



REPUBLIC OF KENYA



**Omune v Republic (Criminal Appeal E055 of 2023)
[2024] KEHC 2242 (KLR) (6 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2242 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E055 OF 2023**

KW KIARIE, J

MARCH 6, 2024

BETWEEN

WYCLIFFE ONYANGO OMUNE APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. Case No. E032 of 2022 of the Chief Magistrate's Court at Homa Bay by Hon. Celesa J.M. Nang'ea–Chief Magistrate)

JUDGMENT

1. Wycliffe Onyango Omune, the appellant herein, was convicted of the offence of rape contrary to section 3(1) as read with section 3 (3) of the [Sexual Offences Act](#) No.3 of 2006.
2. The particulars of the offence were that on the 27th day of August 2022 at Nyawita sub-location, Rangwe Sub-County within Homa Bay County, he intentionally and unlawfully caused his penis to penetrate the vagina of MOA without her consent.
3. The appellant was sentenced to serve fifteen years imprisonment. He was aggrieved and has appealed against both conviction and sentence. He was in person and raised grounds of appeal as follows:
 - a. That the ingredients of the offence were not proved.
 - b. That the complainant is both untrustworthy and an incredible witness.
 - c. That the appellant was not accorded a fair trial as enshrined in Article 50(2) of the [Constitution](#).
 - d. That the prosecution witnesses' evidence was not corroborated.
4. The state opposed the appeal.



5. This is a first appellate court. As expected, I have analysed and evaluated all the evidence adduced before the lower court afresh. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of *Okeno vs Republic* [1972] EA 32.

6. The ingredients of the offence of rape are set out in section 3 of the [Sexual Offences Act](#), which states as follows:

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.

7. The complainant, PW1, testified that Elly tricked her into going to his house to collect a present that had been sent to her through him by a friend who was in Nairobi. When they got to the house, Elly took her, but there was no present. Elly wanted to have sexual intercourse with her, but she declined. He unsuccessfully attempted to rape her. When the appellant joined them, he asked her to comply with Elly's demands. This is when the appellant took over and raped her. Since she had not known the appellant by name, she described him to Brian Ouma (PW2), who supplied her with his name.

8. Paul Nyapaya Atera (PW4) is a clinical officer at Rangwe Sub-county Hospital. His evidence was that he examined the complainant on the 27th day of August 2022 he examined the complainant. The external genitalia were bloodied, and the hymen was freshly torn. The walls of the vaginal were bleeding.

9. In her evidence, MOA (PW1) testified that she had not, before this date, engaged in sexual intercourse. The medical evidence therefore supported her contention that she had been raped.

10. The appellant was not a stranger to her except that she did not know his name. She could describe him and, after his arrest, could identify him. I find that the appellant was identified as the perpetrator.

11. In his defence, the appellant contended that he was falsely framed. However, since he said he had not known her before, there was no basis for falsely implicating him. There was no evidence on record to suggest the existence of a grudge. This contention is therefore dismissed.

12. The appellant contended that the sentence was excessive. An appellate court would interfere with the trial court's sentence only where there exists, to a sufficient extent, circumstances entitling it to vary the trial court's order. These circumstances were well illustrated in the case of *Nillson v Republic* [1970] EA 599, as follows:

The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v Rex* (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R v Shershevsity* (1912) CCA 28 TLR 364.

13. Section 3 (3) of the [Sexual Offences Act](#) Provides:



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.

14. The appellant was sentenced to serve fifteen years imprisonment. This court has not been shown that the learned trial magistrate acted upon some wrong principle or overlooked some material factor. I have no basis to interfere with the sentence.
15. The appeal lacks merit, and I accordingly dismiss it.

DELIVERED AND SIGNED AT HOMA BAY THIS 6TH DAY OF MARCH 2024

KIARIE WAWERU KIARIE

JUDGE

