



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Ochanga v Republic (Criminal Appeal E025 of 2023)  
[2024] KEHC 3446 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3446 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL E025 OF 2023  
RN NYAKUNDI, J  
APRIL 11, 2024**

**BETWEEN**

**HORACE OCHANGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. E.  
Kigen in Eldoret Law courts Cr. S.O No. 148 of 2022)*

**JUDGMENT**

1. The appellant was charged with the offence of rape contrary to section 3(1)(a)(b)(3) of the [Sexual Offence Act](#) No. 3 of 2006. The particulars of the charge were that on 15<sup>th</sup> October, 2022 in Kapseret sub-county of Uasin Gishu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of M.L.
2. The appellant also faces an alternative charge which is committing an indecent act with an adult contrary to section 11(a) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were more less the same.
3. Being dissatisfied with the said judgment the appellant lodged the present appeal relying on the following grounds:
  - i. That the trial court erred in both law and fact when failing to evaluate and analyze the evidence on record and arriving at the erroneous conclusion that the appellant committed the offence.
  - ii. That the learned trial magistrate erred in both law and fact by failing to consider that the prosecution witness evidence were contradictory, questionable, doubtful and untrustworthy to warrant conviction.



- iii. That the learned trial magistrate erred in both law and fact by not considering that the evidence of penetration was not conclusively proven as per the law requires.
  - iv. That the learned trial magistrate erred in law and fact by not finding that the prosecution has failed to prove its case to the required standard of prove.
  - v. That the learned trial magistrate erred in law and fact by not observing the appellants right to fair hearing.
4. The parties filed submissions in support of their case.

#### **Appellant's submissions**

5. The appellant submitted that the trial magistrate failed to accord the appellant a fair trial after the prosecution failed to disclose the exact charge the appellant was facing. That the reported complaint was assault only for him to answer a charge of rape.
6. The appellant submitted that he was wrongly convicted and sentenced on charges the police were speculating and such an ambiguity was clear from the fact that the complaint at the police station was assault but what was being investigated was attempted rape. He submitted that he got convicted and sentenced on fabricated charges, which amount an abuse of the court process.
7. It was the appellant's position that the court disregarded the defence of alibi advanced by the appellant. He further argued that the medical evidence had discrepancies that could not sustain the charge in question.
8. Finally, the appellant submitted that the trial court failed to comply with section 36 of the *Sexual Offences Act* by failing to order an examination or a DNA analysis on the exhibits presented in court to either link or exonerate the appellant.

#### **Respondent's submissions**

9. Counsel for the Respondent urged this court to uphold the conviction and sentence on grounds that the same was based on sound analysis of the evidence and supported by law.
10. The Respondent submitted on the three elements that need to be proved to sustain a charge of rape. On penetration, it was submitted for the respondent that the medical evidence corroborated the complainant's testimony. According to PW5, Dr. Irene Simiyu the complainant had pain in the back of her head. There was erythema around the vestibule are with a cream discharge. That there were also epithelial cells which was elevated at 89 position which she interpreted to be signs of friction in the vulva. The medical doctor concluded that there were signs of sexual activity.
11. On the element of consent, the respondent indicated that the complainant has been captured testifying that the appellant grabbed her, tore her dress and pant, knocked her in the back of the head and then forced himself inside her. Even in her cross-examination, she maintained that she did not consent to the sexual encounter. To this end, the respondent submitted that given the fact that a medic found her with injuries to the genitalia and the back of her head corroborates this rendition.
12. The Respondent maintained that the appellant was positively identified. That the complainant, PW2 and PW3 testified that they had known the appellant as a village elder and a boda boda operator. The complainant also testified that the appellant had previously attempted to court her but she declined his advances. The respondent concluded that the appellant was someone who was very well known to the witnesses. That it is then a case of recognition rather than identification of a stranger.



