



**RMR v Republic (Criminal Appeal E043 of 2023)
[2024] KEHC 9801 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9801 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E043 OF 2023
WA OKWANY, J
JULY 25, 2024**

BETWEEN

RMR APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Conviction and Sentence at the Chief Magistrate's
Court at Nyamira in Criminal (Sexual Offence) Case No. E054 of 2022
delivered by Hon. C.W. Waswa, Senior Resident Magistrate on 18th April 2023)*

JUDGMENT

1. The Appellant was charged with the offence of rape contrary to Section 3(1)(a)(c) as read with Section 3(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on the 29th day of September 2022, in Nyamira North Sub-County within Nyamira County intentionally and unlawfully penetrated the vagina of MKN by use of force.
2. The Appellant also faced the alternative charge of committing an indecent act with an adult contrary to Section 11A of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on 29th September 2022 in Nyamira North Sub-County within Nyamira County intentionally touched the vagina of MKN against her will.
3. The Appellant faced a second count of deliberate transmission of HIV contrary to Section 26(1)(a) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on 29th day of September 2022 in Nyamira North Sub-County within Nyamira County having actual knowledge that he was infected with HIV, intentionally, knowingly and wilfully had unprotected sexual intercourse with MKN which infected her with HIV.



4. The Appellant pleaded not guilty to all the charges and a trial was conducted in which the prosecution called a total of four witnesses.

The Prosecution's Case

5. PW1, MKN, testified that she was in her house on 29th September 2022 at about 10.00 a.m. when the Appellant came and enquired if her husband was at home. She stated that she knew the Appellant because he was her husband's colleague where he worked. She stated that no sooner had she informed the Appellant that her husband was not at home than he opened the gate and held her neck, pushed her down, tore her skirt and pant and raped her while threatening to stab her.
6. PW1 went to the hospital after the incident and later reported the matter to the police. She stated that she was found to be HIV negative and that the Appellant raped her without protection (condom). PW1 produced her skirt (P.Exh1) and pant (P.Exh2).
7. PW2, No. 203789 P.C. Belinda Otieno, was the Investigating Officer. She recorded the witness statements and escorted the victim to the hospital. She stated that the Appellant was arrested on the same day at about 8.00 p.m. and escorted to the hospital where he was found to be HIV positive.
8. PW3, JM, was the victim's husband. He explained that he had on the material day left home for work at about 9am only to receive a call from the area chief who informed that the Appellant had raped his wife. He rushed to the hospital to see PW1 and later escorted her to the police station where they reported the matter. He confirmed that he knew the Appellant because they worked together in the Community Policing department (nyumba kumi).
9. PW4, Enock Onyambu, was the Clinical Officer at Ekerenyo Sub-County Hospital. He testified that the Appellant was examined and found to have penile discharge with no laceration on his penis. He added that the Appellant was known to be HIV Positive.
10. PW4 produced documents in respect of the victim which indicated that she had bruises around the neck that were more pronounced on the left side. He stated that there was vaginal penetration, that her skirt and underwear were torn. He added that examination of the victim's genitalia revealed that her labia majora and minora appeared to be normal with minimal blood discharge and that sperm cells were seen. He produced the victim's Treatment Notes (P.Exh 3) and P3 Form (P.Exh4) together with the Appellant's treatment notes (P.Exh5) and the P3 Form (P.Exh6).
11. At the close of the Prosecution's case, the trial court found that the Appellant had a case to answer after which he was placed on his defence. The Appellant elected to tender sworn evidence and did not call any witnesses.

The Defence Case

12. The Appellant (DW1) testified that he did not know the victim and claimed that the charges filed against him were false. He explained that he went to work on the material day and that he was arrested while on his way home at about 4.00 p.m.

The Trial Court's Judgment and Sentence

13. At the end of the case, the trial court found that the Appellant was guilty of the charges in count 1 and 2. The Appellant was consequently convicted and sentenced to serve 10 years and 30 years respectively for the said offences with a rider that the sentences were to run concurrently.



