



**Ochwari v Republic (Criminal Appeal E019 of 2024)
[2024] KEHC 14968 (KLR) (26 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14968 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E019 OF 2024
RE ABURILI, J
NOVEMBER 26, 2024**

BETWEEN

JOSEPHAT SIBO OCHWARI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising from the judgment, conviction and sentence in Maseno SPM SOA Case No. 186 of 2019 delivered on 18th March, 2024 by Hon. J.Kimetto, Principal magistrate)

JUDGMENT

1. The appellant herein Josephat SibO OchwarI was charged, with others not before court, of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code.
2. The particulars of the charge were that on the 4th March 2019 at around midnight in Kisumu West sub-county within Kisumu County, whilst armed with dangerous weapons namely; pangas and claw bars jointly with others not before court robbed BCC of her mobile phone make Infinix Hot 5, black in colour worth Kshs. 8,000 and immediately before such robbery wounded the said BCC .
3. The appellant also faced a second charge of gang rape contrary to section 10 of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on the 4th March 2019 at around midnight in Kisumu West sub-county within Kisumu County, the appellant jointly with others not before court intentionally and unlawfully caused his penis to penetrate the vagina and the anus of BKC in turns without her consent.
4. The appellant also faced the alternative charge of committing an indecent act with an adult contrary to section n 11 (a) of the *Sexual Offences Act* No. 3 of 2006.
5. The prosecution called 6 witnesses in support of their case then proceeded to hear the appellant’s sworn testimony.



6. In her judgement, the trial court found the appellant of the offence charged in count 1 of robbery with violence as well as count 2 of gang rape. Subsequently, the trial magistrate sentenced the appellant to serve life imprisonment on count 1 and 15 years imprisonment on count 2.
7. Aggrieved by the conviction and sentence imposed, the appellant filed his petition of appeal dated 9th April 2024 and subsequently filed a supplementary record of appeal dated 3rd July 2024 raising the following grounds of appeal:
 - a. That the trial court erred in both law and facts in admitting the evidence of DNA sampling that was ordered by police constable Kariuki Samson, an officer below the rank of an inspector and relying on unproduced court order. Hence rejection of such evidence pursuant to section 122A, 122D penal code and Article 50 (4) COK 2010.
 - b. That the trial court erred in both law and facts in not making a finding that the court did not comply with section 200 (3) (4) CPC. Hence materially prejudiced the appellant.
 - c. That the trial court erred in both law and facts in convicting the appellant relying on a duplex charge sheet.
 - d. That the trial court erred in both law and facts in not making a finding that direct evidence had absolved the appellant from any wrongdoing and the circumstantial evidence relied on was not corroborated by either direct or another circumstantial evidence.
 - e. That the trial court erred in law and in fact in readily applying section 4 *Evidence Act* to make presumption to convict the appellant on an offence of Robbery with violence c/s 296 (2) basing on the fact that had been displaced by circumstances.
 - f. That the trial court erred in law in not making a finding that PW1 did not prove ownership hence theft not established beyond a reasonable doubt.
 - g. That the trial court erred in law and in fact in not making a finding that life sentence is unconstitutional and manifestly excessive.
8. The appeal was canvassed by way of submissions.

The Appellant's Submissions

9. It was submitted that the police officer who ordered the DNA sampling procedure was below the rank of inspector and this was against the provisions of section 122 (A) and (D) of the Penal Code and was in violation of his rights to a fair trial.
10. The appellant submitted that the convicting magistrate Hon. Kimetto took over the case after it had partly been heard by Hon. Mitei and failed to inform the appellant of his right to re-summon and rehear any witness contrary to the provisions of section 200 (3) of the CPC. Reliance was placed on the case of Richard Charo Mole v Republic [2010] eKLR.
11. It was submitted that the trial court erred in law and in fact in convicting him based on a duplex charge sheet as was held in the case of Mary Waithera Kamau v Republic [2016] eKLR and as such the appellant ought to be acquitted.
12. The appellant submitted that he was absolved from the charges against him as theft or stealing was not proved beyond reasonable doubt. Reliance was placed on the case of Samwel Kariuki Wanjiku v Republic [2019] eKLR.



