



REPUBLIC OF KENYA



**Khalwale v Director of Public Prosecution (Criminal Appeal E088 of 2021)
[2023] KEHC 23331 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23331 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E088 OF 2021
A. ONG'INJO, J
SEPTEMBER 28, 2023**

BETWEEN

ALBERT WANGIRA KHALWALE APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

(Being an appeal against the Judgement delivered by Hon. R.M. Amwayi, Senior Resident Magistrate at Mombasa Chief Magistrate's Court Criminal Case No. 873 of 2020 on 16th September 2021, Republic v Albert Wangira Khalwale)

JUDGMENT

Background

1. The Appellant, Albert Wangila Khalwale was charged in Mombasa Chief Magistrates Court CR. Case No. 873 of 2020 with the Offence of Robbery with violence contrary to Section 295 as read with Section 296 of the penal code.
2. Particulars were that Albert Wangira Khalwale on the 23rd day of May 2020 at Kindunguni area in Likoni sub-county robbed one Mobile phone make ITEL valued at Kshs. 4000/= and cash Kshs. 3000/= the property of Pauline Anzazi Ziro and immediately before such robbery used actual violence to the said Pauline Anzazi Ziro.
3. In the 2nd Count the Appellant was charged with the offence of rape contrary to Section 3(c) of the [Sexual Offences Act](#) No. 3 of 2006.
4. Particulars to 2nd count were that the appellant Albert Wangila Khalwale on the 23rd day of May 2020 at Kindunguni area in Likoni Sub-County unlawfully caused his penis to penetrate the vagina of Pauline Anzazi Ziro without her consent.



5. In the alternative the appellant Albert Wangira Khalwale was charged with offence of indecent act with an adult contrary to Section 11(A) of the Sexual Offences Act No. 3 of 2006.
6. Upon consideration of the evidence and 4 prosecution witnesses and the sworn evidence of the appellant in defence, the trial magistrate found the appellant guilty of the 2 principal counts of robbery with violence and rape and he was accordingly convicted and sentenced to serve 50 years for the offence of robbery with violence in Count 1 and 10 years for the offence of rape in Count II.
7. The Appellant was aggrieved with the conviction and sentence and he has filed Petition of Appeal dated 4th October 2021 on the following amended grounds filed on 26th March 2023: -
 - i. That the trial court Magistrate erred in law & facts by convicting him without considering the ingredients of the charge were not proved.
 - ii. That the trial court Magistrate erred in fact & law by convicting him without considering that the offence charged was not proved to the required standard.
 - iii. That the trial Magistrate erred in law & fact by convicting him without considering that only the lesser charge of robbery with violence under Section 296(1) was made out by the prosecution.
 - iv. That the trial court Magistrate erred in law & fact by meting out a sentence that did not take into account the mitigating factors.
 - v. That the trial court Magistrate erred in law & fact by convicting the appellant without considering that the period spent in remand custody prior to conviction & sentence.
8. The appeal herein was canvassed by way of written submissions.

Prosecution's Case

9. The Complainant was robbed and raped by a boda-boda rider she had hired to take her to her house in Ujamaa on 23rd May 2020 at 7.00pm from Ushindi Stage after she had crossed the ferry. The complainant said before she boarded, she saw the rider very well as the stage was lit and the rider was not wearing a helmet.
10. That on the way the rider used a different route that she did not know and when she inquired he said he was avoiding police officers due to curfew and that she should not get worried. She said that it was 7.45pm when the rider decided to divert to the unknown route. That when they reached where there were no people or houses, the rider switched off the engine. That the complainant alighted and started running away as she felt the place was insecure.
11. That the rider pursued and caught up with her and started removing her clothes, she said she had a Kitenge skirt, biker and panty which he removed, pushed her to the ground and they started struggling and he managed to rape her. That the rider did not heed even when she told him she was sick. That after he had raped her he gave her the panty to wear but she just put it in the bag. The complainant said she didn't know the place where they were and she boarded the appellant's motorbike.
12. The complainant said that before raping her the appellant snatched her bag containing Kshs. 3500/=, and Itel & Samsung mobile phones. That when she boarded the appellant's motorbike he didn't take her home but took her to a different location that was unknown to her and he stopped and switched off the engine.



