



REPUBLIC OF KENYA



**Mohamed v Republic (Criminal Appeal 03 of 2020)
[2022] KEHC 17197 (KLR) (5 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 17197 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL 03 OF 2020
SM GITHINJI, J
APRIL 5, 2022**

BETWEEN

ATHMAN MARO MOHAMED APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Conviction and Sentence from the
Original Hola Criminal Case No. 10 of 2019 in a Judgment delivered
on 13th February, 2020 by Hon. A.P.Ndege – Principal Magistrate)*

JUDGMENT

1. The Appellant was charged with the offence of Gang Rape contrary to Section 10 of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offence being that on 28th day of April, 2019 in Tana River Sub County within Tana River County in association with Mohamed Yassin Badi, Haji Delo Juma, Jafari Galogalo Athman, Said Omar Malan together with two others not before court, intentionally caused his penis to penetrate the vagina of HMJ a child aged 15 years old.
2. At the end of the trial, the Appellant was convicted and sentenced to 13 years imprisonment. Aggrieved by the sentence and the conviction of the trial court, the Appellant lodged an appeal on the following amended grounds:
 1. That the learned trial Magistrate erred in law and fact by failing to consider he was a first-time offender and a layman on issues pertaining to the law.
 2. That the learned trial Magistrate erred in law and fact by ignoring his mitigation during sentencing.
 3. That the learned trial Magistrate erred in law and fact by failing to consider that he was remorseful for his actions.



4. That the learned trial Magistrate erred in law and fact by giving him a sentence that was excessive and harsh.

Background

3. PW1 HMJ stated that she stays with her grandmother and aunt. She recounted the events of 28th April, 2019 at around 1:00 a.m. she was at home with her grandmother. She told the court that she went out for a short call outside the house and saw someone who came and grabbed her. Her testimony is that, that person put a veil on her mouth and then grabbed her throat. That she recognized him as Delo Juma. That the moonlight helped her recognize the person who had grabbed her whom she had known for a period of over three years. She recognized him as Accused No. 2 in the dock.
4. She informed the court that he walked with her beside the village upto a motorbike that was at a distance and that there was another person at the motorbike whom she recognized as well. That the other person is Yassin Badi who was known to her since he stays in the same village. She recognized him as Accused 4 in the dock.
5. Further, she informed the court that Delo got her on the motorbike and Yassin rode the motorbike to [Particulars Withheld] Village. She added that there was moonlight which was however not that bright. That Delo got her off the motorbike and started hitting her with a cane and at the same time, Yassin was holding her. That another motorbike arrived with 3 men and she recognized them as Jaffari, Athman and G. She also told the court that she heard Yassin make a phone call saying that they were successful in getting hold of the girl and that they were at the thicket. She recognized all the accused persons in the dock stating that she had known them for over 3 years. That one of the Accused, G is a relative.
6. Further she told the court that when she recognized the voice of Jafari, she called out to him for assistance but he went and held her legs and spread them apart. That they got hold of her blue dress and pulled it upwards to her torso. They removed her underpant and at this time, she was struggling with them. They wrestled her to the ground; Delo removed his clothes, he then held his male sexual organ and put it into her female sexual organ. Her testimony is that Delo then got off and Athman followed. He likewise held his male sexual organ and put it into her female sexual organ.
7. Jafari then held her legs and spread them. G held her hands and pinned them on the ground. Athman and Yassin did the same thing. Each held his male sexual organ and put it into her female sexual organ. That at the time, she was screaming and crying. She stated that two men came whom she did not recognize and asked what they were doing. The assailants held their clothes and escaped. She told the court that Jafari had something like a condom but she was penetrated without it's use. The good samaritan introduced himself as Wako. He was from Laini and had responded to her scream. Her testimony is that she explained to him that she had been defiled and how the accused persons had led her there.
8. She recounted that they took her to the Chief of Laini Village and at this point she could not walk properly. She was given a room to rest until morning. Her testimony is further that in the morning, the suspects were sought, they were availed but she could not recognize them well because they were shouting saying that they were not the ones. That she later recognized Delo, Athman and Jafari. That Yassin came with another young man then unknown to her called Saidi but she could not recognize him well. That G could not be arrested because he escaped.
9. A woman called Sauda went and she explained to her what happened. That they later together with all the accused persons visited the scene of the incident, returned to the Police Station and finally went to Hola County Referral Hospital where she was attended to.



