



REPUBLIC OF KENYA



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**Chepyegon v Republic (Criminal Appeal E003 of 2023)
[2024] KEHC 1210 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1210 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL E003 OF 2023
RB NGETICH, J
FEBRUARY 8, 2024**

BETWEEN

SAMWEL CHEPYEGON APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and sentence from the Judgment delivered on the 2nd day of February, 2023 by Hon. V. Amboko (SRM) in Kabarnet Magistrate's Court Criminal Case No. 6 of 2020)

JUDGMENT

1. The Appellant Samwel Chepyegon was charged in count 1 with the offence of rape contrary to Section 3 of the *Sexual Offences Act*. The particulars of the charge were that the appellant on the 4th day of March, 2020 at around 2130hrs at Baringo South Sub- County within Baringo County, intentionally and unlawfully caused his penis to penetrate the vagina of PJ by use of force.
2. The appellant denied the offence and the prosecution availed four witnesses to testify in support of their case and after trial, the court rendered a judgement where the trial court found the Appellant guilty as charged, convicted and sentenced him to 10 years imprisonment.
3. Being aggrieved by the judgement of the trial court, the Appellant has now appealed to this court on the following grounds of appeal: -
 - i. That the learned trial magistrate erred in both law and fact by failing to note that the evidence of identification was not proven to the required standard.
 - ii. That the learned trial magistrate erred in both law and fact by failing to hold that the medical report was not conclusive and unreliable.



- iii. That the learned trial magistrate erred in both law and fact as it failed to observe that the witness evidence was inconsistent and uncorroborated.
- iv. That the learned trial magistrate erred in both law and fact by failing to accord the Appellant a fair trial.
4. The Appellant prays that this appeal be allowed, sentence be quashed and he be freed to liberty.

Appellant's Submissions

5. The Appellant submitted on two grounds contained in the memorandum of appeal. First that his rights to fair trial were violated by the trial court; he submits that he was arrested on 6th March, 2020 and brought to court on 9th March, 2020 which was after three days and this delay was not explained by the police. The Appellant argues that it is obvious that the provisions of the law being Article 49 (f) of *the Constitution* of Kenya, 2010 and Section 37 and 108 of the Criminal Procedure Code were not adhered to. The appellant submits that the law must be observed by those enforcing it. That if an arrested person/ suspect must be arraigned before court within the stipulated time, failure to do so makes the charge baseless.
6. The Appellant argues that the trial court took almost 3 years to finalize the matter. He argues that he took plea on the 9th March, 2020 and the matter was finalized on the 2nd February, 2023 which is against the provisions of Article 50 (2) (e) and 159 (2) (b) of *the Constitution* of Kenya, 2010. The Appellant complains that the reasons for delay in prosecuting the matter by the trial court were unjustified and that some of the reasons advanced was that the witnesses were not in court though bonded, police file not available hence his rights were violated.
7. The appellants argues that the complainant explained herself in court that she wanted to withdraw the case. The Appellant submits that the complainant was not willing to give any evidence in court and the court went ahead to proceed with the case which was a violation of the rights of the complainant under Section 204 of the Criminal Procedure Code. That to make it clear that the complainant was serious to withdraw the case after the trial court denied her the request, she made an application to the High court which was received and stamped by the court on the 3rd March, 2023 whereby she told the Honourable court that the accused had sought for forgiveness and she had forgiven him and has no intention of proceeding with the case. That the complainant in her application to the High raised 4 reasons as to why she wanted to withdraw the case.
8. The Appellant submits that the trial court failed to consider his defence; he argues that he was put on defence where he gave a sworn testimony and availed 3 witnesses. He submits that DW1 Maureen Kemei testified that the accused was her husband and, on the 4th March 2020, she was with the appellant the whole day where they spent in the shamba till evening and later they spent the night with the appellant. That after the court went through the testimony of DW1, DW2, DW3 and Dw4 which all corroborated, the trial court went ahead to reject his defence without any reason.
9. The appellant submits that with regard to the violation of his rights to a fair trial under Article 50 (2) (e) and the violation of the complainants' rights under section 204 of the criminal procedure code by refusing to allow her withdraw her case yet she had sufficient reasons to do so, the Appellant urges this court to order for re-trial.
10. The Appellant submits that the prosecution's case was not proved beyond reasonable doubt and this honourable court ought to come up with a different verdict leading to acquittal of the Appellant.



