



REPUBLIC OF KENYA



**Japhet v Republic (Criminal Appeal 32 of 2019)
[2022] KEHC 10364 (KLR) (25 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10364 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL 32 OF 2019**

PJO OTIENO, J

MAY 25, 2022

BETWEEN

ISAIYA MURIERA JAPHET APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. Sogomo G SRM in Tigania Law Court in Criminal S.O No. 5 of 2017 delivered on 28/6/2017)

JUDGMENT

1. The appellant herein was charged with robbery with violence contrary to section 296(2) of the [Penal Code](#). It was alleged that on 23/1/2017 in Kianjai Sub-Location, Kianjai Location, Tigania West Sub County, within Meru County, he robbed MA of her phone make Nokia 1200, a panga and 50 Kgs of beans all valued at Ksh. 5,350 and immediately before such robbery, he used actual violence to the said MA by beating her with crude weapon namely panga. He faced an alternative charge of handling stolen goods contrary to section 322(1)(2) of the [Penal Code](#) in which it was alleged that on the same date and place, he, otherwise than in the cause of stealing, dishonestly retained a phone make Nokia 1200, the property of MA knowing or having reasons to believe it to be stolen.
3. He also faced a second count of Rape contrary to section 3(1)(a)(c) as read with section 3(3) of the [Sexual Offences Act](#) alleging that on the same date and place, he intentionally and unlawfully caused his penis to penetrate the vagina of MA, by use of force. To that charge the appellant faced an alternative charge of committing an indecent act with an adult contrary to Section 11(a) of the [Sexual Offences Act](#) it being alleged that on the same date and place, he intentionally touched the vagina of AM with his penis against her will.
5. He denied all the accusations and the prosecution in its endeavors to prove its case presented a total of 6 witnesses.



6. The summary of the evidence by the prosecution was that PW1, MA, the complainant was on the material day alone at around 10.00 am kindling a fire in her kitchen when a stranger arrived. The stranger grabbed her by the neck, carried her shoulder high to a nearby banana plantation and stepped on her ribs. When the stranger asked her if she knew him, she answered in the negative. He then strangled her some more, hoisted her dress up and raped her. When he was done with the rape, he entered inside the house, took a bag of beans, a machete and a cell phone. When he had left, she lifted herself up, screamed and Ntoribi (PW2) came to her rescue and took her to Miathene hospital. She reported the matter to Ngundune police station where she was issued with a P3 form. The scene of crime was photographed by police who arrested the stranger the same night. She went to Ngundune police station and pointed the stranger out of a group of 10 people. The police informed her that the cell phone was recovered from the appellant.
7. During cross examination, she affirmed that it was the appellant who had gagged and raped her before stealing her beans and cell phone.
8. PW2 Joel Ntoribi, was on the material day heading home at about 11.00 am, from urru, when he heard screams from PW1's home, about a kilometer from his home. When he got there, he found PW1 bleeding from the mouth with a swelling on her face and she appeared confused. PW1 told him that a stranger had attacked her, taken her into the banana plantation and stolen her cell phone. He later learnt from other women neighbours, who came to the scene and to whom the complainant had confided, that PW1 had also been raped by the stranger. The witness then called PW1's daughter namely N through the phone and informed her of the incident. They took PW1 to Ngundune police station where she was issued with a P3 form and later taken to Miathene hospital. He recorded his statement and stated that he did not see the assailant ride off. He however identified the appellant as a person known to him since childhood, hailed from a neighbouring village and was called Isaiah.
9. PW3, Charles Muchui, was on the material day at a sign board along Miathene-Kianjai road when he saw the appellant, who he knew quite well, emerge carrying a yellow gunny bag and a machete. He asked the appellant, was who was holding a cell phone, where he was coming from, and he responded that he had just harvested beans in his land. The appellant then boarded a motor cycle and rode off. Moments later, Kenneth from the area community policing informed him that an old woman, namely MA, had been robbed and raped. He immediately recalled seeing the appellant, who was behaving suspiciously, and they embarked on a search for him. They found the appellant at Kathama market, with a cell phone, which subsequently turned out to be the complainant's. They apprehended the appellant, informed the police who rearrested the appellant and he recorded statement from the witness. He said that the appellant was known to him and produced the cell phone which he said, they had scrolled and found telephone contacts of the complaint.
10. During cross examination, he stated that the appellant told him that he was from the farm of the complainant's neighbour namely Farid, but Farid denied the same.
11. PW4, SM, the principal of [Particulars Withheld] Secondary Centre said that he was informed by his mother E through the phone that his grandmother, the complainant had been assaulted. Shortly thereafter, he received another call from his brother Z who relayed the same news. When he arrived home at 4.00 pm, he learnt from his mother that his grandmother had actually been raped and robbed of her cell phone and a bag of beans. He spoke with the community policing youths who tracked down the appellant. When the appellant saw them, he threw a small cell phone out of the bar, which upon investigations, turned out to be his grandmother's. The area chief was called to apprehend the appellant and take him to the police station. He knew the appellant quite well as he used to see him in Kianjai area.



