



REPUBLIC OF KENYA



**Ouma v Republic (Criminal Appeal E017 of 2023)
[2025] KEHC 198 (KLR) (17 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 198 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E017 OF 2023
DK KEMEL, J
JANUARY 17, 2025**

BETWEEN

VINCENT OMONDI OUMA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the honorable P.J. Nandi (SPM)
delivered on 13th April 2023 in Bondo PMCC (S.O) NO. 019 of 2022)*

JUDGMENT

1. The Appellant herein Vincent Omondi Ouma was charged with four counts. The first count is gang rape contrary to Section 10 of the [Sexual Offences Act](#). The particulars were that the Appellant on the 9th day of April 2022 at around 5.00 Am at Siaya County, in association with others not before the court, intentionally and unlawfully caused his penis to penetrate the vagina of M.A.O (particulars withheld) without her consent. He was also charged with an alternative charge of committing an indecent Act with an adult contrary to Section 11 (A) of the [Sexual Offences Act](#). The particulars being that the Appellant on the 9th day of April 2022 at around 5.00 Am in Siaya County intentionally touched the vagina of M.A.O. (particulars withheld) with his penis without her consent.
2. The second count is assault causing actual bodily harm contrary to section 251 of the Penal Code with the particulars being that on the 9th April 2022 at around 5.00 Am at Mahaya Sub-Location in Rarieda Sub-County within Siaya County unlawfully assaulted MA thereby occasioning her actual bodily harm.
3. The third count is attempted rape contrary to section 4 of the [Sexual Offences Act](#) No.3 of 2006 with the particulars being that on the 9th day of April 2022 at around 5.00 Am at Rarieda Sub County within Siaya County, in association with others not before the court intentionally and unlawfully attempted to cause his penis to penetrate the vagina of MAO without her consent.



4. The fourth count is assault causing actual bodily harm contrary to section 251 of the Penal Code with the particulars being that on the 9th day of April 2022 at Mahaya Sub Location in Rarieda Sub County within Siaya County unlawfully assaulted one MAO.
5. The Appellant denied the charges and that the matter went to full trial whereupon the he was convicted of all the main counts and sentenced as follows:
Count 1.....25 years' imprisonment
Count II.....2 years' imprisonment
Count III.....2 years' imprisonment
Count IV.....10 years' imprisonment
6. Aggrieved by the conviction and sentence on count I on gang rape, the Appellant filed a Petition of Appeal filed on 3/5/2023 wherein he raised the following grounds of appeal:
 - i. That the trial magistrate failed to observe that nothing linked him to the alleged offence.
 - ii. That the trial magistrate failed to observe that the sentence imposed was against the evidence adduced.
 - iii. That the trial magistrate failed to appreciate that the sentence imposed is unconstitutional due to its mandatory nature.
 - iv. That the trial magistrate failed to comply with the provisions of section 33 of the Sexual offences Act.
 - v. That the prosecution failed to prove its case beyond reasonable doubt and hence the conviction went against the weight of the evidence.
 - vi. That the judgment is against the law and does not meet the requirements of section 169 of the Criminal Procedure Code.
 - vii. That the sentence is manifestly excessive
 - viii. That the trial magistrate failed to consider the appellant's sworn defence statement hence rejected it without cogent reasons.
7. The Respondent opposed the appeal on the grounds that the case was sufficiently proved at the trial court.
8. This being a first appeal, it is the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent findings and conclusions (See Okeno vs. Republic [1972] EA 32). In doing so, this Court takes cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to make due allowance in that regard. See the case of Ajode v. Republic [2004] KLR 81.
9. The prosecution called a total of nine (9) witnesses in support of its case.
10. PW1 MAO she testified that she is a resident of Mahaya area and a form four student at [particulars withheld] Secondary school. She recalled that on 8/4/2022 they were called upon to go and preach and sing at a funeral. That the following morning of 9/4/2022 at 4.00 Am she was with MA and that they decided to return to their home after the funeral. That as they walked, they saw a person wearing black clothes, a mask and a cap. When they stood, the person also stood, when they walked the person also walked. That they were frightened and they started running. She saw other people emerging from



the front carrying torches and directed the torch light on their eyes. That she decided to branch but three people followed her and got hold of her and started to beat her. That they took her into a forest and forcefully removed her trouser, biker and pants and started raping her in turns. That she was gang raped by five people in turns.

