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Nyamogo v Republic (Criminal Appeal 28 of 2019) [2025] KEHC 191 (KLR) (17 January 2025) (Judgment)

Neutral citation: [2025] KEHC 191 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL 28 OF 2019

DK KEMEI, J

JANUARY 17, 2025

BETWEEN

COLLINS OMONDI NYAMOGO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the judgment of Hon. M.O Wambani (CM) in Siaya Chief Magistrate's Court in Criminal Case S.O No.E063 of 2021 delivered on 3rd August, 2022)

JUDGMENT

1. The Appellant, Collins Omondi Nyamogo was charged with the offence of Rape contrary to Section 3(1) (a) (c) (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence being that on 24th October, 2021 within Siaya County, intentionally and unlawfully caused his penis to penetrate the vagina of BA by use of force and threats.
2. He also faced an alternative charge of committing an indecent act with an adult contrary to Section 11(a) of the *Sexual Offences Act* No. 3 of 2006.
3. On 10/11/2021 the Appellant was arraigned in court where the substance of the charge and every element were read to him. He denied the offence and a plea of not guilty was entered by Hon. Lester Simiyu (PM).
4. PW1 BA aged 19 years having been born on 26/6/2002 told the court that on 24/10/2021 at about 10.00 am her aunt instructed her to go and herd with the workman, PO. While at the grazing field, it rained. The Appellant came to the grazing field and teased the work man who ran way. She stated that she went to bath in the bathroom that was a bit far away from her aunt's house and while in the bathroom, the Appellant who had a knife accosted her. She stated that at that time, she had stripped off her clothes and that the Appellant put her down and raped her. She stated that she could not scream since the Appellant threatened to stab her with the knife and ordered her not to tell anyone, lest he

could do whatever he wanted. She stated that again while she was going to pick a chemistry book, she met the Appellant who informed her that he would write to her a letter that she would not forget. She told the court that she decided to tell her mother and not her aunt about what had happened and that they reported at Kowet Police station. She was taken for checkup at Siaya County Hospital. She told the court that she did not know the Appellant prior to the incident and that she did not consent to the sexual intercourse with the Appellant. On being cross-examined, she stated that the bathroom that did not have a lock, was away/outside her aunt's house. She stated that she lived with her aunt but that she did not inform her aunt who is usually harsh. She stated that she was frightened by the Appellant who had a knife. She added that an eye witness informed her mother about the rape incident. She stated that she went to hospital on 28/10/2021. She stated that they went to the hospital and later went to school and after school, they went to the police station to report the matter at Kowet Police station. She stated that she was tested for pregnancy and HIV.

5. A voire dire examination was conducted on PW2 AO who told the court that he does attend school at [Particulars Withheld] Primary School but did not know his age or the meaning of oath. Though he told court that he understood the difference between truth and lies. The learned trial Magistrate, Hon. M.O Wambani (CM) directed PW2 to give unsworn testimony. PW2 stated that he knows PW1 whom they live together with his grandmother. He stated that he knew PW1 and the Appellant. He told court that he usually sees the Appellant at the river which is near home. He stated that he saw PW1 and the Appellant inside the bathroom doing bad manners. He stated that the bathroom has a door, though it is not lockable. He stated that there is a hole on the wall of the bathroom and also on the door of the bathroom. He stated that PW1 and the Appellant were standing but the Appellant and PW1 had their clothes on but PW1 removed her clothes while the Appellant also removed his. He stated that he did not hear what they were saying. He stated that he told his grandmother about the rape. He told the court that PW1 denied the rape allegations. On being cross-examined, he told the court that he was behind the bathroom playing when PW1 went to take a bath. He stated that their home is near the bathroom. He stated that he saw the Appellant raping PW1 through a hole that is behind the bathroom wall. He told court that he saw them having sexual intercourse (bad manners) while they were both standing.

