



**Andere v Republic (Criminal Appeal E003 of 2022)  
[2023] KEHC 26718 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26718 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL APPEAL E003 OF 2022  
JN KAMAU, J  
DECEMBER 20, 2023**

**BETWEEN**

**JOHN ANDERE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon R. M. Ndombi (SRM) delivered at Vihiga  
in Principal Magistrate's Court in SO Case No 23 of 2019 on 29th March 2022)*

**JUDGMENT**

**Introduction**

1. The Appellant herein was jointly with two (2) others charged with the offence of gang rape contrary to Section 10 of the [Sexual Offences Act](#) No 3 of 2006. He had also been charged with an alternative offence of committing an indecent act with an adult contrary to Section 11(1)(A) of the [Sexual Offences Act](#). He was tried and convicted on the main charge by the Learned Trial Magistrate, Hon R. M. Ndombi, Senior Resident Magistrate who sentenced him to fifteen (15) years imprisonment.
2. Being dissatisfied with the said Judgement, on 13<sup>th</sup> June 2022, the Appellant lodged the Appeal herein. His Petition of Appeal was dated 24<sup>th</sup> May 2022. He set out eleven (11) grounds of appeal.
3. His Supplementary Grounds of Appeal and Written Submissions were both dated 29<sup>th</sup> July 2023 and filed on 2<sup>nd</sup> November 2023. The Respondent's Written Submissions were dated 2<sup>nd</sup> November 2023 and filed on 2<sup>nd</sup> October 2023 (sic). The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.



## Legal analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.
6. Having looked at the Appellant's Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issue that had been placed before it for determination were as follows:-
  1. Whether or not the Appellant's right to fair trial was infringed upon;
  2. Whether or not the Prosecution proved its case beyond reasonable doubt; and
  3. Whether or not the sentence that was meted upon the Appellant herein was manifestly excessive in the circumstances warranting interference by this court.
7. The court therefore dealt with the said issues under the following distinct and separate heads.

### I. Charge sheet

8. Ground of Appeal No (1) was dealt with under this head.
9. Although the Appellant had averred that the Charge Sheet was defective, he did not demonstrate how this was so.
10. On its part, the Respondent submitted that the Appellant was notified of the charges that faced him and what constituted the charge. It asserted that even if there was a defect, the same did not prejudice him as he was clear of the charges that he was facing and ably defended himself during the trial. It urged this court to find that no miscarriage of justice was occasioned to him.
11. It placed reliance on the case of *Obedi Kilonzo Kevevo vs Republic* [2015] eKLR, the Court of Appeal held that the applicable test when an appellate court was determining whether or not the charge sheet was defective was whether the conviction based on the defective charge occasioned the appellant great prejudice.
12. It also relied on the case of *JMA vs Republic* (2009) KLR 671 where it was held that it was not in all cases where a defect in the charge was detected on appeal that would render a conviction invalid because that Section 382 of the Criminal Procedure Code was meant to cure such an irregularity where prejudice to the appellant was not discernible.
13. Notably, under Article 159(2)(d) of the *Constitution* of Kenya, courts have been mandated to administer justice without undue regard to procedural technicalities.
14. As it was not clear what the Appellant's submissions under this head were, suffice it to state that a perusal of the Charge Sheet showed that it contained all the necessary information to inform him of the offence that he had been charged with and to which he pleaded "Not guilty" whereupon the case



proceeded to full trial. He did not demonstrate any prejudice that he suffered as a result of the charges that were read out to him and he pleaded “Not guilty” to the same.

15. In the premises foregoing, Ground of Appeal No (1) of the Petition of Appeal was not merited and the same be and is hereby dismissed.

## **II. Right to fair trial**

16. Ground of Appeal No (2) of the Petition of Appeal was dealt with under this head but under the different sub-heads.
17. The Appellant submitted that it was prudent not to curtail his absolute right to a fair trial as was envisaged under Article 25 (c) envisaged in Article 50(2)(p) mete out a sentence in a minor cognate offence pursuant to Article 24 (1e) and his benefit of doubt (sic).
18. On its part, the Respondent contended that he was accorded a fair trial as he was informed of the charges that he faced, he was availed all the evidence that the Prosecution was relying upon and was put on his defence.
19. Notably, it was also not clear what the Appellant’s submissions on this ground were. He appeared to aver that the sentence that was meted upon him was excessive. The question of whether or not the sentence that was meted upon him was excessive was a different matter altogether This court therefore deferred the analysis of whether or not his sentence was fair later on in this decision.
20. It sufficed for this court to state that in the absence of any other proof to the contrary, this court found and held that the proceedings demonstrated that the Appellant was accorded a fair trial. Indeed, he pleaded to the charge in the proper manner and adduced his evidence as was provided by the law.
21. In the circumstances foregoing, this court found and held that Ground of Petition No (2) was not merited and the same be and is hereby dismissed.

