



**Ondieki v Republic (Criminal Appeal E011 of 2023)
[2024] KEHC 5932 (KLR) (20 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5932 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL E011 OF 2023**

**TA ODERA, J
MAY 20, 2024**

BETWEEN

KEVIN SAGINI ONDIEKI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Judgment delivered by Hon. C.A
Ogweni (SRM) on 29th March, 2023 in Kisii SO NO. 121 OF 2020)*

JUDGMENT

INTRODUCTION.

1. The Appellant herein was charged, convicted and sentenced to 15 years in prison for the offence of gang rape contrary to section 10 of the Sexual Offences Act No. 3 of 2006. The Particulars of the offence were that on 24th December, 2020 at Metembe Sub-location, Marani Sub-county within Kisii County while with others not before the court intentionally and unlawfully caused his Penis to penetrate the vagina of BKO a child aged 17 years.
2. The prosecution in order to prove the case against the Appellant called a total of 4 witnesses. PW1 was the complainant (minor). She testified that she is a student within Kegogi ward. She testified too that she knew the accused person given that lived next to their school and that she used to see him by the road while going to school. She identified him as Sagini.
3. She narrated that on 24th December, 2020 at around 7.00 she together with her sisters and cousin went for a church service till 10;00 pm. While on their way back home just by a coffee factory that was nearby, they realized out that a motor cycle having four passengers was following them. They tried to run away but she got tired and thus she was left behind. The 2 of the 4 men who were armed with a panga followed reached her and she recognized him Sagini the appellant herein.



4. He got hold of her. Sagini while the other man was holding her, tore her clothes, strangled her, inserted his penis inside her vagina and raped her. She tried to plead with them to stop but they refused. She however could not tell whether the other man raped her too. Her sister came to her rescue and the two men ran away.
5. She insisted that she saw sagini and also recognized him by his voice given that he used to make noise next to their school. She also stated that her sisters equally saw him. She stated Sagini had a torch that he directed towards her while raping her and that she heard him telling his friend to hold her down. It was equally her testimony that sagini had the same clothes he had when he was arrested. He had a black trouser. She stated further that she was bleeding from her vagina and had bruises and scratches on the neck and the lower limbs. Equally she stated that there were thorns where she was lying when they raped her and thus had injuries all over her body.
6. It was her testimony that she had seen Sagini that morning and that she identified sagini when she went to the police station. She produced treatment notes, P3 form and birth certificate as exhibits that were all marked for identification.
7. PW2, was the complainant's mother. She narrated that on 24th December, her children went church in the evening. At around 9.30 a neighbor came to report that one of her daughter had a fractured leg. She rushed out and found the complainant on the ground. She was trembling and her cloths were torn. She told her that she had been raped by sagini who was in company of an unknown man. She took the complainant to Marani Hospital. Her other children told her that they had been chased away but later went back. She stated that she found the complainant at a bush near a coffee factory. She stated that the complainant was born on 23rd August, 2003. She insisted that even though the birth certificate read 4th February, 2023 she was certain that the complainant was born in 2003.
8. PW3 was the clinical officer. He produced the P3 form dated 28th December, 2020 of the complainant who was age 17 years and had a history of defilement. He stated that upon examination it was established that the complainant was bleeding from virginal area with abrasions on the thighs; She had sanitary pad soaked with blood; The injuries were consistent with forceful penetration on resistance of the victim; There were lacerations on the left cheek; the abdomen was tender; there were tender lacerations on left breast; the lower limb had lacerations; the left limb had lacerations which were severe on the upper elbow 8 cm long; and both lower limbs had abrasions and laceration more serve on the lateral side near the patella.
9. According PW3 there appears to have been a struggle between the minor and the assailant. He contended too that the injuries were probably caused by blunt objects, sticks, stones and rough surfaces and the same could have occurred in the bush.
10. When cross-examined by the appellant he stated that he was not able to tell whether it was the appellant who sexually assaulted the minor. He stated that the minor revealed that she was assaulted by two persons. Equally he stated that no spermatozoa were observed. He reiterated that the scratches and laceration noted were consistent with friction from borne out of a struggle.
11. PW4 was the investigating officer in the matter. She testified that on 25th December, 2020 while at Kegogi Police station the complainant aged 17 years old reported that on 24th December, 2020 while from church with her siblings, a motorcycle approached them with two men. She identified one as Kevin sagini. The two men chased away two siblings using a panga. They grabbed the minor and pushed her to the ground. Kevin tore her clothes then raped her while the other man threatened her using a panga. The other man then followed on raping her. The siblings came back to look for the



complainant. The two men ran away. The Appellant was on the following day taken to the station to report and with her she brought the torn clothes. She was taken to hospital for treatment.