Respondent's Submissions

11. The Respondent submits that the appellant was charged with the offence of rape contrary to Section 3 (1) of the [Sexual Offences Act](#). That the ingredients of rape were determined in Republic vs Oyer [1985] eKLR where the court of appeal stated the lack of consent is essential element for the crime of rape. That to prove lack of consent the prosecution proved that the complainant resisted and where a woman yields through fear of death or duress it is rape, it is not an excuse that the woman consented; at page 12 of the record of appeal, the complainant indicated that the accused tore her pant and removed his penis and started to rape her and the appellant was strangling her until she fainted. That it is evident that she did not consent and there was penetration and this was also confirmed by the doctor who produced her P3 Form. Medical documents showed complainant was assaulted and raped and she had injuries to prove the same.
12. The respondent submits that on identification of the appellant, still on page 12 of the record of appeal, the appellant was properly identified by the complainant. That the complainant indicated that she had a torch which she used to flash on the face of the attacker and she knew that the attacker was her neighbour having been a neighbour for over 5 years. That the complainant pointed and identified the attacker in court.
13. The Respondent submits that during the defence hearing on page 41 of the record of appeal, the appellant during cross examination stated that, “she wanted to forgive me, I saw that and I agreed that I committed the offence that she could forgive me”, this shows that the appellant admitted the offence in order to gain the complainant’s forgiveness.
14. The Respondent submits that during the defence hearing, the appellant did not indicate where he was when the offence was committed. They submit that the prosecution proved their case by confirming that there was no consent and there was penetration and the appellant was properly identified. On sentence, the Respondent submits that the appellant was convicted and sentenced to serve 10 years imprisonment which was to commence on 11th January, 2023 when he was placed in remand pending sentencing. That this was the minimum sentence provided for in the [Sexual Offences Act](#). It provides a term not less than 10 years but the same can be enhanced to imprisonment for life.
15. The Respondent submits that the trial court exercised its discretion judiciously by imposing a minimum sentence. The Respondent submits that the appeal is unmeritous and it be dismissed.
16. When the matter came up for hearing on the 8th November, 2023, the appellant while in court informed the court that they had agreed with the complainant. That he agrees that he raped the complainant and he prays for forgiveness stating that he has no parents and that he is 60 years old. He stated that he has 2 wives and children and his children have suffered and he thus seeks for forgiveness.

Analysis And Determination

17. This being the first appellate court. I am expected to subject the entire evidence adduced before the trial court to fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanour. The principles that apply in the first appellate court are set out in the case of Okeno vs Republic [1972] EA 32 where it was stated as follows: -

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own



conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See *Peters v. Sunday Post*, [1958] EA 424.)”

18. In view of the above, I have perused and considered the petition of appeal, the record of appeal, the rival submissions by the parties. The appellant was charged with the offence of rape, the statutory definition of rape is in Section 3 (1) of the *Sexual Offences Act*.

- “(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.”

19. In view of the above, I find the following as issues for determination:-

- i. Whether ingredients for the offence of rape were proved.
- ii. Whether the rights of the accused under Article 47 of *the constitution* were violated by the trial court.
- iii. Whether the trial court denied the complainant her rights under section 204 of the criminal procedure Code.
- iv. Whether the sentence was harsh and excessive.

20. The ingredients of the offence of rape created in Section 3 (1) of the *Sexual Offences Act* are intentional and unlawful penetration of the genital organ of one person by another with the absence of consent and if consent is obtained, it is obtained through force.

21. In the case of *Republic vs. Oyier* [1985] KLR 353 the Court of Appeal stated as follows:-

- “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 mental element is to have 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.
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.”



22. In respect to identification, there is no doubt that the appellant was known to the complainant. She said she used a torch light to see and identify the Appellant's face. In the case of *Anjononi & Others vs. Republic* [1980] KLR 59 the Court of Appeal stated as follows: -

“...recognition of an assailant is more satisfactory, more reassuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another.”

