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3), (4), (5), (6), (7), (8), (13) and (15) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

B. Proof Of Gang Rape

34. Grounds of Appeal Nos (10), (11), (12) and (14) of the Petition of Appeal were dealt with under this head.
35. The Appellant submitted that although the P3 Form indicated that PW 2's thorax, abdomen, upper limbs and lower limbs were normal, that would not be the case where there was use of force or a scuffle in alleged act of gang defilement. He argued that a broken hymen was not proof of rape.
36. He contended that the Prosecution's case was full of inconsistencies and that although PW 7 mentioned that the other two (2) attackers namely Jackson and Oscar were arrested, he was the only one who was charged. He further asserted that although PW 7 indicated that he took the inner pants of the three (3) attackers for examination in Kisumu, the said Report had never been availed.
37. On its part, the Respondent cited Section 2 of the *Sexual Offences Act* and submitted that the Trial Court took into consideration Section 124 of the *Evidence Act* and believed that PW 2 was a credible witness. It pointed out that a Birth Certificate was produced which proved that PW 2 was a minor.
38. PW 2 testified that on the material night of 21st March 2020, two (2) of the assailants took her to a tea plantation and told her not to raise alarm or else they would kill her. She stated that one removed a knife



and put it on her chest. They told her to lie down but she refused. They forced her to lie down. They removed her inner wear removed and defiled her in turns. She added that one of them put his penis in her mouth and made her drink some salty tasty drink. She said that she was in her senses although she felt dizzy.

39. Her evidence was unwavering and was corroborated by that of PW 1, PW 3 and scientific evidence of PW 5. Indeed, PW 5 found that her hymen was not intact and there was evidence of sexual intercourse. He produced treatment notes, P3 Form and Post Rape Care (PRC) Form as exhibits in court.
40. PW 7 produced PW 1's Birth Certificate which indicated that she was born on 18th February 2002. The incident happened on 21st March 2020, thus, PW 2 was seventeen (17) years at the time the offence was committed and therefore the Prosecution proved that she was a minor at the material time.
41. Turning on the issue of the Appellant's defence of alibi, this court had due regard to the definition of "alibi" in the Black's Law Dictionary, 10th Edition. It was defined as:

"A defence based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time".
42. The principle had long been accepted that an accused person who wished to rely on a defence of alibi had to raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. The East Africa Court of Appeal came to a similar conclusion in the case of Republic vs Sukha Singh S/O Wazir Singh & Others [1939] 6 EACA 145.
43. It was also trite law that once a respondent raised an alibi defence, the onus shifted to the prosecution to displace the same as was held by the Court of Appeal in the case of Victor Mwendwa Mulinge vs Republic [2014] eKLR.
44. In this case this court noted that defence of alibi was raised at the defence hearing and not at the beginning of the trial. The Prosecution did not rebut the same despite having the option of doing so as provided in Section 309 of the Criminal Procedure Code Cap 75 (Laws of Kenya) that provides that:-

"If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."
45. Be that as it may, weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find the Appellant's alibi evidence and that of DW 2 to have been watertight enough to have weakened the inference of guilt on the Appellant's part.
46. On the contrary, the Prosecution established its case of gang rape against the Appellant herein beyond reasonable doubt. Trial Court therefore acted correctly when it convicted him for the said offence. It was evident that the Appellant and his accomplice had a common intention of defiling her.
47. Notably, the ingredients of gang rape/defilement were that the offence must have been committed in the company of others and with common intention. In the mind of this court, the Prosecution was able to prove its case even in the absence of any Report from Kisumu (sic).
48. As PW 1 did not consent to having sex with the Appellant and one of accomplices, the Prosecution established beyond reasonable doubt which was the required standard of proof in criminal cases that the Appellant herein was guilty of the offence of gang defilement.



49. In the premises foregoing, Grounds of Appeal Nos (10), (11), (12) and (14) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

II. Sentencing

50. Grounds of Appeal No (16) of the Petition of Appeal was dealt with under this head.

51. The Appellant submitted that his sentence was excessive. The Respondent did not submit on the issue of sentencing.

52. Notably, the Appellant was found guilty of the offence of robbery with violence and gang rape.

53. Section 295 of the Penal Code states that:-

“Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.”

54. Further, Section 296 (1) and (2) of the Penal Code provides as follows:-

1. Any person who commits the felony of robbery is liable to imprisonment for fourteen years.
2. If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

55. Section 10 of the *Sexual Offences Act* 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 fifteen years but which may be enhanced to imprisonment for life.”

56. The Trial Court sentenced the Appellant to fifty (50) years imprisonment for the offence of robbery with violence and fifteen (15) years imprisonment for the offence of gang defilement which sentences were to run consecutively.

57. The African Charter on Human and Peoples' Rights on the Rights of Women in Africa provided that any practice that hindered or endangered the normal growth and affected the physical and psychological development of women and girls should be condemned and eliminated. Rape/defilement was one of those practices and actions. It must therefore be condemned in the harshest terms.

58. It was an unforgivable crime because the perpetrator took something valuable to the victim by force and unexpectedly. It was similar to the effects of the offence robbery with violence that left victims shocked and traumatised. It was even more traumatic when the same victim was raped and robbed at the same time. The crimes smacked of pure malice and impunity.

59. In view of the atrocity that was meted on PW 1, PW 2 and PW 3 herein, this court found and held that this was one of the instances that it ought not disturb the Trial Court's sentence.



60. However, in view of this court’s discretion on sentencing, Section 14 of the Criminal Procedure Code provides as follows: -

“when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.” (Emphasis)

61. This court had due regard to the case of Peter Mbugua Kabui vs Republic [2016] eKLR where the Court of Appeal stated as follows:

“As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.

62. In the instant case, the charges in count I, II and III indicate that the offences therein were committed at the same time or date and at almost the same place and were all in the same transaction. The same were connected together in proximity of time and the criminal intent. It amounted to a single invasion of the same protected interest. In this court’s view, the Trial Court ought to have ordered the sentences in counts I, II and III to run concurrently

63. Going further, this court was mandated to consider the period the Accused person spent in remand while his trial was on going in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

64. Section 333(2) of the Criminal Procedure Code provides that:-

“Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody” (emphasis court).

65. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR.

66. Further, the Judiciary Sentencing Policy Guidelines provide that:-

“The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”



67. The Charge Sheet did not indicate the date the Appellant was arrested. However, he was first arraigned in court on 25th March 2020. He was released on bond on 2nd June 2020. He therefore spent two (2) months and seven (7) days in custody during trial. He was convicted on 14th September 2022. He was sentenced on 25th October 2022. The Trial Court did not take into account this period while sentencing him.

Disposition

68. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was dated and lodged on 4th November 2022, was not merited and the same be and is hereby dismissed. The Appellant's conviction and sentence be and is hereby upheld as they were both safe save for the Trial Court's direction that the sentences run consecutively be and is hereby set aside and substituted with an order that the Appellant's sentences do run concurrently.

69. For the avoidance of doubt, the periods between 25th March 2020 and 2nd June 2020 and between 14th September 2022 and 24th October 2022 be and are hereby taken into account while computing his sentence in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

70. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 30TH DAY OF JULY 2024

J. KAMAU

JUDGE