PW4 went on to state that she visited the scene on 25/12/2020, which was around 400 meters, from complainant's home. She stated further that at the scene there was evidence of struggle. It was muddy.

12. She testified further that the complainant identified the Appellant as the assailant who was later arrested by the area chief and members of the public while running away. She testified too that issued the complainant with p3 form that which took to be filed at the hospital after examination. She reiterated that the incident occurred at 9:00pm. It was her testimony that she established that the child was born on 4/2/2003 and went on to produce a copy of the birth certificate. She also produced the complainants, which included a soiled flowered skirt, a white, black and red torn blouse and a torn purple panty.
13. When cross examined by the Appellant PW4 stated that she trusted the victim. She also reiterated that her clothes are torn. She stated too that the appellant used a panga to tear the clothes which panga was never recovered. She affirmed her testimony that the Appellant were identified by the complaint.
14. When put on his defense, the Appellant gave a sworn testimony that on 24/12/2020 he was at his grandmother's place at Mosochi. And he only went back to Metembe on 28/12/2020. He stated he was arrested while at the river by members of the community policing. He stated too that he did not know the child or any of the witness who testified against him. When cross examined by Mr. Kaino he yielded that he did not have any witness to confirm that he was in Mosochi on 24/12/2020.
15. The learned trial magistrate upon hearing both sides delivered her judgment on 8th March, 2023 wherein she found the accused person guilty of the offense and convicted him accordingly.
16. The trial court upon finding the Appellant guilty, it allowed the accused person to mitigate his sentence. On mitigation the accused person stated that he is an orphan who came from a humble background and thus asked for leniency.
17. The court ordered for a victim impact statement and pre-sentencing report to be filled. The Report dated 29/3/2023 was filled. The probation officer Mr. Masaki who produced the report observed that the matter had affected the victim's psychologically given that this was her first sexual experience and hence she feared for her life. The officer equally observed that the appellant was not remorseful and therefore recommended a custodial sentence.
18. The learned trial magistrate having considered the victims impact statement, the pre- sentence report dated 24/3/2023 especially the psychological trauma faced by the minor and as a result of this offence, having established accused is also said to be unremorseful as well his mitigation is considered, she sentenced the Appellant to serve fifteen (15) years imprisonment.
19. Dissatisfied with the decision of the trial on the sentence and conviction of the learned trial court, the Appellant filed a petition of Appeal dated 13th April, 2023. His grounds of Appeal were that:
 - a. The trial court erred in law and in fact by failing to take into account the evidence produced by the accused but wholly concentrated on the prosecution uncorroborated and dishonest evidence brought in bad faith by the complainant.
 - b. The trial court erred in law and fact by convicting the accused by relying on the prosecution's evidence whereas the prosecution failed to prove their case beyond the standard reasonable doubt as the investigating officer indicated the accused had cut the complainant's clothes using a panga but the doctor's examination did not find any injuries to have been caused by a sharp object.



- c. The trial court erred in law and facts by relying on the evidence of PW1 and PW2, who are mother and daughter but did include the evidence of any other witness including the complainant alleged sisters who are allegedly said to have been chased away as the complainant was being held back.
 - d. The trial court erred in law and facts when he convicted the Appellant based a false evidence. Pw3 told court the complainant had reported an assault case but the case before court was gang rape. He told court there were no spermatozoa seen during his examination of the victim.
 - e. The trial magistrate erred in law by holding the entire prosecution witnesses evidence including PW2 who never called her neighbor who allegedly informed her that her child was being injured to give evidence.
 - f. The trial magistrate erred in law convicting the Appellant as the doctor told court that the victim had a sanitary towel soaked in blood but failed to tell the court whether the blood was as a result of alleged rape or monthly period of the complainant.
 - g. The trial magistrate erred in law by convicting the Appellant as the doctor failed to establish why and which part of the complainant's genitalia was bleeding as there was no hymen breached.
 - h. The trial magistrate erred in law and fact by failing to establish that the prosecution evidence is compromised, is made up of shoddy investigation and chose to treat the appellant's evidence with total disregard.
 - i. The trial magistrate wrongly evaluated the evidence which resulted in wrongful conviction of the accused to serve 15 years' imprisonment as the appellant was not around the said place do not know the complainant as well as the witnesses who testified against him.
20. Based on the above grounds the Appellant prays that this appeal be allowed and the conviction be quashed and the 15 years' sentence set aside. This court directed that the Appeal be disposed of by way of written submissions. Both parties filed their submissions for consideration.
21. This is an appellate court and it is the duty of this court to re-evaluate the entire evidence on record and arrive at its own independent decision on conviction and sentence.

