



REPUBLIC OF KENYA



**Kibet v Republic (Criminal Appeal E001 of 2024)
[2024] KEHC 8206 (KLR) (8 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8206 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL E001 OF 2024
RB NGETICH, J
JULY 8, 2024**

BETWEEN

MARKSON KIBET APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and sentence from the Judgment delivered on the 26th July, 2023 by Hon. P. Koskey (SPM) in Kabarnet Magistrate's court Criminal Case S.O No. E006 of 2023)

JUDGMENT

1. The Appellant was charged 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 offence were that the accused on the 21st day of April, 2023 at about 1700Hrs at Baringo Central Sub- County within Baringo County intentionally and unlawfully caused his penis to penetrate the vagina of VK without her consent in contravention of the said Act.
2. In the alternative, the appellant was charged with the offence 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 on the 21st day of April, 2023 at about 1700hours at Baringo Central Sub- County within Baringo County, the accused intentionally and unlawfully committed an indecent act by touching the vagina of VK with his penis in contravention of the said Act.
3. The accused denied both the main and alternative charge and the matter was set down for full trial with the prosecution calling 4 witnesses in support of the charges against the accused and the appellant gave sworn statement in his defence. Upon close of hearing, by judgment delivered on the 26th July, 2023, the trial court found the appellant guilty and convicted him of the offence of Rape contrary to section 3(1) of the *Sexual offences Act*. On 9th August, 2023 the appellant was sentenced to 10 years imprisonment.



4. Dissatisfied with the conviction and the sentence of the trial court, the Appellant filed this appeal which was amended pursuant to section 350(2) of the Criminal Procedure Code on the following grounds: -
 - i. That I am appealing against the conviction only.
 - ii. That trial court erred in both law and facts by failing to infer that the investigations were not conducted to the required standards.
 - iii. That the trial court erred in law and facts by convicting the Appellant herein without appreciating that the medical findings were not conclusive and supportive for the charge of rape.
5. The Appellant prays for the total success of this appeal, conviction quashed, sentence set aside and he be set at liberty. The appeal proceeded by way of both oral and written submissions.

Appellant's Submissions

6. The Appellant submits that his constitutional rights under Article 49(1) (g) of *the Constitution* was violated when the officer who arrested him never informed him the reason of his arrest. He submits that his rights under Article 50(2)(j) was violated when he was denied his rights to have the evidence the prosecution was going to use or rely on. That nowhere in the proceedings indicates that the accused was given statements or any documents. He submits that these violations amount to an acquittal and prayed that this court quashes the conviction and set aside the sentence.
7. The Appellant further submits that the trial court accepted a document which was not examined by the appellant contrary to the law; and the trial magistrate overlooked the evidence of the doctor PW3 who stated that he gave the history of the offence keenly as told and the P3 Form was not filled by him since PW 1 had already taken bath. Further that there is nowhere in the record where PW 3 stated that he examined PW1 and found her with anything that would link the accused to the offence. That it was only the spermatozoa and the Appellant claims that the complainant had spent the night with her husband and had sex.
8. The appellant submits that there was no treatment and the only thing the doctor did was to fill the P3 Form basing on the history of PW1 and argues that a married woman cannot fail to have spermatozoa in her vagina.
9. The Appellant further submits that the investigations officer was not truthful, that there was no inventory diary to show the information gathered from the scene of crime and the people around during the commission of the offence and according to the evidence of PW1, there were people around but the investigations officer PW4 did not mention presence of people and did not bring any to prove the allegations.
10. The Appellant further submit that the case was not investigated and no statements were taken from the witnesses neither were photos taken at the scene of crime. That no treatment documents were produced to confirm the offence or show injuries sustained by the complainant.
11. Further that PW3 the clinical officer did not testify that the complainant was strangled as alleged neither did he link the semen found in the complainant to the Appellant. He submits that no such offence was committed and urged this court allows his appeal, quashes the conviction and sets aside the sentence.

Respondent's Submissions



12. The prosecution counsel Ms. Ratemo submitted orally on behalf of the state. She submits that appellant was charged and convicted of the offence of rape. That the ingredients to be proven are whether there was penetration and whether the victim consented.
13. She submits that the victim testified and stated that it was around 5 P.M and there was sufficient light for her to identify the Appellant. Further that it was her first time to see the Appellant and the Appellant forced himself and forcefully had carnal knowledge of her and after finishing, the accused/ appellant left. She went to Salawa hospital where she was referred to Kabarnet Referral Hospital. That PW3 who treated her at Baringo County Referral Hospital found her genitalia normal and he did not notice any lacerations or tears and the doctor indicated that victim had taken bath earlier.
14. She further submits that under section 2 of the *Sexual offences Act*, penetration can either be complete or partial and therefore the absence of spermatozoa did not negate that penetration occurred and the absence of hymen was explained but it does not negate the fact that the victim was raped.
15. She submits that there are authorities that indicate that the penetration can be proved without medical evidence and relied on the case of *Kassim Vs Republic [2006] eKLR* where the court of appeal indicated that the absence of medical evidence to prove the offence is not decisive since the fact of rape can be proven by oral evidence by the victim of rape or by circumstantial evidence.
16. She submits that the Appellant raised the defence of alibi saying he was at Ainamoi and argued that the appellant's defence was an afterthought because he did not raise a notice of defence of alibi at the start of the hearing so that the prosecution could establish his whereabouts and he also did not avail evidence to prove that he was at Ainamoi neither did he clearly explain the happenings of the day.
17. On the issue of sentence, she submits that the court considered the appellant's mitigating circumstances and the presentence report and imposed a 10 years imprisonment which is the mandatory minimum sentence for the sexual offence of rape. The state counsel submit that the appellant's appeal on conviction and sentence is unmeritorious and should be dismissed.

