Aura alias Pach v Republic (Criminal Appeal E053 of 2024)
[2025] KEHC 4298 (KLR) (4 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4298 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E053 OF 2024

DK KEMEI, J

APRIL 4, 2025

BETWEEN

AUSTINE OCHIENG AURA ALIAS PACH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of Hon. E. Tsimonjero (S.R.M.) delivered on 27th January 2024 in Ukwala PMCC No. E008 of 2023 (S.O)

JUDGMENT

1. The Appellant herein, Austine Ochieng Aura alias Pach, was charged before the trial court for an offense of gang rape contrary to section 10 of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 16th February 2023 at about 2230hours at Ugenya Sub County within Siaya County, with others not before the court, intentionally and unlawfully caused his penis to penetrate the vagina of C Ochieng Omondi without her consent.

2. The Appellant 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* No. 3 of 2006. The particulars were that on 16th February 2023 at about 2230hours at Ugenya Sub County within Siaya County, with others not before the court, intentionally touched the vagina of C Ochieng Omondi with his penis against her will.

3. On count two, the Appellant was charged with the offense of grievous harm contrary to section 234 of the Penal code. The particulars were that on 16th February 2023 at about 2230hours at Ugenya Sub County within Siaya County, unlawfully did grievous harm to C Ochieng Omondi.

4. The Appellant denied the charge and upon a full trial, he was convicted and sentenced to 15 years' imprisonment on each count one and two. The sentences were to run concurrently.

5. Dissatisfied by the conviction and sentence, the Appellant has now filed this appeal wherein he raised the following grounds:

   i. That the trial magistrate erred in law and in fact in basing the conviction on the sole evidence of recognition not withstanding that it is inconclusive that's why she didn't report immediately vide OB No. 15/16/02/2023.

   ii. That the trial magistrate erred in law and fact by failing to evaluate and find that the identification parade conducted was not in accordance with Order 46 of the force standing orders.

   iii. That the trial magistrate erred in law and fact by failing to consider that the evidence was contradictory.

   iv. That the trial magistrate erred in law and fact by failing to consider that there was need for forensic examination report regarding the blood stained clothes allegedly recovered at the scene and produced as exhibit 1.

   v. That the trial magistrate erred in law and fact by failing to consider that the nature of the Appellant's arrest was not conclusive as there were other suspects.

   vi. That the trial magistrate erred in law and fact by failing to consider his alibi defence.

   Reasons wherefore he prayed that the appeal be allowed, conviction be quashed and sentence set aside.

6. This being a first appeal, this Court must re-consider and re-evaluate the evidence adduced before the trial Court to arrive at its independent finding and conclusion. (See Okeno vs. Republic [1972] EA 32. In doing so, this Court is required to take 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 respect as was held in Ajode V. Republic [2004] KLR 81.

7. PW1 CAO testified that on 16/2/2023 at around 2200hrs as she walked home from watching a football match at Ligega Centre and upon reaching the signboard of Ulumba primary school, one Caleb and the Appellant attacked her. One of them grabbed her neck and pushed her to the forest. That the Appellant warned her not to shout and then cut her on the left leg at the knee (she showed the court a healed scar). That after cutting her, he removed her trouser and panty up to the thighs and raped her, as Caleb was standing on the road keeping watch. That one Frank and his friend came to her rescue and that the perpetrators ran away. That Frank and his friend took her to Obwende dispensary where she was given a tetanus injection then the doctor called an ambulance and referred her to Siaya County Referral Hospital. She identified the P3 form which was marked as PMFI-1, the discharge summary as PMFI- 2, the treatment notes as PMFI- 3, and the PRC form as PMFI -4. That there was a security light from a nearby home which enabled her to see and recognize Caleb as her former classmate in high school. That the Appellant was a stranger to her but she could identify him. She reported at Ligega police station and was later called upon to participate in a police identification parade where she identified her assailants.

   On cross-examination, she stated inter alia; that she was grabbed by the neck; that she did not see the assailant removing the panga and only realized after she had been cut; that Frank and his friend found her being raped; that there were electricity lights from a nearby home which was about twenty metres away from the scene; that the villagers did not respond to her screams; that the person who cut and raped her had a beard and wore black clothes; that she lost consciousness after she was cut; that she had not seen a person like the Appellant in the area before.

8. PW2 Franklin Otieno Chweya testified that he is a welder. That on 16/02/2022 at 2200hrs as he went home from the shop he heard a lady's voice screaming for help from a bush. That he was afraid and ran home and alerted some young men namely Samson, Ibrahim, and Derrick who accompanied him to where the screams emanated. That Ibrahim had a torch. That at the scene, they found C and the two young men who ran away before he could identify them. That he knew C as his classmate and who was then bleeding. That they rushed her to a dispensary.