That while the last person was raping her, he was caught in the act by two men who came with torches, as he hurriedly tried to pull up his trousers, they arrested him while the rest escaped. That she did not know the rapists but she normally used to see them at Mahaya. That she was taken to a field where the chief came and then she was taken to Onyielo Health Centre by her father. That she had a cut on the head, chest, left hand on the finger. That she also bled from her vagina during the rape ordeal. She identified her treatment book as MFI-1. She stated further that police came at the hospital and she was taken to Aram hospital where she recorded her statement. She identified her clothes that the police recovered from the scene; one blue trouser with blood stains-(MFI 2), one pant biker-PMFI 3, one black pant-PMFI 4, one used condom-PMFI 5. That the police issued her with a P3 form which was filled at Onyielo Health Centre. P3 form dated 9/2/2022 marked as PMFI-6. She identified the person who was arrested to be the appellants herein in the dock.

On cross examination, stated that the perpetrators blocked the road and then she saw a man following them. That in her statement she indicated that four people came from the front and that she saw a torch light and that the attackers had pangas. She stated further that it is her blood that was on the clothes which the police recovered from the scene of crime.

11. PW2 MA testified that she a 19-year-old and a form four student at [particulars withheld] Secondary School. She recalled that on 9/4/2022 she was at a funeral with PW1 when at around 4.00 Am they decided to go home. That as they went, they noticed someone was following them. That when they moved the person moved, when they stopped, he stopped. That a motorcycle passed by and the man also passed them. That there were other boys who went in front of them with torches directing the light in their eyes. That she tried to run but two of them held her and demanded that she gives them her phone and sweater. That one hit her with a panga on the thigh and threatened to kill her if she did not comply with their demands. That they took her to Mahaya Polytechnic, pulled down her trousers but again they said that place was not safe as the watchman would find them. So, they told her to lead the way to a safe place. That is how she managed to escape to Mama Akinyi. Before she reached she tripped and one of them hit her with a panga on the back. When they saw the door being opened, they ran away. That at Mama Akinyi's place, she briefed her together with Enock and Mark of the ordeal and that she informed them that PW1 had also been attacked. They went and rescued her. Meanwhile Mama Akinyi took her to a field where the chief came. At the field, she saw PW1. That she also saw the accused being beaten. That they took pictures of her and PW1. That she was then taken to Madiany hospital then the following day to Ongielo where she was treated and given drugs. She identified the treatment book marked PMFI -7. That police from Aram police station issued her with a P3 form which was later duly filled and that she identified the same which was marked as PMFI 8. That she did not know the Appellant and did not identify the other perpetrators.

On cross examination, she stated that they left the funeral at 4.00 Am. That when they branched, they met five people in front of them. That there was also a motorcycle and had torch lights which enabled her to see the attackers but could not identify them.

12. PW3 Mark Monye Otieno testified that he is a resident of Mahaya area and a farmer. He recalled that on 9/04/2022t about 4.00 Am he was asleep in his house when he heard noises. He woke up and went towards the noise. It came from his step mothers house. There she met a girl and other people. The girl informed them that she had been attached together with PW1 by some boys and that PW1 was still in danger. That the girl led them to where they were at the time of the attack and while headed there



they heard people screaming “ndio huyu”. They diverted to where the shouts came from and found a certain boy being beaten. He said his name was Omondi. That he called the chief who came to the scene and that the boy was taken to Aram police station. That he was the one in the dock.

On cross examination, he said that he heard the noises at around 4 Am and that he found the appellant being beaten. That he does not know what the complainant told the court as he was not present.

13. PW 4 MO testified that he is a resident of Mahaya. He recalled that on 9/4/2022 at about 5.00 Am he was woken up by a phone call from Gwadi Okello asking him to go to Mahaya field. That he was informed that there was a case involving his daughter and a boy. That he went to the venue and found his daughter and a certain boy who had been arrested. The boy’s father was also there. That the Assistant chief came. That his daughter had a cut on the head, chest and her left hand that had been inflicted with a panga. That he was instructed by the chief to take his daughter to the hospital which he did at Ong’ielo Health Centre. Then they went to Aram police station where they recorded statements.

On cross examination, testified that he was called on the phone at about 5, 00 Am. That his home and the scene is about 300 metres away but there are bushes between them and that one cannot see directly.

