Onyango v Republic (Criminal Appeal E026 of 2024)
[2024] KEHC 14985 (KLR) (26 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14985 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E026 OF 2024

RE ABURILI, J

NOVEMBER 26, 2024

BETWEEN

NOAH OTIENO ONYANGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the judgment, conviction and sentence in Nyando SPM SOA Case No. E019 of 2023 delivered on 18th April, 2024 by Hon. J.M.Wekesa, SPM)

JUDGMENT

1. The appellant herein Noah Otieno Onyango was charged, in the first count, with the offence of rape contrary to section 3 (1) (a) (b) (3) of the *Sexual Offences Act* No. 3 of 2006 the particulars being that on the 18th May 2023 at about 2.30pm at [Particulars Withheld] within Kisumu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MAO without her consent.

2. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*.

3. In the second count, the appellant was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code the particulars being that on the 18th May 2023 at about 2.30pm at [Particulars Withheld] within Kisumu County, the appellant robbed MAO of Kshs. 700 and three mobile phones and immediately before or immediately after the time of such robbery used actual violence to the said MAO

4. The appellant also faced the alternative charge of handling stolen goods contrary to section 322 (1) (2) of the Penal Code.

5. The prosecution called five (5) witnesses in an effort to prove their case at the end of which the appellant was put on his defence where the appellant gave an unsworn testimony.

6. In his judgement, the trial magistrate found that the prosecution had proved its case against the appellant beyond reasonable doubt on all charges brought forth against him. He sentenced the appellant to 10 years imprisonment on count one and life imprisonment for count two.

7. Aggrieved by the conviction and sentence imposed, the appellant filed his petition of appeal dated 2nd May 2024 raising the following grounds of appeal;

    1. That the trial magistrate court erred in law and facts by not considering the circumstances surrounding the evidence of the appellant testimonies.

    2. That the learned trial magistrate erred both in law and facts by sentencing the appellant on the contradictory and insufficient evidence which is not enough to sustain conviction.

    3. That the learned trial magistrate erred in law and facts by convicting the appellant on the charge which is full of fabrications that the particulars of the charge and particulars of the offence were different.

    4. That the learned trial magistrate made error in law and fact when sentencing the appellant on mandatory minimum sentence which is so harsh and excessive.

    5. That the trial court erred in law and facts by fail to give free and fair trial under article 50 of *the constitution* of Kenya 2010.

    6. That the trial magistrate made error in law and fact by proceeding to convict and sentencing the appellant life sentence imprisonment without considering the age of the complainant who was an adult.

    7. That the trial magistrate made also error in law and fact in not making a findings that the ingredients of this offence were not proved as required standard.

8. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

9. The appellant submitted that his advocate did not file submissions and should have asked questions on the three phones. It was his submission that he was framed over a land dispute and that he was not found with the phone.

10. The appellant submitted that he only knew about the rape case and that it was what took him to court.

The Respondent's Submissions

11. Mr. Marete Principal prosecution Counsel for the State made oral submissions opposing the appeal both on conviction and sentence. It was his submission that rape was proved as there was evidence supporting penetration and lack of consent. Mr. Marete testified that the complainant was lured into the forest, threatened and raped. That the PRC report showed semen and discharge.

12. On robbery with violence, Mr. Marete submitted that 3 phones were recovered from the appellant and produced as exhibits and that the complainant saw and identified the appellant,

13. Mr. Marete submitted that the sentence was lawful on both counts although life imprisonment is not defined.

Analysis & Determination

14. The duty of the first appellate court is 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.

15. The evidence before the trial court was as follows, in brief: The complainant testified as PW1. It was her testimony that she works with Mkopa. She testified that on the 17.5.2023 she was on her way to Kendu Bay and on arrival saw the appellant who beckoned her to him asking what phone she had. The complainant testified that she informed the appellant of the phones she had and their relative prices after which the appellant asked for her number saying he would call her when he was ready.