13. It was submitted that the life sentence meted out on him was unconstitutional and manifestly excessive and further that the trial court failed to consider the time spent in custody as provided in section 333 (2) of the Criminal Procedure Code.
14. The appellant submitted that he never committed the offence and that is why he appealed.

The Respondent's Submissions

15. Mr. Marete for the state made oral submissions opposing the appeal. It was submitted that the offences of gang rape and robbery with violence were proved beyond reasonable doubt. It was submitted that the complainant lost her items, the appellant was armed with a panga and in the company of others when they abducted the complainant and gang raped her.
16. Mr. Marete submitted that penetration was proved through the victim's testimony and further that the DNA analysis showed that the appellant raped the victim. He further submitted that the vaginal swab tested positive for spermatozoa.
17. Mr. Marete submitted that the sentence was lawful.

Analysis & Determination

18. The role of the first appellate court is now well settled as was stated in the case of *Okeno v R* [1977] EALR 32 and later in *Mark Oiruri Mose v R* [2013] eKLR among other many decisions that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.
19. The evidence before the trial court was as follows:
20. PW1, the victim/complainant testified that on the material date, she was at her home sleeping in the company of her friend Lucy at [Particulars Withheld] Hostels within Maseno when she heard commotion in the corridors of the hostel, woke up and turned on the lights. It was her testimony that she heard two bangs on her door and it opened and a tall brown man who wore a navy-blue hood and jungle green cap entered armed with a rod asked her to surrender her phone laptop and money which both Lucy and her did.
21. She testified that the second person, who was short and slightly built wearing a green t-shirt and cap, entered and took away her handbag and a box that contained her jewellery. It was her testimony that the person also had a black bag. She further testified that the third person entered in a black jacket and ordered her to walk out and do as he wanted. The complainant testified that apart from the 3 persons there were 2 more people in the corridor and one outside the gate thus making a total of 6 men.
22. The complainant testified that when they were out of the gate, the 3rd man ordered her to remove her tights and the top dress she was wearing. She testified that the 1st man spoke to the 3rd man who had removed his trousers and the 3rd man then put on his trousers. The complainant testified that the 3rd person who was holding a panga to her neck ordered her to remove her pants which she complied with then another man in the group ordered her to bend over and forcefully had vaginal sex with her. It was her testimony that when he was done, he took the panga from the 3rd person as they changed positions and forcefully had anal sex with her after which the other men took turns raping her both in the vagina and anus till, she fell down unconscious.