14. PW5 Mosses Owino Ombewo testified that he is from Siger Sub Location and that he is the assistant chief in that area. That on 9/4/2022 at about 6.00 Am he was at his home when he received a phone call from Monye who informed him that there was a rapist at Mahaya School who was being beaten. That he rushed to the scene where he found members of the public beating one Vincent Omondi. That he rescued him and took him to Aram Police station and advised parents to take the victims to hospital. That the perpetrator he rescued was the one in the dock.

On cross examination, he stated that he was called to come and rescue the Appellant which he did. That the witness claimed that the Appellant had raped her in association with others who had run away. That the appellant committed an offence and that is why he was beaten.

15. PW6 Syprose Awili Ojuro she testified that on 9/4/2022 at about 4.00 Am she was sleeping in her house when she heard noises from outside. That she woke up and opened the door. That when she was outside she heard someone crying from the bushes nearby. It was M. Other villagers came around and the girl informed them that she and her friend were from a funeral when some people attacked them. That some of the villagers went to look for the other girl (PW1). That she took the girl to her house. That a little while later, they heard noises. That they went there and saw that the other girl had been found.

On cross examination, she stated that she was woken up by screams. She opened the door and her son also woke up. That they both went outside and she heard someone crying outside her fence. That her neighbors were deceased.

16. PW7 Pc Cyrus Kimeu testified that he was from Aram police station and that he was the investigation officer. That on 9/4/2022 he arrived at the station at 7.00Am and found a group of people among them his colleagues and a man on the ground with some injuries. That among them was Moses Ombewo, the assistant chief who informed him that the man with injuries had been arrested by the public on the allegation of having raped the complainant. That the suspect was taken to hospital. That upon perusal of the Occurrence Book, which case had been allocated to him to investigate. That he went to Ongiello Health Centre where the victims had been treated. Upon examination, PW1 had injuries on her private parts and panga marks on her chest and bruises on her body.

That he recorded their statement where they claimed that they were from a burial at about 5.00 Am when they were attacked by five people who were not known to them. That the 1st complainant stated that she had been raped in turns by three people. That the 2nd complainant ran away and entered the



home of Syprose. That one of the perpetrators was arrested and subjected to mob justice. The one arrested was in the dock. That he proceeded to the scene with the complainant where they recovered two used condoms which he produced as exhibit 5 and 9 respectively. They received a panty which the first complainant identified as hers marked as MFI 3 and produced as exhibit 3, blue jeans trouser as exhibit 2 and black panty exhibit 4. That he drew a sketch plan and charged the Appellant with the offences.

On cross examination, he stated that they did not take the condoms for analysis because they had dried up due the sunshine heat. That the Appellant was arrested at the scene. That the 1st complainant was taken by three people while the 2nd complainant by two people. That he was not among the people who arrested the Appellant.

17. PW8 Gilbert Ambira stated that he was a clinical officer at Ongiello Heath Centre and that he had a P3 form for MAO. That on a detailed examination, the clothes were blood stained that is the blouse. That she was in pain and unable to walk upright. That there was a deep cut on the perialatal region on the head which was stitched. There was an open fresh wound on the chest and the breast region. That there was a cut wound on the left fingers which were stitched. That the age of the injuries was 34 hours and that the weapon used was sharp in nature. The wounds were stitched prior to the examination. That the degree of injury is harm. That there was blood in the pubic area coming from the genitalia and that the labia were inflamed with a torn hymen. That a high vaginal swab had normal spermatozoa and blood cells. Conclusion was confirmed rape. He produced p3 form of MAO as exhibit 6 and treatment notes as exhibit 1.

He further testified that he had a P3 form in respect of the second complainant MA which indicated that there was no penetration and that she had lower back pain with bruises which were tender on touch. That the age of injuries was 5 hrs 13 minute. He produced the P3 form as exhibits 8, treatment notes as exhibits 7.

On cross examination, he stated that a high vaginal swab showed spermatozoa in her genitalia. He confirmed that the lady had been raped. That he was not able to identify the perpetrators

18. PW9 Edwin Odhiambo from Mahaya stated that on 9/4/2022 he was with his mother when at 5.00 Am when he heard a girl's voice crying. That he went towards where the noise came from, her mother's fence. That her mother and brother came out. They found a girl called M who was known to them. She had been beaten with a panga and that they took her into his mother's house and later went looking for the other girl. That they found M and another person. The other person was the Appellant who was on top of M and raping her and that they managed to arrest him. That it was Vincent who by then had pulled down his trousers to the knee length. That M was bleeding from her private parts. That his mother gave her a lesso. That they called M's father and the chief. That the villagers tried to beat the Appellant but his brother stopped them and called the chief.