   On cross-examination, he stated that he did not know the Appellant as he had never seen him before.

9. PW3 No. 230143 PC Moses Magina from Ligega police patrol base testified that on 16/02/2023 at 2350 hrs a boda boda man Samson went to the station with three people and that among them was C Atieno, Ibrahim Gedo and Derrick. That he noticed that C had been cut on the right leg and could not walk. That C reported that she had been attacked by two people one of whom she knew as Caleb while she could only physically identify the other one. That he recorded the report and proceeded to call his superior but when he returned the people who had brought C had left. That he and his colleague took the complainant to Ligega health centre where she was admitted and that he left her there. That the following day, he went to the area village elder who helped him to trace C's home and that he informed her people and then proceeded to record his statement. That the DCI took up the matter.

   On cross-examination, he stated inter alai; that he did not know the Appellant; that the complainant reported to have been raped and injured by two people one of whom she had known.

10. PW4 No. 12265 Brian Chengek Chenguru, a clinical officer from Siaya County Referral Hospital with ten years' experience testified that he had a P3 form for CAO aged 23 years reference No. 040192. That there were injuries on the hands, cut wound scar on the left knee (was using crutches). That the probable weapon was a sharp object. That on the vaginal examination, there were lacerations and bruises on the vaginal wall, hymen was harmed (old case), whitish pus and vaginal discharge. That specimens were collected via a high vaginal swab (HPS) which revealed stained epithelial cells above 100. That there were no sperms and that pregnancy and other tests were negative. That from the history and examination, he opined that there was forceful vaginal penetration. He produced the P3 form as exhibit 1, discharge summary as exhibit 2, treatment notes as exhibit 3, PRC form as exhibit 4.

11. PW5 No. 110316 PC Josephat Rono initially at DCI Ugunja, testified that he was the investigation officer in the matter. That on 23/2/2023 at about 1030 hours, he was assigned a case of gang rape and grievous harm by the chief inspector Ombithi which had been reported vide OB No. 15/10/2023 at about 2350 hours at Ligega police post. That the complainant was CAO aged 23 years. That he heard that the complainant had been accompanied by her mother and later visited the scene of the crime together with the victim. That about 30 meters from the bush, there was a big house with security lights and that from the bush to the house, the security light is about ten meters. That he recorded all the statements of the witnesses. That as per his summary, Franklin Ochieng was the one from a nearby shop with a friend and that together they went to rescue the victim. That Franklin Otieno Chweya and Derick Otieno Ochola confirmed that they did not identify the perpetrators physically. That the victim had stated that two people who included Caleb and another she later identified as Austine Aura had attacked and raped her and injured her. That he recorded the statements and arrested Caleb who was a classmate of the complainant at Usonga. That an identification parade was conducted at Siaya GK prison and Ukwala police station. That both suspects including the Appellant were positively identified, with the Appellant being identified on the identification parade at Siaya G.k prison while Caleb was identified at Ukwala police station. That he produced the identification parade report for Austine Aura (Appellant) conducted at Siaya GK prison by inspector Leonard Namatandi as exhibit 5(a). That he then charged them as per the charge sheet.

On cross-examination, he stated inter alia; that after recording the statements, he formed the opinion that there was a common intention between the two assailants; that there was evidence of an activity at the scene as it was disturbed; that he duly informed the Appellant about arrangements to conduct an identification parade one month in advance; that as an investigating officer, he is not allowed to be present in an identification parade.

12. The trial court later ruled that the Appellant had a case to answer and thus placed him on his defence. He opted to tender a sworn testimony.

13. DW1 Austin Ochieng Aura alias Pach testified that he is a resident of Ugunja. That on the material date he had travelled from Nairobi and headed home to see his father who wanted some pieces of timber. That he later went to watch a football match and that the police later raided a house where he and three others were sleeping. That he was later ordered to participate in an identification parade conducted at the prison facility. That he agreed to participate in it and that a lady picked him out by touching him. That he declined to sign the parade form as the lady had already seen his photograph. That he denies the charges levelled against him.

    On cross-examination, he stated inter alia; that he was in Kibera for two months and travelled to Ugunja on 22/2/2023; that he was in Nairobi during the alleged offence and was with his wife; that he would not call his neighbours who were with him during his arrest since the evidence they are to adduce is already with him; that he had been charged with another case of robbery with violence and that is why he was in remand prison.

14. The appeal was canvassed by way of written submissions. The appellant submitted that the Respondent failed to prove their case beyond reasonable doubt as by law required.

