



**Kamweru & another v Republic (Criminal Appeal 113 of 2023)
[2024] KEHC 8002 (KLR) (2 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8002 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 113 OF 2023**

DR KAVEDZA, J

JULY 2, 2024

BETWEEN

GEORGE KIMANI KAMWERU 1ST APPELLANT

MICHAEL NJENGA NGANGA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. P. Mutua (SPM) on 15th June 2021 at Kibera Chief Magistrate's Court Criminal case no. 2743 of 2013)

JUDGMENT

1. The appellants were charged with four counts of offences namely; kidnapping with intent to confine contrary to Section 259 of the [Penal Code](#), engaging in organized criminal activity contrary to Section 3 (g) of the [Organized Crimes Act](#) No. 5 of 2010, and assault causing actual bodily harm contrary to section 251 of the [Penal Code](#). They also faced a charge of gang rape contrary to Section 10 of the [Sexual Offences Act](#) No. 3 of 2006 with an alternative Count of committing an indecent act with an adult contrary to Section 11 of the same Act. They were acquitted on count II and convicted on all other counts. They were sentenced to serve four years imprisonment in Count I, two years imprisonment in Count III, and ten years imprisonment in Count IV. The sentences were to run concurrently.
2. Being aggrieved, they challenged their conviction and sentence. In their respective appeals, they challenged the totality of the prosecution's evidence against which they were convicted. They contended that the elements of the charges they were convicted of were not proved beyond reasonable doubt. They urged the court to quash their conviction and set aside the sentence imposed.
3. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence which



was before the trial court and come to its own conclusions on that evidence without overlooking the findings of the trial court but bearing in mind that it never saw the witnesses testify.

4. PW1 SMN testified that she had borrowed Ksh 40,000 from John Kirika Lukenya (Baba Nyambura), the father of the 1st appellant. Unable to repay due to financial hardship, she visited him on August 7, 2013, to negotiate installment payments. At his office, Baba Nyambura claimed her debt had grown to Ksh 120,000 and insisted she pay in full, instructing the first appellant to ensure she did not leave. Four men, including the 2nd appellant, arrived in a taxi. Believing she was being taken to the police, she was instead driven to a forest where the men beat and stripped her.
5. She narrated that she was severely beaten by her four captors. The 2nd appellant was using an electrical wire while the 1st appellant was using 'rungu' to hit her. DW1 was also using her shoes to strike her head. The complainant was assaulted all over her body, strangled, and punched in the jaw, which caused her to lose consciousness. Upon regaining consciousness, she found herself naked in a house with three of the assailants sleeping on chairs. She was given a phone and told to call someone for money. When she couldn't reach her brother or sister, she was slapped and forced to undress. After undressing, the beating resumed.
6. She managed to call her brother for help, but the men, including the appellants and two other assailants, raped her. When her brother arrived with the money, the first appellant was arrested. The remaining men fled, but police rescued her. She was hospitalized, and the appellants were charged. She identified her torn clothes and medical reports as evidence.
7. PW2 DMN, PW1's brother, testified that on August 8, 2013, their sister MW informed him that PW1 had been hijacked. He called her number but it was off, so he asked his friend Samuel Ngari Mukuyu (PW3) to go to Kiserian. PW3 met PW1's captors at Total Petrol Station, who demanded repayment of a loan that had grown to Ksh. 120,000 for PW1's release. PW3 reported this to the police, who then rescued PW1. He stated that he found them at the petrol station, where PW1 revealed she had been beaten and raped. He took her to the hospital, where she was admitted, and later recorded his statement. On cross-examination, he confirmed receiving the report from Mary Wangare, not PW1, and that PW1 did not pay for her treatment. He also stated that PW1 told him she was raped by four people and confirmed she had borrowed the loan.
8. PW3 Samuel Ngari Mukuyu testified that on August 8, 2013, his friend DMN (PW2) asked him to check on PW1, who had been hijacked, and provided him with PW1's phone number. After calling the number, he was met by the 1st appellant and Beth Nyambura, who demanded Ksh. 120,000 for PW1's release. He informed PW2, who said he was coming, and then decided to report the situation to the police. An officer familiar with the 1st appellant's residence led a rescue operation, and PW1, who was injured, was taken to the hospital by PW2. He also identified the 2nd appellant at the petrol station the following day, leading to his arrest.
9. On cross-examination, PW3 stated that PW1 reported being tortured by four men and one woman. He noted that the 1st appellant came together with Beth and came to the police station shortly after PW1's arrival.
10. PW4, Stanley Kiiru Gitau who was a taxi driver testified that on August 7, 2013, he was hired by Beth Nyambura (2nd accused) to drive four people, including the appellants to Birika. After refuelling, they stopped at the Chief's office and inspected some plots before returning to the office. He later learned that the 1st appellant and Beth were arrested. During cross-examination, he noted that the woman did not appear afraid and that he did not witness any violence.



