



**EKR v Republic (Criminal Appeal E093 of 2021)
[2022] KEHC 14683 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14683 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E093 OF 2021
A. ONG'INJO, J
OCTOBER 27, 2022**

BETWEEN

EKR APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the decision by Hon. E. A. Nyaloti, Chief Magistrate on 6th August 2021 in Mombasa Sexual Offences Case No. 99 of 2019, Republic v Edwins Kipngetich Rob)

JUDGMENT

1. The accused EKR was charged in Count I with the offence of rape contrary to Section 3(1)(a)(b)(3) of the *Sexual Offences Act* No 3 of 2006. The particulars are that on the September 22, 2019 at XXXX area in Mombasa sub-county within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of TW without her consent.
2. In the alternative charge EKR was charged with the offence of indecent act with an adult contrary to Section 11 (A) of the *Sexual Offences Act* No 3 of 2007. The particulars are that on the September 22, 2019 at XXXX area in Mombasa sub-county within Mombasa County, intentionally touched the vagina of TW with his palms against her wish.
3. The accused EKR was charged in Count II with the offence of robbery with violence contrary to Section 295 as read with Section 296 (2) of the *Penal Code*. The particulars are that on the September 22, 2019 at XXXX area in Mombasa sub-county within Mombasa County, while armed with a dangerous weapon namely a knife robbed TW off her mobile phone make Tecno Spark 3 valued at Kshs 11,500 and cash Kshs 10,500 and immediately before or immediately after the time of such a robbery threatened to use violence to the said TW
4. The trial magistrate considered the evidence of five prosecution witnesses and found that there was sufficient evidence to put the accused on his defense. The trial magistrate was satisfied that the



prosecution had proved its case against the accused beyond reasonable doubt. The trial magistrate further found that the accused was guilty of the offence of rape and was convicted.

5. The appellant was aggrieved and dissatisfied by the entire decision by the trial court and preferred the appeal herein on the following grounds: -
 1. That the learned trial court magistrate erred in law fact by convicting me the appellant to 12 years imprisonment without considering that identification being an essential element of defilement was not proved beyond reasonable doubt.
 2. That the learned trial court magistrate erred in law fact by convicting me the appellant to 12 years imprisonment without considering that I the appellant was denied a right to a fair trial pursuant to article 50 (2) (p) of the Constitution.
 3. That the learned erred in law by not considering the period of 2 years which is stipulated under section 333 (2) of the criminal procedure code, which I spent in custody during trial.
 4. That the learned trial court magistrate erred in law fact by convicting me the appellant to 12 years imprisonment without considering my reasonable defence.
6. This appeal was canvassed by way of written submissions.

Prosecution's Case

7. PW1, TW stated that she stays in XXXX and sells telephones. That on September 15, 2019, she was going home while talking on the phone when she found the accused who asked whether she sells phones which she replied in the affirmative. PW1 stated that she met the accused at 7.00 pm, there was electric light and she could clearly see the accused. That the accused asked for her number which she gave him then she left and went home. That on September 16, 2019, the accused started sending her love messages. The accused asked her if she could be his girlfriend but PW1 declined. That the accused kept calling and sending her text messages. That the accused called and told her that he wanted to buy a phone. That PW1 told the accused that she had Spark 3 phone and he told her to go with the phone to him. That the accused directed her to KPA Welfare. PW1 stated that she went to where the accused had directed her on September 22, 2019 at around 4.00 pm and 5.00 pm. That she found the accused in a club and sat with him where he offered to buy her a drink which she declined.
8. PW1 stated that the accused took her to a house in KPA, opened the door and asked her to get in the house. That PW1 resisted and told the accused that they do the transaction outside but the accused told her not to fear. PW1 stated that she entered the house and the accused closed the door. That the accused forced her to sit and he threatened her with a knife. That she told the accused to open the door but he refused. That the accused took the new phone and told PW1 to add him Kshs 10,000. PW1 says that she did not have the Kshs 10,000 but the accused told her to ask for money from her friends. PW1 stated that she sent a message to her boss and told him to send Kshs 10,000. That the accused told her to sleep with him but she refused and he held a knife and threatened to stab her if she refused to have sex with him. That the accused told her to kneel which she did. That he then told her to lift her hands up and he went ahead and removed her clothes and removed her underpants. That the accused removed his clothes and had sex with her.
9. PW1 further stated that the accused asked if she was a virgin and inserted his fingers in her vagina. That PW1 tried to remove the accused's hand but he persisted and she told him that she was feeling pain. That the accused told her not to make noise and he continued to have sex with her. That the accused forced her to shower which she did and he had sex with her for the 3rd time. That the accused took the phone and continued asking for Kshs 10,000. That he asked her to show him the Mpesa PIN number