10. Upon cross examination, she told the court that she recognized the appellant since they had been staying together for over three years. That she also recognized their voices. That it was dark but there was moonlight despite it being before the month of Ramadhan. She also confirmed that they were availed to the chief on the same day they committed the act. That they went together to the police station. She made noise at the time of the incident and someone responded to the screams. She equally recognized the motorcycle that took her to the scene of the offence.
11. PW2 EM, was the victim's mother. She told the court that on 28th April, 2019 she was asleep at her home. That her friend came and told her to accompany her to the chief 's office since her child had been defiled. They went and when they got there, they found the victim asleep. That morning, a police vehicle arrived and took the victim's grandmother, grandfather and all the suspects. She said that all the accused persons were shown to her and she knew all of them. That they later went to the scene of the crime and photos were taken. The treatment Notes were marked as PMFI 2, the PRC as PMFI 3, the Age Assessment as PMFI 4, the P3 as PMFI 5 and the clothes as PMFI 6-10.
12. Upon cross examination, she stated that she was asleep when the victim was kidnapped. That the information she had was got from her child. She confirmed that they went to the scene in the morning with the police. That the accused was availed in the morning and that she did not see any motorbike at the chief's place though there was one in court.
13. PW3 BW stated that on 28th April, 2019 he was at [Particulars Withheld] visiting her sister. That he left at 1:00 a.m in the company of his child OJW. That he heard noises from far that sounded like someone was in distress. He told the court that he heard the noise for some time and it sounded like a woman in a quarrel with her husband. That the noise came from the forest. He stated that he heard the noise of a motor cycle in the thicket. That he heard a voice saying, "nyamaza nyamaza utaleta watu."
14. His testimony was that he went there and lit a torch on the faces and recognized the assailants as boys from the village. He stated that he lit the torch on the 1st accused person and said that he had known him for a long time. He also recognized Jaffari, Delo and G having known them for a long time. That there was a girl there, that he found one of the accused persons on top of her. That it was the first accused person who was naked. That he had a top on, but was naked downwards and the girl was completely naked lying on her back facing upwards.
15. He told the court that the 4th accused person was spreading her legs and the 2nd accused person held her hands firmly. That he was seated on her butts with all clothes while forcefully grasping her hands. He also stated that he did not see accused no. 3 in the dock. That he knew accused no. 4 since he stays in that village and he had known him for a long time. That he was the one who was shouting 'utaleta watu'.
16. He confirmed that he saw approximately 6 people and when they saw him, they scattered. That he took the girl though she was strange to him. He stated that the girl was naked and in distress and that she begged him to examine her but he refused. That he lifted her and told her to wear clothes so that they can go to the chief. That they went to chief Habiba and the girl explained herself. They stayed there until morning. That they went and arrested the four accused persons. That Yassin was arrested while operating a boda boda and he did not resist arrest. That Yassin was alleged by the victim to be the one who took her to the scene on the motorbike.
17. PW4 Omar Jara told the court that on 28th April, 2019 at around 2:00 a.m. he was at [Particulars Withheld] with his father PW3 walking home. He informed the court that they heard a noise from the thicket and that it was of a person in distress. That it was a female cry. He also stated that the father decided to follow up on the cry and he followed him.