11. PW5, Dr. Zohud Khadija from Nairobi Women's Hospital presented a medical report prepared by Dr. Mureithi, which detailed the injuries and treatment of PW1. Upon examination, the injuries sustained were; swelling on the head and left eye, bleeding through the nose, whip marks on the body, temporal mandibular joints which were painful, fracture on the left jaw and vaginal discharge, and hymen with old tags. She testified that PW1 was also diagnosed with depressive psychosis while admitted. She underwent treatment and counselling. The report corroborated PW1's account of gang rape and assault. On cross-examination, Dr. Khadija confirmed that no spermatozoa were found and explained that a foul smell from the body could result from contact with a foreign body.
12. PW6 Cpl. Eustece Macharia received a report from PW3 about a kidnapped woman on August 8, 2013, Recognising the 1st appellant from a previous encounter, he led a rescue operation to save PW1 from a locked house. During the rescue, various items were found, including documents suggesting a link between the first appellant and Mungiki. On August 9, 2013, the 2nd appellant was identified and arrested among the other accused persons not before this court.
13. During cross-examination, PW6 clarified that none of the recovered documents definitively proved the 1st appellant's membership in an illegal group. The testimonies highlighted a coordinated effort by the appellants to intimidate and harm PW1, who was ultimately rescued by the police.
14. After the close of the prosecution's case, the appellants were found to have a case to answer and were put on their defence. DW1 Beth Nyambura Kirika DW1, a secretary at her father's business, testified that PW1 and a man presented documents to obtain a loan on August 7, 2013. They called the first and third accused to verify the land, but PW1 didn't show it. When DW1's father recognized PW1 as a previous borrower, PW1 ran off when money wasn't produced by evening. They stayed at the first accused's house overnight, where PW1 slept in DW1's bed. The next day, they met PW1's brother at a petrol station, but confusion led them to the police station, where they were arrested. DW1 denied involvement in PW1's alleged kidnapping, rape, or assault, asserting the title used for the loan was found not genuine during a search.
15. DW2, the area Chief, testified he was not aware of any Mungiki activity in August 2013 and was not informed by the police. He acknowledged that the Mungiki group is outlawed.
16. DW3, George Kimani Kamweru, testified that on August 7, 2013, he was called by the DW1 to assist in verifying securities for loans. They found PW1 with documents for a loan secured against a Toyota Probox. They contacted DW5, DW1's father, who confirmed that PW1 had defaulted on a previous loan and should not be granted another. When PW1 attempted to escape, she was accidentally struck by a door. They proceeded to Birika to verify the land but found discrepancies. After unsuccessful attempts to secure the loan repayment, they decided to take PW1 to the police station, though she requested to spend the night elsewhere. They ended up at the DW1's house, where PW1 slept in the same room with him. The next day, they met PW1's brother at a petrol station but did not receive the promised money. They then went to the office and subsequently to the police station where they were arrested and charged.
17. On cross-examination, DW3 clarified his role in accompanying the 2nd appellant to the office due to fear. He confirmed discrepancies in the land claim and the refusal to grant PW1 more time due to her long-standing default. He also noted that PW1 was left at the house temporarily and was later taken to the police station by officers. DW3 asserted he was not present when police searched his house.
18. DW4, Michael Njenga Nganga, testified that on August 7, 2013, he was at work when the first appellant asked him to accompany him to the office where a woman was seeking a loan. DW1, his employer, raised concerns about the woman's documents, noting a previous unpaid loan secured with



a false title deed. They called the DW1's father to verify this. They attempted to verify the land she claimed to own in Birika but found it to be untrue. Back at the office, she asked to call her brother for money instead of going to the police immediately. When her brother couldn't come right away, DW4's employer refused to release her, and she asked to stay the night. DW4 left for work and later learned of the arrests of the 1st appellant and DW2 but did not intervene, assuming DW5 would handle it. He was subsequently arrested on August 12, 2013, with campaign materials for a political candidate unrelated to Mungiki, which he was supporting. He maintained that he had no part in assaulting or raping the complainant.