and her phone went off. That the accused took her line, threatened her with a knife and forced her to disclose her PIN number. That the accused then transferred Kshs 10,000 from her phone to his phone. PW1 stated that the accused had unprotected sex with her and that she stayed in the accused's house from 5.00 pm to 10.00 pm. That the accused escorted her to the gate and she took a tuktuk to Central Police Station. That she then went to Coast General Hospital for treatment. That the accused identified the PRC Form that she was issued with and the knife the accused threatened her with, the box of the phone, and the towel that the accused forced her to wipe herself with, exhibits which police officers went to the accused's house and recovered. PW1 identified the accused in court as the one who raped her.

10. PW2, Aaron Kimutai Sorogoi stated that he works with KPA security and that on September 16, 2019, he met Edwin Kipngetich for the first time at XXXX Estate and that he knew one Lelei who was an uncle to the accused. That the accused told PW2 that he was working at Mtwapa. PW2 stated that the accused asked to sleep in his house and he gave him keys to the house. That on September 22, 2019, PW2 was going to work and he called the accused at 9.00 pm but his phone number xxxx was not going through. PW2 stated that he called at 10.30 pm and the accused received his call and told him that they meet at the KPA Welfare. That the accused told him that he had bought a Tecno Spark 3 phone. PW2 stated that he went to his house and found a box of Tecno Spark 3 and a knife on the sofa set. That next day he called the accused who did not pick up. That PW2 went to see the accused who told him that he was going to shower and he requested to be seen later. That the Accused did not show up. That PW2 met Lelei, the uncle to the accused and he told him that the accused had gone home. That on September 24, 2019 PW2 was on duty when his supervisor called him and told him that he was required at Central Police Station. PW2 identified the accused as the one before court.
11. PW3, Dr Faima Swaleh from Coast General Teaching and Referral Hospital stated that she had a P3 form of TW aged 22 years which was filled and signed on October 3, 2019 by Dr Mohamed who was involved in other medical duties. PW3 stated that she had worked with the doctor for three years and was familiar with his handwriting and signature. PW3 produced the P3 Form as exhibit 5. That the Complainant alleged she had been raped and the findings were that there was a sexual assault. PW3 stated that there was no discharge from the vaginal area. That the second document is the post rape care form for TW which was filled on September 23, 2019 at 11.45 am. That the allegations were that the survivor had been raped when she went to sell a phone to the accused and that the accused threatened to stab the Complainant. PW3 stated that the accused penetrated the Complainant's vagina with his penis, and produced it. The findings were that the Complainant was sexually assaulted.
12. PW4, No xxxx SGT Joseph Ringera stationed at Central Police Station as the investigating officer stated that on September 23, 2018, he was instructed by the OCS to investigate a case of rape which had been reported the previous night by a lady. PW4 stated that he interrogated the Complainant who told him that she had gone to deliver a phone to the suspect when the suspect robbed and raped her. That the suspect had met the Complainant at Makande area and requested the Complainant to deliver a phone. PW4 stated that he recorded the Complainant's statement who also led him to the scene on September 24, 2018 which was at Makande KPA quarters block N door No 202.
13. PW4 stated that at the scene, he looked for the owner of the house who is a witness. That he opened the house and at the table he found a knife which the Complainant identified as the one that the accused had used to threaten the Complainant. That the house had a sitting room and a bedroom. PW4 marked and produced the knife as exhibit 2. He also stated that he recovered an empty box of Spark 3 phone which was on the sofa set in the house and produced the empty box. That in the bedroom, he found the towel that the accused asked the Complainant to wipe herself with after the rape. PW4 produced the towel as exhibit 3. PW4 stated that the accused ordered the Complainant to send money to his number



