



**Odhiambo v Republic (Criminal Appeal E138 of 2023)
[2024] KEHC 5487 (KLR) (22 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5487 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E138 OF 2023**

DR KAVEDZA, J

MAY 22, 2024

BETWEEN

DAVID OMONDI ODHIAMBO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. Mutua (SPM) on 16th February 2023 at Kibera Chief Magistrate's Court Criminal Case no. E2445 of 2021 Republic vs David Omondi Odhiambo & Another)

JUDGMENT

1. The appellant with another not before this court was charged with four counts of offences. In count I, he was charged and convicted for the offence of robbery with violence contrary to section 296(2) of the [Penal Code](#). He was sentenced to death. In count II, he was charged and convicted for the offence of gang rape contrary to section 10 of the [Sexual Offences Act](#). In count III, he was charged and acquitted of the offence of conspiracy to commit a felony contrary to section 393 of the [Penal Code](#). In Count IV, he was charged and convicted for the offence of being in possession of suspected stolen items contrary to section 323 of the [Penal Code](#). The sentences in counts II and IV were held in abeyance.
2. Being aggrieved, he filed the present appeal challenging his conviction and sentence. In the undated petition of appeal received on 14th April 2023, the appellant raised 4 grounds which have been coalized as follows: He challenged the totality of the prosecution's evidence against which he was convicted. He complained that identification was not proper. He argued that the trial court failed to consider his defence. In addition, he contended that the sentence imposed was harsh and excessive.
3. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate, and re-analyse the evidence afresh and come to its own conclusion on that evidence. The court should



however bear in mind that it did not see witnesses testify and give due consideration for that. (See *Okeno v Republic* [1972] EA 32).

4. The prosecution called seven (7) witnesses in support of their case. During her testimony, PW1 RWM recounted a harrowing experience that occurred on the night of October 27, 2021. She described how, while on her way home from work around 9:30 pm, she was accosted by two men, one armed with a knife and the other with a gun, near Mbagathi Bridge. They instructed her to walk with them quietly, which she initially complied with, but began to resist when she realized they were leading her towards an underground tunnel. The men proceeded to rob her of her laptop, phone, and identification documents. They beat her up and demanded money from people in her contacts. They then raped her the whole night.
5. After several hours, around 2:30 to 3:00 am, they released her. Using the lights from their phones and the street lamps, she managed to make her way to Armed Forces Memorial Hospital, where she identified the appellant, whom she recognized by a scar on his nose, both during an identification parade at the police station and during the incident itself. Evidence presented during the trial included MPESA statements confirming the money transfer from her father as demanded by the assailants, post-rape care forms, medical examination reports (P3 Forms), and identification parade forms.
6. During cross-examination, the defence questioned PW1's account, suggesting inconsistencies such as the presence of lights from various sources and the absence of certain details in her initial statement. However, PW1 maintained her testimony, asserting that she was able to identify the appellant through his scar and voice despite the traumatic ordeal. She also provided evidence of physical injuries sustained during the incident, refuting claims that she was unable to identify her attackers.
7. PW2 Rose Mutindi Mutheka an Mpesa attendant, testified that a customer made regular withdrawals on October 27th and 28th, 2021 with the money being collected by the co-accused. She identified the phone number used for these transactions and provided evidence of the withdrawals. Under cross-examination by both the defence, she maintained her testimony, confirming the Second Accused's identity as her customer and providing additional details about their interactions.
8. PW3, John Njuguna, a clinical officer at Nairobi Women's Hospital, presented medical documentation related to the examination of the victim, PW1 following the reported incident. The documents, including Post Rape Care Form, GVRC Form, P3 Form, and Lab results, indicated injuries consistent with sexual assault and physical trauma. These included bruises on various parts of the body, scratches, and signs of infection in the genital area.
9. PW4, VM, the father of PW1, testified that on the night of October 28, 2021, he received a distressing call from his daughter stating that she had been abducted by armed individuals threatening her with rape and murder. He then received a call from a man demanding a ransom of Kshs. 30,000, to which he sent Kshs. 16,500 before the call abruptly ended. Later, PW1 informed him that she had been gang-raped. He advised her to report to the police and seek medical attention. Evidence presented included Mpesa statements showing the money transfers from his account to PW1's number.
10. PW5, No. 235582 IP Hezron Kimutai Korir of DCI Kilimani, testified regarding three Identification Parades conducted at the request of PC Zachary Munene. Only the appellant was positively identified in the parade, based on a mark on his nose and his voice, with the appellant duly signing the parade forms. During cross-examination by the appellant, PW5 explained the procedure of the Identification Parade and refuted claims of bias or improper conduct. He clarified that participants were chosen based on similarity in height and body.



