



**Ogonji v Republic (Criminal Appeal E062 of 2022)  
[2023] KEHC 19400 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19400 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL APPEAL E062 OF 2022  
RE ABURILI, J  
JUNE 29, 2023**

**BETWEEN**

**PAUL INCE OGOJNI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal against the conviction and sentence by the Hon. R.M. Oanda on the 2.12.2022 in the Senior Principal Magistrate's Court at Winam in Sexual Offences Case No. E029 of 2021)*

**JUDGMENT**

**Introduction**

1. Paul Ince Ogonji, the appellant herein, filed this appeal against the conviction and sentence for rape contrary to section 3 (1) (a) (b) 3 of the [Sexual Offences Act](#) of 2006. It was alleged that on the March 13, 2021 at Kondele area in Kisumu Central sub-county within Kisumu County, he intentionally and unlawfully caused his penis to penetrate the vagina of VW without her consent. The appellant also faced the alternative charge of committing an indecent act with an adult contrary to section 11 (a) of the [Sexual Offences Act](#) No 3 of 2006.
2. The prosecution called 4 witnesses in support of its case which was proved beyond reasonable doubt and the appellant was found guilty and sentenced to serve 10 years' imprisonment.
3. Aggrieved by the trial court's decision, the appellant filed the instant appeal vide a Petition of Appeal dated December 8, 2022 and had the same filed in court on the December 14, 2022. The appellant raised the following grounds of appeal;
  - i. That the learned trial magistrate erred in law and facts by finding a conviction on unsubstantiated pieces of evidence thereby arriving at a decision which was at variance with the weight of evidence on record.



- ii. The decision or judgement and conviction of the learned trial magistrate complained of was arrived at without giving or appreciating the facts that the elements of proving lack of consent was lacking in the circumstances of the case.
- iii. The learned trial magistrate failed to appraise himself to the fact that proof beyond any reasonable doubt was not achieved on the parts of lack of consent and what caused the state of unconsciousness thereby basing his conviction on mere contrary to the rules of procedure.
- iv. The learned trial magistrate based his conviction on mere perception and ill-will by disregarding the proved elements of consent.
- v. The learned trial magistrate failed to appreciate that it was not safe to base a conviction on evidence marred with contradictions and serious inconsistency.
- vi. The learned trial magistrate erred in law and fact by basing his conviction on exaggerated unreasonable and unbelievable medical evidence.
- vii. That failure by the trial court to give as part of the sentence the period already spent in custody violated the appellant's rights to equal protection and benefits of the law hence should be given by the instant court.
- viii. The appellant as to be supplied with subordinate court proceedings to put forward further grounds hereof and to be present at the time and place of hearing of the instant appeal.

4. The parties filed submissions to dispose of the appeal.

### **The Appellant's Submissions**

- 5. The appellant submitted that the trial court erred in law and fact in appreciating the evidence of no consent given by a single witness uncorroborated contrary to section 124 of the *Evidence Act* and further that the trial court did not warn itself of the dangers of acting on such uncorroborated testimony.
- 6. It was submitted that the trial court erred in law and in fact in not making a finding that the minimum mandatory nature of sentences under section 3 (1) (a) (b) 3 of the *Sexual Offences Act* and was unconstitutional. He further submitted that he was entitled to the least severe sentence in pursuant to Article 50 (2) (p), 24 (I, e), section 26 (2) of the *Penal Code* and provision 333 (2) of the *Criminal Procedure Code*. Reliance was placed on the case of *Eddwin Wachira & 9 others* Petition No 97 of 2021.
- 7. The appellant submitted that he was a young man of twenty-three years who was a 2<sup>nd</sup> year University student at Maseno University at the time of the incident and the complainant was his longtime lover for three years who hatched the case after their love turned sour. It was his submission that he was an orphan whose education depended on handouts.
- 8. It was his submission that the sentence of 10 years was manifestly excessive, cruel, harsh and not proportionate to the circumstances of the case and thus it was expedient for this court to reduce the sentence.



## The Respondent's Submissions

9. On behalf of the respondent, it was submitted that the complainant did not consent to the sexual act as the appellant had threatened her, undressed her and raped her before and after intoxication.
10. It was submitted that penetration was proven by medical evidence and corroborated by the complainant's testimony. Reliance was placed on the cases of *Charles Wamukoya v Republic* Criminal Appeal No 72 of 2013 and that of *Alex Chemwotei Sakong v Republic* [2018] eKLR.
11. It was submitted that the appellant did not raise the issue of identification in the court of first instance and was thus positively identified by the complainant. The respondent relied on the case of *Anjononi & Others v Republic* [1980] KLR 59 where the Court of Appeal held inter alia that recognition of an assailant was more satisfactory, reassuring and more reliable than identification of a stranger as it depended upon the personal knowledge of the assailant.
12. On the sentence meted out on the appellant it was submitted that the same was provided for under the provisions of section 3 (1)(a)(b) (3a) of the *Sexual Offences Act*.