ISSUES FOR DETERMINATION

22. Having considered the Petition of appeal, the written submissions by the Appellant in support of the same and the submissions of the Respondents on the same and given that this appeal is on conviction and sentence of the Appellant for the offense of gang rap, I find the following as the issues that arise for determination: -
- 1) Whether the offence of gang rape was proved specifically that the appellant committed the offence of rape in association with another or others, or any other with common intention, is in the company of another or others who commit the offence of rape; and
 - 2) Whether there was penetration and
 - 3) Whether the appellant was properly and clearly identified as the perpetrator together with others.



ANALYSIS AND DETERMINATION

23. This court is duty bound to do as a first appellate court [to] reconsider the evidence adduced before the trial court and re-evaluate it to draw its own independent conclusions and to satisfy itself that the conclusions reached by the trial judge are consistent with the evidence. (See *Ngui -Vs- Republic* [1984] KLR 729 and *Susan Munyi -Vs- Keshar Shiani*, Civil Appeal No. 38 of 2002).
24. Section 10 of the *Sexual Offences Act* against which the Appellant was charged, found guilty and convicted provides as follows: -
- Any person who commits the offence of rape or Defilement under this Act in association with another or others, or any other 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 than fifteen years but which may be enhanced to imprisonment for life,
25. It is therefore outright that Prosecution prove a charge based on offence of gang rape, it must prove the following four elements beyond reasonable doubt:
- a. Penetration as defined by section 2 of the *Sexual offences act* without consent thereof;
 - b. In association with another or others, or any other with common intention, is in the company of another or others who commit the offence of rape
 - c. Positive identification of the perpetrator.
26. The question this court must answer at the end its determination is; were all these elements proved beyond reasonable doubt?

Penetration

27. Section 2 of the Act defines 'penetration' as:
- ...the partial or complete insertion of the genital organs of a person into the genital organ of another person.
28. In the case *Mark Oiruri Mose vs R* (2013) eKLR the Court of Appeal observed as follows:
- ...Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.... (Emphasis mine).
29. PW3 confirmed that on examination of the PW1's genitalia after the alleged incident he found that the complainant was bleeding from virginal area with abrasions on the thighs; she had sanitary pad soaked with blood and concluded that the injuries were consistent with forceful penetration on resistance of the victim.
30. PW1 stated that she was raped. She gave evidence of penetration. She narrated that the Appellant while the unknown man was holding her, tore her clothes, strangled her, inserted his penis inside her vagina and raped her. The medical evidence did confirm penetration. The evidence of penetration



given by PW1 was also partly corroborated by her complaint to the Police PW4 when she went to report the matter at the police station. During cross-examination by the Appellant conceded there was no evidence of spermatozoa in the complainant's genital organs. Nevertheless, this is not a strict requirement for purposes of penetration. Accordingly, there was penetration.

31. According to the complainant, the sexual intercourse was not consensual but forced upon her by the Appellant and the unknown man. She described the ordeal. She narrated that the Appellant and his accomplice who were armed with a panga tore her clothes and strangled her. Thereafter the Appellant inserted his penis inside her vagina and raped her while his accomplice was holding her. She tried to plead with them to stop but they refused. PW3 corroborating the evidence of the complaint stated that examination revealed that there were lacerations on the left cheek; the abdomen was tender; there were tender lacerations on left breast; the lower limb had lacerations; the left limb had lacerations which were severe on the upper elbow 8 cm long; and both lower limbs had abrasions and laceration more severe on the lateral side near the patella. He contended that such revelation showed that there was a struggle between the minor and the assailant. He contended too that the injuries were probably caused by blunt objects, sticks, stones and rough surfaces and the same could have occurred in a bush. PW4 stated that when she visited the scene of crime she observed that there was evidence of struggle as scene was muddy.
32. It is trite law that penetration however slight constitutes the offence of rape and it is not necessary that medical evidence be availed to prove penetration.
33. In any event the proviso to Section 124 of the Law of *Evidence Act* provides that "Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth". The trial magistrate found that there was overwhelming medical evidence and that of the victim to show that there was penetration. The trial magistrate is the one who saw the witness while testifying and believed her testimony. The testimony that there was penetration is supported by medical evidence produced herein. I find that prosecution proved that there was penetration on the vagina of the victim at the material time as rightly held by the trial Magistrate.

