



**Longomo v Republic (Criminal Appeal E034 of 2021)
[2024] KEHC 734 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 734 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL APPEAL E034 OF 2021
RN NYAKUNDI, J
FEBRUARY 1, 2024**

BETWEEN

LOKIRIDI LONGOMO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of Hon. J.M.
Wekesa in Kakuma Law courts Cr. S.O No. 4 of 2021)*

JUDGMENT

1. The appellant was charged with the offence of rape contrary to section 3(1) (a) (b) (3) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of the offence were that on 28th January, 2021 at around 0700hrs at [Particulars withheld] village, Lokichoggio location in Turkana West Sub-County, the appellant intentionally and unlawfully caused his penis to penetrate the Vagina of EE. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#). The particulars were that on 28th January, 2021 at around 0700hrs at [Particulars withheld] village, Lokichoggio location in Turkana West Sub-County, the appellant intentionally touched the Vagina of EE against her will.
2. The appellant was convicted on the main charge and sentenced to serve fifteen (15) years imprisonment.
3. Being dissatisfied with the said judgment the appellant lodged the present appeal relying on the following grounds:
 - i. That the trial magistrate erred in law and facts when she failed to observe that penetration was not proven by the prosecution.



- ii. That the learned trial magistrate erred in law and facts when she failed to observe that the prosecution witness did not recognize the accused person in the instant case.
 - iii. The learned trial magistrate erred in law and facts when she failed to observe that there were inconsistencies or contradictions in the testimonies of the prosecution witnesses.
 - iv. That the learned magistrate erred in law and facts when she failed to observe that the evidence which was availed by the prosecution witnesses was hearsay evidence.
 - v. That the learned magistrate erred in law and facts when she failed to observe that there was no corroboration between PW1 and PW4.
4. The prosecution in support of its case called five witnesses.
 5. However, given the nature of the offence and the fact that one of the critical elements of rape is penetration, I shall consider the testimony of the complainant and that of the doctor to establish the element of penetration.
 6. PW1 was the complainant. She testified that on the material day at around 7:00AM, she left her house to go and relieve herself on a long call at some bushes near her house when the accused herein accosted her, held her hand and asked her to be up on her feet or he would kill her. He led her towards some long grass when he spotted a certain boy from a far and asked her not to scream or people would think the Toposa enemies (from neighboring South Sudan) were around. She protested telling him she was not a girl but a married woman that needed to be respected because she wore her "Alagama" (A Turkana traditional ornament made from copper worn by married women whose dowry is fully paid.) The accused did not listen to her but got hold of her Alagama and pulled her by it then led her to the long grass, caused her to fall then lifted up her clothes, removed his penis and inserted it inside her vagina and raped her repeatedly. He raped her four times. As he first entered her, he told her that he would kill her if she cried. That as he enjoyed himself, he told her in wonder that the vagina of an old woman is like that of a child. The witness went on to narrate the turn of events, which I have gone through. Her daughter in law assisted in hiring boda boda for her that took her to the police station at Lokichoggio where she reported the incident. She was referred to the hospital for treatment and was issued with a P3 form that she identified in court.
 7. PW4, Dr. Roy Situma of Lopiding Sub-County hospital examined and treated the victim herein. He also filled her P3 form and took the trial court through the same as follows; on state of clothing, there were no blood-stained clothes. The victim had a checked red and black shirt and sky blue shuka. On general medical history; she alleged to have been raped by a person known to her and sustained physical injuries on the chest and genitals. There was no evidence of substance or drug abuse. Head and neck had right parietal tenderness. Thorax and abdomen had bilateral chest tenderness. Upper and Lower limbs were normal. Approximate age of injury was three days. Probable type of weapon causing injuries were kicks and blows. He gave her antibiotics and analgesics. Degree of injury was categorized as bodily harm. Nature of offence was categorized as alleged rape. Approximate age of victim is eighty-one (81) years. On examination, she had obvious injuries on her vulva; area around the opening of her vagina. There was nonblood-stained vaginal discharge. The accused was also examined. His penile shaft was examined and it had no bruises. A high vaginal swab was done on the complainant that showed numerous epithelial cells and blood cells. Urinalysis was done but showed no significant results. Patient was admitted at the facility on 28th January and discharged on 29th January, 2021. He produced the medical report, lab and treatment notes in respect of complainant herein as exhibits. His opinion was that the victim was both sexually and physically assaulted.



8. The accused person in his defence stated that he as from Songot area and is a herder. He left the said area for Lokichoggio to visit his friend due to hunger. He talked to his friend from morning to evening and his friend promised to give him some sorghum and beans. The following day, his children gave him food that he ate and he went to sleep only to be woken up around 4:00PM by some NPRs that knocked on the door and entered his friend's house. They ordered him out and asked him if he had wronged any of the fifteen NPRs (Nationals Police Reservists) he stated that he had wronged none and they started beating him up. The one that had gotten him out of the house had pity on him and took him to hospital at Lopiding. A sample of urine was taken. That he was later transferred to Kakuma in the morning and taken before court where a charge of rape was read to him, to which he pleaded not guilty. He testified that he was issued with statements that he gave to his friends that knew how to read and informed him that he had raped a 80 year old woman.