## **III. Proof of prosecution’s case**

22. Grounds of Appeal Nos (3), (4), (5), (6), (7), (8), (9) and (10) of the Petition of Appeal were dealt with together under this head as they were all related.
23. The Appellant submitted that the Clinical Officer, Fredrick Ouma Ogola (hereinafter referred to as “PW 4”) disproved that there was any penetration of the Complainant, EAN (hereinafter referred to as “PW 1”). He faulted the Trial Court for relying on the provisions of Section 124 of the Evidence Act and failing to warn itself on the uncorroborated evidence of penetration by a single witness and relying on the same. He contended that the Trial Court failed to point out PW 1’s demeanour.
24. He asserted that the Trial Court moved suo moto by adding gaps in the Prosecution’s case when it stated that doctors linked the presence of epithelial cells to trauma sexual activities (sic). He was emphatic that this was not the Prosecution’s evidence and blamed the Trial Court for entering the arena of the fight between the Prosecution and the Defence.
25. It was also his submission that the evidence that was adduced showed that he did not rape or penetrate PW 1.
26. On its part, the Respondent submitted that PW 1 testified that “Omosh” raped her and that she was penetrated by two (2) people one of who was not in court. It argued that she identified her perpetrators as she vividly narrated the events of that material date. She added that she was in fact found in the house



the Appellant's Co-Accused, namely Boaz Ketch Omollo, and that the Appellant herein confirmed having taken her to the said house.

27. It referred this court to the case of *Republic vs Oyier* (1985) KLR pg 353 where it was held that lack of consent was an essential element of rape. It also placed reliance on the case of Criminal Appeal No 49 of 2017 (eKLR citation) where it was held that the ingredients of gang rape are that the offence must have been committed in the company of others and the offence was committed with common intention.
28. It pointed out that the fact that there was no spermatozoa was immaterial. It added that there was no consent and PW 4 confirmed that PW 1 was raped and that she had injuries on her abdomen, legs and arms. It further submitted that the Appellant was in the company of others when he raped PW1 was raped.
29. It argued that as was held in the case of *Kassim Ali vs Republic* Cr Appeal No 84 of 2005 (Mombasa) (unreported), it was held that absence of medical evidence was not decisive as the fact of rape could be proven by oral evidence.
30. It submitted that all the ingredients of gang rape were present and there were no contradictions and that in the circumstances of the case, the Prosecution proved beyond reasonable doubt that penetration had occurred. It therefore urged this court to dismiss the Appeal herein for lacking in merit.
31. A perusal of the proceedings showed that on the material date of 31<sup>st</sup> December 2018, PW 1 left Vihiga and headed home. She arrived at [particulars withheld] at about 1.50pm. She asked a woman she met at the Centre where she could get a boda boda and she (the woman) directed her to [particulars withheld]. She did not know any of the boda boda riders.
32. She met her cousin Austin at the bar and when she asked him to take her home, he told her that he had already had a customer he was taking home. He asked her to wait for her. She sat at a table and behind her were four (4) men. One of the men asked her to join them at their table. When she told him that she did not know him, he told her that he knew her. She asked him to remove his cap. She then identified him as Simon, the Appellant's Co-Accused during the trial in the lower court.
33. She explained that she could not join them on their table because she did not take alcohol. The man then referred her to another man who was also on the same table and he agreed to take her home. She paid him Kshs 100/=. However, he passed her place at a fast speed. When she removed her phone to tell her brother what was going on, he stopped, removed a knife and confiscated her phone and switched it off.
34. His phone rang and he said "Symo sema" (Symo, talk). They spoke in the Luhya language so she never heard what they talked about. At the time, he had ordered her to sit on the ground and when they finished talking, he ordered her to board the boda boda and to sit in front of him and drove to Ekwanda Centre.
35. When they got there, he called someone and spoke in the Dholuo language and asked where they were and why they were taking long. He then ordered her to remove her trouser. When she refused, he put a knife on her throat and had sex with her forcefully. He also had anal sex with her. As he was going on, the said Symo and another person who was not presented to the Trial Court arrived. Symo then asked him why he did not wait as agreed. Symo then told her to see what had befallen her yet she had been refusing him.
36. As she dressed, money fell off from her pocket and the said Symo picked it up. Symo asked Omosh to give her back her phone because they had already done terrible things to her. Two (2) other men arrived. These were the Appellant and his Co-Accused Boaz. When the said Boaz asked what happening, Symo



