



**Ochieng' v Republic (Criminal Appeal E082 of 2021)
[2022] KEHC 14696 (KLR) (21 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14696 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E082 OF 2021
A. ONG'INJO, J
OCTOBER 21, 2022**

BETWEEN

DAVID NOAH OCHIENG APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against conviction and sentence by Hon. E. A. Nyaloti, Chief Magistrate on 24th August 2021 in S. O. Case No. 61 of 2018, Republic v David Noah Ochieng)

JUDGMENT

Background

1. David Noah Ochieng' was charged in Mombasa Chief Magistrate's Court SO Case No 61 of 2018 with the offence of rape contrary to Section 3(1)(a)(c)(3) of the *Sexual Offences Act* No 3 of 2006. The particulars are that David Noah Ochieng' on the August 10, 2018 at Mombasa in Mombasa County intentionally and unlawfully caused his penis to penetrate the vagina of EMM without her consent.
2. In the alternative count, the appellant was also charged with the offence of committing an indecent act with an adult contrary to Section 11(A) of the *Sexual Offences Act* No 3 of 2006. Particulars of the offence are that David Noah Ochieng' on August 10, 2018 at Mombasa in Mombasa county, intentionally touched the vagina of EMM with his penis against her will.
3. The trial magistrate considered the evidence of the three prosecution witnesses and the sworn statement of the appellant and convicted the appellant who was sentenced to serve 10 year-imprisonment.
4. The appellant was aggrieved by the conviction and sentence and he preferred the appeal herein on the following grounds: -



1. That the learned trial magistrate erred in law and fact in coming to a finding that the prosecution had proved its case against the accused.
 2. That the learned trial magistrate erred in law and fact in finding that there was lack of consent just because of abrasion on the Complainant's private parts.
 3. That the learned trial magistrate erred in law and fact in failing to analyse the evidence as a whole and particular in failing to consider and give a finding on the issues raised which were: -
 - a. How come the Complainant waited for the salon to be free of all customers yet she was not the last to arrive?
 - b. How come the Complainant opted to surrender her position to enable other customers to be served while she was content to be the last customer?
 - c. How come the Complainant did not raise alarm yet she was alone in the Salon, while the Appellant went to fetch a condom, and yet she had her mobile phone and called nobody?
 - d. How come there were security guards outside the door and their assistance was not sought either before or after the assault?
 - e. Why did the Complainant fail to report to the Police (Central Police Station) which was only meters away from the scene of the crime?
 - f. Why did it take the Complainant up to the afternoon of the following day to make a report?
 - g. How come the complainant visited a medical facility known as XXXX Medical Centre which was the first facility to attend to her, and the document from that facility was concealed from the court, and
 - h. How come in that facility no abrasions were observed?
 4. That the learned trial magistrate erred in law and fact by disregarding the Appellant's defence.
 5. That the sentence was manifestly excessive and harsh.
5. The Appellant prayed that this court sets aside the conviction and sentence and to direct that he be set at liberty. The Appellant filed written submissions to that effect.

Appellant's Case

6. PW1, EMM, stated that she lives in XXXX, Mombasa County and does cosmetics business. PW1 stated that on August 10, 2018 at around 6.00 pm, she went for pedicure at the accused's salon in Mombasa Town and that it was her second time at the salon. PW1 found other customers being served and she was the last one to be served by the accused. That at 7.00 pm, PW1 was alone with the accused in the salon and after the job, she paid him Kshs 750 through Mpesa. PW1 stated that the salon door was locked and when she asked the accused to open it, he became harsh which led to an argument that lasted up to 10.00 pm. That with the locked doors, the accused proceeded to caress PW1's breasts and threatened to attack her. PW1 states that the accused got out and locked her inside. She also locked the door from the inside. PW1 stated that after 45 minutes the accused was back, he kicked the door and got in then proceeded to rape her. That when the accused finished committing the heinous act, he opened the door which allowed PW1 to go home at around 1.00 am. PW1 stated that the following day he informed his friend JR about the rape who advised her to report the matter to the police. PW1 stated



that she made a complain to Central Police Station on August 11, 2018, she was then sent for medical examination where she was examined and medication administered on August 12, 2018 at SXXXX Hospital in Likoni and on August 13, 2018 a police officer took her to Coast General Hospital for further medical assistance. PW1 stated that she also filled out forms, one of them being the PMF 1 – PRC form present in court and a P3 form. That PW1 did not know the accused before and he heard him being referred to in the salon as Davy.