## Role of the Court

13. This being the first Appeal, this Court has the duty to re-evaluate and analyze the evidence in detail and come up with its own independent conclusions while bearing in mind that it neither saw the witnesses nor heard the evidence when the parties were testifying so as to see their demeanour. The said duty was espoused by the Court of Appeal in the case of *Mark Oiruri Mose -vs- Republic* [2013] eKLR, in the following words: -

“...It has been said over and over again that the first appellate court has the duty to revisit the evidence tendered before the trial court, afresh analyse it, evaluate 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 demeanor of the witnesses and hearing them give evidence and to give allowance for that...”

## Evidence at the Trial Court

14. VW, the complainant testified as PW1 that she met the appellant on the March 12, 2021 and she gave him her contacts. She testified that on the March 13, 2021, she was at Empire Club in Lolwe when she received a call from the appellant telling her to drink. It was her testimony the appellant came with two motorcycles and she used one with him and the appellant dropped her off at Gugt Guest House but then called her again telling her to proceed to Entebbe Building off Kondele to hang out which she did.
15. The complainant testified that she had a drink then went off and woke up and found the appellant on top of her having sex with her and that he told her that he wanted to teach her a lesson. PW1 testified that the appellant slapped her and prevented her from calling a friend. She further testified that the appellant threatened her from saying anything or else he would kill her and later dropped her at the house. The complainant testified that she called DNM and they went to the police station and later to Jaramogi Oginga Odinga Teaching and Referral Hospital.
16. In cross-examination, the complainant stated how she took 3 sips of the drink at Entebbe and blacked out. She reiterated that she woke up and found the appellant in the act.
17. PW2 DNM testified that she stayed at Maseno and was a student at Maseno University. She testified that on the March 14, 2021 at 6.30am the complainant texted her that she had been raped so she



- asked her to go to her place. It was her testimony that they went to the hospital at Russia where the complainant was examined and given medication after which they proceeded to Kondele Police Station and reported the incident and were issued with a P3 form.
18. In cross-examination, PW2 stated that when the complainant came to her home she was traumatized and did not tell her much other than one of the names of her accuser was Paul. She stated that she was not present at the party and never witnessed the incident.
  19. PW3 No 223298 PC Christabel Onyango testified that on the March 15, 2021 the complainant reported the rape incident at Kondele Police Station reiterating the facts of the rape as testified by the complainant. She testified that nothing was recovered from the scene. In cross-examination PW3 denied that the curfew orders were applicable at the time of the incident.
  20. PW4 Dr Ombok Lucy from JOOTRH testified that she filled the P3 form for the complainant who presented at the institution alleging to have been raped. It was her testimony that on genitalia examination, the complainant had normal external genitalia with broken hymen, was experiencing pain while urinating and had bloody discharge. PW4 produced the P3 form as PEX2. It was her testimony that the PRC form was filled by her colleague Esther Mate and had the same results as the P3 form specifically that there were bruises on the complainant's vagina with blood stains and that the Hymen was absent. She produced the PRC form as PEX1.
  21. In cross-examination, PW4 stated that the complainant when examined stated that the perpetrator was not known to her. She further testified that the complainant came to the hospital after changing her clothes. PW4 further stated that the complainant had already given birth and the hymen was absent and that a high vaginal swab was done and various epithelial cells seen. It was her testimony in cross-examination that the bloody bruises were as a result of the bruises and not menses.
  22. In his defence, the appellant gave a sworn testimony that he met the complainant in 2019 and after exchanging contacts began a relationship. He further testified that in November they spent a night at a guest house, Triple Hotel and had sex that night and the following day they went to a fashion boutique in town where he bought her some items as evidenced by the receipt adduced as DEX2.
  23. It was his testimony that later in the year 2021 he met the complainant with her friends Grace and Faith in town when they had lunch together and later took drinks together. He testified that on the material date of the incident, the complainant suggested that they go somewhere for a night so they proceeded to Entebbe Guest House where they complainant's phone went missing and she asked him to get it or buy a new one.
  24. The appellant testified that he requested the complainant for a week to get the phone. It was his testimony that the complainant later on requested for money so that she could take her sick child to hospital but he never had any. He testified that the complainant did not understand him and the relationship ended there. It was his testimony that the complainant threatened him that he would rot but he never understood till when he was arrested on the April 3, 2021.
  25. The appellant testified that while in custody the complainant demanded for Kshs 40,000 and as he did not have the money, he was charged in court. In cross-examination, the appellant stated that he and the complainant were in a relationship since 2018 and that on the March 13, 2021, he was at Empire. He further stated that the complainant lied about the drink and that the case against him was about the money and the talk about the complainant's son.



## Analysis and Determination

26. I have considered the grounds of appeal, the submissions by the appellant and the prosecution counsel against the evidence adduced at the trial court. In the present case, the appellant was charged with the offence of rape, 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.”

27. 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.”