19. DW5 John Kirika Mkenya testified that he intervened when the complainant tried to secure a loan using a title deed, having previously defaulted on a loan from him. He accompanied the appellants to verify the land she claimed to own, but no report followed. The next day, he learned of their arrest.
20. In count I, the appellants was convicted for the offence of kidnapping with intent to confine contrary to Section 259 of the *Penal Code*. Section 259 of the *penal code* provides that someone who kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined is guilty of a felony and liable to imprisonment for seven (7) years. Kidnapping connotes the taking of a person forcibly and illegally detaining such person with the intention of extorting ransom from others to secure the release of such kidnapped person. The ingredients of kidnapping can be one or a combination of more than one of the following: -
 - a. The person must have been taken forcibly and without their will;
 - b. Such person must have been illegally detained in a secret place;
 - c. Such person must be held captive or hostage;
 - d. The person who has detained such person must have the intention of confining the abducted person secretly, illegally, and wrongly;
 - e. The person who has detained such person must want to extort monies from others to secure the release of the detained person.
21. This is an offence against an individual's liberty and from the evidence by the complainant (PW1) it was established that when she was unable to repay a loan, she visited the lender John Kirika Lukenya (Baba Nyambura) to negotiate. He claimed her debt had tripled and ordered his son (the first appellant) to detain her. Four men, including the appellants, abducted the complainant, beat her in a forest, and confined her in a house where she was also raped.
22. PW2 and PW3 testified that the captors demanded Ksh 120,000 for PW1's release, which was reported to the police. A Rescue Operation was led by led by PW6 the police who found PW1 locked in a house and arrested the first appellant. These outlined the coordinated effort by the appellants to illegally take the complainant against her will, confine her, and extort money from her brother in order to secure her release.
23. In the foregoing and based on the evidence on record, I find that the prosecution discharged their burden of proof by proving all the elements of the of kidnapping and thus finds that the conviction by the learned magistrate on count I was proper.



24. On count III, they were convicted for the offence of assault causing actual bodily harm contrary to section 251 of the [Penal Code](#). According to Section 251 of the [Penal Code](#): -

“Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.”

25. The essential elements of the offence of assault causing actual bodily harm are;

- i. Assaulting the complainant or victim
- ii. Occasioning actual bodily harm

26. The complainant, PW1 led evidence to the effect that on the material day she was kidnapped. She testified she was severely beaten by four captors: the 2nd appellant with an electrical wire, the 1st with a 'rungu', and DW1 with her shoes. They assaulted, strangled, and punched her unconscious. Upon waking, she found herself naked with three assailants asleep. They forced her to call for money; when unsuccessful, she was slapped and forced to undress again, followed by more beatings. When she was finally rescued, she went to the hospital where she was examined. The medical evidence presented by PW5 was that PW1 had swelling on the head and left eye, bleeding from the nose, whip marks on her body, painful temporomandibular joints, and a fractured left jaw. She also testified that PW1 was diagnosed with depressive psychosis during her admission, for which she received treatment and counselling. The probable weapon used to inflict the injuries was blunt and the injuries were classified as grievous harm.

27. Firstly, PW1 was unequivocally able to identify her assailants. Secondly, the evidence convincingly establishes the respondent's presence at the scene during the alleged incident. Thirdly, the evidence strongly indicates that the respondents perpetrated the assault against PW1. Fourthly, medical evidence documented the injuries sustained, which leaves no doubt that the complainant was indeed assaulted.

28. In the end, I find that all the ingredients for the offence of assault causing actual bodily harm were proved against the appellants beyond reasonable doubt. The conviction on count III is sustained.

29. In count IV, the appellants were convicted of 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.

30. 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.

31. 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.”
32. It was the complainant’s evidence that the 1st appellant first appellant told her to sit properly so he could rape her. Subsequently, the first appellant, then the 2nd appellant, another assailant who was not arrested raped her in that order. The female assailant DW1 watched and laughed during the ordeal. Afterwards, they told her to take her clothes off the floor. The first appellant instructed her to wash her blood-stained blouse and the floor, and they also forced her to wash her private parts while they watched. She maintained that they had sex with her without her consent. The ordeal lasted the whole night.
33. 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.
34. On additional, corroborating evidence, the complainant visited the hospital after her ordeal. Upon examination, there were no injuries on her genitalia but there was vaginal discharge. She was treated and discharged. Accordingly, the prosecution proved that there was intentional and unlawful penetration of PW1 genital organs, without her consent.
35. On identification of the appellant, PW1 identified the appellants after they were arrested. She stated that they were two of the three men who raped her. During the duration during which the offence occurred, there was no margin of error and/or mistaken identity. This court finds that the appellants were positively identified as the perpetrator of the offences herein by the consistent, well-corroborated, and water-tight testimonies of the prosecution witnesses. The trial court’s conviction on the charge of gang rape was therefore proper.
36. On sentence, the appellants were each sentenced to serve four years imprisonment in Count I, two years imprisonment in Count III, and ten years imprisonment in Count IV. The sentences were to run concurrently. During sentencing, the trial court exercised its discretion and considered the appellants’ mitigation, that they were remorseful and that they were first offenders. The sentence imposed was therefore justified.
37. I therefore do not find any reason to interfere with the sentence imposed by the trial court. The appeal is dismissed for lacking in merit.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 2ND DAY OF JULY 2024

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D. KAVEDZA



JUDGE

In the presence of:

1st Appellant present in person

2nd Appellant present in person

Mr. Mutuma present for the Respondent

Naomi Court Assistant

