



RH v Republic (Criminal Appeal 20 of 2023) [2024] KEHC 4492 (KLR) (2 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4492 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDAMA RAVINE
CRIMINAL APPEAL 20 OF 2023**

RB NGETICH, J

MAY 2, 2024

BETWEEN

RH APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant was charged in count one with the offence of Rape contrary to section 3(1) as read with Section 3(3) of the *Sexual offences Act* No. 3 of 2006. The particulars of the charge were that on the 2nd day of October, 2018 at about 1830 hours at [particulars withheld] within Baringo County, the accused intentionally and unlawfully committed an act which caused the penetration of his penis into the vagina of MJL without her consent.
2. The accused faced an alternative count of indecent act with an adult contrary to section 11(a) of the *Sexual offences Act* No. 3 of 2006, the particulars of the offence being that the accused on the 2nd day of October, 2018 at about 1830 hours at [particulars withheld] within Baringo County, intentionally and unlawfully committed an act which caused his penis to come into contact with the vagina of MJL without her consent.
3. The accused denied all the charges and the matter was set down for full trial and judgment was delivered on the August 14, 2019, found the accused guilty as charged, convicted him under section 215 of the *CPC* and sentenced him to serve 10 years imprisonment.
4. Dissatisfied with the conviction and the sentence of the trial court, the Appellant filed this appeal on the following grounds:-
 - i. That the Learned trial magistrate erred in law and in fact by failing to note that the witnesses' evidence was contradictory and inconsistent hence could not support a just conviction.



- ii. That the Learned trial magistrate erred in law and in fact by failing to appreciate the doctor's findings in the medical evidence.
 - iii. That the Learned trial magistrate erred in law and in fact in failing to appreciate that the prosecution did not prove its case beyond any reasonable doubt.
 - iv. That the Learned trial magistrate erred in law and in fact in failing to take into account and consider or give reasons for disregarding the appellant's defense.
5. The Appellant prays for the total success of this appeal, conviction quashed, sentence set aside and he be set at liberty.

Appellants Written Submissions

6. The appellant filed written submissions and argues that having been sentenced to serve 10 years imprisonment for the offence of rape, he urges this court to invoke the provisions of Section 333(2) of *Criminal Procedure Code* and allow his sentence to run from the date of arrest his date of arrest being August, 2018 and cited the case of *Abolfathi Mohammed & Another* (2018) eKLR where Paul Kihara J allowed sentence to start from the date the convict was arrested. He further urged this court to consider his age and grant him a non-custodial sentence; that he is a senior citizen, a family man and a breadwinner for his family.
7. When the matter came up for hearing on the February 23, 2024, the appellant submitted orally that he is remaining with 2 years and 6 months from his jail term of 10 years imprisonment for the offence of rape.

Respondent's Submissions

8. The state counsel Mr. Kingori did not object to the time taken in remand being considered but are opposed to a non-custodial sentence on ground that PW 1 to PW4 all said the community were afraid of the Appellant.
9. The court called for social inquiry report to confirm the position on the ground as at now. The report was filed on the April 17, 2024. From the report, the applicant is aged 62 year old man. He was unskilled but has trained in upholstery while in prison. He is a father of three young adults who have been brought up by their mother after separating with the applicant. That the applicant schooled up to Form Four (4) and scored a mean grade of C+ (plus) but did not proceeded to a tertiary college but he instead engaged himself in farming and casual jobs up to the time of his arrest and incarceration.
10. The applicant claims the victim was his girlfriend but when his parents disapproved of their relationship and realized that they persisted, they framed the offence of rape. He regrets the circumstances leading to his arrest and pleads for leniency from the honorable court. He maintains that he did not commit the offence and urged this court to review his sentence.
11. The siblings to the inmate expressed mixed reactions during the interview. They stated that before incarceration, the applicant had been harsh to them even to the extent of chasing them away from their parental land at Kamelilo. Though they expressed bitterness, they are hopeful that the applicant may have transformed while in prison and will reluctantly accepted welcome him back home if he is granted a non-custodial sentence.
12. From the report, the victim was aged 18 years old at the time of the offence and was in Form Four. She has since completed her secondary education and works as a house help in Nairobi. The report indicate that she displayed bitterness and resentment towards the and her wish is for the applicant to complete



sentence in prison. She also expressed fears regarding her safety bearing in mind the character of the applicant before his incarceration.

13. The mother to the victim expressed bitterness towards the applicant and said he very arrogant person who never interacted well with his neighbors and family members. She was not willing to forgive him and is of the view that he completes his sentence in prison.
14. The area administrator stated that the applicant's social record was tainted and said previous accusations had been reported against the prisoner and added that before his incarceration, he was not in talking terms with his siblings whom he had mistreated to the point of sending them away to live in town. He also stated that most members from the community especially his neighbors wanted him to serve his sentence to completion and hoped that he will have reformed before he is reintegrated back into the community so as to guarantee safety of all. In conclusion, the probation officer is of the opinion that home environment is currently not receptive for the reintegration of the prisoner.

Analysis And Determination

15. The appellant abandoned appeal on conviction and sought review of sentence to allow him serve non-custodial sentence and for the period he served in remand to be computed in sentence.
16. In respect to period served in remand, Section 333 (2) of the [Criminal Procedure Code](#) provide as follows: -

“Subject to the provisions of section 38 of the [Penal Code](#) (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this [Code](#).

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

17. The above provision has been the subject of interpretation by both the High Court and the Court of Appeal. In [Ahamad Abolfathi Mohammed & Another V Republic](#), [2018] eKLR, the Court of Appeal stated as follows: -

“By dint of section 333 (2) of the [Criminal Procedure Code](#), the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on June 19, 2012.”

18. On perusal of the record, I note that the charge sheet indicates that the accused was arrested on October 5, 2018 and he was sentenced to 10 years imprisonment on August 14, 2019 and was therefore in custody for a period of 10 months which was not considered by the trial court. There is no indication



that the trial court ordered that the period the applicant was in custody be compute in the sentence imposed.

19. In respect to the second prayer of being allowed to serve noncustodial sentence for the remaining period of sentence, I have considered the applicant's mitigation and the social inquiry report. From the social inquiry report the community, his family, victim and local administration are not ready to welcome the applicant back to the community. The victim and her family are still bitter. There is no indication that the applicant has reached out to the victim for forgiveness. The applicant's siblings also have mixed reaction on proposal to release the applicant to serve the remaining sentence in the community. From the report, he was arrogant to his siblings and chased them from home. There is no indication of him having made any attempts to reconcile with his siblings. The community did not also speak good of the applicant. In view of the above, no custodial sentence is not suitable for the applicant.

Final Orders:

20. ..

1. Application for review of sentence is hereby dismissed.
2. Period served in remand by the applicant to be computed in the sentence imposed by the trial court.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 2ND DAY OF MAY 2024.

RACHEL NGETICH

JUDGE

In the presence of:

CA Elvis.

Ms. Ratemo for state.

Appellant Present in person.