23. The complainant testified that the attackers dragged her towards the hostel but when they realised that she had regained consciousness they told her to run to the hostel which was about 250 – 300 meters away from the bush.
24. The complainant testified that she was assisted to her room and later taken to the Maseno University Dispensary by her colleagues and further taken to Chulaimbo Hospital for treatment and examination. She testified that she was also referred to a government chemist where her DNA sample was extracted and that she later took the police to the scene of the incident. It was her testimony that when the suspects were arrested, she was called to an ID parade where she managed to identify the 4th accused who had a scar on the left side of the face.
25. In cross-examination by the appellant, the complainant stated that she was able only to identify one of her assailants but not the appellant. She testified that there were security lights at the scene.
26. PW2 and PW3 who were both students and colleagues to the complainant corroborated her testimony about the attack at the hostel. It was their testimony that the attackers stole from them first before proceeding to the complainant's room. They further testified that the attackers left with her and after sometime, the complainant returned and informed them that she had been raped so they called an ambulance and took her to the clinic. They testified that they did not see the faces of the persons who stole from them.
27. PW4, the investigating officer testified that they received information of the incident on the night of 3rd and 4th March 2019. He testified that on the 4th March 2019 he visited the victim of the gang rape and received some of her exhibits including her night dress, panty and a swab that had been taken from the victim.
28. It was his testimony that they arrested 9 suspects on the 17th March 2019 and that on the 20th March 2019 he escorted the suspects, the complainant and the exhibits recovered to the Government Chemist and also DNA sampling and analysis
29. PW5, Polycarp Luta Kweyu, the government analyst testified that on the 5th March 2019 he received samples of whitish cream panty marked D2, sleeveless grey dress D1, black pair of long trouser tights D3, buccal and vaginal swab from the complainant marked A and B. He testified that on the 20th March 2019 further samples were submitted that included a white cap marked D1, jungle cap marked D2, black cap D3 and buccal swaps for the accused persons. It was his testimony that he was requested to indicate if there was any genetic relation between the earlier samples and the buccal samples submitted.
30. PW5 testified that he concluded that the DNA profile generated from the panty item D2 and high vaginal swab item A was a mixed profile of the complainant and other accused persons including the appellant. He produced the report as P Exhibit 5b and the exhibit memo as P Exhibit 5a.
31. PW6, a clinician at Chulaimbo Hospital testified and produced a PRC form and a P3 form concerning the complainant's examination on the 4th March 2019. It was her testimony that the genital examination revealed that the outer genitalia were intact, that there were signs of anal and vaginal penetration which was evident by inflammation on both orifices. She testified that there was moderate gapping on the anus and a whitish discharge from the vagina and that the hymen was absent. PW6 testified that on HVS (High Vaginal Swap) there was a presence of spermatozoa as well as red blood cells, epithelial cells and pus cells seen with the degree of injury assessed as grievous harm. The DNA profiles matched the DNA of the complainant and the accused persons, including the appellant herein who was the third accused.



32. Placed on his defence, the appellant denied committing the offence and said that he was shocked to learn the charges laid against him in court. He testified that before his arrest he sold changáa and bhang when he was arrested. In cross-examination the appellant stated that he did not know why and how his DNA was found in the complainant's specimen. He testified that the police decided to implicate him in the crime.
33. I have considered the appellant's grounds of appeal, the evidence adduced before the trial court as well as the submissions by both the appellant who is self-represented and the prosecution counsel appearing for the Respondent State. I find the following issues for determination:
- a. Whether the prosecution's case against the appellant herein was proved beyond reasonable doubt and
 - b. Whether the sentence imposed on the appellant was excessive and harsh or unconstitutional.
34. Robbery with violence is an offence created under Sections 295 and 296(2) of the Penal Code as follows:
- “295. 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.
- 296(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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”
35. In *Jeremiah Oloo Odira v Republic* [2018] eKLR the Court condensed the aforementioned sections and elaborated on the offence of robbery with violence as follows:
- “Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence.
- On the other hand, the offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -
- i. The offender is armed with any dangerous or offensive weapon or instrument, or
 - ii. The offender is in the company of one or more other person or persons, or
 - iii. The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person” (See *Olouch v Republic* (1985) KLR)



36. The appellant was also charged with the offence of gang rape. Section 10 of the *Sexual Offences Act* which provide as follows: -

“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 the fifteen years but which may be enhanced to imprisonment to life.”

37. Elements of the offence of gang rape or gang defilement are in Section 10 of the *Sexual Offences Act* are:

- a. Unlawful sexual act committed in association with another or others or
- b. Being in the company of another or others who commit the offence with common intention of committing the offence.

38. For gang rape to be proved besides the above, the three ingredients of defilement being age of complainant, penetration and identification of assailant must be proved.

39. In the instant case, the complainant testified that she was attacked by a group of attackers who broke into her hostel, whilst armed with rods and pangas, stole from her and other students in the dorm then proceeded to rape her. The complainant admitted that she did not see the appellant during the incident. Further, during the police identification parade that was carried out to identify the arrested suspects, the complainant did not identify the appellant but another person on the parade who had a scar. PW1, PW2 and PW3 all testified that the attackers stole various things from them at the hostel. However, neither PW2 nor PW3 could identify the appellant as one of the attackers on the night of the incident.

40. The complainant admitted that she could not identify the appellant from the night of the incident but the evidence adduced by PW5, the government analyst, identified the appellant’s DNA as one of the DNA’s retrieved from the complainant’s pant.