6. PW3 AOO, stated that she was PW1's aunt and stated that at 5.30 pm, she was at [Particulars Withheld] market but upon returning home, she did not find PW1 and that PW2 informed her that the Appellant had raped PW1. She told the court that she called PW1's mother, B who came to her home. She stated that PW1 informed her about the rape incident and how the Appellant threatened her using a knife. She took PW1 to Kowet Dispensary where she was referred to Siaya County Hospital and later reported the incident to Kowet Police post. She stated that PW1 could not have known the Appellant since PW1 had come to live with her recently. On being cross-examined, she told court that she knew the Appellant who was their neighbour's son. She told the court that at 4.50 pm she was not at home but at [Particulars Withheld] market. She stated that it was PW2 who informed her about the rape incident, immediately she arrived at home from the market. She stated that she asked PW1 about the incident in the presence of PW1's mother. She told the court that she took PW1 to hospital two days after the incident. On being re-examined, she told the court that she took PW1 to Nyathi Dispensary.

7. PW4 Isaac Imbwaga, Clinical Officer at Siaya County Referral Hospital testified that she examined PW1 and filed in the P3 Form dated 28/10/2021, Post Care Form and treatment card. He told the court that PW1 who had been raped on 24/10/2021 at around 1700 hours had changed her clothes when she was brought to the hospital by her aunt. Upon examining PW1, there was pain on her left breast; hymen was missing/absent; no lacerations or bruises; HIV test was negative; VDRL was negative; pregnancy test was negative; urinal analysis revealed blood stains with red blood cells but no spermatozoa. He concluded that there was past vaginal penetration. He found heavy menstrual

bleeding. He stated that PW1 was seen at Nyathi Dispensary and then at Siaya County Referral Hospital. He stated that PW1's injuries indicated use of force by the perpetrator. On being cross-examined, he stated that PW1's pain on her breast was caused by the perpetrator who used force before raping her. He stated that he does not know the perpetrator.

8. PW5 No. 257001 PC Mercy Msika testified that on 25/10/2021 he perused the OB where she found that she had been assigned the case involving PW1 who is reported to have been raped. PW1 was 19 years at the time of reporting. She told the court that PW1 was able to identify the Appellant as the perpetrator. On being cross-examined, she stated that the P3 Form was filled in by a police officer at the station. She told the court that she did carry out investigations but she did not visit the scene of the incident. She stated that the rape incident took place on 24/10/21 at around 1700 hours and that PW1 knew the Appellant very well, thus there was no need for an identification parade.

9. The learned trial magistrate found the Appellant had a case to answer and placed him on his defence. He opted to tender a sworn testimony.

10. DW1 Collins Omondi Nyamogo told the court that on 9/11/2021 at 6.00 am, he was in his house preparing to go to work when his door was opened and that he saw a torch light and met two police officers outside his house. They told him to go back in the house and arrested him without telling him the reasons. He was taken to Kowet police post and was detained. They took his finger prints and took him to Siaya Police station. He stated that he was arraigned in court on 10/11/2021 for plea taking where he denied the offence. He stated that he was supplied with the prosecution witness statements, charge sheet and documents. He stated that he did not know the offence before taking the plea.

11. On 3/8/2022, Hon. M.O Wambani (CM) found PW1 and PW2 had offered overwhelming direct and/or primary evidence that incriminated the Appellant for raping PW1 on 24/10/2021.It was held that PW4 medical evidence corroborated PW1and PW2 testimony. The learned trial magistrate found PW3 and PW5's testimony corroborated PW1's testimony. She found the Appellant's defence to be a mere denial and an afterthought considering the circumstances under which this offence was committed. The learned trial magistrate found the Prosecution had proved the offence of rape and its elements against the Appellant beyond reasonable doubt. Upon considering the offence, Appellant record, mitigation and the contents of the Probation Officer's Report dated 22/8/2022, the learned trial magistrate sentenced the Appellant to serve 10 years' imprisonment.

