



REPUBLIC OF KENYA



**Olal v Republic (Criminal Appeal E060 of 2023)
[2024] KEHC 9800 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9800 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E060 OF 2023
WA OKWANY, J
JULY 25, 2024**

BETWEEN

KELVIN OCHIENG OLAL APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgement and Conviction at the Chief Magistrate's Court in Nyamira, Criminal Case No. E092 of 2020 delivered by Hon. C.W. Waswa, Senior Resident Magistrate on the 7th December 2021)

JUDGMENT

1. The Appellant herein, Kelvin Ochieng Olal, alongside three co-accused persons namely; Isaiah Ondongo Omondi, Joshua Otieno Onyango and Stephen Oduor Ouma, were jointly charged with the offence of Gang Defilement contrary to Section 10 of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on the night of 11th and 12th day of November 2020 in Rachuonyo East Sub-County within Homa Bay County, they jointly, intentionally and unlawfully caused their penises to penetrate the vagina of BAO, (particulars withheld) a child aged 16 years old.
2. They also face the alternative charge of committing an indecent act with a child contrary to Section 11 (1) *Sexual Offences Act*. The particulars of the charge were that on the night of 11th and 12th day of November 2020 in Rachuonyo East Sub-County within HomaBay County jointly and intentionally caused their penises to come into contact with the vagina of BAO (particulars withheld) a child aged 16 years.
3. The Appellant and his co-accused persons also faced a second count of assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars were that on the night of 11th and 12th day of November 2020 in Rachuonyo East Sub-County within HomaBay County unlawfully assaulted BAO (particulars withheld) thereby occasioning her actual bodily harm.



4. They pleaded not guilty to all the charges and a trial ensued in which the prosecution called a total of eight (8) witnesses.

The Prosecution's Case

5. PW1 BAO (particulars withheld) was on the night of 11th November 2020 at a funeral venue in the company of her cousin one RO. (PW2) (particulars withheld) when she was she abducted by four (4) unknown men who took her to a nearby house where they defiled her in turns. She returned to the funeral venue and reported the incident to one Pastor Michael. A search was immediately conducted at the funeral venue where the Appellant was arrested. PW1 identified the Appellant as one of her attackers. She was thereafter escorted to the hospital and the police station where the incident was reported.
6. PW2, RO (particulars withheld) the victim's cousin was on the material night with PW1 at the said funeral when they were suddenly accosted by two men who roughed him up before abducting the victim. He identified the Appellant as one of the people who abducted the victim on the said night.
7. PW3 JO (particulars withheld) was the victim's mother. She learnt of the misfortune that had befallen her daughter on the night in question and reported the matter to the police. She also escorted the victim to Ekerenyo Hospital for examination. She produced the victim's birth certificate as (P.Exh1).
8. PW4, Elijah Odhiambo, the Assistant of Chief Rongo Pala Sub-Location testified that he received the defilement report and the names of the suspects.
9. PW5, Justin Geke, a Clinical Officer treated the victim at Ekerenyo Sub-County hospital. He confirmed that the victim had been penetrated through several intercourses. He produced the P3 Form (P.Ex2), Outpatient Card (P.Exh3), PRC Form (P.Exh 4a and b).
10. PW6, Joshua Otieno, a village elder at [Particulars Withheld] village testified that the accused persons hailed from his village.
11. PW7, No. 81708 Cpl Alice Kiptoo, was the Investigating Officer. She interviewed the victim and recorded witness statements. She visited the scene of crime and recovered used condoms on the bed and the floor. The condoms were handed over to the DCIO for analysis together with the victim's inner pants. She produced the victim's white under pant (P. Exh5) blouse (P.Exh6), black and red innerwear belonging to Isaiah Odongo (P.Exh7), red boxer of Joshua Onyango (P.Exh8), Grey boxer of Stephen Oduor (P.Exh9) and Navy blue short of Kelvin Ochieng (P.Exh10).
12. PW8, Polycarp Lutta, the Government Chemist in charge of DNA section testified that one P.C. Godfrey Makokha and Cpl Alice Kiptoo submitted several samples for analysis on 14th December 2020. He conducted the analysis and made various conclusions. He produced the Government Chemist Report (P.Exh11) and the Exhibit Memo Form 9 (P.Exh 12).