15. On the part of the Respondent, it was submitted that it proved the charges beyond reasonable doubt and that it prayed that the court dismisses the appeal, uphold the conviction and affirm the sentence.

16. I have given due consideration to the evidence tendered before the trial court as well as the submissions filed. I find the issue for determination is whether the Respondent proved the charge of gang rape and grievous harm beyond reasonable doubt against the Appellant herein.

17. It is noted that the first count related to an offence of gang rape contrary to section 10 of the *Sexual Offences Act* No. 3 of 2006 which provides as follows:

> " any person who commits the offense 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 than fifteen years but which may be enhanced to imprisonment for life."

18. Thus when one commits either rape or defilement in association with another or in association with others, such person will be guilty of gang rape. I must also state here that sexual penetration through the anus is covered under the definition of rape.

19. A number of decided court cases have addressed the definition of gang rape. As submitted by counsel for the Respondent on appeal herein, one of these cases is the case of Francis Matonda Ogeto versus Republic (2019) eKLR where the court stated inter alia as follows:-

> " 25. Under Section 10 of the *Sexual Offences Act*, the ingredients of gang rape are rape or defilement under the Act; committed in association with others or

committed in the company of another or others who commit the offence of rape or defilement with common intention. It is therefore clear that defilement which is committed in association with others or with common intention notwithstanding the fact that the accused may not have defiled the victim amounts to gang rape according to the said section. It therefore matters not whether the offence was rape or defilement as long as the conditions under Section 10 are found to exist."

The definition of ''gang'' in section 2 of the Act means two or more persons. Under section 10 of the Act, the Respondent was under a duty to prove four elements of the offence which are inter alia; that there was commission of rape; that the rape was without consent; that the rape was in association with another person or others or any with common intention who commit the offence of rape; that there was positive identification of the perpetrator. The Act provides a scenario where the gang rape can occur where one or more persons engage in the sexual act upon the victim in turns or where one person engages in the act while another keeps watch as they have a common intention of committing the said offence. In the case of R Vs Oyier [1985]KLR 353 the Court of Appeal held as follows regarding the offence of rape under section 3(1) of the *Sexual Offences Act*:

> ''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 metal element is to have sexual 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.
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> 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. In the instant case, PW1 who was the complainant stated that the Appellant warned her not to shout as he cut her on the left leg at the knee (she showed the court a healed scar). That after cutting her, he removed her trouser and panty up to the thighs and raped her, as Caleb was standing on the road keeping watch. The clinical officer (PW4) likewise stated that from the history and examination, he opined that there was forceful virginal penetration and that he produced the P3 form as exhibit 1, discharge summary as exhibit 2, treatment notes as exhibit 3, PRC form as exhibit 4. On the strength of the medical evidence availed by the clinical officer which corroborated that of the complainant, iam satisfied that indeed the complainant was raped as there was penetration of her vagina by the assailant on the material date. Further, there was absence of consent to the sexual intercourse as it was done against her will. In fact, the complainant was severely injured on her leg before the assailants managed to subdue her and raped her. I find the element of penetration was proved by the Respondent beyond any reasonable doubt.

21. The other element to be proved is the identity of the culprits. This being a case based on visual identification at night, I have to be guided by what was stated by the Court of Appeal in the case of Wamunga versus Republic (1989) eKLR 427 as follows:-