11. PW6, Ambrose Munyoki, an Analyst and Data extraction officer from Safaricom Limited, testified that he provided Mpesa account statements and subscriber details in response to a court order. The Mpesa statements were for the accounts of PW1, Wanjiru Murathe, and Benson Gathecha Murathe the 2nd accused, and subscriber details for another individual, Yvone Auma Owino. He also provided location and call logs indicating that the phone number belonging to PW1 was in the same location as the phone number registered in the name of Yvonne Auma on October 27th and 28th, 2021, at Nyayo Highrise. The Mpesa statement showed that money was sent from RW to Benson Gathecha.
12. During cross-examination, PW6 clarified that the phones registered in the names of YA and PW1 were in the same location because they were using the same booster. He acknowledged that Y was communicating with the Second Accused but couldn't specify the content of their communication. When questioned further, PW6 admitted that he couldn't definitively confirm whether PW1 and Y were in the same area at all times.
13. PW7, the investigating officer from Kilimani Police Station, testified that upon receiving the report, investigations revealed that the money sent by PW1's father was transferred to Benson Gathecha. They tracked the appellant using the phone number to which the money was sent and found him in possession of the phone associated with that SIM card, which was also determined to have been at the scene of the crime. At the time of arrest, the appellant was also found with an iPad phone suspected to be stolen. The said Benson Gathecha was found with a phone linked to the SIM card to which money was sent, and both signed inventories of recovered items from their respective residences. The First Accused was identified in the Identification Parade, and charges were brought against him.
14. PW7 produced several exhibits, including MPESA statements, call logs, and evidence of phone presence at the crime scene, to support his testimony. Under cross-examination by the appellant, PW7 confirmed that the phone registered in the name of YA was found at the crime scene, and the appellant was in possession of that phone and SIM card. He emphasized that there was no motive to frame the appellant, as they had no prior connection, and reiterated that the appellant signed the inventory and was identified by PW1.
15. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. In his defence, he gave sworn evidence and did not call any witnesses. The appellant, DWI, testified in his defence, claiming he was arrested at his home in Dandora III on 16/11/2021 by police who accused him of selling drugs. He stated that he was taken to Dandora phase IV, where the Second Accused (Benson Gathecha), whom he didn't know, was also arrested. Both were then taken to Kilimani Police Station, where the Second Accused was booked, and he was taken to Kibera where another person was arrested. They were then returned to Kilimani Police Station, where he was questioned about a robbery at Mbagathi, to which he denied involvement. He asserted having an Airtel SIM card in his cellphone and claimed innocence regarding the allegations against him. He also highlighted inconsistencies in the victim's initial report and the identification process.
16. During cross-examination by the Second Accused, DWI admitted that police officers used his phone to contact the Second Accused, contradicting his earlier claim of not knowing him.
17. The Second Accused, DW2, testified that on 27/10/2021, he received a call from the First Accused, who asked him to receive money on his behalf as his line had "Fuliza." He agreed, and money was sent to him from (PW1), as instructed by the appellant.
18. The appeal was canvassed by way of written submissions by the parties which have been duly considered. In count, I, the appellant was convicted of the offence of robbery with violence. The key



ingredients for a robbery with violence charge are found in section 296(2) of the Penal Code. It provides as follows-

“if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death”.

19. In count II, the appellant was charged and convicted for the offence of gang rape. The offence of gang rape is provided for under Section 10 of the Sexual Offences Act. The said section states as follows: -
 10. 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 upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.
20. Under Section 10 of the Act, the key ingredients of the offence of Gang Rape include:
 - a) Proof of rape or defilement;
 - b) Proof that the assailant was in association with another or other persons in committing the offence of rape or defilement or that the assailant did not per se commit the offence of rape or defilement, but with common intent, was in the company of another or others who committed the offence.
21. Was the offence of rape committed? Section 3 of the Act defines ‘rape’ as follows:
 - (1) A person commits the offence termed rape if –
 - (a) he or she intentionally and unlawfully commits an act which cause 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.
 - (2) In this section the term “intentionally and unlawfully” has the meaning assigned to it in section 43 of this Act.”
22. As regards the offence of robbery with violence, there was proof of the ingredient of theft of the complainant’s laptop, mobile phone and identification documents. From the record, no purchase receipts or form IMEI numbers of the phone or laptop were given. Ownership of electronics such as mobile phones need not be proved by production of purchase receipts which owners may not retain for long periods after purchase or by technical IMEI numbers which phone owners do not care to record. Evidence that distinguishes a phone from others as belonging to the witness suffices; it could be by a name curved on the phone, a cracked screen or back cover, missing buttons in this case, or other distinguishing features. The circumstances of the recovery of the phones may also aid in the identification of the phones. In this case, the complainant’s phone and laptop were not recovered.
23. After enduring a harrowing ordeal at the hands of her assailants, the complainant was finally released. She immediately visited the hospital and subsequently reported the incident to the police. The medical examination revealed that she had sustained injuries on her forehead, neck, upper limb, and back.