The Defence Case

13. At the close of the Prosecution's case, the accused persons were placed on their defence after the trial court found that they had a case to answer. The 1st Accused elected to give unsworn testimony and called two witnesses. The 2nd and 3rd Accused persons opted to remain silent. The 4th Accused was absent. Eventually the 1st, 2nd and 4th Accused absconded court and judgement was delivered on 7th December 2021 in the presence of only the 3rd Accused- Joshua Otieno Onyango- who was acquitted of the charges in the main and alternative count. All the accused persons were acquitted in the second count but the 1st, 2nd and 4th accused were convicted on the main charge of defilement. The



- 1st Accused, the Appellant herein, was arrested after absconding court and sentenced to serve 30 years' imprisonment.
14. The Appellant was aggrieved by the findings of the trial court on both conviction and sentence. He filed the instant appeal and listed the following grounds of appeal in his Petition of Appeal: -
1. That the Prosecution case was proved (sic) beyond reasonable doubt.
 2. That your ladyship, the Learned Trial Magistrate erred both in law and fact by passing judgment out of mere fabricated evidence having no credible proof from the Prosecution given that the Appellant did not commit the said crime.
 3. That your ladyship, the Learned Trial Magistrate erred both in law and fact by basing the conviction and sentence notwithstanding that there was no proof from the medical officer to support the same allegation as alleged.
 4. That your ladyship, the Learned Trial Magistrate equally erred both in law and fact without noticing that the medical report adduced did not show whether it was the Appellant herein who had committed the purported crime.
 5. That your ladyship, the Learned Trial Magistrate never heard an authentic proof since the Investigating Officer relied on the hearsay report and information adduced by the complainant's family.
 6. That your ladyship, the Learned Trial Magistrate erred both in law and fact by basing the conviction without a proper pre-sentencing report.
 7. The Learned Trial Magistrate erred in law and fact in imposing a punitive sentence that was manifestly excessive.
 8. That the Appellant requests to be supplied with typed and certified proceedings to erect more grounds of Appeal.
15. The Appeal was canvassed by way of written submissions which I have considered.
16. As the first appellate court, I am aware of the duty to reconsider and reanalyse the evidence tendered before the trial court afresh with a view to arriving at independent findings while bearing in mind the fact that I neither saw nor heard the witnesses testify. This is the position that was stated in *Kariuki Karanja vs. R (1986) KLR 190* where the court held thus: -
- “On a first appeal from a conviction by a judge or a magistrate, the appellant is entitled to have the Appellate Court's own consideration and view of the evidence as a whole and its own decision thereon. The Court has a duty to rehear the case and reconsider the materials before the Judge or Magistrate with such materials as it may have been decided to admit.” (See also *Njoroge vs. Republic (1987) KLR, 19*)
17. The main issues for my determination are whether the charge of gang defilement was proved to the required standard and whether the sentence passed by the trial court was legal and appropriate.

