



**Ahmed v Republic (Criminal Appeal E039 of 2023)
[2024] KEHC 12933 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12933 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E039 OF 2023
JN ONYIEGO, J
OCTOBER 3, 2024**

BETWEEN

ABDULLAHI MOHAMED AHMED APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence by Hon. Aganyo Rosalyn
P.M. in Wajir Sexual Offences No. E001 of 2023 delivered on 24.11.2023)*

JUDGMENT

1. The appellant herein, was charged alongside one Mohamed Abdullahi Mahamed with the offence of gang rape contrary to Section 10 of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offence were that on 16.04.2023 at around 2300hrs at Wajir West Sub County within Wajir County in association and in turns intentionally and unlawfully caused their penises to penetrate into the vagina of SHI without her consent.
2. He was also charged with an alternative charge of committing an indecent act with an adult contrary to Section 11(a) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars thereof were that on 16.04.2023 at around 2300hrs at Wajir West Sub County within Wajir County he intentionally touched the vagina of Saadia Hassan Issack with his penis against her will.
3. Upon returning a plea of not guilty, the case proceeded to full hearing. Consequently, the trial court convicted the appellant and sentenced him to 40 years' imprisonment.
4. The appellant being dissatisfied with the said conviction and sentence, preferred the instant appeal citing grounds summarized in his amended petition dated 24.06.2024 as follows:
 - i. The learned trial magistrate erred in both matters of law and facts by failing to consider that the prosecution evidence was not adequate to sustain a conviction.



- ii. The learned trial magistrate erred in both points of law and facts by failing to consider that the adduced evidence contradicted each other and hence uncorroborated.
 - iii. The learned trial magistrate erred in both matters of law and facts by failing to consider the appellant's defence.
 - iv. The learned trial magistrate erred in both matters of law and facts by shifting the burden of proof to the appellant.
 - v. The learned trial magistrate erred in both matters of law and facts by imposing a harsh sentence upon the appellant.
 - vi. The learned trial magistrate erred in both matters of law and facts by considering extraneous matters/facts that did not form part of the case.
5. Reasons wherefore, the appellant prayed that this appeal be allowed, conviction quashed and sentence set aside.
 6. It is the appellants' submission through the firm of Wanyoike and company advocates that during the trial, the prosecution adduced inadequate, contradictory and uncorroborated evidence which was below the required standard of a criminal trial. It is his case that the burden never shifted from the prosecution. Further, that the prosecution relied on the evidence of one witness which was not only faulty but also failed to support the charge herein.
 7. To support the allegation that the evidence of the single witness was not adequate to support the finding of the court, reliance was placed on the case of Abdallah Bin Wendo & Another vs Republic 20 EACA 168 where the court held that a fact may be proved by a single witness but that does not lessen the need for testing that evidence.
 8. That the medical report lacked the essential ingredients to support the charge herein as there was no evidence of lacerations, cuts or any injury suffered by the complainant from the incident. That in as much as the medical officer confirmed that there was a sexual activity, it was neither confirmed when the same happened nor was there any visibility of spermatozoa found in the complainant with the origin being the appellant.
 9. It was contended that the prosecution's evidence was adversely manipulated, inaccurate and unbelievable. That the evidence by the witnesses was contradictory in nature hence not helpful to the prosecution's case. In was further contended that the evidence by the complainant simply connoted perennial domestic squabbles between the parties which in any way is normal in married people. Counsel further asserted that the prosecution did not call material witnesses and as such, the same was prejudicial to its case. On sentence, counsel submitted that the same was manifestly excessive in the circumstances of the case. This court was therefore urged to quash the conviction and set aside the sentence by the trial court.
 10. The respondent on the other hand did not file submissions.
 11. This being a first appeal, this court has a duty to reconsider and re-evaluate the evidence tendered before the trial court a fresh in order to arrive at its own conclusion. In the case of Kiilu and Another vs R [2005] 1 KLR 174, the court of appeal stated the principles governing the hearing of first appeals to be as follows:

“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; 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"

