



**RO Alias B v Republic (Criminal Appeal E005 of 2023)
[2024] KEHC 4343 (KLR) (15 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4343 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E005 OF 2023**

KW KIARIE, J

APRIL 15, 2024

BETWEEN

RO APPELLANT

AND

REPUBLIC RESPONDENT

*(From the original conviction and sentence in S.O. Case No. 12 of 2019 of the
Chief Magistrate’s Court at Homa Bay by Hon. L. Simiyu–Principal Magistrate)*

JUDGMENT

1. RO alias B, 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, and that of grievous harm contrary to section 234 of the *Penal Code*.
2. The particulars of the offences were that on the 7th day of April 2019 within Homa Bay County, he intentionally and unlawfully caused his penis to penetrate the vagina of EAO by use of force [sic].
3. In count two, the particulars of the offence were that on the 7th day of April 2019, outside Legal Club in Homa Bay sub-county, he unlawfully caused grievous harm to EAO.
4. The appellant was sentenced to serve ten years’ imprisonment in count one. In count two, he was sentenced to serve two years’ imprisonment. The sentences were ordered to run consecutively. 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 learned magistrate erred in law in not ordering the sentence to run concurrently.
 - b. That the learned trial magistrate erred in law in conducting proceedings that violated the rights of the appellant as per the provisions of the law of Kenya since the charges raised against the appellant were made to be two despite the fact that they arose from a single offence.



- c. That the learned trial magistrate erred in law and facts by not considering that the case was full of contradictions and inconsistencies.
 - d. That the learned trial magistrate erred in law and facts in not considering the appellant's defence despite the fact that the same was not rebutted.
 - e. That the learned trial magistrate erred in law and facts in not considering that the sentence given to the appellant for the offence of rape was manifestly harsh and excessive.
 - f. That the learned trial magistrate erred in law and fact in not considering that the ingredients of rape were not met.
 - g. That the learned trial magistrate erred in law and facts in not considering that the prosecution failed to prove their case beyond reasonable doubt as required by the law.
 - h. That the learned trial magistrate erred in law and fact in not considering that the prosecution's evidence was not corroborated.
 - i. The learned trial magistrate failed to consider the appellant's mitigation as provided under sections 216 and 329 of Kenya's CPC Cap 75 Laws.
 - j. That the appellant appeals against conviction and sentence of rape only and prays that the sentences run concurrently.
 - k. That the appellant prays to adduce more grounds upon receiving the proceedings and during the hearing.
5. The state opposed the appeal. Mr Ndege contended that the conviction and the sentences were proper.
 6. 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 v Republic* [1972] EA 32.
 7. 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.
 8. EAO (PW1) is the complainant in this case. Her evidence was that the appellant, who was unknown to her, grabbed her and viciously attacked her. This was despite an attempt by some people to intervene. This was outside Regal Club. The proprietor of the Club, JOO (PW6), supported her evidence. His evidence was that when he tried to implore the appellant, he was advised to leave him for he was dangerous.
 9. The complainant further said that she was dragged to a motorbike and taken away to a house, where she was subsequently raped.
 10. The police were alerted by members of the public that a woman had been killed outside Regal Club. When they went to the scene, they were informed that B had taken away on a motorbike a woman he



had beaten. This was the evidence of CPL. Nicholas Omondi Otieno (PW2), Sgt. Fredrick Lengatin (PW3), CPL. Emmanuel Namai (PW4) and PC. Carolyne Mwangi (PW3).

11. In previous interactions, some officers knew B's house. They rushed to his house, and after forcing the door open, they found the complainant, who appeared disoriented, was groaning in pain, and had a swollen face. She had indications of having bled from her mouth and nose. They took her to hospital after she complained of rape.
12. Dr. Abongo Godfrey produced a medical examination report that confirmed that the complainant had been injured physically and raped.
13. The appellant, in his defence, contended that JO assaulted the complainant. He further said that JO threatened him for snatching the complainant from him. When the complainant testified, he did not confront her with these issues. The contention that he was framed was an afterthought.
14. At the time of his arrest, the appellant was in the company of the complainant in the house where she complained he raped her. The prosecution, therefore, adduced evidence to show that the appellant was the perpetrator of both offences against the complainant.
15. The evidence in respect of the offence of grievous was that it occurred outside Regal Club while that of rape was at a house where he took the complainant. These were two distinct offences. There was no prejudice in charging him with both offences.
16. The appellant contended that the sentence in respect of rape was manifestly harsh. 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] E.A. 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. Shershewity* (1912) C.CA 28 T.L.R 364.
17. 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.
18. The appellant was sentenced to ten years imprisonment. I Am not persuaded that the learned trial magistrate acted upon some wrong principle or overlooked some material factor. The circumstances of this case militated against leniency. Had the prosecution applied for enhancement and issued a notice, I would not have hesitated to increase the sentence.
19. The sentences should run concurrently Since the two offences were in the same transaction. I, therefore, set aside the order of the learned trial magistrate and substitute it with an order that the two sentences run concurrently. The appeal succeeds only to that extent.

DELIVERED AND SIGNED AT HOMA BAY THIS 15TH DAY OF APRIL 2024

KIARIE WAWERU KIARIE

JUDGE