41. The fact of the complainant’s rape was also discernible not only from the complainant’s testimony but also from the evidence of PW6 who produced the PRC and P3 form that showed there were signs of anal and vaginal penetration which was evident by inflammation on both orifices, gapping on the anus and a whitish discharge from the vagina and that the hymen was absent.

42. In my view, the evidence provided by the prosecution did not prove that the appellant was one of the parties engaged in robbery with violence against the complainant. None of the witnesses called by the prosecution identified the appellant. None of the alleged stolen goods were recovered in the possession of the appellant.

43. That notwithstanding, the appellant submitted that the charge was duplicitous for citing Section 295 and 296 (2) of the Penal code. Section 295 is a definition section; it contains the ingredients of robbery with violence and the issues of section 295 and 296 were set out in the Court of Appeal in *Johana Ndungu v Republic* [1996] eKLR. The Court stated:

“In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the Penal Code. The essential ingredient of robbery under section 295 is the use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients



constituting robbery is pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:

1. If the offender is armed with any dangerous or offensive weapon or instrument,
or
2. If he is in company with one or more other person or persons, or
3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes, or uses any other violence to any person.”

44. Further, in the case of *Joseph Onyango Owuor & Cliff Ochieng Oduor vs R [2010] eKLR (Criminal Appeal No 353 of 2008)* The Court stated as follows:-

“Mr. Musomba submitted that unless the afore quoted sub-section (section 296) is read with section 295 of the Penal Code, then reliance on section 296(2), above, without more will not disclose the commission of an offence. Section 295 of the Penal Code defines the offence of robbery. Section 296(1) and 292(2) of the Penal Code, have a common marginal note, namely “punishment of robbery. ...”

45. Section 295, does not deal with the degree of violence being merely a definition section... Sections 296 (1) and 296 (2) of the Penal Code deals with the specific degrees of the offence of robbery and have been framed as such.

46. The charge sheet herein read as follows:-

“Charge: Robbery With Violence Contrary To Section 295 As Read With Section 296 (2) Of The Penal Code.

Particulars Of Offence:

On the 4th March 2019 at around midnight at xxxxx Township in Kisumu West sub-county within Kisumu County, whilst armed with dangerous weapons namely; pangas and claw bars jointly with others not before court robbed Birir CC of her mobile phone make Infinix Hot 5, black in colour worth Kshs. 8,000 and immediately before such robbery wounded the said BCC .”

47. In the case of *Paul Katana Njuguna vs Republic [2016] eKLR* the court observed as follows: -

“In arguing the appeal, Mr. Nyaga submitted that the charge against the appellant was duplex as he was charged under both Sections 295 and 296 (2) of the Penal Code. Referring to *Simon Materu Munyaru -v- Republic, [2007] eKLR*, quoted in *Joseph Njuguna Mwaura & 2 Others -v- Republic, [2013], eKLR*, counsel submitted that it was wrong to charge the appellant with the offence of robbery under Section 295 as read with Section 296 (2), as that rendered the charge duplex and created a confusion. ... In regard to the alleged defect in the charge, Mr. Omirera submitted that Section 295 of the Penal Code was simply a definition section, and although charging an accused under both Sections 295 and 296 (2) was undesirable, doing so did not amount to a fatal defect in the prosecution’s case, as the same could easily be cured by invoking Section 382 of the Penal Code.”

48. In the instant appeal, the theft involved the use of crude weapons. I find that quoting section 295 in the charge sheet would not occasion an injustice. The appellant was aware of the charges facing him during



the trial process, he failed to raise the issue of defective charge sheet at trial and proceeded to cross-examine the witnesses accordingly. This is a clear indication that no confusion during the trial and thus not fatally defective. It is clear from the particulars of the charge quoted above that they support the offence of robbery with violence.