28. The issues for determination in this appeal are follows;

- (i) Whether the complainant consented to the sexual act.
- (ii) Whether penetration was proved.
- (iii) Whether the appellant was positively identified.
- (iv) Whether the sentence was excessive.

29. As regards consent, the complainant testified that she was drinking with the complainant and after a few sips, she blacked out only to wake up with the appellant on top of her, raping her. She testified that the appellant slapped her and denied her an opportunity to call her friend. She further testified that the appellant threatened to kill her if she revealed the incident to anyone.

30. In his defence, the appellant denied committing the offence but in cross-examination, he admitted that he was at Empire. In my view, the appellant’s defence was a mere denial. The complainant did not consent to the sexual act. Her testimony was corroborated by evidence of PW4 Dr Ombok Lucy



who testified that on examination of the complainant's genitalia, she found that the complainant had multiple bruises on her vagina that led her to experiencing pain while urinating and having a bloody discharge. I find that the appellant spiked the drink in order to take advantage of the complainant and rape her. I find that the complainant did not consent to have sex with the appellant. The the appellant, who was in her company spiked her drink and proceeded to rape the complainant. I thus find that the complainant did not consent to the sexual act.

31. On the issue of identification, I find that the Appellant was well known to the complainant as from both the complainant's and the complainant's testimonies, they had been in a relationship for a while. In the case of *Anjononi & others v Republic* [1980] KLR 59 the Court of Appeal held that:

“...recognition of an assailant is more satisfactory, more reassuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another.”

32. In this case, I find that the identification of the appellant was by recognition of a person who was not a stranger. The appellant and complainant were known to each other since 2019 hence there was no mistaken identity.

33. On the element of penetration, I find that there is evidence of penetration. The testimony of the complainant was corroborated by that of PW4, the Doctor who examined her and confirmed penetration. Her genitalia were bruised, bloody, epithelial cells were seen and the complainant was in pain.

34. The appellant further alleged that his conviction was based on evidence that contained contradictions and inconsistencies. The appellant however did not point out said contradictions or inconsistencies. It is not enough to alleged that there were contradictions in the evidence and leave it there. The appellant was under a duty to pin point what contradictions exist and their material effect on his conviction. I find no such contradictions in the evidence of the prosecution. In my view, the evidence adduced by the prosecution corroborated each other.

35. The Court of Appeal addressed itself on the issues of contradictions in the case of *Richard Munene v Republic* [2018] eKLR stated as follows:

“It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”

36. Accordingly, there was no material contradiction in the evidence on record as would prejudice the appellant. Consequently, I find that this ground fails.

37. Taking all the above into consideration, I find that the prosecution proved beyond reasonable doubt that it was the appellant who raped the complainant herein. I therefore find no reason to interfere with the trial court's finding and holding on conviction. I uphold it.

38. As to whether the sentence meted out on the appellant was harsh, the punishment prescribed for the offence of rape in section 3 (3) of the *Sexual Offences Act* is a term which shall not be less than ten years but which may be enhanced to imprisonment for life.



39. In his mitigation, the appellant prayed for a non-custodial sentence and further pleaded that the time spent in custody be considered. He also asked the court to consider his studies.
40. After considering the mitigations and the fact that the appellant was a first offender, the trial magistrate sentenced the appellant to serve 10 years' imprisonment stating that he had taken into consideration the 2 years that the appellant had been in custody.
41. Sentencing is in 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.
42. In the case of *Shadrack Kipchoge Kogo v Republic* Criminal 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 that the sentence was so harsh and excessive that an error in principle must be inferred.”
43. Similarly, in *Wanjema v Republic* [1971] E.A. 493 the court said:
- “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.”
44. I find that the sentence of ten years' imprisonment that was meted herein was lawful and not harsh, considering the circumstance under which the offence of rape was committed, with the appellant spiking the complainant's drink in order to take advantage of her state of mind and raping her.
45. The appellant further submitted and urged the court to have his sentence comply with section 333 (2) of the *Criminal Procedure Code*. Section 333(2) of the *Criminal Procedure Code* provides that:
- “Subject to the provisions of Section 38 of the *Penal Code*, 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 sub section (1) has prior, to such sentence shall take account of the period spent in custody.”
46. It is clear from the above proviso that the law requires courts to consider the period the convict spent in custody in sentencing.
47. In the instant case, it is not in doubt that the appellant was in custody during the entire period of his trial, a period that the trial court noted was 2 years. The trial court did take this period into consideration but seemed not to be clear. It was not evident whether the 10-year sentence included the 2 years that the appellant had been in custody or not.
48. Therefore, in compliance with Section 333 (2) of the *Criminal Procedure Code*, I hereby order that the sentence of 10-years imprisonment shall commence from the day of arrest that is the April 3, 2021.
49. This file is closed.



**DATED, SIGNED AND DELIVERED AT KISUMU THIS 29<sup>TH</sup> DAY OF JUNE, 2023**

**R.E. ABURILI**

**JUDGE**