Analysis and Determination

9. I have considered the appeal and the evidence adduced at the trial court. I have also read the record of the trial court and the judgment. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanour of the witnesses. See *Okeno v Republic* [1972] E.A 32.
10. The issues that arise for determination in this appeal are;
- i. Whether the prosecution proved its case to the desired threshold;
 - ii. Whether the sentence meted upon the appellant was lawful.
11. This court has re-evaluated the evidence in this appeal in light of the submissions made on this appeal. Section 3(1) of the [Sexual Offences Act](#) states that a person commits the offence of rape if;
- He or she intentionally and unlawfully commits an act which causes penetration with his or genital organs;
- a) The other person does not consent to the penetration; or
 - b) The consent is obtained by force or by means of threats or intimidation of any kind.”
12. The prosecution was therefore required to establish penetration, absence of consent, and that the Appellant was the perpetrator of the act. On the element of penetration, the complainant testified and gave a narration of how the Appellant had raped her. She testified that he led her towards some long grass when he spotted a certain boy from a far and asked her not to scream or people would think the Toposa enemies (from neighboring South Sudan) were around. She protested telling him she was not a girl but a married woman that needed to be respected because she wore her “Alagama”(A Turkana traditional ornament made from copper worn by married women whose dowry is fully paid.) The accused did not listen to her but got hold of her Alagam and pulled her by it then led her to the long grass, caused her to fall then lifted up her clothes, removed his penis and inserted it insider her vagina and raped her repeatedly. He raped her four times. As he first entered her, he told her that he would kill her if she cried.



13. The key ingredients of the offence of rape created in section 3 (1) of the *Sexual Offences Act* include intentional and unlawful penetration of the genital organ of one person by another, without consent. In the case of *Republic v Oyier* [1985] KLR 353 the Court of Appeal held that;
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.”
14. Evidence was adduced by PW4 that the patient had obvious injuries on her vulva; area around the opening of her vagina. That the neck and the head had right parietal tenderness. As I have stated it was the complainant’s testimony that the accused did not listen to her but got hold of her Alagama and pulled her by it then led her to the long grass, caused her to fall then lifted up her clothes, removed his penis and inserted it insider her vagina and raped her repeatedly.
15. It is therefore evident that the complainant did not consent to the sexual act. The evidence she gave was corroborated by evidence of the medical doctor who examined her and confirmed the injuries as outlined in the report. The medical evidence also confirmed that the patient had tenderness on the thorax and abdomen. The degree of the injury was classified as sexual and physical assault.
16. The issue however is whether the appellant penetrated the complainant. From the evidence of the complainant, the accused person was positively identified to her. She stated that she only saw him on the day he raped her. He was dressed in a black t-shirt and maroon and green Maasai Shuka. That the sun was just going up. It was around 7:00 AM and she was able to see his face clearly. In such circumstances, the accused person was positively identified. In the cases of *R v Turbull and others* (1976) 3 ALL ER 549. Lord Widgery C.J had this to say:- “First , wherever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be convincing one and that a number of such witness can all be mistaken. Secondly the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation ” At what distance” In what light” was the observation impended in any way, as for example by passing traffic or press of people. Had the witness ever seen the accused before” How often” if only occasionally, had he any special reason for remembering the accused” How long elapsed between original observation and the reason for remembering the accused” How long elapsed between original observation and the subsequent identification to the police” was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance.”



17. The evidence by the prosecution leaves no doubt that the appellant caused penetration of the complainant. Accordingly, I find that the elements of rape were proved beyond doubt. The conviction was therefore proper.

On sentence

18. In the “*Muruatetu Case*”, the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to re-sentencing;

- (a) age of the offender;
- (b) being a first offender;
- (c) whether the offender pleaded guilty;
- (d) character and record of the offender;
- (e) commission of the offence in response to gender-based violence;
- (f) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaptation of the offender;
- (h) any other factor that the Court considers relevant.”

19. In my considered view, the accused mitigation ought to count in sentencing. The objectives of sentencing should be considered in totality. In this regard, section 3(1)(a)(b)(3) of the *Sexual Offences Act* gives room for the exercise of judicial discretion.

20. Further, the sentencing objectives in Kenya have been captured in the Sentencing guidelines 2023 to be the following: -

- 1) Retribution: to punish the offender for his/her criminal conduct in a just manner.
- 2) Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
- 3) Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law abiding person.
- 4) Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
- 5) Community protection: to protect the community by incapacitating the offender.
- 6) Denunciation: to communicate the community’s condemnation of the criminal conduct.
- 7) Reconciliation: To mend the relationship between the offender, the victim and the community.
- 8) Reintegration: To facilitate the re-entry of the offender into the society.

21. Therefore, mandatory minimum sentences place a bar on the trial court’s ability to set a sentence lower than the one prescribed by the statute. It kind of stripes the Judge or magistrate’s power to exercise judicial discretion on a case-to-case specifics. Sometimes I consider it as an intrusion by the legislature with regards to the sentencing discretion of Judges and Magistrates. The courts merely become rubber stamps. It would seem in this case discretion was fettered for the appellant to be sentenced to the very



minimum period of fifteen (15) years imprisonment. In contrast to the above given the guidelines in the *Benard Kimani v Republic* “It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

22. The trial court while sentencing the accused persons noted that the accused person was a first offender and that in his mitigation, the appellant stated that he had two brothers who depend on him since his father died. In my view, the objectives of sentencing were not considered in totality.
23. In the upshot, the 15 years custodial sentence be and is hereby interfered with a lesser sentence of ten (10) years imprisonment. The court in arriving at this decision, has taken into account the aggravating factors, mitigation, and that the appellant is a 1st offender together with the holistic application of the objectives of sentencing. The appeal therefore partially succeeds on sentence whereas the order on conviction is affirmed.

DATED AND SIGNED AT LODWAR THIS 1ST DAY OF FEBRUARY, 2024

R. NYAKUNDI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of;

Mr. Yusuf for the state

Appellant present

