



**Kiprono alias Broker v Republic (Criminal Appeal E025 of 2021)
[2023] KEHC 23102 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23102 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CRIMINAL APPEAL E025 OF 2021
JR KARANJA, J
SEPTEMBER 28, 2023**

BETWEEN

VINCENT KIPRONO ALIAS BROKER APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant, Vincent Kiprono Alias Broker, was convicted and sentenced to ten (10) years imprisonment by the Chief Magistrate at Kericho for the offence of rape contrary to Section 3(1) and (3) of the *Sexual Offences Act*. It was alleged that on the 30th September 2019 in Kericho East – Kericho County, he intentionally had carnal knowledge of SC without her consent. There was an alternative count of committing an indecent act contrary to Section 11(A) of the *Sexual Offences Act*. This was rendered obsolete on conviction of the appellant on the main count.
2. Be that as it may, the appellant was aggrieved by the accruing conviction and sentence and preferred the present appeal on the basis of the grounds set out in his petition of appeal filed herein on 17th July 2023. He appeared in person at the hearing of the appeal and fully relied on his written submissions in support of the appeal. His major complaints were that the age of the complainant was not proved and that the prosecution evidence was not worth of credibility and was also not proved to the required standard.
3. On sentence, the appellant contended that the trial court did not consider that he was a first offender thereby imposing upon him sentence which was harsh and excessive.

In opposing the appeal and its supporting grounds, the state/respondent represented by the learned prosecution counsel, M/s Aseda, orally submitted that the complainant was an adult aged 21 years and therefore the necessity of proving her age did not arise. That, the ingredients of the charge were



fully established and proved by the complainant's evidence and medical evidence availed through the Clinical Officer (PW 4).

4. The Learned Prosecution Counsel further submitted that the complainant did not consent to the sexual act and was strangled with a sweater to prevent her from screaming. That, the appellant and the complainant were well known to each other such that he was positively identified as the culprit whose motive was to punish the complainant for squandering his money at a lodge.

It was contended by the Learned Prosecution Counsel that the appellant's mitigation was considered and the sentence imposed upon him was lawful. The state/respondent therefore called for the dismissal of the appeal.

5. The appeal together with its supporting grounds was given due consideration by this court against the rival submissions. It was thus incumbent upon this court to revisit the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.
6. In summary, the prosecution case was that on the material date, the complainant (PW 1) who hailed from Kapsoit Kericho was at a club in search of a job. She was a former state counsel. Later, as she took a motorcycle to proceed home she was joined by the appellant but they went to a guest house where she alighted when the appellant suddenly got hold of her skirt and threatened her. He alleged that she had squandered a lot of his money. She called a guard but the appellant asked for and was given a condom by a person called Chumo.
7. The appellant then held the complainant by the neck and used a sweater to strangle and prevent her from screaming. He then pulled down her skirt and removed her inner pants at a dark place. She fell down on the ground. He removed his clothes and proceed to have sex with her using a condom which burst. Thereafter, he kicked and punched her before he took off. She reported the incident at Kapsoit Police Post and proceeded to Kericho District Hospital.
8. Daniel Kipkosgei Rono (PW 2), a guard at Kapsoit testified that the complainant went to his place of work, a club, in search of his employer. She went away briefly and returned at about 12:30am with the appellant but his employer had not yet come. She and the appellant then went away towards a guest house. She later reported to him that the appellant had raped her. He noticed that her clothes were torn and muddy.
9. PC Peter Kamitha (PW 3), of Kapsoit Police Post received the necessary report from the complainant and investigated the matter. He recorded necessary statements and gathered that the appellant and the complainant were known to each other and had proceeded to a guest house where the appellant forcefully had sex with the complainant. He issued a P 3 form to the complainant. He later arrested the appellant.
10. The P3 form (P.Ex1) was compiled and signed by Nancy Wendo (PW 4), a Clinical Officer based at Kericho County Referral hospital after she examined the complainant, a week after the incident and found that she had indeed been raped. That; her female sexual organ was penetrated by a male sexual organ.
11. In his defence, the appellant stated that he was a farmer and was arrested at a hotel in Kapsoit on 9th October 2019. He had gone there to deliver milk when a certain lady, wife to a friend of his, was pointed to him. Police officers indicated to him that they wanted him to assist in investigations. He was then taken to Kapsoit Police Post where he was locked in the cells before being arraigned in court on allegation that he raped a lady who had earlier on threatened him. The appellant's defence was thus a denial.



12. The trial court considered the evidence in its totality and concluded that the Prosecution case had been proved against the appellant beyond reasonable doubt. The appellant was thus convicted and sentenced accordingly.

Having reconsidered the evidence, it became clear to this court that other than the evidence of the complainant (PW 1) there was no other independent evidence to confirm that indeed the complainant was raped as alleged.

13. The Clinical Officer (PW 4) confirmed that the complainant was sexually penetrated by a man but she was not in a position to state or show that the man was the appellant.

The guard (PW 2) could only testify that he saw the appellant and the complainant together from the time they arrived at his work place to the time they went away towards the direction of a guest house. He did not witness the alleged rape of the complainant but he confirmed that she later returned to his place of work with torn muddy clothes.

14. The investigating officer (PW 3) merely recorded witness statements, issued a P3 and obtained exhibits. He arrested the appellant and charged him on the basis of what he was told by the witnesses, the crucial one being the complainant herself.

There was no corroboration of the complainant's evidence that she was raped by the accused. Her company with the appellant as indicated by the guard (PW 2) merely raised suspicion and nothing more on the appellants alleged involvement with the offence.

15. Apparently, the trial court convicted the appellant based on the credibility of the complainant's evidence and rendered itself in that regard thus: -

“It is clear from the complainant's testimony that she was truthful and reliable. She remained consistent even upon being cross-examined.....I believe her testimony.”

Where a conviction is based on the credibility of a witness an appellate court may not interfere with it for the simple reason that the trial court had the advantage of seeing and hearing the witness and is therefore better placed to make findings based on the credibility of witnesses.

16. In the circumstances, this court has no opinion but to find that the appellant's conviction was proper and lawful.

With regard to the sentence of ten (10) years imprisonment imposed by the trial court, it was lawful and in accordance with Section 3(3) of the [Sexual Offences Act](#) which provides that: -

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

17. The foregoing provision is framed in mandatory terms thereby removing a court's direction in sentencing. Thus, the trial court had no option than to impose the mandatory minimum sentence of ten (10) years imprisonment. However, in view of the emerging jurisprudence coming from our superior courts on the mandatory nature of sentences this court would find that the sentence imposed on the appellant although lawful was too excessive in the circumstances for a first offender who probably disagreed with the complainant and reacted in a manner which interfered with the dignity and modesty of a woman and for which he should be extremely ashamed and be punished by way of a sharp short sentence of imprisonment.



18. In that regard, the sentence of ten (10) years imprisonment imposed by the trial court is hereby set aside and substituted for a sentence of five (5) years imprisonment. Other than the alteration in the sentence the appeal is dismissed for want of merit.

Ordered accordingly.

[DATED AND DELIVERED THIS 28TH DAY OF SEPTEMBER, 2023.]

J. R KARANJAH

JUDGE