> " Where the only evidence against a Defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of the identification were favorable and free from the possibility of error before it can safely make it a basis for a conviction".
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> In the case at hand, PW1 stated that there was a security light from a nearby home that enabled her to see and recognize Caleb as her former classmate in high school. The Appellant was a stranger to her but she could identify him. The Investigation officer (PW5) stated that they went to the scene of the crime with the complainant, about 30 meters from the bush, there was a big house with security lights. That from the bush to the house with security lights is about ten meters. PW5 further stated that the victim had stated that two people Caleb and another she later identified as Austine Aura had attacked her, raped her and then injured her. Further, it was PW5's evidence that an identification parade was conducted at Siaya GK prison and Ukwala police station. That both suspects including the Appellant were positively identified, with the Appellant being identified at the identification parade at Siaya G.k prison while Caleb was identified at the identification parade at Ukwala police station. That the identification parade report for Appellant herein was conducted at Siaya GK prison by inspector Leonard Namatandi and that the investigating officer produced the parade form as exhibit 5(a).
>
> It emerged from the evidence of the complainant that the Appellant's companion was one Caleb kept watch as she was assaulted by the Appellant. She was able to recognize the said Caleb who was her former schoolmate and also identify the Appellant through the aid of electricity lights from a nearby home and was able to see her attackers. Further, during the identification parade conducted at Siaya GK prison, she was abler to pick out the Appellant herein. Even though the Appellant has faulted the said identification exercise in that he had remarked that he was not satisfied with it, the Appellant did not provide the reasons for the dissatisfaction. The complainant had already given the description of the Appellant as one who was short with hairy beard all over the cheeks and that she was able to identify him after three months. In fact the report indicates that she started crying as soon as spotting him. It is noted that the police had first used a photograph of the Appellant who had earlier been involved in another case and that the complainant was called upon to confirm if she could manage to identify the suspect. Indeed, the use of photographs by the police in carrying out investigations is not unusual and that the fact that they used a photograph to be identified by the complainant before taking her to the prison to participate in the parade exercise should not be seen in bad light. Suffice to add that the complainant had earlier given the description of her attacker soon after the incident and thus had no problem picking him out during the parade. The parade was conducted in prison while that of the Appellant's accomplice took place at Ugunja police station. The exercise being conducted at the said facility was quite in order as long as the parade rules were followed. It is noted that the officer who conducted the parade was not called to testify and that the parade form was produced by the investigating officer. I find that the Appellant suffered no prejudice. It is instructive that the Appellant did not object to the production of the said parade form as an exhibit and that he duly cross-examined the witness at length. Iam satisfied that the Appellant herein was positively identified. Thus, i find that the prosecution proved beyond any reasonable doubt that the

Appellant was the culprit in the gang rape committed against the complainant. I uphold the finding on conviction on the first count.

22. Turning to the second count of grievous harm, section 234 of the *Penal Code* provides that:

> " any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life"
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> Section 4 of the *Penal Code* defines grievous harm as
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> "grievous harm" means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense;
>
> The aforesaid section furher defines ''maim'' as the destructive or permanent disabling of any external or internal organs, membrane or sense.

23. It was the evidence of the complainant that the person who raped her cut her first on the knee and that she even showed the scar to the trial court. From the evidence of the medical officer (PW4) who produced the treatment notes as exhibit 2 and upon perusal of the same it showed that the complainant sustained a fractured patella and also had a cut wound on the left knee anteriorly. The treatment notes dated 17/02/2023 show that there was a cut wound, pain, swelling and inability to walk, reduced knee joint (fracture of the patella and that P.O.P (Plaster of Paris) was applied due to the fracture. The degree of injury was classified as grievous harm. It was PW1's testimony that the doctors had recommended that she needed an implant to deal with the fracture. I find that the injury sustained by the complainant undoubtedly falls within the ambit of the definition of grievous harm under section 4 of the *Penal Code*. Indeed, the injuries suffered by the complainant were so severe that it is safe to classify them as maim since the complainant has been permanently disfigured.

    Turning to the Appellants alibi defense, I find that the same did not dislodge the watertight evidence of the prosecution which was quite overwhelming against him and that the same was rightly rejected by the learned trial magistrate. Hence, the finding on conviction on the second count was quite sound and must be upheld.

24. As regards sentence, it is noted that the Appellant was ordered to serve fifteen (15) years' imprisonment on the first count while he was ordered to serve a sentence of fifteen (15) years' imprisonment on the second count and that both sentences were ordered to run concurrently. Section 10(1) of the *Sexual Offences Act* No. 3 of 2006 provides for a minimum sentence of fifteen years' imprisonment upon conviction. Section 234 of the *Penal Code* provides that a person convicted for such an offence is liable to be imprisoned for life. Looking at the sentences, I find that they are neither harsh nor excessive as they are the minimum possible in law. It is noted that the complainant underwent a horrendous experience and that her life has been turned upside down as she has been turned into a cripple. I find the sentences to be reasonable and appropriate in the circumstances.

25. It is noted that the Appellant remained in custody throughout the trial and thus the period spent in custody must be factored in the sentence as provided for under section 333(2) of the *Criminal Procedure Code*. Indeed, the trial court did not consider the same and thus the Appellant's appeal succeeds to that extent only. The charge sheet indicates that the Appellant was arrested on 20/5/2023 and hence, the sentence shall commence from that date.

26. In the result, it is my finding that the appeal against conviction lacks merit and is dismissed. The appeal on sentence succeeds only to the extent that the sentences imposed by the trial court shall commence from the date of arrest namely 20/5/2023.

Orders accordingly.

DATED, AND DELIVERED AT SIAYA THIS 4 TH DAY OF APRIL, 2025

D. KEMEI

JUDGE

In the presence of:

Austin Ochieng alias Pach.....Appellant

Mwangi for M/s Mumu.....for Respondent

Okumu.....Court Assistant