



**ANJIR v Republic (Criminal Appeal E003 of 2023)
[2024] KEHC 1196 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1196 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E003 OF 2023
JN ONYIEGO, J
FEBRUARY 9, 2024**

BETWEEN

HASSAN KASSIM ANJIR APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant herein was charged with the offence of rape contrary to Section 3(1) as read with Section 3(3) of the *Sexual Offences Act*. Particulars of the charge were that on 20.03.2022 at Garissa Sub-County, intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of LNW without her consent.
2. The appellant also faced an alternative count of committing an indecent act contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. Particulars were that on 20.03.2022 at Garissa Sub-County, intentionally and unlawfully touched the genital organ namely vagina of LNW. with his genital organ namely penis without her consent.
3. Having pleaded not guilty to the charge, the prosecution called seven (7) witnesses in attempt to prove its case. At the close of the prosecution's case, the appellant was placed on his defence whereby he tendered sworn defence and called one witnesses.
4. In its judgment delivered on 28.09.2022, the trial court convicted the appellant and consequently sentenced him to serve fourteen (14) years in prison.
5. Being dissatisfied with the conviction and the sentence, the appellant appealed to this court *vide* a petition of appeal filed on 16.01.2023 wherein he listed the following grounds:
 - i. That the trial magistrate erred in law and fact by failing to consider his mitigation.



- ii. That the trial magistrate erred in law and fact by failing to consider that the sentence meted out was not only harsh but also extreme.
6. In his submission, the appellant urged that; the evidence tendered before court was not sufficient to warrant a conviction; he was not given time to read witnesses statements; the complainant wanted to withdraw her case but the court refused; there was no positive identification; there was no proof of communication between him and the complainant using his telephone number; PW3 gave false evidence; he was a first offender and that he was remorseful. Consequently, he urged this court to consider his appeal and quash the conviction and thereafter set aside the sentence herein.
7. On his part, the respondent through Mr. Kihara prosecution counsel submitted that the prosecution proved its case beyond reasonable doubt. Counsel contended that there was sufficient proof that the victim was raped by the appellant and that there was no consent. Regarding the claim that the court did not give the appellant time to read statements, counsel contended that he was given sufficient time and that is why he was able to cross examine witnesses. On identification, it was counsel's submission that the time spent together by the two at night and part of the day time was enough for positive identification.
8. Brief facts of the case are that, PW1, LNK came to know the appellant through her cousin, SW who had given her his number to call for connection for employment opportunity. That she called the number and a man identified himself as Andrew picked the same. Andrew who eventually turned out to be the appellant promised to secure her a job in Garissa. Desperate as she was, the said A offered to pay bus fare for her to Garissa. That upon reaching Garissa, A organized with a bodaboda rider to pick and thereafter take her to his house. That the bodaboda rider took her to a shamba where they found the appellant who paid the bodaboda rider.
9. She continued to state that the appellant welcomed her to his house and upon asking him for the job, he told her that she will be tending the melons for 2 to 3 months to cater for the fare that he had paid for her. He further threatened her of calling police on her should she try to run away. She cooked and thereafter, the appellant told her that he was going to spend the night at a friend's place but to her shock, the appellant returned to the house where he raped her. It was her evidence that she escaped from the appellant's house the following morning for Garissa using a probox vehicle. That the two passengers that she found inside the vehicle took her to Garissa Police station upon sharing her plight with them.
10. PW2, Daniel Ntabo testified that on 21-3-22 he was from Sankuri headed to Garissa aboard a probox MV when he found PW1 who equally boarded the said vehicle. That upon being asked for fare, she requested for a phone so that she could insert her sim card to call somebody to send her fare. That no one sent her fare and so upon asking her what was happening, she explained to him what had befallen her and so, he bought her food and thereafter left. In the evening, he told the driver of the probox vehicle that they should pick her up from where they left her since she looked young. That they reported the matter to Sankuri Police Station.
11. PW3, PM testified that on 21.03.2022 he was with PW2 aboard a probox vehicle when PW1 stopped the said vehicle. That he paid his fare but PW1 had none. He stated that PW2 paid for PW1's fare as the driver had insisted that she had to pay. He basically corroborated the testimony of pw2 word by word.
12. PW4, AAA stated that on 19.03.2022 at around 12.00 noon, the appellant called informing him that his wife was to come from Bungoma. He thus requested him salary advance of Kes. 2,500 and further requested him to deposit the said amount to phone number, 07572XXXXX. That the name that was reflected was SS. He further stated that on 22.03.2022 at around 9.00 p.m., he called the appellant