told him that there was nothing he was solving. Symo gave the said Boaz a “wife”. Symo and Omosh left Pw 1 with Boaz and Johny.

37. Johny was riding the boda boda. Boaz sat behind her and started fondling her breasts. Johny removed a panga and slapped her with it. Two (2) men came and she thought that they were coming to help her. They told her to finish what she had started and ordered her to board the boda boda again. Boaz told her not to speak because Symo had already handed her over to him as a wife.
38. She was taken to a double room and ordered to sit on a sofa. When she objected, Johny slapped her with a panga. Johny told Boaz to enjoy himself and he would see him in the morning. Boaz locked the door and threatened her with a panga. He held a panga on her head and had sex with her. He told her that since she was his wife, she should obey.
39. When Boaz left the house, she managed to alert some people of her detention in the house which was locked. The Village elder told her that he was calling the Assistant Chief Mr Mbuya (hereinafter referred to as “PW 2”). The Chief said that the house belonged to his brother. He called him. It was Boaz who came. When he asked him why he had locked PW 1 in the house, he said that he found her being assaulted by some people and they rescued her. He was ordered to open the house and she was rescued and taken to the police station. Her evidence was that the Appellant and the said Symo never raped her.
40. PW 2 confirmed knowing the said Boaz as he was from the same clan. He confirmed having seen PW 1 in his house and explained how he asked him to open the door whereupon she was rescued.
41. No xxxxx Cpl Rael Ambasa (hereinafter referred to as “PW 3”) was the Investigating Officer in this matter. She reiterated the evidence that was adduced by the Prosecution witnesses. She told the Trial Court that Omosh was never arrested.
42. PW 4 confirmed that PW 1 suffered bloody injuries. He stated that no spermatozoa or injuries to the vagina were seen but there was presence of epithelial cells. When he was cross-examined, he stated that epithelial cells could be as a result of an infection and not necessarily due to penetration.
43. PW 1 was the only single identifying witness in the case. Under Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya), a trial court can convict a person on the basis of uncorroborated evidence of the victim if it is satisfied that the victim is telling the truth.
44. Notably, the proviso of Section 124 of the *Evidence Act* states that:-

“Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth (emphasis).”

45. However, a trial court must exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person’s word against the other. Other corroborating evidence could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful.



46. This court agreed with the finding of the Trial Court that the presence of epithelial cells was a sign of sexual activity. The court was allowed to take judicial notice of conclusions that are made by medical practitioners when adducing their evidence during trial of sexual offences.
47. Notably, Johny was the Appellant herein. He did not penetrate PW 1. He left her in the company of his Co-Accused Boaz who raped her and locked her in his house where she was rescued in the morning. His other Co-Accused Simon was present when Omosh raped her. It was irrespective that the Appellant herein did not penetrate her.
48. Her evidence was unwavering and was corroborated by that of PW 2 and PW 4. The Appellant, his Co-Accused and Omosh all had a common intention of raping her. Being present and doing nothing put them all in the same space. As she did not consent to having sex with any of them, the offence of gang rape was established.
49. This court therefore found and held that the Appellant's sworn evidence could not and did not outweigh that of the Prosecution. Instead, it came to the firm conclusion that the Prosecution established its case of gang rape against the Appellant herein beyond reasonable doubt and the Trial Court therefore acted correctly when it convicted him and his Co-Accused for the offence of gang rape.
50. In the premises foregoing, Grounds of Appeal Nos (3), (4), (5), (6), (7), (8), (9) and (10) were not merited and the same be and are hereby dismissed.