Identification of the assailant

34. The gravamen of this appeal turns on identification of the Appellant by PW1. The offence was committed at night. Generally, identification at night may be difficult and the Court must warn itself of the dangers of admitting evidence of identification at night unless the circumstances were favorable to a positive identification. PW1 She testified that she knew the accused person given that he lived next to her school and that she used to see him by the road while going to school. She also testified that that she knew him by the name Sagini and also recognized him by his voice given that he used to make noise next to their school. She also stated that her sisters equally saw him she stated Sagini had a torch that he directed towards her while raping her and that she heard him telling his friend to hold her down. It was equally her testimony that Sagini had the same clothes he had when he was arrested. He had a black pair of trousers.
35. PW4, the Investigating Officer corroborated the evidence by PW1 in material respect. She stated that PW1 reported the gang rape on 25th December, 2020 against the appellant and an unknown. Further that appellant was arrested by the area chief and members of public while trying to run away.

The appellant in his defense claimed that on 24th December, 2024 he was visiting his grandmother at Mosochi. It is trite law that even where an accused person raises a defence of alibi the prosecution still



bears the burden of proving their case beyond any reasonable doubt and this burden does not shift to an accused person. In the case of *UGANDA v. SEBYALA & OTHERS* [1969] EA 204, the learned Judge quoted a statement by his Lordship the Chief Justice of Tanzania in Criminal Appeal No. 12D 68 of 1969 where his lordship observed:

“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.”

In the case of *Victor Mwendwa Mulinge v Republic* (2014) eKLR, it was held that:

“It is trite law that the burden of proving the falsity if at all, of an accused’s defence of alibi lies on the prosecution; see *Karanja vs Republic*; the court held that in a proper case, a trial court may in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond reasonable doubt; take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigating and thereby present any suggestion that the defence was an afterthought.”

36. I have carefully weighed the alibi and the Pw1 testified that she knew the appellant as a neighbour and even referred to him as Sagini and that he lived next to her school and that he used to make noise near her school. She said she recognized his voice when he spoke to her accomplice telling him to hold her. She said she saw him with aid of the torch light when he directed the torch light at her while raping her and that he was wearing black trousers when he raped her and that they were the same trousers he wore in court during her testimony. The testimony of PW1 on recognition was not challenged. I find that there was overwhelming evidence against appellant as this was a case of recognition and Pw1 properly recognized him at the scene and I do not see any chance of mistaken identity or fabrication. I proceed to dismiss the alibi as a mere denial.
37. On whether the appellant raped the victim in association with another, PW1 said that she was chased by two men who were armed with pangas; i.e. Appellant and another whom she did not know and the role of the other man was to pin her down as appellant raped her. Though PW1 said she could not tell whether the other man also raped her, it is clear to me that the other man had common intention with appellant as he held PW1 as appellant raped her. I find that appellant raped PW1 in association with the other man who was in his company and thus they gang raped her within the meaning of section 10 of the *Sexual Offences Act*.
38. On the issue of consent, of consent, it was not denied that the complainant was a minor aged 17 years. A birth certificate was produced as prove of the same. A minor does not have capacity to consent to sex and therefore it goes without saying the issue of consent does not arise.
39. I have re-evaluated the entire evidence on record and I find that the prosecution proved their case in the lower court against the appellant. The conviction was thus sound and within the law. I find his appeal on conviction to lack merit and I dismiss it.



What about sentence?

40. This Court is guided by the principles in the Court of Appeal case of Bernard Kimani Gacheru vs. Republic [2002] eKLR where it was stated as follows:

“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.”

41. From the above principles a trial court must take into consideration all the facts of a case as well as the mitigation from the accused person. I note that in the present case, it allowed the accused person to mitigate his sentence. On mitigation the accused person stated that he is an orphan who came from a humble background and thus asked for leniency. The learned trial magistrate equally ordered for a victim impact statement and pre-sentencing report to be filled. The report dated 29/3/2023 was filed which revealed matter had affected the victim’s psychologically given that this was her first sexual experience and hence she feared for her life. It equally revealed that the appellant was not remorseful and therefore recommended a custodial sentence. This was a gruesome gang rape. The trial court sentenced the Appellant to 15 years’ imprisonment for the offense. The sentence provided for gang rape is 15 years imprisonment which may be enhanced to life imprisonment. I am aware of the sentencing principles set down by the Supreme Court in the celebrated Muruaretu case. The sentence was within the law considering the aggravated nature of the offence. I am not persuaded to interfere with the sentence.

42. In the end, I uphold the conviction and the sentence and dismiss the Appeal by the Appellant.

T.A ODERA

JUDGE

5.24

Delivered Virtually via teams platform

In the presence of:

Koima for Prosecution

Court Assistant: Oigo

Appellant: Present

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