14. Aggrieved by the decision of the trial court on both conviction and sentence, the Appellant instituted the present appeal and listed the following grounds of appeal in his Petition of Appeal: -
1. That the Learned Trial Magistrate erred in law and in fact in convicting the Appellant despite the fact that he was detained in police custody for three days and thus his constitutional rights under Article 49 (1) (f) (i) of *the Constitution* had been infringed.
 2. That the Learned Trial Magistrate erred in law and in fact in convicting the Appellant irrespective of the fact that there was no medical evidence linking the Appellant to the offence for which he was convicted.
 3. That the Learned Trial Magistrate equally faulted in both law and facts by failing to consider the Appellants rights to legal representation as enshrined in Article 50 (2) (g) (h) of *the Constitution* of Kenya.
 4. That the Learned Magistrate erred in law when he imposed an illegal sentence thereby occasioning a miscarriage of justice.
 5. That the Learned Trial Magistrate erred in law and in facts by notwithstanding that the medical report did not link the Appellant given that the complainant in this matter when tested nothing was found in her body i.e. HIV.
 6. That the Learned Trial Magistrate erred in law and in fact in convicting the Appellant that he was forced of the hearing proceeded in court and yet he was sick his lord (sic).
 7. That the Learned Trial Magistrate equally erred in law by meting out a sentence that was harsh and excessive in the circumstances of the case.
15. The Appeal was canvassed by way of written submissions which I have considered.
16. The duty of a first appellate court was explained by the Court of Appeal in the case of Kiilu & Another vs. Republic [2005]1 KLR 174 thus: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

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; 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.”

Analysis and Determination

17. I have considered the record of appeal and the parties’ rival submissions. I find that the following issues fall for my determination:-
- i. Whether the offence of rape was proved to the required standard.
 - ii. Whether the offence of deliberate transmission of HIV was proved to the required standard.
 - iii. Whether the sentences passed by the trial court were appropriate and legal.



Rape

18. Section 3 of the [Sexual Offences Act](#) provides for the offence of rape as follows: -

3.Rape

- (1) A person commits the offence termed rape if –
 - (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
 - (b) the other person does not consent to the penetration
 - (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.
- (3) 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.

19. The Prosecution must establish the following elements in order to prove the offence of rape: -

- i. That there was intentional and unlawful penetration on the victim’s or with the victim’s genital organs;
- ii. That there is no consent to the penetration by the victim; and
- iii. If there is consent, the same was obtained by force or by means of threats or intimidation of any kind.

20. In the present case, the victim testified that the Appellant raped her and used a knife to threaten her. She testified as follows: -

“...I told him Jared was absent. R was outside. He opened the gate and came and got hold of my neck and said, ‘leo ni siku yako’. He laid me down and tore my skirt and pant. The skirt was black and pant was black as well. R got hold of my neck again and told me that he would strangle me. R bent me over and from the back, he inserted his penis into my vagina. He inserted his penis into my vagina from the back. He inserted his penis into my vagina. R threatened that he would strangle me and he also had a knife which he threatened to stab me with it. My son was present at the time and he was crying. R finished and left the house. R didn’t remove my skirt and pant but he tore them...”

21. The above extract of the complainant’s testimony shows that she was forcefully sexually penetrated on the material day. Her evidence is believable and consistent as she gave a detailed account of how the Appellant threatened to stab her with a knife and strangled her in the process of raping her. I also note that PW4 presented medical evidence that corroborated the victim’s testimony that she was raped on the said date.

22. PW4 examined the victim and confirmed that not only was she sexually assaulted but that she was also strangled as he neck was tender, painful and bruised. PW4 produced the victim’s P3 Form and treatment notes which showed that the victim had bloody discharge and sperm cells in her genitalia.



23. On the identification of the Appellant as the perpetrator of the offence, I note that the Appellant was well known to the victim and that the offence was committed in the morning when there was adequate lighting to aid in clear identification. The victim testified that she had known the Appellant for a period of 1 year prior to the incident because he worked with her husband and would often drop her husband home from work. I find that the evidence of identification was that of recognition and that the Appellant was not a victim of mistaken identity. It is trite that evidence of recognition is more reliable than identification of a stranger (See *Turnbull and others* [1979] 3 All ER 549).
24. I have considered the evidence presented by the Appellant in his defence and I find that it consisted of mere denial that did not oust the otherwise watertight evidence from the prosecution witnesses. I am satisfied that the Prosecution proved the charge of rape against the Appellant beyond reasonable doubt and I therefore uphold the conviction.