- Specifically, she had swelling on her forehead, bruises on the anterior neck, bruises on her left scapula, and scratch marks on her wrist.
24. The fact of wounding of the complainant on the head, face, and knees during the theft completed the offence of robbery with violence, however, the value of the items stolen. Section 296 (2) of the Penal Code has the 3rd alternative ingredient as wounding, beating, or striking which was proved by the evidence in this case.
25. On identification, PW5 conducted an ID parade where the appellant was identified as one of the assailants. She told the court that she recognised the scar on his nose during the incident and in a police identification parade. During the ordeal, which lasted the whole night the complainant had sufficient time to know the identity of the appellant who was one of her assailants. She was very clear on the facts of the incident, and her evidence was not shaken on cross-examination. It is my considered view that the appellant was properly and positively identified and apprehended after the incident. I find the testimony of the prosecution's witnesses to be reliable direct evidence of visual identification against the appellant.
26. For the offence charged in count II, Section 10 of the Act, the key ingredients of the offence of Gang Rape include:
- a) Proof of rape or defilement;
 - b) Proof that the assailant was in association with another or other persons in committing the offence of rape or defilement or that the assailant did not per se commit the offence of rape or defilement, but with common intent, was in the company of another or others who committed the offence.
27. Was the offence of rape committed? Section 3 of the Act defines 'rape' as follows:
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 - (a) he or she intentionally and unlawfully commits an act which cause 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.
 - (2) In this section the term “intentionally and unlawfully” has the meaning assigned to it in section 43 of this Act.”
28. Rape is defined under section 3 of the Sexual Offences Act to mean, the intentional and unlawful penetration of a person's genital organ into another's genital organ without their consent. In R v Oyier (1985) KLR pg 353, the Court of Appeal held as follows: -
- “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. 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. 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.”

29. PW1 narrated how she was taken to a tunnel by her two assailants who raped her successively until morning. She maintained that they had sex with her without her consent. The ordeal lasted the whole night.
30. PW 1’s testimony did not require corroboration in accordance with the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if the trial magistrate recorded reasons why she believed the victim was telling the truth. The trial magistrate found PW1 to be a truthful witness and found no evidence as to any previous interaction between the appellant and the complainant that would make her give a false narration of the events. Further, I have thoroughly looked at the record and I note that PW1 was consistent in her narration of the series of events. Despite being subjected to rigorous cross-examination by the appellant, her evidence was not shaken on cross-examination.
31. On additional, corroborating evidence, the complainant visited the hospital after her ordeal. Upon examination, there were no injuries on her genitalia but there was a whitish discharge. She also had an infection. She was treated and discharged. Accordingly, the prosecution proved that there was intentional and unlawful penetration of PW1 genital organs, without their consent.
32. On identification of the appellant, PW1 identified the appellant after he was arrested. PW2 stated that the appellant was one of the two among the people who attacked her and sexually assaulted her. During the duration during which the offence occurred, there was no margin of error and/or mistaken identity. This court finds that the appellant was positively identified as the perpetrator of the offences herein by the consistent, well corroborated and water-tight testimonies of the prosecution witnesses.
33. In count IV the appellant was charged with the offence of having suspected stolen property contrary to section 323 of the *Penal Code*. It was the prosecution’s case, that upon his arrest, the appellant was found in possession of an iPad which was suspected to be stolen. The provision of the *Act* provides as follows:

Any person who has been detailed as a result of the exercise of the powers conferred by section 26 of the *Criminal Procedure Code* and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained and who does not give an account to the satisfaction of the court of how he came by same is guilty of a misdemeanour.
34. Section 26 of the *Criminal Procedure Code* alluded to in section 323 of the *Penal Code* authorises a police officer to stop and search and detain any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully detained. PW7 gave evidence that upon searching the appellant’s house, they recovered an iPad which was suspected to be stolen. In addition, the appellant could not account for it. The evidence on record was not disputed. The conviction on this count was therefore proper
35. On sentence, the appellant was sentenced to death on count I and was not sentenced on counts III and IV as the sentences were held in abeyance. Section 329 of the *Criminal Procedure Code*, gives judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the offence is prescribed. In that regard, I find the sentence imposed shatters all hopes of the appellant for rehabilitation or having another chance to start afresh.



36. Therefore, the appeal on the sentence imposed succeeds. The sentence of death imposed on Count I is hereby vacated. I hereby resentence the appellant to thirty (30) years imprisonment for counts I. In count II, the appellant is sentenced to serve ten (10) years imprisonment. In count IV, the appellant is sentenced to serve twelve (12) months imprisonment. The sentences shall run concurrently and shall commence on 16th November 2021 when the appellant was arrested pursuant to section 333(2) of the [Criminal Procedure](#).

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 22ND DAY OF MAY 2024

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D. KAVEDZA

JUDGE

In the presence of

Appellant present

Mr. Mong'are for the Respondent

Joy Court Assistant