16. The complainant testified that later in the evening the appellant called her with an unknown number and introduced himself again stating that they should meet at the bridge but the appellant was not there but he later directed her to his position at Mouna area. The complainant testified that he finally met the appellant and that she had two phones and that the appellant picked the Nokia C31 and wanted to pay with cash but the complainant refused stating that she only could receive money through paybill. The complainant testified that the appellant eventually led her towards his home in an effort to retrieve his ID card but on reaching the forest, the appellant threatened to kill her if she screamed like.

17. The complainant testified that the appellant threatened to poke her eyes off with four porcupine arrows. She testified that the appellant told her to remove her clothes and proceeded to rape her and then stole her phones and Mkopa bag after which the appellant fled. She testified that she started to scream and an individual named Dan approached her and inquired as to what had happened after which he went after the accused recovered the stolen things and took the appellant to the police. She reiterated her testimony in cross-examination.

18. PW2 COG testified that he spotted that appellant telling the complainant to follow him to another point and thought they were just talking. He testified that later on he saw one D with the complainant who had informed Dan of what the appellant had done to her. It was his testimony that together with Dan they were able to confront and arrest the appellant and subsequently together with others took him to the Police Station. In cross-examination PW2 stated that he knew the complainant well.

19. PW3 DG testified that on the 18.5.2023 a boy, whom he later identified as the appellant, was brought into his home by two boys and a girl on allegations of having raped the girl. He testified that the appellant denied the allegations and that they later took him to the police station. He further testified that the appellant was found with two phones, porcupine thorns and a black bag.

20. PW4 David Materi, a Clinical Officer at Pap Onditi Nyakach Sub-county Hospital produced P3 form as P Ex 8. It was his testimony that on examination, 8 hours after the incident, there were lacerations around the vaginal opening with faeces at the perennial region, no spermatozoa but epithelial cells of around 10 or 20 signifying friction. He concluded that there was evidence of vaginal penetration. He testified that treatment notes from Kodigo Health Centre and Nyakach Hospital also confirmed his conclusions as well as a PRC form which he produced as P Ex 9,6 and 7 respectively.

21. PW5, PC Corporal Charles Oyoo testified that he was the investigating officer. He corroborated the complainant's testimony and further stated that the appellant was arrested by villagers and brought to the police station and that he was found with three phones and a black bag as well as porcupine thorns.

22. In his defence, the appellant gave a sworn testimony denying committing the offence and testified that he was framed by one Dcan. He testified that he knew he was in court for the charges of rape and robbery with violence.

23. 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:

    I. whether the prosecution proved beyond reasonable doubt, all elements of the offence of rape and of robbery with violence against the appellant to warrant his conviction; and

    II. Whether the sentences imposed were harsh and excessive to warrant interference by this court.

24. On the first issue, the appellant was charged with the offence of rape contrary to section 3 (1) (a) (b) (3) of the *Sexual Offences Act* No. 3 of 2006 as well as the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

25. The statutory definition of rape is in section 3 (1) of the *Sexual Offences Act*

> "(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. The main ingredients of the offence of rape created in section 3 (1) of the *Sexual Offences Act* include intentional and unlawful penetration of the genital organ of one person by another, coupled with the absence of consent in the case of Republic v Oyier[1985] KLR 353 the Court of Appeal held that:

> "1. The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.
>
> 2. To prove the mental element required in rape, the prosecution had to prove 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.
>
> 3. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact."

27. The complainant did not consent to the sexual act. She testified that the appellant led her into the forest, forcefully, he threatened her using porcupine thorns and he threatened to use them to pluck out her eyes; that he ordered her to undress then raped her until satisfaction after which he left, despite her pleas that she had undergone an operation and was barred from having sex. Her testimony was corroborated by evidence of the Clinical Officer who examined her and confirmed that she had

lacerations around the vaginal opening with faeces at the perennial region, epithelial cells of around 10 or 20 signifying friction thus evidencing penetration.

28. I am therefore persuaded that the prosecution proved their case against the appellant on this charge of rape.

29. As regards, the charge of robbery with violence, the said offence is contained in 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 Dgerous 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."

30. In Jeremiah Oloo Odira v Republic [2018] eKLR, the Learned Judge captured 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 Dgerous 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)

31. Based on the evidence of PW1, the complainant, as corroborated by PW2 and PW3 who gave a detailed recollection of what had happened on that day, it is clear that the appellant was the individual who threatened then raped the complainant and then stole the phones which she had as well as the black bag in which she was carrying them all which were recovered from him when he was initially arrested by PW2 and PW3. It is my considered view that the appellant was positively identified by PW1, PW2 and PW3.