13. Finally, the respondent stated that it is not clear why the appellant complained of his rights to a fair trial were infringed upon. That glancing at his submissions, the appellant states that he was assaulted by the complainant and her team. The appellant believes that since the assault case was not followed through, it impeded his right to a fair trial. Counsel opined that such a complaint was misplaced.

### **Analysis and Determination**

14. 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 demeanor of the witnesses. See *Okeno vs. Republic* [1972] E.A 32.
15. 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.
16. 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.”
17. 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 she had closed her shop and went to Yala hotel to see her house girl, she then entered the corridor where she met the accused who grabbed her, tore her clothes which included a dress and a pant he then knocked her on the back of her neck and she fell down where the accused forcefully penetrated into her and ejaculated on her.
18. 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 vs. 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.”

19. PW5, the medical doctor testified that upon examination, there was erythema around the vestibule area with a cream discharge. There was also epithelial cells which was elevated at 89 position which she interpreted to be signs of friction in the vulva. All these led to a conclusion that there was a sign of sexual activity.
20. 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 that there was a sexual activity. She also confirmed that the complainant had pain in the back of her head.
21. The next issue is whether the appellant penetrated the complainant. From the evidence of the complainant, the accused person was positively identified to her. The evidence is that the accused person is known to the complainant as a village elder and a boda boda operator. The complainant equally indicated that the appellant has made attempts previously to court her but she declined his advances. It is evident the two knew each other well prior to the case. In such circumstances, the accused person was positively identified.
22. 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**

23. The appellant was sentenced to serve 10 years imprisonment. The offence of rape is punishable with an imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life. The trial court is therefore at liberty to consider the circumstances of the case and issue an appropriate sentence.
24. In the “*Muruatetu Case*”, the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to 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-adaption of the offender;
  - (h) any other factor that the Court considers relevant.”
25. 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.
26. Further, the sentencing objectives in Kenya have been captured in the *Sentencing guidelines 2023* to be the following: -



- i. Retribution: to punish the offender for his/her criminal conduct in a just manner.
  - ii. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
  - iii. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.
  - iv. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
  - v. Community protection: to protect the community by incapacitating the offender.
  - vi. Denunciation: to communicate the community's condemnation of the criminal conduct.
  - vii. Reconciliation: To mend the relationship between the offender, the victim and the community.
  - viii. Reintegration: To facilitate the re-entry of the offender into the society.
27. 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.
28. 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."
29. The trial court while sentencing the Appellant noted that he is a first offender and the court further factored in his mitigation. With the advent of the Supreme Court Decision in *Muruatetu -vs- R* (2017)eKLR minimum mandatory sentences is no longer the trending jurisprudence. In considering the appropriate penalty to impose in this case the trial magistrate identified the factors she needed to consider as including the gravity of the offence, the character and circumstances of the Appellant, the aggravating factors, the subjective factors which may have influenced the offence, its design and manner of execution by the Appellant and the possibility of sending out a clear message that Sexual Offenders upon found guilty must be met by the full force of the law. There are no strong argument of reducing the 10 year prison term to any other lesser offence in favour of the Appellant. The fact that it is a minimum sentence does not render it illegal, inappropriate, harsh, excessive, or punitive.
30. In the upshot, the 10 years custodial sentence be and is hereby affirmed with the rider that the application of the letter and spirit of Section 333(2) of the *CPC* takes effect for the sentence to be computed to give credit for the period spent in pre-trial detention. That in effect grants an amendment to the committal warrant for the sentence to take effect from the 2.10.2021. Save for that position taken by this court the Appeal on conviction is dismissed so do the verdict on sentence. The Appellant has another chance to file and Appeal to the Court of Appeal for reconsideration of the matter a fresh.



**DATED AND SIGNED AT ELDORET THIS 11<sup>TH</sup> DAY OF APRIL, 2024**

In the Presence of

Mr. Mugun for the state

Appellant

.....

**R. NYAKUNDI**

**JUDGE**