12. Briefly, PW1, Wycliffe Nyabando, a senior clinical officer reg. no. 11993 stated that the complainant was raped as the HVS showed numerous epithelial cells and active spermatozoa. According to him, VDRL, STI's, pregnancy and H.I.V tests were done but the same were found to be negative. He stated that the presence of sperms was an indication that penetration took place and the assailant ejaculated inside the complainant. In the same breadth, a general examination depicted bruises on the neck region and a swollen left hand on the fourth digit as a result of struggles. He thus produced treatment notes, lab results, PRC form and P3 Form as evidence.
13. PW2, SHI testified that she is married to one MAM co-accused to the appellant herein. That their marriage was blessed with one child. She stated that they have been living together as husband and wife for a period of eight years and that they come from the same clan just like the appellant herein. She stated that on 18.04.2023 at around 11.00 p.m., her husband arrived home. That her husband went to where she was sleeping and held her by the neck thus choking her.
14. That the husband undressed her and thereafter the appellant herein entered their house and proceeded to rape her for a period of about one hour. It was her evidence that she identified the appellant during the ordeal using torch light shone by her husband. It was her testimony that, While the appellant was raping her, her husband held her on the ground tightly thus leaving no room for movement. That she called out for help and in response PW3 and PW4 came to her rescue. It was her case that with the help of her family, she reported the matter to the police and thereafter, she was taken to Griftu Hospital for medical care.
15. PW3, RD testified that she knew the appellant as a neighbour from home while the other accused person was her brother in law. That on 16.04.2023 at around 11.00 p.m., she heard distress calls from PW2. As a consequence, she responded to the same by going to the scene. Upon reaching there, she found PW2 crying while the appellant and her husband were leaving the house. Together with others, they took PW2 away and thereafter informed the chief of the incident after which the matter was reported to the police and thereafter, PW2 was taken to the hospital. On cross examination, she confirmed that prior to the incident happening, the appellant was at her home and only left at 8.00 p.m. That when she responded to PW2 's distress calls, she saw the appellant escape from the scene of the incident.
16. PW4, HH testified that PW3 is her sister while the husband to PW2 is her cousin. She said that she also knew the appellant herein as they come from the same clan. It was her evidence that on the material night, she was at PW3's house as she was feeling unwell. While there, they heard cries emanating from PW2's house and so, they rushed to the scene. With light shining from the torch that they carried, they were able to see the appellant as he was escaping from the scene while PW2's husband stayed put but later on also escaped. They informed the wazee and thereafter, the matter was reported to the police.
17. PW5, No. 111255 PC Juma Albert testified that he was the investigating officer and that when the matter was assigned to him, he escorted the complainant to Griftu Hospital for medical checkup and later a P3 form was filled from the same facility. He reiterated the evidence of the complainant and further stated that on 19.04.2023, together with PC Sharrif, they effected arrest against the appellant



- and later on 20.04.2023, the husband to PW2 presented himself at the station where he was equally arrested. Upon carrying out investigations, he charged the duo with the offence currently before the court.
18. On his defence, DW1, Mohamed Abdullahi in his sworn statement denied committing the offence and further stated that he was not aware of the allegations that allegedly occurred in his house on the material night.
 19. DW2, Abdullahi Mohamed in his sworn statement denied committing the offence before the court. He stated that on 14.04.2023, he met his co-accused, the husband of PW2 and his mother, who also is his aunt when they told him that PW2 had abandoned her house and thus was living with one Osman. That he called the said Osman demanding that PW2 return to her house. When he learnt that PW2 had returned home, he called his co –accused and advised him and further warned him too. While still at his aunt’s house, they heard noise coming from PW2’s house and upon rushing there, they told PW2’s husband to stop what he was doing as the night had set in and people were going to bed. The following morning, while with the elders, PW2 approached them. That it was then that they noted visible neck scratches and hand injuries. The same was reported to the police and thereafter, PW2 was taken to the hospital.
 20. I have considered the record of appeal and grounds of appeal herein. I have also considered the appellant’s submissions. Issues that emerge for determination are; whether prosecution proved its case to the required degree and whether the sentence meted out was excessive.
 21. The appellant was charged with the offence of Gang rape which is defined under Section 10 of the [Sexual Offences Act](#) as:-

“ 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.”
 22. On the other hand, rape is defined under Section 3(1) of the [Sexual Offences Act](#), 2006 in the following terms; -

A person commits the offence termed rape if –

 - a. He or she intentionally or unlawfully commits an act which causes 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.
 23. Section 2 of the Act defines penetration as:

The partial or complete insertion of the genital organs of a person into the genital organs of another.
 24. In her evidence, the complainant stated that while she was sleeping, her husband arrived home and upon going to where she was sleeping, held her by the neck thus choking her. He undressed her and thereafter the appellant who was following him closely entered their house and proceeded to rape her for a period of about one hour. The fact that the complainant was held on the ground to stay put while the sexual activity was happening and further, due to the injuries sustained by the complainant, clearly the sexual activity was not consensual.