On cross examination, he stated that he was the one who arrested the Appellant and that the other boy ran away with the panga. It was around 5.00 Am.

On reexamination, he stated that he arrested the Appellant while in the act of raping the first complainant.

19. That marked the close of the Respondent's case.
20. The trial court ruled that a prima facie case had been established and thus put the Appellant on his defense.
21. DW1 Vincent Omondi Ouma stated that on 8/4/2022 at 8.00 Pm he went to sleep in his mother's house. That he did some work at home then left for work at Ndori as a casual laborer at around 6.00



Am. That he used a short cut, and met some people armed with pangas and rungas and who started to assault him. That PW9 stated that he arrested him when he found him with the complainant but that the complainant claimed that she did not know him. He still denied the charges.

On cross examination, he stated that he did not know why he was assaulted.

22. The appeal was canvassed by way of written submissions. It is only the Respondent who filed submissions.
23. The Respondent on its part submitted that they had proved all the elements of the offences beyond reasonable doubt and sought that the appeal be dismissed. They submitted that the elements to be proved for the offence of rape are: penetration, lack of consent and identity of the perpetrator as the accused/appellant. On penetration, the Respondent submitted that based on the case of Mark Oiruri Mose Vs R (2013) eKLR the Court of Appeal stated that for as long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and that penetration need not be deep inside the victim's organ.
24. Further, they submitted that PW1 testified that she was gang raped in turns by five people. (page 11 line 22-23 of the Record of appeal). That PW8 also confirmed that she had been raped. (Page 20 of the record of appeal). On this, I agree that penetration was proved sufficiently.
25. On identification, Respondent submitted that the act happened in the dark and thus difficult to identify. However, PW9 testified that they arrested the Appellant while in the act of raping the first complainant. To that end, they submitted that identity was proved.

On the issue of consent, they relied on the case of Republic vs. Oyier where the Court of Appeal held:

“the lack of consent is an essentially element in the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.”

To that end, they submitted that all the elements of the offence were well proved.

26. I have considered the record of the lower court plus the submissions and authorities. It is not in doubt that the Appellant's appeal is only on count one of the offences and thus this court will proceed to analyze the same. The Appellant is deemed to be satisfied with the conviction and sentences on the other counts. I find the issue for determination is whether the Respondent proved its case regarding the offence in count one of gang rape contrary to section 10 of the Sexual Offences Act against the Appellant herein beyond reasonable doubt.
27. Section 10 of the Sexual Offences Act stipulates about the offence of gang rape thus: Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.
28. It is trite law that a conviction on the charge of rape must stand on the proof of the elements of penetration, lack of consent and the identification of the assailant as the perpetrator of the crime.

On the element of penetration, the record bears witness that PW 1 testified to having been raped by five people in turns and that one of them was caught in the act while others escaped. (Page 11 lines 20 -25 of the Record of Appeal). She also stated that she bled from her vagina and that her pant, biker and trouser were bloodstained.



It was also the testimony of PW9 that he caught the Appellant on top of the complainant raping her. (Page 23 line 1-2 of the Record of Appeal). It was also the testimony of PW8 who was the clinical officer that the first complainant had been raped. (Page 20 line 12 of the Record of Appeal). The said witness duly produced the treatment notes as well as the P3 form as exhibits which left no doubt that the complainant had indeed been raped and that her consent was not sought. Indeed, going by the circumstances of the case, there was absolutely no way that consent could have been obtained from the victim going by the manner in which she was brutalized by the Appellant and his accomplices and thus the rape was by force.

I am thus satisfied that the element of penetration was proved sufficiently.

29. On the issue of consent, the case of Republic vs. Oyier where the Court of Appeal held that :

“ the lack of consent is an essentially element in 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.”

Further, in the testimony of the complainant she stated that she was raped by five people in turns. The first complainant gave a vivid account of how she was manhandled by the gang who actually assaulted her with a panga and forcefully removed her clothes despite her protestation. This is enough to confirm that there was no consent as she was brutalized by the Appellant and his accomplices who raped her in turns.

