



**Langat v Republic (Criminal Appeal E043 of 2022)
[2024] KEHC 13580 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13580 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E043 OF 2022
RL KORIR, J
OCTOBER 30, 2024**

BETWEEN

NICKSON KIPNGETICH LANGAT APPELLANT

AND

REPUBLIC RESPONDENT

*((From the Conviction and Sentence in Criminal (S.O) Case Number 66
of 2019 by Hon. Kiniale L. in the Principal Magistrate’s Court at Bomet))*

JUDGMENT

1. The Appellant Nickson Kipngetch Langat was charged with the offence of rape Contrary to Section 3(i) (a) (b) as read with Section 3(3) of the [Sexual Offences Act \(Act No. 3 of 2006\)](#). He was alleged to have unlawfully penetrated J.C without her consent on 9th October 2019 at 23.40hours at [Particulars Withheld] Location within Bomet County.
2. He faced a second court of committing an indecent act with an adult Contrary to Section 11(A) of the [Sexual Offences Act](#). The particulars of the offence was that he intentionally and unlawfully touched the vagina of J.C. against her will.
3. The trial Appellant (then denied the Accused) the charges and the case went to full trial. The Prosecution case was that the Complainant J.C. was a pillion passenger alongside another passenger aboard a boda boda ridder by the Accused. That somewhere along the way, the rider refused to take the Complainant to her destination and instead took her to a bush and raped her having left behind the other passenger. That after raping her, he took her to a “home” and reported that they had ben involved in an accident. The owner of the home upon hearing of the rape from the Complainant locked the Accused in the house and called the police who went and arrested the Accused. At the same time, she caused her sons to take the Complainant to a medical clinic.



4. According to the evidence of Dr. Mutai Nickson, he examined the complainant the next day at the Longisa hospital and found external injuries on the head and neck, upper limb and posterior arm secondary to road traffic accident.
5. He also found evidence of broken hymen, bruises in the vaginal wall and concluded that the Complainant had been raped.
6. At the conclusion of Prosecution case, the court found a prima facie case against the Accused and placed him on his defence. He gave an unsworn statement in which he denied the charge. He denied having been with the Complainant on the material night and denied being a boda boda rider.
7. At the close of the trial, the court in its judgement dated 27th January 2021, the trial court convicted the Accused of the main charge. It subsequently sentenced him to serve 20 years' imprisonment.

The Appeal

8. The Accused (now Appellant) was dissatisfied with the trial and judgment and filed a Memorandum of Appeal in this court on 19th October 2022. His grounds were that the trial court relied on the Prosecution evidence which was uncorroborated, inconsistent, and full of irregularities and insufficient to find a conviction.
9. On 22nd February 2023, the Appellant filed an Amended Memorandum of Appeal pursuant to Section 350 (2) (1) of the CPC and limited his appeal to sentence only. His home-made grounds are produced verbatim as follows:-
 - i. That the amended grounds appeal is only on sentence
 - ii. That the learned trial magistrate erred in law and fact on giving out a sentence which is/was harsh and disproportionate with provision of Constitution of Kenya 2010.
 - iii. That the learned trial magistrate erred in law and fact by not considering the mitigation of the appellant in trial determination.
10. On 19th September 2023, this court directed the parties to canvass the appeal through written submissions.

The Appellant's submissions

11. In his written submissions filed on 22nd February 2023, the Appellant asserted that his appeal was against sentence only. He submitted that the sentence was harsh and disproportionate to the offence. That the trial magistrate did not consider the mitigating factors including the fact that the Accused was a first offender and was aged 23 years old. The Appellant further submitted that he had been in pre-trial remand custody for 1 year and 4 months, a period which the trial court did not consider. Further, the Appellant submitted that the court did not take into consideration his mitigation that he was a class 8 drop out hence lacking legal knowledge and was a bread winner to his poor mother and siblings.

The Respondent's submission

12. The Respondent's filed written submission on 12th July 2023. They submitted, that the offence was proven beyond reasonable doubt. That the act causing penetration was proved by the evidence of PW2 the clinician who filled the P3 form. On lack of consent, the Respondents submitted that the victim sustained physical injury when she jumped off the boda boda and instead the Appellant took her to a bush to rape her instead of taking her to hospital. That this together with the bruises in the vaginal wall