23. On the issue of penetration, complainant testified that the accused tore her pant, removed his penis and raped her while strangling her until she fainted. This evidence was corroborated by that of PW3 a clinical officer who examined her and found that she had a foul smell discharge on the external genitalia, Lab tests VDRI, HIV was negative. That urine had pus cells, he testified that High vaginal swab indicated blood was seen and that there was no possibility that she was on periods as she was 50 years old. That he reached a conclusion that she had been raped and assaulted. From the above evidence it is clear that penetration was proved beyond reasonable doubt.

24. On issue of consent, the Act provide that the offence of rape is committed if the other person does not consent or the consent is obtained by force or threat. Evidence adduced show that the Appellant tore the complainant's pant and strangled her until she fainted clearly. Her testimony was corroborated by evidence of the clinical officer who examined her and confirmed that she had injuries occasioned as a result of the act. This clearly show that the act was forceful. There was no consent from the complainant.

(ii) Whether the appellants constitutional rights were violated

25. The Appellant argues that Article 49 of *the constitution* require an accused person to be brought before a court as soon as reasonably possible, but not later than twenty-four hours after being arrested or if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day was violated.

26. The charge sheet shows that the appellant was arrested on the 6th March, 2020 and arraigned in court on the 9th March, 2020. I have looked at the 2020 calendar and note that 6th march 2020 was a Friday. 24 hour would fall on a Saturday which is not a working day. The next working day was therefore Monday 9th March, 2020. The argument by the appellant cannot therefore stand and 24-hour period ended on a day that is not an ordinary court day.

27. That aside, the consequence of such violation was pronounced in the case of *Julius Kamau Mbugua vs Republic* (2010) eKLR, thus;

“In our view, it is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused. However, the trial court can take cognizance of such pre-charge violation of person liberty, if the violation is linked, to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g. where an accused has suffered trial related prejudice as a result of death of an important defence witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection like an acquittal. Otherwise, the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the



statutory duty of a criminal court and which is by Section 72 (6) expressly compensable by damages.”

28. Further, even if violation of appellants’ right was to be found, the same does not automatically translate to acquittal as held in the case of *Musa Shaban Kabughu v Republic* [2020] eKLR where the court stated as follows:-

“In other words, the violation of the appellant’s right to be produced in court within 24 hours did not automatically result in a right to an acquittal from the offence he faced. Instead, it would give rise to a claim for damages, and the appellant was at liberty to claim for the violation of his Constitutional rights. On this basis, we do not consider the delay in his arraignment in court to have been unreasonable or fatal to the prosecution’s case. This ground is dismissed”.

29. Having found that the appellant was arraigned in court the next working day which was Monday 9th March 2020, that ground of appeal fails.

30. On ground that the complainant wanted to withdraw the case but the court denied the request. I have perused the court record and find that on the 24th June 2020, when the matter came up before court, the complainant informed the court that she wanted to settle the matter at home with the appellant but the prosecutor opposed citing public interest and the need to balance between rights of the accused and victim. The court declined withdrawal indicating that the offence is governed by the *Sexual Offences Act* and the offence was not only alleged to have been committed on the victim but also affects the society as a whole and dismissed the application to withdraw.

31. Section 40 of the *Sexual Offences Act* give the decision as to whether the prosecution or investigation by any police officer of a complaint that a sexual offence has been committed should be continued rests with the attorney general. From the foregoing, it was for the complainant to communicate the desire to settle the matter out of court to the Attorney General who has the discretion to decide whether to discontinue prosecution of the case or not. There is no indication that this was done and no approval to withdraw was therefore given to enable the trial magistrate allow withdrawal of the matter.

(iii) Whether sentence imposed was harsh and excessive

32. Section 3 (3) of the *Sexual Offences Act* provides that 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.

33. Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. In the case of *Shadrack Kipchoge Kogo vs. Republic* Criminal Appeal No. 253 of 2003(Eldoret), 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”

34. Similarly, in the case of *Wanjema vs. Republic* (1971) E.A. 493 the court stated as follows; “An appellate court should not interfere with the discretion which a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into consideration some immaterial fact, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case.”



35. In view of the circumstances in this case I am of the view that the sentence imposed is appropriate and will not interfere.

Final Orders: -

36. Appeal on both conviction and sentence is dismissed.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 8TH DAY OF FEBRUARY 2024.

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RACHEL NGETICH

JUDGE

In the presence of:

Appellant - present.

Ms. Ratemo for State.

Elvis/Momanyi – Court Assistants