Analysis and Determination

18. The offence of gang defilement is provided for under Section 10 of the *Sexual Offences Act* No. 3 of 2006 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 the fifteen years but which may be enhanced to imprisonment to life.
19. The elements of the offence of gang defilement are:-
- a. Unlawful sexual act committed in association with another or others or
 - b. Being in the company of another or others who commit the offence with common intention of committing the offence.
20. In the instant case, the victim (PW1) testified that four (4) people abducted her from the funeral venue and took her to a mud house where they defiled her. She testified, in part, as follows: -
- “I started screaming and one of them took my hat and placed it inside my mouth. We were inside in the bedroom on the bed. Then they started raping me. All four of them raped me. They each used a condom. I can’t tell who started raping me and who finished. There was no light inside the house. They raped me until 1.00 a.m.. The accused persons raped me one after the other. They were not even wasting one minute when one was finished.....”
21. The above testimony shows that the victim was subjected to unlawful sexual penetration by more than one person. This evidence remained uncontroverted by the defence and was further corroborated by the medical evidence adduced by the Clinical Officer (PW5) who testified that: -
- “...She was in fair general condition. The genitalia were normal. There were no injuries noted. There was vulva and labia deposits, white milking deposits. Hymen was absent. She was pregnant. HIV test was negative. Red blood cells and epithelial celled were seen. She had a soft tissue injury on the posterior upper arm. Proved that there was penetration.... It’s rare for red blood cells and epithelia cells to be seen at the same time. It shows there were several intercourses.”
22. A perusal of the P3 Form (P.Exh 2) and the PRC Form (P.Exh 4a) confirms the injuries that were noted by the Clinical Officer while the PRC Form indicates that the victim had torn mud stained clothes. I find that the prosecution proved that the victim was unlawfully and forcefully sexually assaulted by several men on the night in question.
23. Turning to the issue of identification, the victim testified that she was not able to see the faces of her attackers because it was dark but added that two of the assailants escorted her back to the funeral venue after the ordeal and that she was able to identify the Appellant as one of the assailants. The victim testified as follows on her identification of the Appellant: -
- “After they finished, I told them to return me where they found me. So we all left the house together. Two (2) of them returned me to the funeral. The 1st accused and another one who I can’t tell returned me to the funeral..... I told pastor Michael what happened. He went with some people and found the 1st accused along the road near the funeral service. They got hold of the 1st accused and I managed to see him. The other person had already run away.”



24. PW2 testified that the 1st Accused/Appellant was arrested outside the gate and that he identified him as the person who had abducted the victim. On cross-examination he maintained that he saw the 1st Accused/Appellant that night because there was light where he was with PW1.
25. This court notes that the incident took place at night when it was obviously dark and that the court must therefore caution itself on the possible dangers of night identification. In *R vs. Turnbull* [1977] QB 224, the court gave guidance on the subject of night identification and held that: -
- “If the quality [of the identification evidence] is good and remains good at the close of the accused’s case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution [...]
- When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example, when it depends on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification.” (Emphasis added)
26. In the present case, I note that the circumstances under which the victim and PW2 identified the assailants were not clear as they did not state that the quality of the lighting in the area was conducive for positive identification. I however find that even though the victim may not have been able to positively identify any of her attackers, the Prosecution presented the evidence of Polycarp Lutta (PW8), the Government Chemist who analysed several samples and exhibits including used condoms (item No. 8 on the Report –P.Exh 11).
27. PW8 testified that the DNA found in the sperms in the condom matched the Appellant’s DNA profile while the DNA profile from outside the condom matched the victim’s DNA profile. He further stated that the DNA profile of the blood stains found on the victim’s blouse matched the Appellant’s DNA profile.
28. My finding is that the evidence presented by PW8 conclusively linked the Appellant to the crime as it proved that he was the one who used one of the condoms that was recovered in the house/the crime scene. I find that the fact that the DNA profile found outside the condom matched the victim’s DNA profile leads to the irresistible conclusion that the condom was not only used by the Appellant, but that it was the one used on the victim. This means that the Appellant was one of the assailants who defiled the victim.
29. It is my finding that the trial court arrived at the correct finding that the prosecution proved the charge of gang defilement against the Appellant to the required standard and that the conviction was therefore safe.

Sentence

30. As I have already stated in this judgment, Section 10 of the *Sexual Offences Act* provides that a person convicted for the offence of gang rape/defilement is liable to imprisonment for a term of not less than the fifteen years which may be enhanced to imprisonment to life.



31. It is trite that sentence is at the discretion of the trial court and that an appellate court may only interfere such discretion if it is shown that it was manifestly excessive. This is the principle that was stated in *Wagude vs. R* (1983) KLR 569 where Kneller, Hancox JJA. & Chesoni, Ag. JA. held thus: -

“The Court may interfere with the sentence only if it shown that it was manifestly excessive. In this instance two years’ Imprisonment for stealing by a person employed in the public service was not manifestly excessive.”