30. Lastly, on the element of identification, it is worth noting that the incident happened in the dark. However, the testimonies of PW1 and PW9 confirm that the Appellant herein was actually caught red-handed in the act and was atop the complainant and who was promptly apprehended. Indeed, the Appellant was found in flagrant delicto as he was then trying to zip up up his trousers. He was thus squarely placed at the scene of crime. The Appellant has raised the issue that the complainant indicated on cross-examination that she did not know him. However, that statement must be seen to imply that the complainant did not know him as a person but the fact he was found in the act left no room for escape by the Appellant. I find that the evidence of PW1 and PW9 clearly placed the Appellant at the scene of crime. I find the Appellant’s defence did not shake the evidence of the Respondent which was quite overwhelming against him. The Appellant’s defence was properly rejected by the trial court. I am satisfied that the Appellant was one of the rapists and hence the finding on conviction was quite sound and that I do not see any reason to interfere with it.

31. The Appellant raised various other grounds such as that the trial court failed to comply with section 33 of the *Sexual Offences Act*. It is noted that the said provision deals with situations where the victim is of unsound mind or mentally challenged yet the circumstances herein were quite different since the complainant had no such problems and that her testimony was direct in nature. I find the same was not applicable in the circumstances. As regards the Appellant’s claim that the judgement did not comply with section 169 of the Criminal Procedure Code, it is noted that the judgement by the trial court is well reasoned and that it contains the points for determination and thus the same in compliance with the said provision.

32. As regards sentence, it is noted that the Appellant was ordered to serve twenty five (25) years’ imprisonment. The Appellant has raised several grounds challenging the excessive, lengthy sentence as well as the Constitutionality of the sentence.

33. Section 10 of the *Sexual Offences Act* stipulates the sentence to be imposed for an offence of gang rape as thus: Any person who commits the offence of rape or defilement under this Act in association with



another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.

The Appellant's grounds of appeal numbers 2, 3 and 7 basically challenges the sentence imposed by the trial court. Indeed, there has been a hue and cry regarding the imposition of minimum sentences and that several courts had been interfering with minimum sentences following the decision of the Supreme Court in the case of Francis Karioko Muruatetu and Others Vs R [2017] eKLR. However, the said court vide its decision dated 12th July 2024 vide Petition No. 18 of 2023 held that all minimum mandatory sentences under the Sexual Offences Act No. 3 of 2006 are lawful unless otherwise amended. The import of this decision is that all minimum sentences are lawful until the Sexual Offences Act is amended and or outlawed. The sentence provided for under section 10 of the Sexual Offence Act is a sentence of 15 years which can be enhanced to life imprisonment. The circumstances of the offence herein in count one appear to be tragic in that the victim was on her way home with her fellow school mate only to be ambushed by the Appellant and his accomplices who viciously attacked them. The first complainant was hit with a panga and then wrestled to the ground and was forcefully raped in turns while her companion managed to escape in the nick of time after being overpowered. The Appellant and his accomplices raped the complainant in turns and that the Appellant happened to be in the act and on top of the girl when members of public arrived and apprehended him while his accomplices managed to escape. The girl was rescued and was then bleeding from her private part and that her pant, biker and trouser were bloodstained. The girl walked with difficulties as she was assisted to hospital for treatment. The actions of the Appellant and his accomplices were abhorrent and must be deprecated since the victim has been psychologically scarred for the better part of her life. It is trite law that sentencing is at the discretion of the trial court. The record indicates that the Appellant was accorded an opportunity to mitigate before the sentence was passed and that he opted to ignore by claiming that he did not know about the case. Obviously, the Appellant had been aware about the case as he had been participating in it all through. The trial court noted that the Appellant was not remorseful and that the circumstances under which the offence was committed was aggravating in nature as there was violence against the victim. I find the sentence imposed was neither harsh nor excessive in the circumstances. I decline to interfere with the same. The appeal on this ground therefore fails.

34. Ultimately, this court is satisfied that the trial court addressed itself correctly on the law and facts. There are no grounds for interfering with the findings of fact by the said court. I am satisfied that the appellant was properly convicted of the offence of gang rape contrary to section 10 of the Sexual Offences Act. The resulting sentence was within the limits permitted by law and i find no reason to interfere with the exercise of that discretion by the trial court.
35. In view of the foregoing observations, it is my finding that the appeal lacks merit. The same is dismissed. The conviction and sentence by the trial court are hereby upheld.

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

D. KEMEI

JUDGE

In the presence of :

Vincent Omondi Ouma.....Appellant

M/s Kerubo.....for Respondent

Mboya.....Court Assistant