12. Aggrieved by the decision, the Appellant lodged the following grounds of appeal:

    1. The learned trial Magistrate erred in law and fact by failing to realize that the prosecution's case was not only insufficient but also fabricated, speculative, unconstitutional and lacked probative values to warrant the court decision.

    2. The Prosecution's case was not proved beyond reasonable doubt.

    3. The Prosecution witness evidence did not corroborate.

    4. PW1's evidence was incredible.

    5. The ingredients of rape as an offence were not proved.

    6. That his arrest was improper.

    . His right to fair trial was violated under Article 50(2) of *the Constitution* as he was not supplied with witness statements, list of exhibits and other documents the Prosecution was to rely upon in the case.

13. The appeal was canvassed by way of written submissions. The Appellant submitted that no witness identified him with any body, mark or clothes that he was seen with. Reliance was placed on Anjononi & Others Vs Republic (1980) KLR 59. The Appellant submits that PW1's evidence did not corroborate medical evidence since no lacerations, no bruises or spermatozoa were noticed on PW1's vagina by PW4. According to the Appellant, PW1 consented since she removed her clothes alone and as per PW2, PW1 was in the bathroom doing bad manners without screaming or raising any alarm. It is submitted that PW3 adduced hearsay evidence since AOO was away at [Particulars Withheld] Market during the alleged day and time of the incident. On contradictions, the Appellant submits that hymen cannot be broken without bruises; without any lacerations, no rape; blood cells can be as a result of monthly period since 28/10/2021 was such a date for PW1 to attend; PW4 did not tell the court how old the missing hymen was; hymen was not broken but missing; paracetamols were the only drugs presented; there was no exhibit like the alleged knife or blood stained cloth was tendered in court. It is submitted that the power to sentence is discretionary thus Section 3(3) of the *Sexual Offences Act*, 2006 ousts the power of the court. The Appellant urged the Court to place him on probation or set him at liberty. The Appellant asserts that he was not accorded a fair trial. According to the Appellant, PW1's testimony was incredible as she did not raise any alarm. Reliance is placed on Ndungu Kimani Vs Republic (1979) KLR 283. It is submitted that PW2 did not understand the nature of oath, thus his evidence cannot be used to incriminate the Appellant. According to the Appellant, PW2 did not see the appellant lying on top of PW1. It is submitted that a missing/broken hymen is not proof of rape, thus the trial Court erred in law and fact to base his conviction on the absence of hymen. Reliance is placed on PKW Vs Republic (2012) eKLR citing Queen Vs Quintinna. The Appellant submitted that the medical evidence by PW4 did not support penetration. Reliance is placed on Robert Nycombe, CA Criminal Division UK of 2017, and Criminal Appeal No. 100 of 1984 Benjamin Mugo Mwangi & Another, and Bernard Kebiba Vs Republic Cr. Appeal No. 104 of 2000 at Kisumu. The Appellant urge this Court to allow his appeal in its entirety, quash the conviction, set aside the sentence and set him free or order for C.S.O. Alternatively, there be a retrial or this Court to exercise its discretionary powers and reduce the sentence.

14. The Respondent submitted that the elements required to be proved for charge of rape are; penetration of the female genitalia; lack of consent from the victim; and identification of the perpetrator. The Respondent submitted that penetration was sufficiently proved by the prosecution beyond reasonable doubt. Reference is made to PW1's evidence that the Appellant put her down and raped her while PW2 saw the Appellant and the complainant inside the bathroom doing bad manners. PW4 who examined PW1 found PW1 had pain on her left breast and that her hymen was missing/absent. According to PW4, there was a past vaginal penetration. Reliance is placed on Bassita Hussein Vs Uganda Supreme Court Criminal Appeal No. 35 of 1995 where court held that the act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. On consent, the Respondent submitted that PW1 stated that the Appellant threatened to stab her with a knife before raping her. The Appellant did not dispute that he was found at the scene of crime by PW2. The Respondent submitted that it is evident that PW1 knew the Appellant prior and thus recognized him. It is submitted that the issue of prosecution's case being speculative, unconstitutional and lacking probative value was not raised by Appellant as an issue during the trial and amounts to an afterthought. It is submitted that PW1's testimony was corroborated by PW2 and PW4's evidence. The Respondent submitted that the Appellant has not demonstrated how his arrest was improper and wrong and how that affected the evidence that he raped PW1. The Respondent submitted that the Appellant's right to fair trial under Article 50(2) of *the Constitution* was not violated since the Appellant did not object to the hearing commencing for not lack of witness statements. He conducted the hearing well, understood and cross-examined the witnesses. It is submitted that he was not prejudiced during the hearing and that the issue

