



**Ojode v Republic (Criminal Appeal E036 of 2024)  
[2025] KEHC 6727 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 6727 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL APPEAL E036 OF 2024  
A. ONG'INJO, J  
MARCH 13, 2025**

**BETWEEN**

**CHRISPINE O OJODE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence by Hon. S. N. MUTAVA Resident Magistrate in Rongo Principal Magistrate's Court Sexual Offence Case No. E034 of 2023 delivered on 12th March 2024)*

**JUDGMENT**

1. The Appellant Chrispine O. Ojode was charged with the offence of attempted rape Contrary to Section 4 of the Sexual Offence *Act No. 3 of 2006*.
2. Particulars are that on 2<sup>nd</sup> November 2023 at Gracia area the Appellant attempted to cause his penis to penetrate the vagina of Euphemia Akoth Owiti.
3. In the alternative the Appellant was also charged with the offence of committing indecent act with an adult child contrary to Section 11 (a) of the Sexual Offence *Act No. 3 of 2006*
4. Based on the evidence of five (5) Prosecutions witnesses and the Appellant's testimony the Trial Magistrate convicted the Appellant and sentenced him to serve 5 years imprisonment.
5. The Appellant was aggrieved by the conviction and sentence and he lodged his Petition of Appeal filed on 30<sup>th</sup> April 2024 on the following grounds:-
  1. The learned trial Magistrate erred in law and fact by convicting the Appellant for an offence of attempted rape while there was instructive no sufficient evidence to sustain the particular offence.



2. The learned trial Magistrate erred in law in failing to find that the essential ingredients of the offence of attempted rape under Section 4 of the *Sexual Offences Act* were not proved and that the articular charge could not be upheld.
  3. The learned trial Magistrate erred in law in failing to find that the glaring discrepancies in the evidence tendered by the prosecution was incapable of sustaining the offence of attempted rape
  4. That the Trial Magistrate erred in law by convicting the Appellant on the basis of prosecution evidence that was evidence that was of no relevance and or probative value in respect of the particular charge against the Appellant.
  5. That the Trial Magistrate erred in law in failing to find that there was neither sufficient, proper nor conclusive evidence to sustain an offence of attempted rape for the specific charge before the trial court.
  6. That the Trial Magistrate erred in law by either failing and or neglecting to reasonably consider the averments and submissions of the defense because he would have concluded and come to te finding that the Appellant was guilty of the particular offence before court.
  7. That the sentence passed meted on the Appellant by the trial court was manifestly draconian, excessively punitive and unfairly oppressive considering the facts and circumstances of the alleged offence.
6. Reasons wherefore the Appellant prayed that the conviction be quashed and sentence set aside.
  7. The Prosecution's case was that the Appellant
  8. PW1 Lilian Nyaboke the Clinical Officer at Rongo Sub County Hospital stated that on 2112023 she examined the Complainant following allegations of rape. The Officer said that she observed that the Complainant was in fair general condition with slight tenderness on the left cheek. On examination of the private parts of the Complainant, she had colourless discharge and her genitalia was not penetrated. PW1 filled the treatment notes and PRC forms. That the Complainant was 26years old.
  9. PW2 is the Complainant stated that she did not know the Appellant before the incident occurred but that on 2112023 the Appellant called her with a strange number and the true caller showed that it was Salim. That the Appellant insisted that he knew the Complainant very well and he sent her some clothes. That the Complainant informed the Appellant that she needed shoes (sneakers) for Kshs. 4,500=, That the Appellant also sent her a jacket and they were to meet at the bus park to collect the items. The Complainant called the Appellant and they met at St. Nicholas School Gracia area where the Appellant paid the bodaboda rider and he left.
  10. The Complainant further stated that the Appellant informed her that the mother was at home but when they arrived there the Appellant opened the door and pushed her inside the house and threatened her. The Appellant warned her to fear him and pushed her on the bed and she was told that she would not leave the home. The Appellant locked the door and started touching her breasts saying he had met her severally at Climax and he was proud of her. There was a knife on the table that made the Complainant not to scream for help because the Appellant had threatened to beat her up and they were only the two of them. That the Complainant begged him to leave and when she tried to escape the Appellant pushed her down and slapped her on her cheek. That the Complainant send Kshs. 200 to the Appellant to buy food and take to her neighbour but he locked the house from outside and left. That the Appellant called her neighbor by the name Brenda to confirm if she had sent her food.



