



REPUBLIC OF KENYA



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**Odhiambo v Republic (Criminal Appeal E006 of 2022)
[2023] KEHC 26739 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26739 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL E006 OF 2022
JN KAMAU, J
DECEMBER 20, 2023**

BETWEEN

SIMON ODHIAMBO 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 20th June 2022, the Appellant lodged the Appeal herein. His Petition of Appeal was dated 11th April 2022. He set out six (6) grounds of appeal.
3. His Supplementary Grounds of Appeal and Written Submissions were both dated 1st August 2023 and filed on 25th September 2023. The Respondent's undated Written Submissions were filed on 9th November 2023. 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 Prosecution proved its case beyond reasonable doubt; and
 2. 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. Proof of Prosecution's Case

8. Grounds of Appeal Nos (1), (2), (3), (4) and (6) of the Petition of Appeal were dealt with together under this head as they were all related.
9. The Appellant submitted the Complainant, EAN (hereinafter referred to as "PW 1") did not tell the Trial Court how she identified him at the scene of the crime. He pointed out that she only stated that she identified him at Westgate Bar where there was electricity light. It was his contention that she was raped by Omondi and that she guessed that he was the one who was supposedly referred to as "Symo". He averred that voice recognition was vital to distinguish him from other "Symos."
10. He added that his Co-Accused, John Andere, said that he was at the scene where PW 1 was raped by Omosh and ferried her to the house of his other Co-Accused, Boaz Oketch Omollo but he never said that he (the Appellant) herein was at the scene. He said that that raised reasonable doubt. He referred this court to the case of *Mbelle vs Republic* (1984) KLR 626 but did not indicate the holding he was relying upon.
11. It was his further submissions that the Clinical Officer, Fredrick Ouma Ogola (hereinafter referred to as "PW 4") denied that there was evidence of penetration and that he conceded that both he and his Co-Accused, John Andere did not penetrate PW 1.
12. On its part, the Respondent submitted PW 1 had met the Appellant herein three (3) times previously and on that material night, they talked as she was waiting for her cousin. It added that the Appellant referred her to Omosh to take her home. It asserted that she identified the Appellant herein in a Club that was well lit and that he was mentioned on the phone at the first scene of crime whereafter he came as Omosh was raping her. He also gave out PW 1 to his Co-Accused John Andere and Boaz Oketch Omollo and told Boaz Oketch Omollo that he was giving her a wife. He then took money that fell from her pocket.
13. It was its submission that she was able to identify him as they had spent ample time together.



14. A perusal of the proceedings showed that on the material date of 31st December 2018, PW 1 left Vihiga and headed home. She arrived at [Particulars Withheld] Centre 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] near Club Centre. She did not know any of the boda boda riders.
15. 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. The Appellant herein 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 she had met him three (3) before.
16. She explained that she could not join them on their table because she did not take alcohol. The Appellant 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.
17. His phone rang and 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 [Particulars Withheld] Centre.
18. 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.
19. 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’s Co-Accused Johny and 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.
20. 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.
21. 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.
22. 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 Johnny never raped her.



23. 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.
24. No 86662 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.
25. 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.
26. 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.
27. 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).”
28. 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.
29. The evidence showed that PW 1 ably identified the Appellant as having been the same Symo who came to the scene when Omosh was raping her. She had spent adequate time with him at [Particulars Withheld] Club and could not have confused him at the scene of crime because Omosh even spoke to him on the phone. This court was persuaded to find and hold that PW 1 positively identified the Appellant.
30. 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.
31. Notably, the Appellant herein did not penetrate PW 1. He handed her over to the Appellant’s Co-Accused Boaz and Johnny whereafter Johnny dropped her and Boaz at Boaz’s house. Boaz raped her and locked her in his house where she was rescued in the morning. The Appellant was present when Omosh raped her. It was irrespective that the Appellant herein did not penetrate her.
32. 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.



33. 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.
34. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3), (4) and (6) were not merited and the same be and are hereby dismissed.

II. Sentence

35. Ground of Appeal No (5) of the Petition of Appeal was dealt with under this head.
36. 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.
37. 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).
38. 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.
39. 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.
40. On its part, the Respondent submitted the sentence of fifteen (15) years was lawful and urged this court not to interfere with the same.
41. 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.”
42. 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.
43. 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.

44. 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.”

45. 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

46. 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.

47. 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.

48. 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

49. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was dated 11th April 2022 and filed on 20th June 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.

50. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 20TH DAY OF DECEMBER, 2023.

J. KAMAU

JUDGE

