



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ochango v Republic (Criminal Appeal E034 of 2023)  
[2024] KEHC 1926 (KLR) (1 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 1926 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CRIMINAL APPEAL E034 OF 2023  
HI ONG'UDI, J  
MARCH 1, 2024**

**BETWEEN**

**JOSEPHAT ONCHIRI OCHANGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of Hon. C. A. Ogwenso (SRM) delivered  
on 26th July 2023 in Sexual Offences Case No. E050 of 2021 at Kisii)*

**JUDGMENT**

1. The appellant was charged with the offence of gang rape contrary to section 10 of the *Sexual Offences Act* No 3 of 2006. The particulars being that on the 28<sup>th</sup> day of March 2021 at 2100hrs at in Kitutu Central Sub-County within Kisii County in association with others not before court intentionally and unlawfully caused his penis to penetrate the vagina of N.K.N without her consent. The appellant also faced 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.
2. The appellant denied the charges and the case proceeded to full hearing, with the prosecution calling four (4) witnesses, while the appellant made a sworn defence and called one witness. Thereafter he was convicted and sentenced to 15 years imprisonment on the main count.
3. Being dissatisfied, he filed this Appeal dated 9<sup>th</sup> August 2023 raising the following grounds:
  - i. The trial magistrate erred in law and facts by relying on the evidence of the investigating officer who in fact the told court that he visited the scene but did not recover any useful evidence. The alleged torn pant was an illusion which did not exist.
  - ii. The trial court further erred in law and fact by convicting the accused by relying on the falsified evidence of the investigating officer who testified that the complainant also identified other



assailants as a store keeper at St. Angela's primary school but failed to point out why the alleged assailant was never charged for the alleged rape.

- iii. The trial court erred in law and facts by failing to discern and establish the possibility of the complainant having been raped by other persons other than the appellant whose HIV-Status is negative but the complainant's is HIV-Positive according to the complainant victim's impact assessment filed in the pre-sentencing report.
  - iv. The trial court erred in law and facts when he convicted the Appellant based on a false and unsubstantiated evidence as the only evidence pointing to the appellant is that he has a gap between his teeth where the complainant only imagined the assailant could be the same as the appellant who is her loyal customer that she served in a bar.
  - v. The trial court erred in law and facts when he convicted the Appellant by treating with total disregard his evidence and that of his wife who confirmed that on the material day and time of the alleged offence the husband was at home.
  - vi. The trial court erred in law and facts when he convicted the Appellant as it was evidence of the appellant that he used to be a calm and polite customer. It was until the appellant refused to lend her Kshs 50,000 that their relationship deteriorated.
  - vii. The trial court erred in law and facts when he convicted the Appellant for a mistaken identity using the gap in between teeth as there are thousands with gaps between their teeth.
  - viii. The trial magistrate wrongly evaluated the evidence which resulted in wrongful conviction of the accused to serve 15 years imprisonment.
4. The Appeal was canvassed by written submissions.

#### **The appellant's submissions**

5. In his submissions filed on 15<sup>th</sup> November 2023 the appellant submitted that the testimony of PW1 was contradicted by that of PW2. He stated that PW1 testified that she saw him very well but could not recognize the others, while PW2 testified that PW1 told him that she was raped by six men and she was able to recognize two of the men who were her clients. He submitted further that the prosecution having failed to adduce water tight evidence against him the trial court could not convict him on contradictory evidence. He placed reliance on the cases of *Ramkrishina Denkray Pandya v Republic* Appeal No 06 of 1190 EACA 93 and *Republic v Silas Magongo* [2017] eKLR.
6. The appellant submitted further that it was the testimony of the Investigating officer that upon visiting the crime scene he did not find any useful evidence or recover any exhibits. He contended that the said investigations clearly portrayed how the police wanted to fix him into the heinous act, having failed to trace the other suspect who was also said to be PW1's regular client. He placed reliance on the case of *JOO v Republic* [2015] eKLR and urged this court to set him at liberty.
7. The appellant additionally submitted that the claim by the complainant (PW1) that he infected her with HIV was not supported by any medical report and he ought to have been exonerated from the act by the trial magistrate. He contended that the trial magistrate erred by convicting him on the mere ground that he raised his alibi late. He cited the case of *Seketoleko v Uganda* [1967] EA 531 at Page 533 where Sir Udo Udoma CJ stated that the accused should not be convicted on the weakness of his defence but due to the weight of the prosecution side. He urged the court to allow the appeal and set him free.



### **The respondent's submissions**

8. The respondent's submissions dated 23<sup>rd</sup> October, 2023 were filed on 25<sup>th</sup> October 2023 by learned prosecution Counsel Justus Ochengo for the ODPP. He opposed the appeal submitting that this was a case of recognition and the circumstances of recognition were favourable as the appellant was a regular client in a bar where the complainant worked. He submitted that the prosecution had proved beyond reasonable doubt that the complainant did not consent to the horrendously sexual act against her.
9. Counsel went on to submit that the appellant's defence of alibi was an afterthought as it was not raised during the prosecution case and the trial magistrate was right in dismissing it. He further supported the sentence of 15 years arguing that it was lenient as it was the minimum sentence for the offence of gang rape. Counsel urged the court to dismiss the appeal as it was devoid of merit and the conviction and sentence were proper.