#### **IV. Sentence**

51. Ground of Appeal No (11) of the Petition of Appeal was dealt with under this head.
52. The Appellant submitted that since penetration was not proven, the remaining ingredients of the offence formed a complete offence under Section 157(1) of the *Penal Code* (sic) for which he ought to have been sentenced to a minimum of three (3) years.
53. He added that the Trial Court also erred for not finding that the minimum mandatory nature of the sentence under Section 10 of the *Sexual Offences Act* was unconstitutional and not warranted. In this regard, he placed reliance on the case of Petition No 97 of 2021 *Edwin Wachira & 9 Others* (sic) (eKLR citation not given).
54. He asked this court to exercise mercy, and grace and mete out a least severe sentence rather than the current one in the event his appeal was not successful.
55. He further urged this court to consider the case of Land Markdecree Case of *88 Prisoners vs ODPP & 2 Others* (eKLR citation not given) where it was held that once an accused person was sentenced to a certain number of years, his liberty was lost once he was arrested and consequently, the sentence ought to run from the date of arrest.
56. On its part, the Respondent submitted that there was nothing on record to show that the Trial Court only imposed the sentence because it was the mandatory minimum sentence and not because it was the appropriate sentence to be meted out. It was their submission that the Trial Court exercised its discretion after considering all the relevant facts in the matter by sentencing him to fifteen (15) years out of a possible life imprisonment.
57. It pointed out that rape was a serious and monstrous crime which robbed the victim her dignity and could cause lifelong psychological trauma thus calling for a severe and deterrent sentence. It urged this court not to interfere with the sentence as the same was lawful.



58. Section 10 of the *Sexual Offences Act* provides that:-

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

59. The Trial Court sentenced the Appellant to fifteen (15) years imprisonment which was the mandatory minimum sentence. Despite there being emerging jurisprudence to reduce sentences under the *Sexual Offences Act* as can be seen in the case of *Dismas Wafula Kilwake vs Republic* [2018] eKLR where the Court of Appeal held that Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing offences, the African Charter on Human and Peoples' Rights on the Rights of Women in Africa provided that any practice that hindered or endangered the normal growth and affected the physical and psychological development of women and girls should be condemned and eliminated. Rape was one of those practices and actions. It must therefore be condemned in the harshest terms.

60. As was correctly pointed out by the State, rape was a crime that robbed the victim all her dignity and carried lifelong trauma. It was an unforgivable crime because the perpetrator took something valuable to the victim by force and unexpectedly. It was similar to the effects of the offence robbery with violence that left victims shocked and traumatised. It was even more traumatic when more than one (1) perpetrator ganged up against a hapless victim and was threatened with death if he or she did not comply.

61. The Appellant's assertion that he ought to have been sentenced to three (3) years did not therefore find favour with this court. Section 157(1) of the *Penal Code* provides as follows:-

“Any person who conspires with another to induce any woman or girl, by means of any false pretence or other fraudulent means, to permit any man to have unlawful carnal knowledge of her is guilty of a felony and is liable to imprisonment for three years.”

62. Notably, the Appellant, his Co-Accused and Omosh did not induce PW 1 to have carnal knowledge with another. The Appellant's Co-Accused Boaz and Omosh had carnal knowledge of her without her consent

63. Considering that PW 1 was raped by more than one (1) person one of who even had forceful anal sex with her and that she was threatened and slapped with pangas made this a most despicable and brutal act by the Appellant, his Co-Accused and Omosh. Section 157(1) of the Penal Code was therefore inapplicable herein.

64. In view of the atrocity that was meted on PW 1 herein, this court found and held that this was one of the instances that the sentence ought to be higher than what was meted upon the Appellant. However, in view of the fact that the Appellant herein did not actually rape PW 1, this court was persuaded that it should not enhance the sentence. It therefore left the sentence of fifteen (15) years imprisonment undisturbed.

65. As it was not clear from the Lower court file when the Appellant was arrested as there was a gap between the date of arrest indicated in the charge sheet and the date of arraignment in court, this court opted not to consider the period spent in custody while the trial was going on. He was at liberty to bring an application for the same at the appropriate time.



**Disposition**

66. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 11<sup>th</sup> April 2022 was not merited and the same be and is hereby dismissed. The Appellant's conviction and sentence be and is hereby upheld as they were both safe.

67. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 20<sup>TH</sup> DAY OF DECEMBER 2023**

**J. KAMAU**

**JUDGE**