7. PW2, Dr Nafisa Seif, stated that she works at Coast General Hospital as a general practitioner and that she had a P3 form signed by his colleague Dr Nabil Varwani on August 16, 2018. PW2 stated that she understands Dr Nabil's handwriting and signature which she is familiar with after working with him for one year. She stated that the general condition indicated that the patient had right hip tenderness. That the examination of her genitalia indicated that the external genital was normal, the vagina had abrasions, the hymen was broken with an old scar, the injury was assessed as harm, and the patient was given analgesics. PW2 stated that the P3 form was filled on August 16, 2018, signed and she produced it as Exhibit 1. She further stated that there was a PRC form signed by Dr Said on August 14, 2018 for the patient, EM. That on examination of the female sexual organ, the hymen was broken but the anus was normal. PW2 stated that the vagina had healing abrasions lab, investigations were done, HIV test was negative, VDRA test for Syphilis was negative, and Hepatitis B was negative. That the patient was given STI treatment and a drug to prevent pregnancy. PW2 produced the PRC form as Exhibit 2.
8. PW3, No xxxx SSGT of Police Nimo Abdullahi based in Kwale but formerly at Central Police Station on August 11, 2018 stated that she was in the office when she perused the files and found that there was a sexual offence which had been allocated to her. PW3 stated that she called the complainant who went to the office, questioned her and PW3 found that she had been raped by the accused. That the complainant sought initial treatment at Savannah Clinic where she was treated but PW3 took her to Coast General Hospital Gender Clinic where she was examined. PW3 stated that the accused insisted on knowing the complainant, he started massaging her and she paid Kshs 500 for the services. PW3 stated that as the complainant was leaving, she found the accused had locked the door. The accused took the complainant to another room and locked her from the outside. That the complainant also locked herself in the room, which annoyed the accused who broke the door. PW3 stated that the accused put a condom on and raped the complainant on a table. PW3 further stated that she visited the scene of crime and found that it was as had been narrated by the complainant. That the complainant did not know the accused before. A P3 form was filled. PW3 stated that the complainant was born in 1995 and an adult according to her birth certificate. PW3 produced the birth certificate for EM, the complainant. That the complainant had paid for salon services through Mpesa to the accused's number which PW3 used in tracing and arresting him. PW3 stated that in the company of PC Mugambi, the complainant identified the accused who was charged with the offence of rape. PW3 identified the accused in the dock.

Respondent's Case

9. The accused, DNAO, in sworn statement said that he has been a salonist for close to 15 years and has a salon in BXXXX in town. He stated that on August 10, 2018 the complainant went to his salon to have her nails done and that he had known the complainant before as she had been to his salon more than ten times. The accused stated that on the said day, the complainant went to the salon at 1.00 pm. The accused had customers so he told her to wait. The accused stated that he took the complainant for lunch and when they came back the complainant told the accused that she had gone there to visit him. The accused stated that the complainant stayed in the salon up to 7.14 pm when everyone else had left and that the complainant was his lover. The accused further stated that the complainant said was expecting her periods and asked him to look for a condom to prevent her from getting pregnant.



That afterwards the complainant asked the accused to marry her but he declined because he could not afford to have two wives. The accused further stated that the complainant asked him to rent a house for her and to provide for her. That he declined and this annoyed her. That the complainant threatened to report the accused to the police for rape.

Appellant's Submissions

10. The Appellant submits that there was consensual sexual activity involving the complainant and the Appellant on the basis that while the complainant would have been attended to earlier, she opted to give up her chance in the line to others as she waited and chatted with the Appellant. That the complainant let all other staff members leave her alone with the accused. That the complainant then remained with the accused for some time doing what she called romancing. That she had a cell phone but made no attempt to call anybody or to send a message even when she was left alone in the salon. That she never made any noise or plea for help even though there were neighbours and even watchmen outside.
11. The Appellant submits that while it was admitted that the incident took place at a salon not far from the Central Police Station, the complainant opted not to report immediately but went home instead. That she reported in the afternoon of the following day and that this ought to suggest that her actions were an afterthought.
12. The Appellant submits that the trial court did not consider the possibility of the abrasions being caused later, as well as the lapse of time. That the trial court wrongly concluded that abrasions meant resistance. The Appellant further submits that the trial magistrate closed her eyes to glaring issues. That the complainant's first visit was to a medical facility known as Savani Medical Centre. That according to the facility, even the bruises which PW later claimed to have seen did not exist, which could only be consistent with a sexual activity for which the parties are prepared for and consenting. The Appellant submits that the question that needs to be answered is why the prosecution chose to keep the said document away from the court yet they supplied it to the Appellant as an exhibit to be produced. The Appellant submits that the court did not consider the large time lapse between the two medical reports and the fact that the prosecution attempted to conceal the presence and availability of the first medical examination document.
13. The Appellant submits that the trial magistrate misunderstood the doctor's testimony at page 10 and that an old scar can only refer to a breaking of the hymen at a long past session. The Appellant submits by concluding that there was consent and the evidence adduced by the prosecution in fact supports the Appellant's assertions. The Appellant therefore urged that the appeal be allowed.