13. PW 1 said there were people seated outside their houses who told her they knew the rider had the habit of abusing his female customers. That the rider went away for 10 minutes and when he returned and alleged he wanted to take her home she refused. She said the people who told her about the accused gave her a sheet and she covered herself outside. That the appellant went away and returned at 3.00am and told her they should go home and she refused. She said that another motorcycle came and took her home. She did realize her ITEL phone and Kshs.3500/= were missing from the bag.
14. That when she got home, she went to hospital before going to report to police at Inuka Police Station. That P3 was filled at Likoni District Hospital together with PRC form. That on 1/06/2020 two officers Habiba and Mwinyi accompanied her to the scene where photographs were taken. She was given contact form officer at Likoni ferry. The Complainant said she had taken Registration of the motorcycle which was KMPA 031R.
15. The Complainant said she waited at the stage for 3 hours but did not see the motorcycle. That when she left to go to Bombolulu she received a call from a rider who had offered her a sheet on the night of the attack who informed her that the appellant had been seen at the stage in possession of her phone. She returned and the person with her phone was identified to her. She identified him as the one who robbed and raped her. She alerted officer Mwinyi who advised her to report to the officers at the ferry. She however approached the suspect and told him to take her to Ujamaa and he accepted. On the way he alerted Officer Mwinyi.
16. That when they got to Ujamaa she saw officer Mwinyi and she told the rider to stop and he was arrested and taken to the police station. That at the police station, the appellant was asked to show the phone he had and it was found to be the one that had been stolen from the complainant. She also identified the bag from which the phone was stolen. The complainant showed the court her photo in the phones gallery.
17. PW 2 P.C. Mwinyi Haji from Inuka Police Station testified that when the report of rape and robbery was reported by the complainant, CPL Fatuma assisted him to interrogate the complainant before she was referred to Likoni Sub-County Hospital for examination and she was treated & PRC & P3 forms duly filled by Dr. Kalau – PW 4 who confirmed the fact of rape. The treatment notes, P3 & PRC forms were produced by Dr. Kalai.
18. PW 2 testified that they visited the scene near a baobab tree in an isolated area with no houses nearby. One Duga Kenga did record a statement to confirm he saw the appellant who was known to him as a rider take the complainant to Kibaraza on the material night. PW 2 testified that complainant hired the suspect and they arrested him at the stage. That on conducting a search, a phone belonging to the complainant was recovered. That the appellant alleged the complainant gave him the phone. That the phone had appellant's airtel sim card – EXP 4.
19. PW 3 P.C. Collins Mumila testified that on 1/6/2020 at about 4.55 pm, he was with P.C. Moke when he received a phone call from CPL. Fatuma who told them there was a case to be investigated. She handed them over to P.C. Mwinyi and they proceeded to Ujamaa Stage where they arrested the accused who was wanted for the offence of rape. That when the appellant was taken to the office and P.C. Mwinyi conducted a search, a phone that had been stolen from the complainant was recovered.
20. PW 4 Dr. Stephen Kalali examined the complainant as outpatient no. 9485/2020 at Likoni Sub-County Hospital and she was treated & PRC & P3 forms duly filed. PW 4 testified that the complainant's right side of the hand was swollen & right shoulder had other injuries. That the knee was also swollen. That she also had a swollen head which she said she fell from the motorbike the appellant was riding. PW 4 was informed by the complainant that the appellant raped her without her consent.



PW 4 put the complainant on anti-biotics and gave her tetanus injection. He said the complainant's external and internal genitalia were normal without signs of penetration. PW 4 produced PRC & P3 forms as EXP 1(a), 1(e) and treatment notes as EXP 1(a). PW 4 said that the Complainant was sexually active and penetration does not necessarily result into injuries to the genitalia.

Defence Case

21. The Appellant gave sworn statement and said that he had entered into an agreement with the complainant that he would be taking her home. He said that they became friends and in April the Complainant told him that her daughter was sick and she requested to be paying Kshs. 250/= per week instead of 50/- per day and he accepted. That the Complainant did not pay the 1st and 2nd week of May 2020 and he stopped going for her. That when she asked him to go to her home he declined.
22. That on 27/05/2020 he went to complainant's home to ask for the money and she became harsh and threatened that she would raise alarm for members of public to beat him. That he left to go back to work. That in June at 5.30 pm, he was at the stage when the complainant asked him to take her home but he didn't refuse. On the way he requested to be taken to the market to buy tomatoes but suddenly while at the market he was surrounded by people who introduced themselves as police officers. When asked if he knew the complainant he confirmed. That he was arrested and taken to the police station and booked in cells. He said he was charged with an offence he didn't know. The Appellant said he didn't report to anyone that the complainant had not paid him.

