



REPUBLIC OF KENYA



KENYA LAW
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**Ojwang v Republic (Criminal Appeal E012 of 2023)
[2025] KEHC 189 (KLR) (17 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 189 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E012 OF 2023
DK KEMEL, J
JANUARY 17, 2025**

BETWEEN

ISAAC ODHIAMBO OJWANG APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising out of the conviction and sentence of Hon S.W. MATHENGE
(Senior Resident Magistrate) in Bondo Principal Magistrate's Court
Criminal Case No. E020 of 2021 delivered on 23rd September 2022)*

JUDGMENT

1. The Appellant herein was charged with the offence of rape contrary to section 3(1) as read with 3 (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the night of 28th and 29th December 2020 between 2100hrs to 0200hrs in Kaudha West sub location, Gem Sub-County within Siaya County, intentionally and willfully caused his penis to penetrate the vagina of PAO without consent.
2. The Appellant likewise faced a charge of grievous harm contrary to section 234 of the Penal Code with particulars being that on the night of 28th December 2020 between 2100 hrs in Kaudha West sub location, Gem Sub County within Siaya County, unlawfully did grievous harm to PAO.
3. The Appellant denied both charges and upon a full trial, he was convicted on both counts and sentenced to 10 years' imprisonment for each count and that the sentences were ordered to run consecutively.
4. Aggrieved by the said conviction and sentence, the appellant has now appealed to this Honourable court against the same on the following grounds:



- i. That the trial magistrate failed to consider the duration the appellant spent in custody in line with section 333(2) of the Criminal Procedure Code.
 - ii. That the trial magistrate rested the burden of proof on the appellant as against the guidelines of section 107 of the *Evidence Act*.
 - iii. That the trial magistrate misdirected herself by relying on the evidence of a single witness.
 - iv. That the trial magistrate erred in both law and fact by failing to find that the Prosecution failed to prove the ingredients of both counts.
 - v. That this Honourable court be pleased to consider that the sentence meted was harsh and excessive.
 - vi. That this court be pleased to subject the sentences to run concurrently.
5. The duty of this court is well settled. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In the case of *Maurice Okello Kabura & Another Vs Republic* [2022] eKLR, the court held as follows: -

“.. This being a first appeal, the court is expected to analyze and evaluate afresh all the evidence adduced before the lower court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See *Okeno V Republic* [1972] EA 32, *Pandya V Republic* [1957] EA 336 and *Kiilu & Another V Republic* [2005] 1 KLR 174...”

6. A total of five prosecution witnesses testified while the appellant was the only defence witness.
7. PW1 PAO testified that she is a salonist within Gem Sub -County and the complainant herein. She stated that on 28th December 2020 at about 2100 hours she was heading home from work when the appellant attacked her and assaulted her with a panga. That he cut her on her left wrist. That as she bled from her wrist, he dragged her into the bushes, removed her clothes and raped her until 0200 hours. That in the process, he asked her if she recognized him and she answered in the affirmative. That it was Isaac as she recognized him by his voice as he had been her former boyfriend with whom they had broken up. That he threatened to kill her and asked her how many men she had slept with after they had broken up. That after he was through, he gave her her clothes, took her to the road and left her. That she called her neighbor Donald Omondi who took her to Akala health centre but it was closed. That she reported to Akala Police Station who advised her to seek treatment first. Upon returning to her house, she called her brother KO who came and took her to Lilam hospital then later to Bondo Sub County hospital. She identified P3 form dated 29/12/2020 PMFI 1, Lilam Medical Centre treatment notes –PMFI 2, Bondo Sub County Hospital treatment notes –PMFI 3, Lab request –PMFI 4. That she was attacked at a place called Jacks Ville Centre where there was lighting from three bulbs which enabled her to see him. That she did not give the appellant consent to have sex with her.

On cross examination, she stated that she cut her wrist at Jackville Centre then dragged her into the bush. That the appellant lit his torchlight from his phone and he removed his mask and that she was able to see him.

8. PW2 Jared Obiero Opondo testified that he coordinates clinical services at Bondo sub county hospital. That he examined PAO aged 28 years who alleged to have been assaulted and raped by a person known to her. The examination revealed that she had a compound fracture radius-ulna, age of injury was one



day old. Probable weapon was a sharp object. That he classified the injury as grievous harm. That on examination of the genitalia, her hymen was open, roomy and red and inflamed, hyperemic. There was increased vaginal discharge. Lab examination revealed that HV swab was bloody, positive epithelial cells, positive red blood cells. On urinalysis, it showed positive puss cells, epithelial cells. VDRL was non-reactive. He formed the conclusion that the victim was raped, infected with STIs and assaulted. He signed and stamped the P3 form on 29/12/2020. He stated that the patient was treated at Leelahm Medical Centre and later referred to Bondo Sub County hospital for management. He produced the P3 form dated 29/12/2020 as P Exhibit 1, Leelahm Medical Centre treatment notes –P exhibit 2, Bondo Sub County hospital treatment notes –P Exhibit 3, Lab request –P exhibit 4.