12. During cross examination, he stated that his mother and brother did not mention the appellant's name when they called him, as his identity had not yet been revealed. The appellant had another cell phone which he did not throw away.
13. PW5 Geoffrey Muthomi Murithi, a Clinician at Miathene sub county hospital produced the complainant's P3 form. On examination, the complainant had swollen face and thighs, her labia majora and minora were inflamed and there was a discharge. When the high vaginal swab was done, spermatozoa, red blood cells, pus cells and gram negative bacilli were detected. Based on those observations, he opined that the complainant had been raped. He also examined the appellant and produced his P3 form which revealed no bruises or any other abnormalities. He further produced 2 laboratory investigation forms and treatment notes as exhibits in court. He was not subjected to any cross examination by the appellant.
15. PW6 Corpl. Noeline Makoba of Tigania police station and the investigating officer herein, was at the station when the complainant came to make the report about the rape and the robbery. She recorded PW1's statement and rearrested the appellant who had at the first instance been apprehended by the area youths. They recovered the complainant's phone (PEx.1) from the appellant and the identification parade was conducted the following day where PW1 positively identified the assailant. She filled an identification form which she produced as exhibit. She visited the scene which was a plantation at the complainant's home, took photographs thereof and produced them as exhibits. The appellant was unknown to her prior to his arrest. She was equally not cross examined by the appellant.
17. When called upon to defend himself, DW1, the appellant, offered unsworn testimony and denied either robbing or raping the complainant. He testified that the complainant was unknown to him as he first saw her in court. He was relaxing in a hotel after work when youths arrested him accusing him of having robbed the complainant. One of those youths planted a cell phone on him claiming that it belonged to the complainant and he was taken to the police station.
18. The trial court after analysing the evidence found the case to have been proved beyond reasonable doubt, convicted and sentenced the appellant to death in respect to count 1 and to 30 years' imprisonment with hard labour in respect to count 2.
19. Dissatisfied with the conviction and sentence, the appellant lodged this appeal setting out 4 grounds as follows: -
 - a. The trial court erred in law and fact by failing to note that the prosecution did not prove its case beyond reasonable doubt.
 - b. The trial court erred in law and fact by failing to note that the vital and crucial witnesses were not summoned before court to testify.
 - c. The trial court erred in law and fact by failing to note that the alleged exhibit was planted upon the appellant.
 - d. The trial court erred in law and fact when it rejected the appellant's defence without a cogent reason.
20. The appeal was directed to be canvassed by way of written submissions, which were respectively filed on 7/12/2021 and 9/2/2022. In his submissions, the appellant submitted that the only eye witness to the offence was the complainant, who was quite elderly and confused, as the testimony of PW3 was contradictory and incredible. He faulted the trial court for relying on contradictory, uncorrelated and uncorroborated evidence of the complainant to convict him, without warning itself of the dangers of the same, and relied on the Court of Appeal cases of *Bernard Kebiba v Republic* (2000)eKLR