11. The Complainant further stated that she locked the door from inside and called the uncle by the name William who came with the police and found the Appellant at the door. The Appellant was arrested and the Complainant recorded statement and was taken to hospital.
12. PW3 William Okili Soo a community elder stated that he was an uncle to the Complainant. That on the 21/12/2023 around 8:00p.m he received a call from a number that he didn't have in his contacts saying that she was dying and was at Nyarach area. That he went to Rongo Police Station where he was given reinforcement and station vehicle at around 9:00p.m and they left. PW3 stated that he told the Complainant to shout to enable them locate the sound and they managed to locate it. PW3 met the Appellant at the door and he started fighting the police but he was arrested and taken to the police station. PW3 recorded his statement.
13. PW4 PC Robert Kyalo attached to Kamagambo Police Station stated that on 21/12/2023 two men went to the police station and they were talking to a lady and informed him that the Complainant was locked in a house. That OCS, PC Nyarango and PW4 rushed to the scene and found the Complainant screaming. That the Appellant was found at the door and the Complainant was requested to open the door. The Complainant informed them that she had gone to collect some clothes which the Appellant had bought for her and she was locked inside the house as the Appellant tried to rape her. PW4 further confirmed that the house where the Complainant was found belongs to the Appellant.
14. PW5 PC Dennis Nyarango attached to Kamagambo Police Station Crime Department was the investigating officer. That on 21/12/2023 around 1945 hours he accompanied PW4, CPL Sialo and the OCS to Gracia area where there was a distress call from the Complainant. That they met the Appellant at the door and the OCS ordered him to open the door. The Appellant was arrested and charged.
15. When the Appellant was placed on defence, he gave sworn statement and stated that he intended to file submissions and rely on them.
16. The Appeal was canvassed by way of written submissions.
17. The Appellant's submissions were that the Complainant was his girlfriend and they had communicated severally and he had known PW2 for 2 years and they had been meeting and making regular calls which the court declined to investigate. He said that his meetings with the Complainant including on material day was upon agreement and the O ought to have investigated the call data by liaising with Safaricom to establish the truth about their communication.
18. The Appellant further submitted that he was not supplied with proceedings to enable him prepare his defense as provided by *the Constitution*.
19. The Appellant submitted that the ingredients of the offence of attempted rape were not proved and he questioned the authenticity of the P3 form in which the injuries suffered by the Complainant were enumerated and injuries assessed.
20. The Appellant submitted that the Complainant's evidence contradicted that of the I O in regard to whether she was accompanied to hospital by the uncle and Investigating Officer or she went alone. The Appellant also said that there was also contradiction as to which part of the Complainant's body was injured and whether she changed clothes before going to the hospital and that this proves that the PRC form and treatment Notes were fraudulent.
21. The Appellant argued that the P3 form had a lot of errors and was not filled in respect of the Complainant. He said the date the incident and the date in PRCare different and it cannot be assumed that it was a clerical error. He said the P3 was manufactured with an oblique motive and has left a big gap as to whether the Complainant ever visited a medical facility.