and she refused. That the accused threatened her and she gave him her PIN number. That when the Complainant refused to have sex with the accused, he threatened her with the knife and that he used the Mpesa PIN to transfer money from the Complainant's phone number xxxx in the Complainant's name to xxxx in the name of EK. PW4 produced certified Safaricom Statement as exhibit 6. He stated that the money which amounted to Kshs 10,598 was sent on September 22, 2019 at around 21.50 hours and the transaction was done in four bits on the same day, the money having been sent in 4 minutes intervals. PW4 stated that they started tracking the suspect through his phone number and the suspect was traced in Turbo and arrested by PC Bungei. PW4 identified the accused as the one who was before court and the Complainant identified him on the day he was brought from Turbo on October 20, 2019. PW4 stated that there was no relationship between the Complainant and the accused.

14. PW5, No xxx PC Ezekiel Bungei attached to Central Police Station general duties stated that on October 5, 2019, he was called by SGT Ringera, the investigating officer in the case. PW5 stated that he was informed that there was a suspect who had committed an offence in Mombasa and fled to Eldoret. PW5 stated that he was told to go and collect the prisoner. That he went to Turbo Police Station and confirmed that the accused was in custody. PW5 stated that he went and collected the accused and escorted him to Central Police Station. PW5 identified the accused as the one before court.

Defence's Case

15. The accused, EK stated that he stays in xxxx and works with xxxx at Shimanzi. He stated that on September 22, 2019, he was at his place of work then went for Chang'aa drink at Shimanzi when while there he saw police officers who were running after people. That the police officer went to where he was and wanted to arrest him when a struggle ensued between him and the officer who was in the company of PW5. The accused stated that he resisted the arrest and that while fighting phones of the police officers broke but the police officers managed to arrest him later. The accused stated that he was taken to Central Police Station where he was charged with the offence of resisting arrest, malicious damage and selling liquor. That the accused was not taken to court and decided to go on a hunger strike. That on October 3, 2019, he convinced other suspects to go on hunger strike. That on October 6, 2019, the OCS Central Police Station and PW5 took him to the crime office and his finger prints were taken but he was not given a reason as to why. That on October 8, 2019, he was taken to court and charged with an offence he had not committed.

Appellant's Submissions

16. The Appellant submits on whether there was an intentional and unlawful penetration of the genital organ of PW1 that there was an earlier forceful sexual act which was not committed by the Appellant herein as sexual intercourse a day earlier could not possibly have given rise to a scar as opposed to a wound.
17. On the issue of identification, the Appellant submits that mistakes can be made. The Appellant cited the cases of *Francis Kariuki Njiru and 7 Others v Republic, Criminal Appeal No 6 of 2001 (UR)* and the case of *Mohammed Elibite Hibuya & Another v R, Criminal Appeal No 22 of 1996 (unreported)* to that effect. That further, there are questions which remain unanswered regarding identification as set out in the case of *R v Turnbull and Others (1976) 3 All ER 549* as: - 'How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any specially reason for remembering the accused? How long elapsed between original observation and subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?'