Analysis and Determination

14. This being the first appellate court, the court is 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.'



15. After considering the grounds of appeal Records of trial court, submissions and circumstances of the case, issues for determination are as follows: -
- i. Whether the prosecution proved its case beyond all reasonable doubt
 - ii. Whether the trial magistrate analysed the evidence as a whole and considered the issues raised
 - iii. Whether the appellant's defence was considered
 - iv. Whether the sentence was manifestly excessive and harsh

Whether the prosecution proved its case beyond reasonable doubt

16. Section 3(1) of the *Sexual Offences Act* states as follows: -
1. A person commits the offence termed rape if: -
 - a. he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
 - b. the other person does not consent to the penetration; or
 - c. the consent is obtained by force or by means of threats or intimidation of any kind.
17. The elements for the offence of rape under Section 3 (1) of the *Sexual Offences Act* No 3 of 2006 are: -
- i. Penetration
 - ii. Lack of consent and/or consent obtained by force or means of threats or intimidation of any kind
18. *Republic vs Oyier [1985] KLR 353* the Court of Appeal held that: -
- ' 1. 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.
 2. 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.
 3. 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.'

19. It is not in dispute that there was sexual intercourse between the Appellant and the Complainant. PW2, Dr Seif from Coast General Hospital produced P3 Form filled by Dr Nabil who examined the Complainant. Dr Nabil observed that the Complainant's vagina had abrasions and the hymen was broken with an old scar. He assessed the injury as harm and the patient was given analgesics. The ingredient of penetration was therefore proved to the required standards.

20. What is in dispute is whether the penetration was consented to by the Complainant. According to the Complainant, she went to the Appellant's salon at 6.00 pm and she was the last customer after allegedly



allowing an elderly woman to be attended to before her. She said there were two other workers at the salon and at 7.00 pm she remained with the Appellant in the salon alone and when she wanted to leave the Appellant became harsh and that she had not been picking her calls and that the Appellant refused to open the door. That the Appellant then left the salon and locked the door from outside and she also locked the door from inside. That when the Appellant returned after 45 minutes, he pushed and kicked the door open and proceeded to rape her. That it is at 1 am that she left the salon and proceeded home. That it is the following day that she reported to her friend JR about the rape and he advised her to go and report to the police. That on August 12, 2018, she was examined at Savanna Hospital and given medication and on August 13, 2018 that the Investigating Officer PW3 took her to Coast General Hospital where PRC Form and P3 Form were duly filled.

21. The Complainant said she did not know the name of the Appellant but in cross examination she said he had attended to her on one other occasion. PW3 the Investigating Officer testified that the Complainant told him that she had not known the Appellant before. On the other hand, the Appellant said the Complainant had been to his salon for more than 10 times that on the material day she went there at 1.00 pm and she remained with him while his 2 employees left by 7.00 pm. He said the Complainant was his lover.
22. The issues raised by the Appellant's Counsel namely: -
 - i. How come the Complainant waited for the salon to be free of all customers yet she was not the last to arrive?
 - ii. How come the Complainant opted to surrender her position to enable other customers to be served while she was content to be the last customer?
 - iii. How come the Complainant did not raise alarm yet she was alone in the Salon, while the Appellant went to fetch a condom, and yet she had her mobile phone and called nobody?
 - iv. How come there were security guards outside the door and their assistance was not sought either before or after the assault?
 - v. Why did the Complainant fail to report to the Police (Central Police Station) which was only meters away from the scene of the crime?
 - vi. Why did it take the Complainant up to the afternoon of the following day to make a report?
 - vii. How come the complainant visited a medical facility known as Savani Medical Centre which was the first facility to attend to her, and the document from that facility was concealed from the court, and
 - viii. How come in that facility no abrasions were observed?

Are therefore valid in view of the comprehensive evidence given by the Appellant, the conduct of the Complainant and the fact that the initial treatment showed that the initial treatment at Savanna Hospital showed that the Complainant's vaginal wall was normal and it did not have abrasions according to PW3. The Complainant alleged that her trouser got torn during the rape as she successfully resisted but that trouser was not an exhibit in court.

Whether the trial magistrate analysed the evidence as a whole and considered the issues raised

23. This court finds that the trial magistrate in her judgment did not weigh the evidence of the prosecution against that of the Appellant and therefore arrived at a wrong conclusion that the prosecution had



proved its case beyond reasonable doubt when the evidence for the prosecution and that of defence stands in the balance.

Whether the Appellant's defence was considered

24. The trial magistrate referred to the Appellant's defence in one sentence and concluded that since medical evidence points that there was resistance by the Complainant and the hymen was broken and that there was a scar that was seen then there was proof beyond reasonable doubt. There is clearly no consideration of the Appellant's defence in the trial court judgment.

25. In conclusion, this court finds that the appeal is merited, the conviction is quashed and sentence set aside. The Appellant is set at liberty unless lawfully detained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 21ST DAY OF OCTOBER 2022**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Ms. Kambaga for Respondent

Mr. Oloo Advocate holding brief for Mr. Magolo Advocate for the Appellant

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

Ms. Kambaga

We pray for certified copy of the judgment

Mr. Oloo

We pray for an order that security be released

Order: Security for release of Appellant on bail pending appeal to be released to surety. Certified copy of the judgment to be supplied to Respondent counsel. Appellant to pay copying charges for the certified copy of the judgment.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