18. He further stated that they heard the sound of a motorbike as they were heading there. That when they reached the grass field, his father lit the phone torch and at this time, he was behind him. That there was a girl and the men who were with her there scattered.
19. He informed the court that the girl was naked downwards and he was able to identify Jaffari and Athman, the 4th and 1st accused persons. That his father took the child to Chief Habiba.
20. Upon cross examination by the 1st accused person, he told the court that there was moonlight at the time and it was bright. He confirmed that his father lit the torch and he knew 1st accused since they live in the same village. He also stated that 1st accused talked and he recognized his voice.
21. PW5 Habiba Maro Informed the court that on the 28th of April, 2019 at around 3:00 a.m. her door was knocked and Wako was with a girl who was crying lying on the ground. That she asked him about the girl and he told him that he found the girl being defiled by 5 boys and he gave her the names. He said that he had seen Yassin, Delo, Athman, Jaffari and G.
22. That she called the assistant chief to get her KPR, they went for the boys since they were known to them. That the victim told her that she went to relieve herself when suddenly she was taken by a bodaboda being ridden by Yassin and Delo. That the motorbike which Yassin is alleged to have ridden was brought to her office, it was registered as KMEJ xxxx. That the police came and took the suspects and the motorbike.
23. Upon cross examination by the 1st accused person, she confirmed that the girl was brought to her and that he was brought as a suspect. She also confirmed that the first accused person was taken to the police on the same day. She also told the court that she received 5 people, the 1st accused person, Jaffari, Delo, Yassin and G who escaped.
24. PW6 Koshi Mwanaharusi confirmed that PMFI 11, the motorcycle is hers and that the 3rd accused person, Yassin uses it. That he uses it and gives her money in return. She presented the ownership documents of the motorcycle to court PMFI 13 and the receipt of purchase PMFI 14.
25. PW7 Jared Omwanza attached to Hola Hospital as dental technologist No. 20150020250 confirmed that he had an age assessment for the victim which shows that she was 15 years at the time of assessment. He explained to court that they use the eruption pattern and the arrangement of teeth in the mouth of the patient. The age assessment Report from Hola District Hospital dated 29th April, 2019 was Pexh. 4.
26. PW8 Berly Nabuyo No. 2009106196 Clinical Officer at Hola County Hospital told the court that on 28th April, 2019 a client was brought in the company of the police and her guardian. She told the court that the victim came with injuries at the private parts. That upon examination of her private parts, there were signs of defilement because of the bruises at the libia. That there were lacerations showing friction but there was no blood. The vagina had clear fluid and the anus was intact. The conclusion was that there was penetration 10 hours before.
27. PW9 No. 113989 Matunga Victor attached to Hola Police Station was the arresting officer. He told the court that he recalled on 28th April, 2019 he was called by the O.C.S Hola Police Station to go for suspects at Lamu. They went there and found five offenders held in a house and they arrested them. He also told the court that they were taken to the scene of crime where they discovered some footmarks and knee marks suggestive of a struggle. That there was also a motorcycle which was used to transport the victim to the crime scene KMEJ xxxU. They as well recovered a white Tshirt belonging to one of the accused persons. That upon searching the accused persons, he recovered 2 pieces of condoms from the pocket of one of them called Jaffari. That the condoms were unused. That they then proceeded to Hola Police Station where the accused were put in custody and the victim taken to Hola District Hospital.



28. PW10 No. 100482 CPL Mildred Agiza told the court that on 28th April, 2019 she was called at the camp where she found the victim with her parents. She stated that she recorded her statement and took her to hospital at Hola where she was medically examined.
29. That according to the victim's statement, the accused persons had sex with her. That this was after one Delo Juma who is her neighbor arranged with Yassin Badi who had a motorbike KMCJ xxxU to take her from her house to the road where Yassin was waiting for him with the said motorbike. That they took her to [Particulars Withheld] where they entered a thicket in a field used as a playfield.
30. That the accused persons removed their clothes defiling her one after the other. That Yassin Badi started, followed by Delo Juma and Athman Mohamed. That they did this in the presence of others who were watching. That one KPR officer of Laini called Babo with his son heard the noise from the forest. He headed there and found them while in the act. That when they saw him, they ran away.
31. At the close of the prosecution case, the trial court found that a prima facie case had been established against the 1st, 2nd and 4th Defendants and were accordingly placed on their defence. The three elected to give sworn evidence and called no witness. However, the appeal herein is in regard to the 1st accused, I will only address his case.
32. DW1 Athman Maro told the court that he was accused by the headman because of a plot. That the headman planned the dispute and the uncle to the victim vowed to do something bad to him. That he decided to go to Bojini to farm, while there he dug a well and bought a basin which he was using to sprinkle water. That in the morning, he decided to go back to Laini where he stays. That while on the way, he met Babo Aden (KPR) who informed him that the chief was calling him.
33. His testimony is that he went to the chief and after 5 minutes the police went and handcuffed him. That on 3rd May he was brought to court. He told the court that he was shocked with the charges that were preferred against him.

Analysis And Determination

34. Being the first appellate court, I have re-evaluated all the evidence on record. I have to draw my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of *Okeno v Republic* (1972) EA 32 has consistently been cited on the issue.
35. The offence with which the appellant was charged with is of gang rape contrary to section 10 of the [Sexual Offences Act](#) which states:

"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 than fifteen years but which may be enhanced to imprisonment to life."
36. Under section 10 of the [Sexual Offences Act](#), the ingredients of gang rape are: rape or defilement, committed in association with others; or committed in the company of another or others who commit the offence of rape or defilement with common intention. It is therefore clear that defilement (victim a child or an adult) which is committed in association with others or with common intention notwithstanding the fact that some accused may not have defiled the victim, amounts to gang rape according to the said section. It therefore matters not whether the offence was rape or defilement as long as the conditions under section 10 are found to exist.