18. The Appellant submits that the offence of sexual assault against the Appellant was never proved beyond reasonable doubt. That PW1 was sexually assaulted but failed to take a shower for the second time. That however, medical evidence proved that there were no spermatozoa which proves that PW1 was lying to court. Further, that a towel alleged to have been used by PW1 to wipe herself was brought to court but forensic examination was not carried out to rule out the existence of a second person on the towel. That it would have proved that indeed PW1 was in the alleged house on September 22, 2019 together with the appellant herein.
19. In submitting, the Appellant stated that PW2 told the court that on September 22, 2019 at around 10 pm when he went to his house, he found a knife on the sofa set and never told the court the owner of the knife. That when PW4 visited the same house, he told the court that he found a knife on the table which was identified by the Complainant. The Appellant submits that it is not clear who was telling the truth between PW2 and PW4.
20. The Appellant submits that according to the prosecution case, PW1 lost a phone Tecno Spark 3 valued at Kshs 11,500 and cash of Kshs 10,000. That no receipts or IMEI number of the alleged phone was produced in court to prove its existence. That the trial magistrate dropped the charge of robbery with violence and convicted the Appellant with a minor charge of stealing without giving reasons for the said changes.
21. The Appellant states that the prosecution produced in court an Mpesa statement printout from Safaricom proving how Kshs 10,000 was transferred from the Complainant's phone to that of the Appellant. The Appellant went further to cite Section 106B of the *Evidence Act* where it is prescribed that a certificate should accompany the electronic evidence. The Appellant submits that no certificate was produced in court identifying the electronic record or by whom the document was produced. That the authority of the Mpesa statements and its contents remain in question and could not be used to form the basis of the conviction.
22. According to submissions by the Appellant, it is on record that the Appellant was not given witness statement but only provided for after some of the witnesses testified in court. That the Appellant was given witness statements almost one year and eight months after commencement of the case and after key witnesses had testified. That this was a violation of his constitutional rights to a fair trial as held in the case of *Albanus Mwasia Mutua v Republic (2006) eKLR*.
23. That enough evidence was found at the scene of crime which included an alleged box belonging to a lost phone, a knife and a towel. That this was proper evidence to find the real culprits of the heinous acts That the prosecution had the duty of carrying out forensic examination to connect the perpetrator to the offence.
24. The Appellant submits by citing Section 333(2) of the *Criminal Procedure Code* which states that where a person had been held in custody during the trial period, the said period shall form part of the sentence. That the said court ought to consider the said period. The Appellant further cited the case of *Robert Mutashi Auda v Republic, Criminal Appeal No 247 of 2014* at Nairobi to that effect.

Respondent's Grounds of Opposition

25. The State had the following grounds to oppose the Petition of Appeal: -
 1. Identification of the Appellant was established
 2. The fact of penetration was proved
 3. The trial court guaranteed the Appellant's right to a fair trial



4. That the Appellant's defense was considered by the trial court and a finding made for the same
5. The prosecution proved its case beyond reasonable doubt
6. The period spent by the Appellant in custody was considered during sentencing
7. The sentence meted by the trial magistrate was lawful

Analysis and Determination

26. This being the first appellate court, I am guided by the principles in *David Njuguna Wairimu v Republic [2010] eKLR* where the court of appeal held: -

' 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 appellate 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.'

27. After considering the grounds of appeal, Records of the trial court, submissions, grounds of opposition and circumstances of the case, the issues for determination are as follows: -

- i. Whether the Appellant was positively identified
- ii. Whether the Appellant was accorded a right to fair trial pursuant to Article 50 (2)(p) of the *Constitution*
- iii. Whether the two years already spent in custody was considered as stipulated under Section 333 (2) of the Criminal Procedure Code
- iv. Whether the Appellant's defence was considered

Before dealing with the issues that have been framed above, it is important to state that it is erroneous for the Appellant to state that he was sentenced to serve 12 years imprisonment when it is clear from the records that he was sentenced to serve 10 years imprisonment for Count I and 2 years imprisonment for Count II and the sentences were to run concurrently.

Whether the Appellant was positively identified

28. PW1 stated that she met the Appellant on September 15, 2019 at 7.00 pm for the first time and that there was electric light that made her to see him clearly. That on September 16, 2019, the Appellant started calling and sending her love text messages and that on September 22, 2019 between 4.00 and 5.00 pm, the Complainant met the Appellant in a club and sat with him. Further, the Appellant took the Complainant to a house at KPA Makande where the offence herein took place until at 10.00 pm when the Appellant escorted her to the gate and she took a tuktuk and went to report at the police station. The Appellant lured the Complainant to a house at KPA quarters in the pretext of wanting to buy a phone from her. Being that this was the second time, the Complainant was meeting the Appellant in broad daylight, there could not have been a mistake as to the identity of the Appellant. He was recognized by the Complainant and they were interacting as a buyer and a seller of mobile phone and not as strangers to each other.