On cross examination, he stated that the P3 was filled at the police station because the victim could not walk. That a sharp object is something with an edge which can cut. That hyperemic means inflamed. That Luzuri on PEX 4 is a clinical officer who works under him and that it is not Luzuri who filled the P3 form.

9. PW3 Donald Omondi Ochwala, testified that on 29/12/2020 at about 3.00 Pm, her neighbor P knocked on his door. He could see from his D-light that she was bleeding from her left wrist. That upon inquiring, she informed him that she had been assaulted and raped, and begged him to take her to the hospital. That he took her at Akala hospital but it was closed and that they went to Akala Police Station and reported then they returned to their homes.

On cross examination, he stated that he heard a knock at his door and that he did not hear noises.

10. PW4 KOO, stated that he is a businessman. That on 29/12/2020 at 3.00am he received a call from his sister PA who claimed that she had been involved in an accident and that she had been cut on her hand. That he left home and went to Ndori where he found her and who was then bleeding from her hand. That he took her to Leelahm hospital where she was treated and referred to Bondo hospital. That he recorded his statement at Akala police station.

On cross examination, he stated that he recorded his statement on 29/12/2020. That his sister informed her that it was Isaac Odhiambo who had injured her. That he sees the appelland around and so he knows him. That her p3 form was filled at Akala police station.

11. PW5 No.11733 PC Muchenje Godfrey of Yala police station, testified that in 2020 he was based at Akala police station. That while there, on 29/12.2020 at 0730 hrs the complainant PA reported at the station a case of rape and grievous harm against Isaac Odhiambo Ojwang. That she had been treated from Leelam medical centre and had a plaster on her left hand that she claimed had been cut by the appelland herein. He issued her as with a P3 form which was filled at Bondo sub county hospital. That he visited the scene along Bondo-Kisumu highway at Kaudha area in Gem- sub county. That the complainant reported that on 28/12/2020 at about 9.00 pm as she headed home from Ndori market the appelland confronted her while claiming that she was being unfaithful to him. That she claimed that they had since broken up by the time of the incident. That after recording statements, he compiled a file and charged he appelland as per the charge sheet. That he was led to a rental house at Ndori market but the appelland had relocated. The search continued until 9/3/2021 when they acted on a tip off from the complainant that the appelland had resurfaced and that they went to arrest him in his rental house. He pointed out the appelland in court.

On cross examination, stated that the evidence collected was sufficient to charge him. That the case was reported on 29/12/2020. That the scene was around Kaudha area opposite Ajax Feeds. There were bushes nearby. That there were two scenes where the appelland met the complainant and where the appelland raped the complainant. That the first scene has lights next to the highway while the second scene was in a bush where a phone light was used.



12. That marked the close of the prosecution case. The trial court ruled that a prima facie case had been established against the Appellant and who was subsequently placed on his defense. He opted to tender a sworn testimony.
13. DW 1 Isaac Odhiambo Ojwang, testified that he is a resident of Ndori and a gold miner. That the complainant is his girlfriend. That he and the complainant started a relationship in 2015 when he was in form two until 2017. That they separated when her husband died and she wanted him to perform a Luo tradition but that he refused. That they looked for someone else to do the traditions and he moved on with his life. That they parted ways peacefully. That on 10/3/2021 at about 12.45 Am he was arrested and taken to Akala Police Station by Godfrey Muchenje and others. That at the station he saw the complainant talking to PC Godfrey Muchenje. That she brought the case because of their earlier disagreement. That he left the complainant and married her sister one Dorcas Achieng.

On cross examination, he stated that the grudge was when he took her sister for a wife in the 10th month. That on the day of the alleged incident he was at Abimbo mines as he had gone there in 2020 and returned home on 15/12/2020 and that returned to Abimbo on 27/12/2020. That it was his father who used to ferry him to the mines. That he was not able to call any witness to confirm that he works at Abimbo mines.

14. The appeal was canvassed by way of written submissions. However, it is only the Appellant who complied. The Appellant, from the outset, submitted that his appeal is purely on sentence. That the ten years' imprisonment for each count should run concurrently and not consecutively as stated by the trial magistrate. Further, that the time he spent in remand (1 year 7 months) should be taken into account in the said computation.
15. I have considered the record of appeal and the submissions filed by the Appellant herein. It is not in dispute that the Appellant is not appealing against the conviction. It is also not in dispute that the Appellant's grouse is to do with the sentence running consecutively and that the time spent in custody be considered as well. I find that the issues for determination are as follows:
 - i. Whether it is in order to have the sentence run consecutively or concurrently.
 - ii. Whether the time spent in remand was considered by the trial court while passing the said sentence.
16. Section 3 of the *Sexual Offences Act* states thus:

Rape

- (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.
- (2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.