32. In the present case, the Appellant pleaded for leniency during mitigation while stating that his family relied on him. In passing the sentence, the trial court held as follows: -

“This court has considered the mitigation by the accused 1 as well as the nature of the offence. The offence herein was very grave and should attract an appropriate sentence in order to act as a deterrence to others in the society. In the premises, the accused 1 is sentenced to serve 30 years imprisonment.”

33. The trial court’s above decision, on sentence, does not indicate what informed the court to mete out 30 years’ imprisonment and not any other sentence. It would appear that the trial court imposed the sentence because Section 10 of the *Sexual Offences Act* provides for a minimum mandatory sentence of 15 years which may be enhanced to imprisonment for life. It is apparent that the trial court did not exercise discretion on the basis that the law prescribes for mandatory sentence. I find that failure to exercise discretion posed a potential prejudice to the accused person.

34. The issue of whether the terms used in the penalty clause “is liable upon conviction to imprisonment for a term of not less than 15 years which may be enhanced to imprisonment for life” means mandatory minimum sentence is also debatable. It is however clear that the only provision in *Sexual Offences Act* where the term “shall” is used is section 8(2). Needless to say, the word ‘shall’ connotes that the clause is couched in mandatory terms while the word liable has been interpreted to mean that the court has discretion to mete out any other sentence and that the sentence stated in the Act only acts as a guide.

35. In *NOO vs Republic* [2019] eKLR the court discussed the meaning of the words “shall be liable to” and held as follows: -

“8. It seems to me beyond argument the words “shall be liable to” does not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it. From the comments made by the Magistrate cited above, the learned Magistrate did not address himself to the question whether or not the said provision conferred discretion to him. Differently stated, his discretion in the matter before him remained un exercised. As a consequence, he imposed the maximum sentence. Alternatively, he misconstrued the said provision to be mandatory and imposed a life sentence, hence, the exercise of his discretion in pronouncing the sentence was unfairly influenced by the said misdirection of the law or failure to exercise his discretion properly or both.

9. Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the



crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.[7] The principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with.[8] Also, while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered.[9]”

36. I have also considered the nature of the offence that the Appellant committed in conjunction with his co-accused who jumped bail and were not sentenced following their conviction. I am of the view that this is a matter where the trial court should have called for the Probation Officer’s pre-sentence and victim impact assessment report in line with the Judiciary Sentencing Policy Guidelines so as to get a clearer view of the convict’s background in order to arrive at the most appropriate sentence. I say so because, contrary to the trial court’s findings that this is a matter that required a deterrent sentence, the aim of sentencing is more than just for deterrence purposes.
37. It is not in doubt that the victim was subjected to a vile and heinous crime. She was not only defiled by one person, but by men who violently took turns to rape her. The victim was also injured on her left arm in the process of the sexual assault at a time when she is reported to have been pregnant. The facts of this case reveal aggravating factors which this Court cannot overlook.
38. Taking into account the totality of the facts of this case and the findings and observations that I have made in this judgment, the overall impression that I get is that the sentence was excessive. The Appellant is therefore entitled to redress.
39. Consequently and in view of the gravity of the offence, the fact that the Appellant is reported to be a young man and a first offender, I allow the Appeal herein albeit on sentence only. I hereby set aside the sentence of 30 years imposed by the trial court and reduce the same to 15 years’ imprisonment. The sentence period shall be computed to take into account the period, if any, that the Appellant spent in remand custody while awaiting his trial.
40. The appeal herein therefore only succeeds, albeit in part, on sentence only. For the avoidance of doubt, the conviction by the trial court is hereby upheld.
41. It is so ordered

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS AT NYAMIRA THIS 25TH DAY OF JULY 2024.

W. A. OKWANY

JUDGE