of breach of Constitutional provision can only be raised in a Constitutional Petition. The Respondent urge this Court to uphold the conviction and affirm the sentence.

15. This being a first appeal, it is by way of a retrial and this Court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence afresh and draw its own conclusions on it. However, when doing so, the Court should bear in mind that it did not see the witnesses as they testified and give due allowance for that.

16. In this regard, the Court in Okeno vs. Republic [1972] EA 32 set out the duty of a first appellate court in the following words:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

17. The Appellant was charged under the *Sexual Offences Act*, No.3 of 2006(Act). Section 3 of the Act provides:

    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.

18. The Prosecution is therefore required to establish penetration, absence of consent and that the Appellant was the perpetrator of the act.

19. In the case of 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."

20. PW1 told the court that the Appellant came to the grazing field and teased the work man who ran way. According to PW1, when she went to take a bath in the bathroom that was away from her aunt's house

and while in the bathroom, the Appellant who had a knife accosted her. She stated that at that time, she had stripped off her clothes and that the Appellant put her down and raped her. She stated that she could not scream since the Appellant threatened to stab her with the knife and told her not to tell anyone, lest he could do whatever he wanted. She told the court that she did not know the Appellant prior to the incident and that she did not consent to the sexual intercourse with the Appellant. On being cross-examined, she told the court that she was frightened by the Appellant who had a knife.

21. PW2 told stated that he saw PW1 and the Appellant through a hole inside the bathroom doing bad manners. He stated that PW1 and the Appellant were standing and that PW1 removed her clothes while the Appellant also removed his. On being cross-examined, PW2 told the court that he saw them having sexual intercourse (bad manners) while they were both standing.

22. According to PW4, PW1's hymen was missing/absent though there was no lacerations or bruises. PW4 found the urinal analysis revealed blood stain with red blood cells but no spermatozoa. He concluded that there was past vaginal penetration. He opined that PW1's injuries indicated use of force by the perpetrator. On being cross-examined, PW4 stated that PW1's pain on her breast was caused by the perpetrator who used force before raping her.

23. The court notes that apart from testifying on how he was arrested on 9/11/2021 at 6.00 am by two police officers and was not given the reasons of his arrest, the Appellant did not testify against the testimony of PW1, PW2 and PW4 or any other witness.

24. It is in his written submissions that the Appellant submit that PW1 consented to the act since she removed her clothes alone and as per PW2, PW1 was in the bathroom doing bad manners without screaming or raise any alarm. The court notes that this is evidence from his written submissions and not evidence during his testimony.

25. As stated by the Court of Appeal in Daniel Toroitich Arap Moi Vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

> "Submissions cannot take the place of evidence… Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one."

26. Under Subsection 2, it is provided that the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.

27. Section 43 provides that the acts are intentional and unlawful if it is committed—

    (a) In any coercive circumstance;

    (b) Under false pretences or by fraudulent means; or

    (c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence.

28. Based on the evidence on record, i find PW1 did not consent to engage in the sexual intercourse with the Appellant. PW1 had fear of being stabbed by the Appellant who threatened to stab her. PW1 and PW2 positively identified the Appellant. I find the Appellant intentionally and unlawfully committed the offence of rape against PW1. The Appellant had to tease the workman in the company of PW1 with the intention of committing the offence.