and *Benjamin Mugo Mwangi & Anor v Republic*(1984)eKLR in support thereof. He faulted the prosecution for failing either to call Eunice Nchece, Kenneth and Zakayo, who according to him were crucial witnesses to testify or prove its case beyond reasonable doubt, and relied on *Bukenya & Others v Uganda*(1972)EA, on the duty on the prosecution to call all witnesses necessary to establish the truth, even if their evidence may be inconsistent and added that the identification parade was inconclusive and no photograph was taken to show that he was found in possession of the phone. He then faulted the trial court for rejecting his defence which contained some reasonable grounds to support his acquittal. He submitted that the burden of proof was with the prosecution at all times and relied on *DPP v Woolmington*(1935)UKHL 1, *Festus Mukati v Republic*(2013)eKLR and *Miller v Ministry of Pensions*(1947)All ER 373 to support that argument. He beseeched the court to scrutinize the testimonies tendered by the prosecution together with his own evidence in order to arrive at a different conclusion.

21. The prosecution, as respondent, submitted that it had proved all the ingredients of robbery with violence and rape as set out in *Jackson Oluoch & Anor v Republic*(1984)eKLR and the Court of Appeal case of *Republic v Oyier*(1985)KLR 353. It reiterated that the appellant had been found in possession of the complainant's phone by PW3 and relied on the doctrine of recent possession whose elements were summarized by the Court of Appeal in *Eric Otieno Arum v Republic*(2006)eKLR. In praying for the dismissal of the appeal, it submitted that there was no margin of error as to the identity of the assailant and concluded that it had proved its case beyond reasonable doubt.

Analysis and Determination

22. In determining this appeal, this court being a first appellate court is alive to its mandate to refresh and independently re-appraise the whole evidence with a view to coming to own conclusions as laid down by the Court of Appeal in *David Njuguna Wairimu v Republic*(2010) eKLR thus:-

“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 appellant 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.”

23. There was sufficient and uncontroverted evidence that the complainant was raped and robbed on the material day. What is in dispute is whether the appellant was positively identified as the perpetrator. A careful consideration of the evidence on record reveals that the offences took place at day but there were no eye witnesses thereof apart from the complainant. However, soon after the crime, the appellant was met by Pw3 whom he talked to and informed that he was coming from the general direction of the complainant's home. He was carrying a gunny bag and other property that were subsequently shown to have belonged to the complainant and which were reported to have been robbed from her.
24. For the first count of robbery with violence, the law demanded of the prosecution to prove beyond reasonable doubt the three elements as stipulated under section 296(2) of the *Penal Code*, being that: -
- a) the offender was armed with any dangerous or offensive weapon or instrument, or
 - b) was in company with one or more other person or persons, or



- c) 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.
25. The evidence of the complainant was consistent that the appellant stepped on her ribs then strangled her before raping her. As a consequence of such acts, the complainant Pw5 established that the complainant suffered injuries to her thighs and face which were swollen over and above both labia which were inflamed. There was sufficient evidence, beyond reasonable doubt that used personal violence on the complainant before proceeding to her house and carting away her beans, machete and a cellphone. I find no iota of doubt, at all, that violence was used upon the complainant immediately before the theft hence there was the offence inviting the mandatory sentence stipulated by the statute.
26. The next consideration is whether the appellant was the aggressor and he who stole the complainant's property. That is a question that speaks to identification of the appellant. While the complainant did not know the appellant before and as at the date of the attack, two critical events followed the attack and in quick successions. The appellant was met by PW3, an acquaintance, while carrying a yellow gunny bag and a machete and when the two talked, appellant disclosed that he was carrying beans he had harvested from the neighbourhood of the scene of the attack. That was, by approximation of time, within one hour of the attack. Moments later, the said PW3 in the company of other community policing youths traced and found the appellant in possession of a cellphone that was proved to belong to the complainant. In addition the attack happened in daylight and when the identification parade was conducted, the appellant was easily identified by the complainant. In my reassessment of the evidence ad its reevaluation, I do find that the appellant was positively identified not only at the parade but also by PW3 who also found in his possession the cellphone recently stolen from the complainant. Consequently, I do find and hold that the appellant was proved beyond reasonable doubt to have viciously attacked the complainant before stealing from her and that he was properly and safely convicted of the offence of robbery with violence contrary to section 295(2) of the Penal Code. The appeal against it lacks merits and is thus dismissed.
27. The other conviction was for the offence of rape. Rape is defined under section 3 of the Sexual Offences Act to mean, the intentional and unlawful penetration of a person's genital organ into another's genital organ without their consent.
26. The ingredients of the offence of rape therefore, include intentional and unlawful penetration of the genital organ of one person by another without consent. In addressing the point, the Court of Appeal in R v Oyier (1985) KLR pg 353, held:-
- “The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact.”
28. On whether there was intentional, unlawful and non-consensual penetration of the genital organ of PW1, the complainant narrated to the court how the stranger grabbed her by the neck, carried her shoulder high to a nearby banana plantation, stepped on her ribs, strangled her, hoisted her dress up and raped her. When PW2 arrived at PW's home, he found her bleeding from the mouth with