49. Secondly, the appellant urged the court to find that the DNA evidence was obtained contrary to sections 122A of the Penal Code which provides as follows:

122A

- (1) A police officer of or above the rank of inspector may by order in writing require a person suspected of having committed a serious offence to undergo a DNA sampling procedure if there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence.
- (2) In this section - “DNA sampling procedure” means a procedure, carried out by a medical practitioner, consisting of -
 - (a) the taking of a sample of saliva or a sample by buccal swab;
 - (b) the taking of a sample of blood;
 - (c) the taking of a sample of hair from the head or underarm; or
 - (d) the taking of a sample from a fingernail or toenail or from under the nail,”

122B ...

122C.

- (1) Nothing in section 122A shall be construed as preventing a suspect from undergoing a procedure by consent, without any order having been made:
Provided that every such consent shall be recorded in writing signed by the person giving the consent.
- (2) Such consent may, where the suspect is a child or an incapable person, be given by the suspect’s parent or guardian.

122D. The results of any test or analysis carried out on a sample obtained from a DNA sampling procedure within the meaning of section 122A shall not be admissible in evidence at the request of the prosecution in any proceedings against the suspect unless an order under section 122A or a consent under 122C is first proven to have been made or given.

50. Section 122D of the Penal Code is clear that the results of the DNA analysis shall not be admissible in evidence unless the prosecution proves that either the order for collecting the samples was given or that the accused consented to the test.

51. From the evidence, PW4, the investigating officer testified that he proceeded with the appellant and his co-accused to the government chemist with a court order where their samples were extracted by the officer therein. The aforementioned order was not presented before the trial court and further the investigating officer himself was of the rank of Police constable. The statutory requirement is that the order must be made by, “an officer of or above the rank of inspector” From the aforementioned evidence, the provisions of section 122A of the Penal Code were not complied with.



52. The prosecution was also entitled to rely of the consent of the appellant. The appellant, in his defence, testified that he did not know how and why his DNA was found in the complainant's specimen. The appellant submitted that he was arrested for having chang'aa and bhang which he used to sell during which time of arrest he was beaten and sustained injuries that affected his hearing.
53. The prosecution therefore failed to comply with the mandatory provisions of section 112A and C of the Penal Code hence and by reason of section 122D of the Penal Code the evidence connecting the appellant to the robbery incident as well as the gang rape was inadmissible.
54. Since the DNA evidence was the only evidence connecting the appellant to the robbery and rape charges there being no other independent evidence to link the appellant to the felonious act, the inevitable yet painful result is that I must allow the appeal. The appeal is allowed, the conviction and sentence are quashed. The appellant is set free unless otherwise lawfully held.
55. I hope that this judgment will be read by the investigating officers who allow the officers below the rank of inspector of police to purport to issue orders for extraction of DNA samples from accused persons for submission to the Government Chemist for analysis and without the consent of the accused persons which must be in writing.
56. Additionally, the Government Analyst who play a very critical role in the administration of criminal justice should at all-times be sensitized to reject any request or memo with exhibits for DNA sampling where the memo or accused person is prepared by and or accompanied by a police officer below the rank of Inspector of police.
57. Failure to comply with the law in criminal cases is not a procedural technicality which is curable under Article 159 of *the Constitution*. Procedure is as good as substantive justice in criminal law where the accused person is the favourite child and greatest beneficiary of the bill of rights, the right to a fair trial being guaranteed in a very wide manner, which right cannot be limited.
58. Such failure, as was in the instant appeal, causes an injustice to the complainant, while the accused person who would otherwise be held to account for his heinous crime walks away laughing loudest and may as well reoffend knowing that he will have a second bite at the cherry and get away with crime. As a result, victims of such heinous crimes never feel that justice was done.
59. For the above reasons, it is important that I direct that this judgment be served upon the office of Director of Public prosecutions who sanction prosecution of suspects in the midst of glaring legal flaws identified in this case and the Directorate of Criminal Investigations who work so hard to gather evidence against suspects of crimes only for them to miss out on the legal requirements and end up with such results as is the case herein.
60. This file is closed. The lower court file to be returned forthwith.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 26TH DAY OF NOVEMBER, 2024

R.E. ABURILI

JUDGE