29. The Appellant's claim that his right to fair trial was violated under Article 50(2) of *the Constitution* as he was not supplied with witness statements, list of exhibits and other documents the Prosecution

was to rely upon in the case is an afterthought and which must fail since the Appellant stated in his testimony that he was supplied with the prosecution witness statements, charge sheet and documents.

30. According to the Appellant, his arrest was improper. In his evidence, the Appellant stated two police officers arrested him without telling him the reasons. The court is alive to the provisions of Article 49(1) of *the Constitution* in particular (a) (i) that the arrested person has the right to be informed promptly of the reasons of his/her arrest. The court notes that in his submissions the Appellant has not substantiated the manner in which his arrest was improper. It is trite law that the burden of proving violation or threat of violation is upon the aggrieved party alleging the violation as established in Anarita Karimi Njeru Vs Republic (1976-80)1 KLR 1272.It is also settled that the aggrieved party must patently express the manner in which the other party has violated his/her rights as established in Matiba vs Attorney General [1990] KLR 666.

31. This Court finds the Prosecution proved its case against the Appellant beyond reasonable doubt. The appeal against his conviction lacks merit and that the same is upheld.

32. On sentence meted by the learned trial Magistrate, the Appellant submits that since the power to sentence is discretionary, Section 3(3) of the *Sexual Offences Act* No. 3 of 2006 ousts the power of the court. However, the court notes that save for the request to set aside the sentence, it is not raised as a ground of appeal but raised in the written submissions that the provisions oust the court's discretion in sentencing. Section (3) provides that the person guilty is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

33. Aburili J. in Otieno Vs Republic (Criminal Appeal E057 of 2022) [2023] KEHC 26806 (KLR) (21 December 2023) (Judgment) stated that sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The discretion is however limited to the statutory minimum and maximum penalty prescribed for a particular offence.

34. Though the Appellant has not explained how the provision ousting the court's discretion, Sir Henry Webb C.J. in Kichanjele S/O Ndamungu versus Republic (1941) 8 EACA 64 stated as follows on the proper construction of the words "liable to", in the penalty section of a statute:

> " The wording used throughout the code is "shall be liable to" but a consideration of the various sections shows in our judgment, that the use of the words "shall be liable to" does not import that the sentence mentioned in any particular section in which these words occur is merely a maximum and that the court may impose any lesser sentence below the limit indicated."

35. It follows therefore that the trial court may impose a lesser sentence below the limit provided for.

36. The Appellant is asking this Court to set aside the sentence. In the case of Wanjema Vs Republic (1971) E.A. 493 the court stated as follows:

> " An appellate court should not interfere with the discretion which a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into consideration some immaterial fact, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."

37. This court finds the sentence as meted was lawful. The learned trial Magistrate considered the offence, the Appellant's record, mitigation and the contents of the Probation Report in reaching at the conclusion that the Appellant deserved 10 years' imprisonment. The sentence is affirmed. Besides, the actions of the Appellant must be deprecated as he violated the rights of the complainant.

38. The court notes that the sentence was imposed from the date of the sentencing. During his mitigation, the Appellant had asked the trial Court to consider the date he was arrested. That seems not to have been taken into account by the learned trial Magistrate. The issues may not have been raised as a ground of appeal but under The Judiciary Sentencing Policy Guidelines:

> "The proviso to section 333(2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

39. Accordingly, the sentence to be served by the Appellant shall be computed to include the period the Appellant was in custody before the sentence.

40. In the result and save only that the sentence imposed shall commence from the date of arrest namely 7/11/2021, the Appellant's appeal lacks merit and is dismissed.

It so ordered.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 17TH DAY OF JANUARY, 2025.

D. K. KEMEI

JUDGE

**In the presence of:

Collins Omondi Nyamogo ...Appellant

M/s Kerubo............... for Respondent

Mboya.....................Court Assistant