a swelling on her face. PW1 and PW2's testimonies were corroborated by PW5 who testified that when he examined the complainant, she had swollen face and thighs, her labia majora and minora were inflamed, there was a discharge, spermatozoa, red blood cells, pus cells and gram negative bacilli, which were all indicative of non-consensual sexual activity.

29. The court has found and held that the appellant was sufficiently linked to the attack on the complainant and the theft of her property. On the same basis of identification at the parade and the evidence of PW3 as corroborated by that of PW5, the court is satisfied that the prosecution proved to the requisite standards that, there was intentional and unlawful penetration of the complainant's vagina without her consent.
30. Against the otherwise cogent evidence, the appellant when called to his defence and while admitting having been arrested while in possession of the cell phone belonging to the complainant, the same day the robbery took place, offered no reasonable explanation how he came by the same then insisted that the cell phone had been planted on him, in order to incriminate him. It is that defence the appellant says the trial court ignored and failed to take into account. In its judgment, the trial court did consider the defence offered and called it futile and bare. I read that to mean that the defence was not credible and was not convincing to the court. However, even if there had been no mention at all of the evidence by the defence, this court has a mandate to review the entire evidence and come to own conclusions and such failure alone in the absence of credible evidence would not suffice to upset the conviction.
31. I find that based on the evidence led by the prosecution witnesses coupled with the fact that the appellant was found in possession of the cell phone, which was positively identified as the one stolen from the complainant, the appellant was indeed the perpetrator of the offenses of robbery with violence as well as rape.
32. The next complaint by the appellant was that there was failure by the prosecution to call Eunice Nchece, Kenneth and Zakayo, who according to the appellant were crucial witnesses. To that complaint, the courts position is that being an independent office, the DPP must be allowed the latitude to perform its constitutional duty it being remembered all the time that there must not be any definite number of witnesses to prove a fact. In *Julius Kalewa Mutungu v Republic* (2005) eKLR, the court addressed the issue and held:-

“...the prosecution is granted a discretion whether or not to call specific witness and courts would not interfere with that discretion unless it is shown that the prosecution had an ulterior motive in which event it will be presumed that the witness not called would have given adverse evidence.”

36. The last issue touches on the propriety of the sentences imposed which however was not preferred as a ground of appeal but alluded to in the petition by the expression that the appeal challenges both conviction and sentence. Not even submissions were offered in that regard. That notwithstanding, and with the court's mandate on a first appeal, this court is guided that sentencing is at the discretion of the trial court and it takes a very strong case for an appellate court to disturb a discretion exercised by the trial court. That is the law notwithstanding the raging debate on constitutionality of the mandatory death sentence. The Supreme Court in *Francis Karioko Muruatetu & another v Republic* (2017) eKLR, reiterating that sentencing fall to the discretion of the court also affirmed the legality of death sentence when it said:-

“For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment.”



37. The sentences in this appeal on both counts fall within the stipulations of the law and now outrightly too harsh or excessive. One may only comment that the trial court felt overly constrained to impose a mandatory sentence. However, it also noted that the appellant was a repeat sexual offender who deserved harsher sentence. On the basis of that fact, I find no error in imposing the sentence as to merit upsetting the sentence.

38. In the end, I find the entire appeal to lack merits and it is thus dismissed.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, ONLINE, THIS 25TH DAY OF MAY 2022.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Appellant in person

Ms. Nandwa for the Respondent

Court Assistant: Mwenda