Analysis And Determination

18. This being the first appellate court, I am expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis. This I do while bearing in mind the fact that unlike the trial court, I did not have the opportunity to hear the witnesses and observe their demeanour. The principles that apply in the first appellate court are set out in the case of *Okeno v Republic [1972] EA 32* where it was stated as follows:-

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v Republic [1957] EA 570*.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (*See Peters v Sunday Post, [1958] EA 424*.)”

19. Further in *Mark Oiruri Mose v Republic [2013] e KLR Criminal Appeal No.295 of 2012* the Court of Appeal stated as follows:-

“It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own



independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that.”

20. In view of the above, I have perused and considered the lower court record, together with submissions herein and find the following as issues for determination:-

- i. Whether the rights of the accused under Article 47 and 50 of the constitution were violated by the trial court.
- ii. Whether the ingredients for the offence of rape were proved beyond reasonable doubt.
- iii. Whether the sentence imposed was harsh and excessive.
- (i) Whether the rights of the accused under Article 47 and 50 of the constitution were violated by the trial court.

21. Article 50 of the constitution of Kenya provides for the fundamental right to a fair hearing. Sub article 2 (c) and (j) provide as hereunder :-

- “(c) the right of the accused to have adequate time and facilities to prepare his defence.
- (j) the right of the accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence “

22. The right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence is expressly provided for in our constitution. In Thomas Patrick Gilbert Cholmondeley Vs. Republic [2008] eKLR the Court of Appeal stated categorically that:-

“We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under section 77 of our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items.”

23. In arriving at the above decision, the court cited common law duty as well as comparative decisions from various jurisdictions including the UK, Canada and Uganda: respectively R. V. Ward [1993] 2 ALL ER 557; R. V. Stinchcombe [1992] LRC (Cri) 68; Olum & Another V Attorney General [2002] 2 E.A. 508; and, the Kenyan Case of George Ngodhe Juma & two others Vs. The Attorney General Nairobi High Court, (Misc. Criminal Application No. 345 of 2001).”

24. I have perused the record of the trial court and note that when the matter came up before court for plea on the 8th May, 2023, the prosecution indicated that they were not opposing bond and further indicated that witness statements had been supplied to the accused/appellant. Record show that during the hearing, the appellant participated fully in the trial by cross-examining the witnesses without any difficulty and he did not complain of not being issued with witness statements. From the foregoing I see no merit in this ground of appeal.

- (ii) Whether the ingredients of the offence of rape were proved beyond reasonable doubt

25. The main ingredients of the offence of rape created in section 3 (1) of the Sexual Offences Act as follows:-



- a. intentional and unlawful penetration of the genital organ of one person by another
- b. absence of consent.

26. In the case of Republic vs. Oyier[1985] KLR 353, the Court of Appeal held as follows:-

- “ 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.”

(a) Penetration

27. The complainant testified that on the 21st April, 2023 at 5 p.m after washing clothes in the river she was taking bath when the appellant appeared from the bush and dragged her and forcefully had carnal knowledge of her. She went to hospital for treatment after the sexual assault. Her evidence was corroborated by that of PW3 a clinical officer who testified that the complainant visited Baringo County Referral Hospital on the 21st April,2023 with a complaint of having been sexually assaulted and on examination, her genitalia had no lacerations or fluids or tears. He stated that laboratory results showed there was spermatozoa and semen. From the above evidence it is clear that penetration was proved beyond reasonable doubt.

(b) Whether the penetration was forceful/absence of consent

28. The complainant testified that that the accused dragged her to the bush while strangling her until she fainted. She said she was naked taking bath in the river when the appellant appeared from the bush, threatened her and dragged he and forcefully had carnal knowledge of her. From the evidence adduced, it is clear that the complainant did not consent to the sexual act.

29. The complainant stated that went back to the river and bathed and then went home. In the case of Anjononi & Others vs. Republic [1980] KLR 59 the Court of Appeal held that;

“...recognition of an assailant is more satisfactory, more reassuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another.”

30. The incident occurred at 5 p.m. in broad day daylight and there is no doubt that he identified the appellant.

(iii) Whether sentence imposed is harsh and excessive

31. On whether the sentence of 10 years was harsh and excessive, section 3(1) of the *Sexual Offences Act* creates the offence of rape and provide the ingredients of the offence to wit penetration and lack of



consent whereas section 3 (3) of the Sexual Offence Act prescribes the penalty for the offence; section 3 (3) of the *Sexual Offences Act* states as follows;

“ 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.”

32. In the case of Shadrack Kipchoge Kogo v Republic Criminal Appeal No. 253 of 2003(Eldoret), the Court of Appeal stated as follows;

“ Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred”

33. Similarly, in the case of Wanjema v Republic [1971] E.A. 493 the court stated as follows: -

“ An appellate court should not interfere with the discretion which a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into consideration some immaterial fact, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case.”

34. From the foregoing, sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The discretion is however limited by the statutory minimum and maximum penalty prescribed for a particular offence.

35. Section 3(3) of the *sexual offences Act* under which the appellant was charged provide for minimum sentence of 10 years imprisonment which can be enhanced to life imprisonment depending on circumstances of each case. I have considered circumstances of this case and find the sentence imposed by the trial court appropriate. I will not therefore interfere with the sentence. From the foregoing I see no merit on appeal on both conviction and sentence and proceed to dismiss accordingly.

36. Final Orders: -

Appeal on both conviction and sentence is hereby dismissed.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET

This 8th Day of July 2024.

.....

RACHEL NGETICH

JUDGE

In the presence of:

CA Elvis.

Appellant present.

Ms. Ratemo for State.