- enquiring whether his wife arrived of which he told him that she had arrived but had gone to pick her clothes from Garissa town.
13. PW5, MAI recalled that on 21.09.2022, he was driving his probox motor vehicle when PW1 boarded the said vehicle. That another passenger paid her fare as she had none and so, upon interrogating her, he gathered that she had travelled from Bungoma to Garissa. He stated that she had been promised work in Garissa but upon reaching Garissa, she found that the work that was available was that of working in a shamba and that she didn't want the same. They then escorted her to Sankuri Police Station where he recorded his statement.
 14. PW6, Benjamin Kioko, the investigating officer reiterated the evidence of other prosecution witnesses. He confirmed that on 21-3-22 he was in the police station at sankuri when pw1 in company of three people reported a rape incident. He stated that together with his colleague, they took PW1 to Sankuri Health Centre and thereafter to Garissa County Referral Hospital for further treatment. He stated that he arrested the appellant and further charged him with the offence herein. He took PW1 for age assessment and the doctor confirmed that she was 18 years old.
 15. PW7, Shaffie Omar Ahmed a clinical officer at Garissa referral hospital testified that he examined PW1 and found that her hymen was broken but not fresh as the complainant had a history of delivery at the age of 14 years. That the examination further revealed that she had her menses at that time and that there was white discharge. He stated that due to the fact that the complainant had previously delivered, the examination could not show if the victim had been sexually assaulted.
 16. Upon the close of the prosecution's case, the trial court found that a *prima facie* case had been established against the appellant thereby placing him on his defence.
 17. DW1, HKA denied committing the offence. He testified that he had been framed up by his enemies due to an existing grudge over competition over growing water melon. That he was arrested as there were some cows that had died after eating his water melons hence the owners forcefully wanted compensation by taking his water pump. He told the court that he did not know the complainant. He claimed that PW1 was an employee of AA.
 18. DW2, JNG stated that the appellant was his neighbour. That when the appellant was arrested, he had requested him to water his shamba. It was his evidence that previously, there was a cow and calf that trespassed thereby eating his melons and so, the appellant thought that he was arrested in relation to the said issue.
 19. It is trite that, the prosecution was under obligation to prove the Act of rape. The offence of rape and the ingredients of the same are provided for in Section 3(1) of the *Sexual Offences Act* No. 3 of 2006 as follows: -

3.

- (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;



(c) the consent is obtained by force or by means of threats or intimidation of any kind.

20. Other than the testimony of the complainant, nobody witnessed her being raped. The trial court relied on the complainant's evidence alone to convict after correctly cautioning himself on the dangers of convicting based on the evidence of a single witness. The court rightly quoted relevant case law where courts have previously upheld convictions based on the evidence of a single witness.
21. In the case of *George Kioji v R Nyeri* Criminal Appeal No. 270 of 2012 (unreported)] the court was of the view that:
- “Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”
22. Under section 124 of the *Evidence Act*, a court can convict an accused person on uncorroborated evidence of a victim in a sexual offence as long as it is convinced that the victim is truthful. [See the case of *Arthur Mshila Mange vs Republic*, Criminal Appeal No. 24 of 2014 [2016] eKLR].
23. Having laid the basis above, I am in agreement with the trial magistrate who heard the complainant testify and in his view, believed her after warning himself of the dangers of convicting using uncorroborated evidence. I have no reason to doubt the evidence of Pw1 that she was raped.
24. As regards the identity of the perpetrator, the complainant testified on how upon reaching Garissa, the appellant sent a rider who picked her and thereafter took her to the appellant's house. It was not controverted that upon having supper, the appellant informed her that he would spend the night at a friend's place only for him to show up and asked her for sex. The complainant stated that she refused but the appellant forced her. That he undressed her by force and thereafter laid on top of her thereby having sex with her without any protection. The same was also clear when the complainant tricked the appellant thereby enabling her to escape from the appellant's house.
25. It is clear from the testimony PW1 that she was new in Garissa and knew nobody having travelled hundreds of kilometers from western desperately looking for a house help job in Garissa only to fall into a trap in a farm house located inside a bush. The offence was committed at night. The complainant had no grudge with the appellant before as they did not know each other. She had no reason to frame him up. She gave a graphic testimony on every event that took place. It was definitely not a made-up story. Having stayed together the whole night and part of the following morning, identification was clear hence positive. She even took police officers to the same house to effect arrest explaining the position that there was no mistaken identity.
26. On consent, it's the complainant's case that she did not consent to the sexual acts. According to the Proviso to Section 42 of the *Sexual Offences Act*, “a person is said to consent if he or she agrees by



choice, and has the freedom and capacity to make that choice.” In *Republic vs Oyier* [1985] eKLR, the Court of Appeal held as follows: -

“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.

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.”

27. Having carefully considered the evidence by the prosecution and in particular by the complainant and the defence raised by the appellant, it is my view that the sexual intercourse was not consensual otherwise PW1 could not have ran away and reported to the police.
28. This court therefore holds that the prosecution properly established to the required standard of proof that it was the appellant who sexually assaulted the complainant.
29. As concerns lack of sufficient time to read statements, it is clear from his cross examination that he was prepared implying that he had read the statement. I do not find merit on that ground.
30. On the question whether the sentence of 14 years was harsh and excessive, Section 3 (3) of the *Sexual Offence Act* prescribes the penalty for the offence by stating as follows;

“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.”
31. 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.
32. In the case of *Shadrack Kipchoge Kogo vs. Republic* Criminal Appeal No. 253 of 2003, the Court of Appeal stated as follows;

“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred”
33. Considering the cruel circumstances under which the offence was committed I am of the opinion that the sentence meted out was lawful and appropriate.
34. Accordingly, the appeal herein lacks in merit and the same is dismissed. I uphold both conviction and sentence.

DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 9TH DAY OF FEBRUARY 2024.

J. N. ONYIEGO

JUDGE