22. The Appellant also submitted that failure to examine the clothes worn by the Complainant during the incident of the alleged attempted rape adds more doubt to his guilt. He said that the Complainant willingly went to his home and it is a misunderstanding that caused the drama that led to him being charged.
23. The Appellant also submitted that it was not proved that PW3 was the uncle of PW2 and that the prosecution case had so many loop holes that are unrepairable.
24. That the conviction was unfounded and should be set aside as it was unjust.
25. The Respondent submissions are that for the offence of attempted rape to be proved the prosecution had to prove the following ingredients:-
  - a. There was intent to commit the act of penetration with one's genital organ
  - b. The other person does not consent
  - c. There was preparation to commit the act
26. The Respondent submitted that there was proof that the Appellant lured the Complainant to his home and on arrival pushed her inside and this was evidence of his intention to take advantage of her while in his house.
27. It was also submitted that while the Appellant was in the house with the Complainant he pushed her onto his bed and told her she would not leave the home. That he locked the door and threatened to beat her and when she tried to escape he pushed her down and slapped her on the cheek. The Respondent submitted that although the Complainant went to the Appellant's home she did not consent to have sex with the Appellant.
28. In regard to preparation to commit the act the Respondent submitted that the victim testified that the Appellant started touching her breasts and stated that the Appellant claimed he had met her severally at Climax, It was submitted that the fact that the Appellant pushed the Complainant on to the bed is indicative of the fact that he intended to rape her.
29. In response to the Appellant' submissions the Respondent Counsel argued that all the ingredients were proved sufficiently and that the Complainant was categorical that she did not know the Appellant before the incident and that he had called her with a strange number and kept on insisting he knew her.
30. The Respondent's Counsel also submitted that the Appellant was given adequate time to prepare his defense and prepared submissions, which the trial court took into account before passing its sentence
31. On the submissions that the Complainant gave uncorroborated and inconsistent evidence, the Respondent submitted that PW1 explained the inconsistencies in the P3 form and also indicated that the same was countersigned and are therefore minor and do not affect the substance of the case against the Appellant.
32. The Respondent urged the court to dismiss the appeal

### **Analysis and Determination**

33. In a first appeal, the duty of the court was stated in *Mark Oiruri Mose vs. R* (2013) eKLR thus;  
.... the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always



bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.”

34. Having considered the grounds of Appeal, and revisited the evidence tendered before the trial court and the judgment of the Trial Magistrate afresh as well as the submissions by the rival parties, the issues for determination are:-

- i. Whether the ingredients of the offence of attempted rape were proved beyond reasonable doubt.
- ii. Whether the Appellant was convicted based on materials contradictions and discrepancies
- iii. Whether the sentence was harsh and excessive.

35. Section 4 of the *Sexual Offences Act* provides:-

Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life.\

36. Further Section 388 of the *Penal Code*;

- (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.
- (2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.
- (3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence"

37. PW1 testified how the Appellant pushed her into his house after luring her there under the pretense that he was going to deliver to her a package of sneakers and once she was in the house he pushed her onto his bed and started touching her breasts. The Appellant also locked the door from inside after pushing the Complainant inside and when she wanted to leave he pushed her down and slapped her. The actions by the Appellant is a clear indication that he intended to do nothing less than rape PW2.

38. The Appellant claimed that PW2 was his girlfriend but Pw2 said she met him for the 1<sup>st</sup> time and he pretended the package he was to give her was in his house and she went to his house but it turned out he had lied to her. PW3 the Complainant’s uncle and PW5 the investigating Officer was with the OCS and 2 other Officers when they found the Appellant banging the door after finding that the Complainant had secured it from inside while screaming and making distress calls. When the Appellant saw the Police he attempted to run away but on being apprehended he started fighting back. He did not explain that the Complainant went to his house and that they had a relationship. The date the Appellant gave as the date he met the Complainant is long after the incident and it is not logical that he committed the offence before meeting PW2.

38. With regard to contradictions in the prosecution’s case The Court of Appeal in Erick Onyango Odeng’ v. Republic [2014]eKLR cited with approval the Uganda Court of Appeal case of Twehangane Alfred



v. Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA, 6 wherein it was held that the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case.

39. The Appellant alluded to contradictions as to whether the Complainant was accompanied to the hospital; which part of the body was assaulted and doubted whether she was indeed attended to at the hospital but the alleged contradictions discrepancies do not go to the root and or substance of the charge of attempted rape and therefore the ground that the Trial Magistrate relied on evidence that had discrepancies to convict him does not hold water
40. The Appellant also faulted the Trial Magistrate for passing sentence that was manifestly draconian, excessively punitive and unfairly oppressive considering the facts and circumstances of the alleged offence. However, Section 4 of the Act provides for up to life imprisonment. Having found that the Appellant was guilty of the offence of attempted rape I think the Trial Magistrate was very lenient in passing the least sentence and there is no reason to warrant interfering with the exercise of that discretion.
41. The appeal herein therefore lacks merit and the same is dismissed. The Appellant's right to appeal within 14 days is duly explained.

**DELIVERED, DATED AND SIGNED AT MIGORI THIS 13<sup>TH</sup> DAY OF MARCH 2025.**

**A. ONGINJO**

**JUDGE**