25. On whether the complainant was penetrated, the evidence of the complainant clearly pointed to the fact that indeed she was raped. Her evidence was corroborated with the evidence of PW1 who stated that upon examining the complainant, she had bruises on the neck region and a swollen left hand on the fourth digit as a result of struggles. HVS showed numerous epithelial cells and an active spermatozoa. According to him, the presence of sperms was an indication that penetration happened and that the assailant ejaculated inside the complainant.
26. I have no doubt; the complainant was penetrated on the material day. Since the husband did not claim having had sex with the wife on the material night, the only logical conclusion is that she did not have sex voluntarily hence forceful sexual intercourse.
27. On whether the appellant was identified, the complainant stated that she identified the appellant as during the time that her husband entered their house, he was holding a torch that shone unto the face of the appellant. That the appellant raped her for a period of about one hour as her husband held her on the ground forcing her to remain put. It shows therefore that the amount of time the assailant took in raping the complainant was enough to enable positive identification. The same was buttressed by the fact that the appellant was not a stranger to her as she testified that they came from the same clan.
28. PW3 and PW4 also stated that when they arrived at the scene, they found the appellant herein escaping from pw2's house. Further, the appellant was a person well known to them as they came from the same clan. The appellant in his statement did not deny being in the location in question at the time the incident allegedly happened thus leading credence to the assertions by the complainant. [See the Court of Appeal decision in the case of Wangombe vs Republic (1980) KL].
29. In the instant case, the husband of PW2 was not only present but also enabled the complainant to be raped by the appellant herein. It was urged that the husband of PW2 having been unable to satisfy the sexual needs of the complainant, he 'hired' the services of the appellant herein. The husband of PW2 played an important role of gaining access to their house and thereafter holding the complainant to a firm position in order to be raped by the appellant.
30. It is my view therefore that the conviction of the appellant was well founded as the trial magistrate considered the facts before her and found that the prosecution had proved its case against the appellant to the required standard.
31. On the alleged contradictions, I seek to rely on the cases of *John Mutua Musyoki vs Republic, (2017) Criminal Appeal No. 11 of 2016* and Joseph Maina Mwangi vs Republic (2000) eKLR, where the court held the view that, "in any trial, there are bound to be discrepancies. An appellate court in considering these discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code whether such discrepancies are such as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence".
32. In effect, the court is under duty to consider if indeed such inconsistency, if at all, is material enough to affect the conviction. In the instant case, counsel for the appellant did not submit on the same in as much as the same was listed as a ground in the petition of appeal. As such, I find the allegation to be inconsequential.
33. On sentencing, this is within the discretion of the trial court, and an appellate court will not interfere with the exercise of such discretion unless it is demonstrated and found that the court, in exercising its discretion, acted on a wrong principle or overlooked some material factor or imposed a sentence that was manifestly excessive. In Shadrack Kipchoge Kogo vs Republic Eldoret Court of Appeal Criminal Appeal No. 253 of 2003., the Court of Appeal stated that: "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”.

34. I note that the appellant was charged under section 10 of the *Sexual Offences Act* No. 3 of 2006. The sentence therein is a term of not less than 15 years’ imprisonment, but which may be enhanced to imprisonment for life. The appellant herein was sentenced to serve 40 years’ imprisonment. However, an accused person was entitled to the least punishment provided by law unless there are a aggravating factors to justify a higher or more punitive sentence. In my view, the sentence of 40 years is excessive. In the circumstances, I find that the appropriate sentence should be 15 years being the minimum provided by law.
35. In the end, I affirm the conviction by the trial court but substitute the 40 year imprisonment with 15 years to run from the date of sentence.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF OCTOBER 2024

J. N. ONYIEGO

JUDGE