- (3) A person guilty of an offence under this section 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.

17. Section 234 of the Penal code stipulates thus:

Grievous harm

Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.

18. It is clear from the foregoing that both of these offences are very serious and that they carry serious custodial jail terms. The Judiciary Sentencing Policy Guidelines 2016, set out the purposes of sentencing at page 15 paragraph 4.1 as:

- a. Retribution: to punish the offender for his/her criminal conduct in a just manner.
 - b. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
 - c. Rehabilitation: to enable the offender to reform from his criminal disposition and become a law abiding person.
 - d. Restorative justice: to address the needs arising from the criminal conduct such as loss and damage...
 - e. Community protection: to protect the community by incapacitating the offender.
 - f. Denunciation: to communicate the community's condemnation of the criminal conduct.
1. Further, in the New Zealand case of *R vs. AEM* (2000) the court held that: "the main purposes of punishment are to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they offend they meet this punishment."

19. I have perused the sentence imposed by the learned trial magistrate and it is noted that she ordered the Appellant to serve ten years' imprisonment on each count and that both sentences were to run consecutively. In the case of *Ogola s/o Owuor vs Republic* [1954] EACA 270, the court pronounced itself on this issue as follows: -

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (*R - v- Shershowsky* (1912) CCA 28 TLR 263)." See also *Omuse - v- R* (supra) while in the case of *Shadrack Kipkoech Kogo - vs - R.*, Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus: -

sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka - vs- R.* (1989 KLR 306))"



In the more recent case of *Kenneth Kimani Kamunyu -Vs- R.* (2006) eKLR, the Court reiterated this principle and stated that an appellate Court can only interfere with the sentence if it is illegal or unlawful.

20. Section 12 of the Criminal Procedure Code stipulates that:-

“Any court may pass a lawful sentence combining any of the sentences which it is authorized by law to pass.”

Section 14 of the Criminal Procedure Code provides for circumstances in which a court can direct sentences to run concurrently or consecutively. Section 14 provides in part as follows: -

“(1) Subject to sub-section (3) when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.

(3) Except in cases to which section 7 (1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences: -

a. of imprisonment which amount in the aggregate to more than fourteen years or twice the amount of imprisonment which the court in the exercise of its ordinary jurisdiction, is competent to impose whichever is less or

b. of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.”

Section 7 (1) of the Criminal Procedure Code stipulates that: -

a. a subordinate court of the first class held by a chief magistrate, senior principal magistrate, principal magistrate or senior resident magistrate may pass any sentence authorized by law for any offence triable by that court.

b. a resident magistrate may pass any sentence authorized..... or under the *Sexual Offences Act*. See also the High Court decision in *Ali Abdi Shabura -v- Republic- H.C.CR. A No. 90 of 2007*.

21. In the case of *Sawedi Mukasa s/o Abdulla Aligwaisa* [1946] 13 EACA 97, the then Court of Appeal for Eastern Africa in a judgment read by Sir Joseph Sheridan stated that the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice.

As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction, a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.

22. In the instant case, the two counts of offences emanated from the same transaction. The assault was thereafter followed with the act of rape on the complainant. In this regard, I find that the sentences ought to run concurrently. The appeal succeeds on this ground.



23. As regards the time spent in remand custody, it is noted that the learned trial magistrate did consider the same when she held as follows

“ I have considered the offences, mitigation and pre- sentencing report as well as the time spent by the accused in custody. I sentence the accused person as hereunder;

Count 1: Jail term of 10 years

Count 11: Jail term of 10 years.

It is clear from the foregoing that the learned trial magistrate did consider the period spent in custody by the Appellant. It is instructive that the offences attracted life sentences but that the trial magistrate opted to impose the lowest sentences. As the exercise of sentencing is at the discretion of the trial court, iam not persuaded that the issue of the period spent in custody can be revisited again. I find the Appellant’s appeal on this ground lacks merit and is dismissed.

24. In view of the foregoing observations, it is my finding that the Appellant’s appeal partially succeeds. The trial court’s order made on 14/10/2022 that the sentences should run consecutively is hereby set aside and substituted with an order that the said sentences of ten years’ imprisonment on each count shall run concurrently from the date of conviction namely 23/9/2022

Orders accordingly.

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

D. KEMEI

JUDGE

In the presence of:

Isaac Odhiambo Ojwang.....Appellant

M/s Kerubo.....for Respondent

Mboya.....Court Assistant