32. I am unable to find any material contradictions or inconsistencies in the evidence presented by the prosecution to negate the appellant's conviction on both charges. I am satisfied that the prosecution proved beyond reasonable doubt its case against the appellant on both charges brought against the appellant

33. Consequently, the appeal on conviction fails.

34. As regards sentence, section 3 (3) of the Sexual Offence Act prescribes the penalty for the offence, section 3 (3) of the *Sexual Offences Act* states as follows;

> " A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life."

35. The appellant was sentenced to serve 10 years' imprisonment under this charge. Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The discretion is however limited to the statutory minimum and maximum penalty prescribed for a particular offence.

36. In the case of Shadrack Kipchoge Kogo v RepublicCriminal Appeal No. 253 of 2003(Eldoret), the Court of Appeal stated as follows:

> " Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"

37. Similarly, in the case of Wanjema v Republic (1971) E.A. 493 the court stated as follows:

> " An appellate court should not interfere with the discretion which a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into consideration some immaterial fact, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."

38. The penalty for the offence of robbery with violence is death. The appellant herein was sentenced to life imprisonment. Death sentence is still lawful in Kenya, and may be imposed where circumstances so deserve. It has been observed that death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder (see Prof. Ngugi J in James Kariuki Wagana vs Republic [2018] eKLR); say, where excessive or brutal force has been employed, or offence committed in most bizarre manner, or in circumstances which expose many to Dger or injury or death.

39. In the case before me, all the ingredients of robbery with violence have been met. The appellant robbed the complainants, and in the course of the robbery, lethal force was used, and also he was armed with a Dgerous weapon, the four porcupine thorns which he used to threaten the complainant and further he raped the Complainant.

40. The appellant was sentenced to life imprisonment which I find that the same is lawful given that nothing has been shown that the trial court acted upon wrong principles or overlooked some material factors or considered irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle [See Shadrack Kipkoech Kogo v R., Wilson Waitegei v Republic [2021] eKLR]. That sentence is lawful and not unconstitutional. see Republic v Joshua Gichuki Mwangi[2024] e KLR.

41. In the case of Joseph Ochieng Osuga v Republic [2021] eKLR this court stated that the power to interfere with a sentence imposed by the trial court is limited by precedent except where certain

conditions are met. This court cited the Court of Appeal in Bernard Kimani Gacheru v Republic [2002] eKLR where it was stated 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."

42. Bearing the above holding and having in mind the circumstances of this case, the question is whether there is any lawful reason to interfere with the discretion of the trial court in passing sentence.

43. The principles upon which an appellate court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of Ogolla s/o Owuor vs R, (1954) EACA 270 where the Court of Appeal stated as follows:

> " The court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R v Shershowsky (1912) CCA 28TLR 263)."

44. In the case of Wanjema v R [1971] EA 493, 494, the court held that the appellate court is entitled to interfere with the sentencing discretion of the trial court in view of plain error of omnibus sentence and the illegality of the sentence.

45. In another persuasive decision Gikonyo J in Paul Ndung'u Njoroge v Republic [2021] e KLR considered a long term of imprisonment as appropriate where the violence did not cause death or grievous harm. In this case the ingredients of the offence of robbery with injury inflicted was grievous harm. The trial magistrate after considering the appellant's mitigation proceeded to sentence the appellant to life imprisonment.

46. It is my finding that the discretion of the trial magistrate was unfettered. The current jurisprudence is that though the maximum penalty for robbery with violence is death, the court has the discretion to impose any other penalty based on the circumstances of the case. The trial magistrate's hand was not tied as there was room for the exercise of discretion which she did.

47. In the circumstances of this case, life sentence is appropriate sentence. I uphold the trial court's sentence on the same.

48. The upshot of the above is that I find that this appeal lacks merit. It is hereby dismissed.

49. The lower court file to be returned forthwith with copy of judgment via email.

50. This file is closed.

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

R.E. ABURILI

JUDGE