Appellants Submissions

23. The Appellant submitted that the prosecution did not prove that he used a dangerous or offensive weapon or threatened to use any dangerous or offensive weapon when he snatched the complainant's handbag. He was also not in the company of anyone or more other persons involved in the commission of the offence and the ingredients required to prove offence of robbery with violence were not proved. He argued that evidence tabled in support of the charge was insufficient to prove that the Complainant was actually robbed. He said if any robbery was committed then it was a case of robbery under Section 296(1) of the Penal Code and that would entitle him to a reduction of the charge under Section 179 of the Criminal Procedure Code.
24. The Appellant argued that the ingredients of the offence of robbery in Section 296(1) and Section 296(2) of the Penal Code are not distinct and yet the penalties are very different and therefore prejudicial to those charged under Section 296(2) of the Penal Code. The Appellant argued that Section 179 of the Criminal Procedure Code should be applied to him so that he benefits from the lesser charge under Section 296(1) of the Penal Code.
25. The Appellant also made submissions in regard to sentence to the effect that the sentence of 50 years failed to take into account crucial factors such as his age and current human life expectancy which stands at 64.4 for males and 67.4 for females. He relied on the Court of Appeal decision in *Ali Abdalla Mwanza v Republic*, CR.A. No. 259 of 2012. He said the 50 years imposed was meant to serve the same purpose as death sentence. He said he was 34 years and was unlikely to live up to the age of 84 years when the sentence will come to an end. He pleaded that in event conviction is confirmed his sentence should be renewed accordingly.
26. The Respondent on 20th June 2023 sought for 7 days to file submissions but none is in the file.



Analysis and Determination

27. This being the first appellate court, it is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

28. After considering the grounds of appeal, records of the trial court and submissions, the issues for determination are as follows: -

- i. Whether the appellant was properly identified as the perpetrator of the offence of robbery with violence
- ii. Whether the appellant’s defence was considered
- iii. Whether the sentence of 50 years imprisonment was harsh and excessive

Whether The Appellant Was Properly Identified As The Perpetrator Of The Offence Of Robbery With Violence And Rape

29. The appellant acknowledges that he knew the complainant and the complainant in her testimony said that she boarded the appellant’s bodaboda at Ushindi stage at 7.00 pm and the stage was well lit with street lights. The appellant was not wearing a helmet. That instead of taking her to Ujamaa, the appellant took a different route and when the complainant complained, the appellant assured her that he was only avoiding police officers due to curfew. That when they reached an isolated place, the appellant switched off the motorcycle and when the complainant felt insecure and started running away, he pursued her, pushed her to the ground, removed her biker and panty and raped her. Because the complainant did not know where they were at that point, she boarded the motorcycle again and proceeded where the appellant stopped and the people who were standing outside their houses told her they knew the appellant and that he had a habit of endangering his passengers at night. The complainant declined to accompany the appellant anymore. She spent the night in the open until the following morning where she took another motorcycle to her home.

30. At the time that the appellant was struggling with the complainant, he took her bag which contained Kshs. 3500 as well as two mobile phones make Itel valued at Kshs. 4000 and another phone make Samsung. The complainant found the money and Itel phone missing from her bag. When the complainant led to the arrest of the appellant, the Itel mobile phone was recovered from him.

31. The complainant also went to hospital and she was examined and treated and put on medication at Likoni District Hospital. On examination of the complainant at the hospital, she had a swollen right hand and right shoulder, her knee was also swollen and she had a swollen head. This was evidence of the violence that was meted out on the complainant at the time of the robbery and rape of the complainant.

32. Section 296 of the Penal code provides: -



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.
33. From the evidence adduced, the appellant pursued the complainant, removed her clothes, pushed her to the ground and raped her after which he stole her money and phone. Therefore, the appellant's claim that he should benefit from the lesser sentence in Section 296(1) of the Penal Code is not acceptable as there is evidence of violence on the person of the complainant who was raped and injured and her property taken. The fact that the complainant led to the arrest of the appellant and the fact that the complainant's phone was recovered from the appellant coupled with the injury sustained by the complainant makes this court believe that the trial magistrate properly found that the appellant had robbed and raped the complainant. The appellant was therefore properly convicted.
34. Article 50(2)(p) of *the Constitution* provides: -
- (2) Every accused person has the right to a fair trial, which includes the right
 - (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing
35. The right under Article 50(2)(p) is not applicable to the appellant or the situation herein as there is no changes which have been made in the prescribed punishment between the time the offence was committed and the time of sentencing.

Whether The Appellant's Defence Was Considered

36. The trial magistrate said that the defence by the appellant was without any truth and did not in any way cast doubt to the water tight prosecution evidence. This court concurs with the finding of the trial magistrate for the reason that the appellant's defence was only raised late in the day. The allegations were never put to the complainant in cross examination and the complainant said she did not know the appellant prior to the material date that she hired him to take her to her home in Ujamaa. She said they were never friends.

Whether The Sentence Of 50 Years Imprisonment Was Harsh And Excessive

37. Section 296(2) of the Penal Code provides death sentence for the offence of robbery with violence. The trial magistrate exercised her discretion and passed a sentence of 50 years imprisonment instead of the death sentence after considering the mitigation that the appellant was a father of two children and that he had learnt his lesson in custody. He prayed for the court to exercise leniency. This court finds no reason to interfere with that exercise of discretion by the trial court particularly in the face of the heinous acts of the appellant.
38. In conclusion, the appeal lacks merit and is dismissed.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS
28TH DAY OF SEPTEMBER 2023**

**HON. LADY JUSTICE A. ONG'INJO
JUDGE**