37. For the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of [Charles Wamukoya Karani v Republic](#), Criminal Appeal No. 72 of 2013 where it was stated that:

"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

38. In this case there is no doubt about the age of the complainant which was proved both by oral and documentary evidence to have been 15 years at the time of the alleged offence. The evidence of PW1 and PW2 was to the effect that the minor was 15 years at the time of commission of the offence. This evidence was corroborated by the evidence of PW7 who conducted an age assessment on the victim. He informed the court that in determining the age of the victim, they use the eruption pattern as well as the arrangement of teeth of the patient. The Age Assessment dated 29th April, 2019 shows that the victim was 15 years at the time of the offence. To this end, I find that the age of the complainant is firmly established.

39. As regards penetration, section 2 of the [Sexual Offences Act](#) provides that:

penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person"

40. I have carefully analyzed the evidence of PW1, she recounted the events of that fateful night. She told the court that she went outside to relieve herself and was in the process grabbed by someone who she later recognized as Delo Juma. She told the court that she saw him using the moonlight. That the accused persons took her to the thicket, Jafari helped and held her legs and spread them apart, they pulled her dress upward and removed her underpant. That she struggled with them but she did not succeed. She went ahead to narrate how Delo removed his clothes then held his genital organ and put it into her genital organ. That Delo then got off, Athman followed. He held his genital organ and put it into her genital organ.

41. She narrated how Jaffari held her legs and spread then while G held her hands and pinned her on the ground. That after Athman, Yassin did the same thing.

42. On penetration in addition to the evidence of PW1, there is the medical evidence of PW8 who examined the complainant. It was her testimony that there were bruises inside the libia and that there were signs of laceration showing friction. I find existence of sufficient evidence that there was penetration on the victim's genital organ.

43. I am as well guided by the finding in the case of [George Owiti Raya v Republic](#) [2013] eKLR where it was held: -

There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia...it remains therefore that there can be penetration without going past the hymen membrane...It matters not whether the complainant's hymen was found to be intact, suffice it that there was evidence of partial penetration."



Whether identification was proved?

44. The principles to be followed are well settled in the case of *Cleophas Otiemo Wamunga v Republic* [1989] KLR 424, as follows:

Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a greater extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant on reliance on the correctness of the identification.”

45. In this regard I have carefully analyzed the evidence of PW 1, the evidence of PW3 and that of PW4. I note that all the assailants were people known to PW1, PW3 and PW4. The appellant himself in his evidence did not dispute the fact that the complainant knew him. Accordingly, there was sufficient opportunity for the complainant to properly identify her assailants since the ordeal lasted for some hours. The evidence of PW1 herself clearly places the appellant at the scene of the crime and she also went ahead to narrate what each of the accused persons did to her. She disclosed her assailants at the very first opportunity she got. Pw-3 and Pw-4 buttresses her evidence on the same. The three could not have been wrong on the assailants whom they knew before then. The circumstances prevailing then in relation to their ability to see using the moonlight and torches, and as well as some assailant voices, cannot be doubted.
46. As matters stand, all essential elements of the offence, which is the act constituting or linking the appellant to the offence of gang rape, which is well indicated in the charge sheet was proved by the prosecution beyond reasonable doubt. From the available evidence, it is not clear the claimed part of the Appellant’s defence that was overlooked in the trial Court’s judgment. There is also no evidence that the trial court took into account wrong material or acted on wrong principles in order to reach at the preferred conviction and sentence.
47. As regards the sentence, the section states that a person convicted of such an offence is liable to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.
48. In the circumstance of this case, I wish to point out that the trial Magistrate was over lenient in his sentence. He meted an illegal sentence below the allowed minimum in law for a very serious offence. Having said this, I will interfere with the sentence of the trial court and substitute the 13 years imprisonment with the minimum allowed in law which is 15 years imprisonment.

Orders accordingly.

JUDGMENT FOR GARSEN READ AND SIGNED AT MALINDI IN THE OPEN COURT TO PARTIES WHO APPEARS VIRTUALLY, WHO ARE; - THE APPELLANT AND MR MWANGI FOR THE STATE, THIS 5TH DAY OF APRIL, 2022.

S.M. GITHINJI

JUDGE

13/3/2023

Kindly take notice that the appeals herein were not consolidated and the judgment dated 5/4/2022 regards file No.3 of 2020.



File number 4 and 5 were erroneously placed in file number 3 and results about them entered in accordance to result in No.3. The error should be corrected. Appellant in No.4 and 5 should consider whether to proceed with their appeals or withdraw them.

S.M. GITHINJI

JUDGE

13/3/2023