Transmission of HIV

25. Section 26 of the Act provides thus: -

Deliberate transmission of HIV or any other life threatening sexually transmitted disease

1. Any person who, having actual knowledge that he or she is infected with HIV or any other life threatening sexually transmitted disease intentionally, knowingly and wilfully does anything or permits the doing of anything which he or she knows or ought to reasonably know—
 - a. will infect another person with HIV or any other life threatening sexually transmitted disease;
 - b. is likely to lead to another person being infected with HIV or any other life threatening sexually transmitted disease;
 - c. will infect another person with any other sexually transmitted disease,shall be guilty of an offence, whether or not he or she is married to that other person, and shall be liable upon conviction to imprisonment for a term of not less fifteen years but which may be for life.
26. The Appellant testified that he knew that he was HIV Positive and stated that he was in his 8th year as HIV positive patient. The victim, on the other hand, testified that she was tested after she had finished taking her post HIV exposure medication and found to be HIV negative. My finding is that the Appellant was fully aware of his HIV status at the time he committed the offence and must have known that there was a possibility that he would infect the victim.
27. My finding is that even though the victim did not get HIV infection after the incident, the Appellant's knowledge of his status leaves no doubt in my mind that he intended to infect the victim when he raped her without protection.
28. I am however not satisfied that the evidence presented by the prosecution proved the particulars of the charge of intentional infection with HIV. I say so because while the Prosecution's case was that the victim tested HIV negative yet the particulars of the charge were that she was infected with HIV. This aspect of the evidence negates the allegation of HIV transmission. This is to say that the appropriate charge ought to have been attempted deliberate transmission of HIV. I find guidance in the decision in



B M vs. Republic [2018] eKLR where the court quashed the conviction for the offence of deliberate transmission of HIV and held thus: -

“The complainant also having been found to be HIV negative, even if the appellant knew his status; the offence proved would have been that of an attempt not transmission of HIV. Having found that there was no evidence on record to establish that the appellant knew his HIV status, I find that the trial court wrongly convicted him for the offence. I will thus quash the conviction and set aside the sentence for this charge on that account.”

29. In the present case, I find that the prosecution did not prove the elements of the charge of deliberate transmission of HIV since the victim was not infected with the said virus. I therefore find that the prosecution’s evidence was incongruent with the particulars of the charge in the second count and that the conviction by the trial court was therefore unsafe.

Sentence

30. The offence of rape attracts a minimum mandatory punishment of 10 years imprisonment which may be enhanced to life while the second count warrants a minimum mandatory sentence of 15 years which may also be enhanced to life.

31. It is an established principle that sentencing is at the discretion of the trial court and that an appellate court will ordinarily not interfere with such discretion unless it is satisfied that the trial court misdirected itself. In *S vs. Malgas* 2001 (1) SACR 469 (SCA) it was held that:

“A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”

32. Similarly, in *Mokela v The State* (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

“It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy *carte blanche* to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.”

33. In *Ogolla s/o Owuor vs. Republic*, [1954] EACA 270, the predecessor of the Court of Appeal pronounced itself on this issue as follows: -

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”



34. The Court of Appeal, on its part, in *Bernard Kimani Gacheru v Republic* [2002] eKLR restated that:

“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 states is shown to exist.”

35. A perusal of the trial court’s record reveals that the said court called for the Probation Officer’s pre-sentence report which was not favourable to the Appellant. The said trial court then considered the Appellant’s mitigation and the circumstances of the case before sentencing him to 10 years’ imprisonment for the first count and 30 years for the second count.

36. I find that the sentence for the first count was just and legal considering the circumstances of the case. I therefore do not find any reason to interfere with the trial court’s exercise of discretion on the said count. I however hasten to add that the trial court should have taken into account the period spent by the Appellant in custody while awaiting his trial with a view to deducting the same from the sentence period in line with the provisions of Section 333 (2) of the Criminal Procedure Code.

37. In conclusion, I find that the instant appeal is merited, albeit in part, and I therefore allow it in the following terms: -

- a. The conviction and sentence in the first count are hereby upheld, but with a rider that the sentence shall begin to run from the date of arrest being 29th September 2022.
- b. The conviction on the second count is hereby quashed and the 30 years’ imprisonment set aside.

38. It is so ordered.

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

W. A. OKWANY

JUDGE