29. Paragraph 8 of the Appellant's submissions confirm that the Complainant having met him on two occasions, the meeting was more of recognition than identification. The holding in *Peter Masasau Mwanzia v Republic* supports the position that recognition is more reliable.
30. PW2 corroborates the evidence of PW1 regarding the presence of the Appellant at the scene of crime on September 22, 2019. PW2 had given the Appellant keys to his house on the material day and at 9.00 pm when he called him through his telephone number xxxx, it was not going through but at 10.30 pm when he called again, the Appellant told him they should meet at KPA Welfare in Makande. When they met, the Appellant told him he had bought a Tecno Spark 3 phone and when PW2 went to his house, he found a box for the Tecno Spark 3 phone and he also found a knife on the sofa set. PW1 said that the Appellant stole from her a Tecno Spark 3 phone and money which was transferred from her phone to the Appellant's phone under threats. She identified the knife used to threaten her before being raped. Whether the Appellant was accorded a right to fair trial pursuant to Article 50 (2)(p) of the *Constitution*
31. Article 50 (2) Every accused person has the right to a fair trial, which includes the right-
- (p) To the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing;
32. The Appellant's submissions however relate to supply of witness statements which is provided for under Article 50 (2) (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
33. From the records in the trial court, when the matter came up on October 30, 2019, the prosecution counsel indicated to court that she had supplied the Appellant with witness statements. On August 12, 2020 when the matter came up for hearing, the Appellant prayed for statements of the arresting officer and the court issued orders for the same to be availed. On September 9, 2020, the Appellant indicated to court that he did not have all the statements and that the statements that he had previously been given got lost in prison. The court ordered the prosecution to re-issue the Appellant with witness statements. On September 30, 2020, the prosecution indicated to court that they had re-issued the Appellant with all the witness statements. This was also the case on November 4, 2020 when the Appellant was given one more chance to re-read the witness statement. When the matter came up for hearing, the Appellant cross-examined all the witnesses on the evidence presented in court exhaustively.
34. The Appellant's allegations that his rights to fair trial under Article 50 (2) (j) and (p) of the *Constitution* were violated is not true.

Whether the Appellant's defence was considered

35. The defense by the Appellant was that on September 22, 2019 he went to Shimanzi to drink chang'aa when police officers went to arrest the people who were drinking and a struggle ensued between him and PW5. PW5 PC Ezekiel Bungei said he went to Eldoret on October 5, 2019 and picked the Appellant from Turbo Police Station. There was no witness No 6 from the prosecution side. PW2 said that on September 23, 2019 when he went to the accused person's place, the Appellant said that he was going to shower and that the Appellant would see him later. The Appellant however did not go to see him and when he met the Appellant's uncle, the uncle told PW2 that the Appellant had gone home. Although the mention of the Appellant's defense at paragraph 19 of the judgment is brief, his defense is not compatible with the prosecution's case as to where he was on September 22, 2019 and that subsequently he went home after committing the offence herein. His defense was mere denial of the prosecution's case.



Whether the two years already spent in custody was considered as stipulated under Section 333 (2) of the Criminal Procedure Code

36. The sentences of 10 and 2 years for the offence of rape and stealing were ordered to run concurrently and should take effect from 10.08.2019 when the Appellant was first arraigned in court as it is apparent that although he was granted a bond of Kshs 50,000 with surety of a similar amount, he did not secure the security. There was an oversight on the part of the trial court which did not accord the Appellant the benefit of Section 333(2) of the Criminal Procedure Code.
37. In conclusion, this court finds that save for the benefit under Section 333(2) of the Criminal Procedure Code, the appeal lacks merit and is dismissed. The Appellant has 14 days right of appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,

THIS 27TH DAY OF OCTOBER 2022

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for the Respondent

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