- observed by the clinician demonstrated lack of consent. On identification, the Respondents submitted that the Appellant was positively identified as the perpetrator. He was the rider who was known by PW2, who was pillion passenger who placed him at the scene.
13. On sentence, the Respondents submitted that the trial court considered the Appellant's mitigation that Section 3 (3) of the *Sexual Offences Act* provides for a mandatory minimum sentence of 10 years which can be enhanced to life imprisonment. That the 10-year sentence was lawful, fit and proper.
 14. I have already stated that the Appellant asserted in his amended grounds of appeal and in his written submissions, that he was satisfied with the conviction and was appealing against sentence only. I shall therefore not belabour the question whether or not the charge of rape was proved to the required legal standard. A cursory analysis of the evidence however shows that there was sufficient evidence to prove the charge.
 15. The Complainant (PW1) testified that she asked the Appellant who was a boda boda rider to take her from Chebole to her home in Kipsonoi. He agreed and took her as the second passenger, the first being one Ronald Ngeno who testified as PW3. PW1 told the court that when they reached the place where she was to alight, the Appellant refused to stop and sped of forcing her to jump off the moving motor bike. That the rider turned back and the passenger told him to take her to hospital. They assisted her onto the motor bike but before the other passenger got on, the Appellant sped off and later stopped at a bushy area where he raped her.
 16. PW3's testimony corroborated that of PW1. He told the court that he asked the Appellant to take him home as they were neighbours. That he got onto the motor bike and shortly they found the Complainant standing at the stage and they picked her as the 2nd pillion passenger. That the Appellant refused to drop her forcing her to jump off. They went a distance and turned back for her. They found that she had sustained some injuries and he prevailed upon the Appellant to take her to hospital which he agreed. They assisted her onto the bike but the rider sped off before PW3 could sit on the bike. That he later went to the home of the Accused as he had switched off his phone and did not find him. He reported the incident the following day at Boito police station.
 17. PW3 did not see the Appellant rape the Complainant. His evidence was however critical as it corroborated the identification of the Appellant as the one who had sped off with the Complainant.
 18. The Complainant testified that the Appellant did not take her to the hospital as agreed but after raping her took her to his relatives' home. That she told the owner of the home that the Appellant had raped her and that is when she alerted her sons and called the police. He was arrested from that very home.
 19. Evidence of penetration was given by PW2 Dr Mutai Nickson who also produced a P3 form, treatment notes and a Post Rape Care Form (PCR) which all accorded his testimony.
 20. For the comfort of the Appellant therefor I would affirm the conviction as having been based on sound and unassailable evidence.
 21. With respect to sentence the trial court enhanced the sentence from the minimum of 10 years to 20 years.
 22. I have looked at the trial proceedings. The record shows that the court delivered judgement and proceeded to mitigation and sentence soon thereafter. Asked to mitigate, the Appellant pleaded for leniency and asked the court to take into account the period he had been in custody.
 23. There was nothing unlawful about the court sentencing the Accused immediately after conviction. It is best practice however for the court to try and appreciate the circumstances of the offender



before sentencing. Other than statements made by the offender, a social inquiry report made by the Probation Officer usually provides the clearest peek into the offender's circumstances. It also provides the views of the victim both of which ought to be taken into consideration in sentencing. It is therefore important even in the face of mandatory sentences for the court to record and take into consideration the mitigation of the offender.

24. The importance of mitigation was underscored by the Supreme court in the case of Francis Karioko Muruatetu & Another vs Republic (2017) eKLR:-

“It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.”

25. The record shows that the Accused pleaded for leniency and for the court to take into account the period he had spent in custody. In this appeal, the Appellant has pleaded for reduction of sentence stating that he was a first offender and had been in pre-trial custody for 1 year and 4 months.
26. I have taken into consideration the legal principle that sentencing was at the discretion of the trial court and that on appeal, the court can only interfere if the trial court acted on wrong principle. See Ogolla s/o Owuor vs. Republic, (1954) EACA 270.
27. In this case the trial court pointed out that the Accused raped the Complainant after she suffered a road traffic accident. This court finds the circumstances of the case aggravating. From the facts of the case, the Complainant jumped off the Appellant's motor bike because the Appellant refused to stop to allow her disembark. The injury she suffered can be said to have been direct result of his refusal to let her disembark and go home. Secondly after finding her injured, he wilfully took her to a bushy area to rape her instead of taking her to hospital for treatment. This court finds such conduct inhumane and callous. I have no hesitation in finding that the Appellant deserved an enhanced sentence.
28. The Appellant has been serving sentence since 27th January 2021 and was in pre-trial custody from 11th October 2019. While he deserved and continues to deserve an enhanced sentence, I shall temper justice with mercy and reduce his sentence from 20 years imprisonment to 15 years imprisonment. I shall also give effect to the provisions of section 333 (2) of the Criminal Procedure Code in consideration of the period spent in pre-trial custody.
29. I order that the Appellant shall serve 15 years' imprisonment deemed to run from 11th October 2019.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 30TH DAY OF OCTOBER, 2024.

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of Mr. Waweru holding brief for Mr. Njeru for the Republic, Appellant present virtually and

Siele (Court Assistant).