### **Analysis and Determination**

10. This is a first appeal and this Court has a duty to re-evaluate and reconsider the evidence before the trial court and arrive at its own independent conclusion. See *Okeno v Republic* (1972) EA 32; *Pandya v Republic* [1975] EA 336, *Simiyu and another v Republic* [2005] 1 KLR 192
11. Having considered the evidence on record, all submissions, cited authorities and the law, I find the issues falling for determination to be as follows:
  - i. Whether the offence of gang rape contrary to section 10 of the *Sexual Offences Act* No 3 of 2006 was proved by the prosecution.
  - ii. Whether the appellant was properly identified as one of the perpetrators.
  - iii. Whether the conviction and sentence are merited

### **Issue No (i) Whether the offence of gang rape contrary to section 10 of the *Sexual Offences Act* No 3 of 2006 was proved by the prosecution**

12. Section 10 of the *Sexual Offences Act*, No 3 of 2006 provides as follows: -

“Any person who commits the offence 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 on conviction to imprisonment for a term of not less [than] fifteen years but which may be enhanced to imprisonment for life.”

13. The term 'gang' is defined under section 2 of the *Sexual offences Act* to mean 'two or more persons', while the offence of rape under Section 3 of the *Sexual Offences Act* is defined as follows: -
  1. an intentional and unlawful act which causes penetration with his or her genital organs;
  2. lack of consent to the penetration on the part of the other person.
  3. consent that is obtained by force or by means of threats or intimidation of any kind.
14. In view of the above provisions of the law, the prosecution was required to adduce evidence to show that the complainant's genital organ was penetrated; that she did not give consent for the sexual encounter with her attackers or that the act of penetration her was intentional and unlawful. The complainant PW1, testified that on 28<sup>th</sup> March 2021 at 9 pm while leaving work she was attacked by



people unknown to her. They were around 6 men who overpowered her and she gave up. Among the men was the appellant who managed to lift her dress, cut loose her panty and penetrate her vagina using his penis and when he finished he told the others to continue.

15. PW4's testimony, the P3 form, Post Rape Care form (PRC) and the treatment notes all marked as PExh 1, PExh 2 and PExh 3 respectively attest to the fact that the PW1 had a sexual encounter. PW1 testified that she screamed loudly when she was attacked and she sustained injuries on her left eye, back, thighs and the left side of her waist as she was dragged to the dumpsite and raped by her attackers. PW1's testimony clearly shows that she did not give any consent for such an assault on her and accordingly that sexual act was both intentional and unlawful by her attackers. I therefore find that the prosecution proved that PW1's genital organ was penetrated against her consent.

**Issue No (ii) Whether the appellant was properly identified as one of the perpetrators.**

16. The appellant challenged his identification by the complainant in grounds iv and viii of his Petition of Appeal.
17. In the case of *R v Turnbull & others* (1973) 3 ALL ER 549, the Court held as follows:

“... 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 with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? 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 the 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 his actual appearance?..... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

18. Similarly, the Court of Appeal in Criminal Appeal No 274 and 275 of 2009 at Eldoret in *Peter Okee Omukaga & another v Republic* (unreported) had this to say on the evidence of recognition at night:-

“We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as ‘neighbours from the village’, that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.”

19. See also *Anjononi & others v Republic* [1976-1980] KLR 1566 and *Wamunga v Republic* (1989) KLR 426.
20. The evidence by PW1 shows that she was able to recognize the appellant as one of the attackers because of the light and the fact that they talked. She further stated that she recognized the appellant as the man who was in charge of the group and his name is Onchiri. I pose there.



21. The next day after the incident and while still in her house she called her friend who testified as PW2. This is what PW2 told the court at Pg 14 lines 23-25:

“She then told me that she was raped by six men on her way from work the previous night. She said she could recognise (sic) two of the men who were her clients. I spent the night there”.

Further at PG 14 lines 9-11 in cross examination she stated

“She is only my friend, she said she could recognize two of the men who raped her, she did not know their names they were his (sic) clients where she worked”

From this evidence by PW2 it is clear that PW1 did not disclose the names of the two clients who were among the perpetrators of the crime:

22. The report to the police was made on 30<sup>th</sup> March, 2021 at Mosochi police station. What report was made? Were any names given and how was the appellant arrested? At what point did PW1 come to know the appellant’s name? All what PW1 told the court about the report and arrest is at Pg 12 lines 1-3

“I identified Josephat Onchiri to the police. I declared him to the police. I was called upon his arrest. Josephat is the accused herein (points at the accused)”.

From this evidence by PW1 and PW2 there were no names or descriptions given to the police at the time of reporting

23. PW3 who investigated the case stated that PW1 told him that she identified the appellant and another. PW1 allegedly gave the descriptions of the appellant to a member of the community policing. That’s how he arrested him on 20<sup>th</sup> July, 2021.

24. In his defence the appellant denied the charge claiming he had been framed up by PW1 because he had failed to lend her Kshs 50,000/=. He raised an alibi defence supported by his wife (DW2).

25. The lingering and main issue here is the identification of the appellant. PW1 despite her alleged recognition of the appellant did not give his names to PW2 or PW3. PW2 confirmed that he was told by PW1 that she did not know the names of the clients she had identified. PW3 who was the investigating officer did not explain how PW1 identified the appellant at the police station. The Community Policing man whom PW1 allegedly gave a description of the appellant did not testify. He did not even explain why it took him four (4) months to arrest the appellant, if the details were given.

26. Given the kind of evidence on record the one and only resolution to this scenario would have been for PW3 to organize for an identification parade to be conducted upon the arrest of the appellant for PW1 to identify him. No such parade was carried out. For that reason, I find that the appellant was not properly identified as one of the perpetrators of this crime. That being my finding I will not get into the issue of sentence which was within the law.

27. The upshot is that the Appeal has merit and is hereby allowed. The conviction is quashed and sentence set aside. The appellant shall be released unless otherwise lawfully held under a separate warrant.

28. Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 1<sup>ST</sup> DAY OF MARCH, 2024 IN OPEN COURT AT NAKURU.**

**H. I. ONG’UDI**



**JUDGE**

