



**Lumumba v Republic (Criminal Appeal 49 of 2023)
[2024] KEHC 12767 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12767 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 49 OF 2023
DR KAVEDZA, J
OCTOBER 24, 2024**

BETWEEN

PETER KEGODE LUMUMBA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered
by Hon. Boke (PM) on 14th December 2018 at Kibera Chief Magistrate's
Court Sexual Offences Case no. 90 of 2014 Republic vs Peter Kegode)*

JUDGMENT

1. The appellant was charged, convicted and sentenced for four counts of offences: gang rape contrary to section 10 of the *Sexual Offences Act* No. 3 of 2006 - thirty (30) years imprisonment; robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code* – twenty (20) years imprisonment; being in possession of narcotic drugs contrary to section 3(1)(b) as read with section 3(2)(b) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No. 4 of 1994 - three (3) years imprisonment and possession of public stores contrary to section 324(2) as read with section 36 of the *Penal Code* – two (2) years imprisonment. The sentences in counts I and II were to run concurrently while the sentences in counts III and IV were running consecutively with each other with counts I and II. In total, the appellant was sentenced to cumulative sentence of thirty-five (35) years imprisonment.
2. Being aggrieved, the appellant filed the present appeal challenging his conviction and sentence. He challenged the totality of the prosecution's evidence against which they were convicted. He contended that the trial court erred by relying on inadmissible evidence. In addition, the sentence meted out was unlawful since the trial court failed to consider time spent in custody. He urged the court to quash the conviction and set aside the sentence.



3. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate, and re-analyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that. (See *Okeno v Republic* [1972] EA 32).
4. The prosecution called nine (9) witnesses in support of their case. On 7th September 2014, Benson Amany (PW1) recalled that the appellant visited his home while he and his family were having a meal. When offered food, the appellant declined and warned that he would return at 4 a.m. PW1 objected, advising him to visit during the day since they would be asleep by then.
5. At midnight, loud banging at PW1's door woke him. The person outside threatened to break in, forcing PW1 to open the door. A group of seven men, including the appellant wearing a police combat jacket, stood at the entrance. The appellant demanded Kshs. 10,000, waving what appeared to be a pistol and warning that the gang would act if not paid. PW1, having only Kshs. 200, gave it to the appellant, who left him with just Kshs. 20.
6. The appellant then shoved PW1 under a bed, barricading him with basins to prevent interference. The gang proceeded to tie PW1's wife to a metal chair, the appellant undressed her and proceeded to rape her. When he was done, his friends took over and raped her in turns. Her screams alerted neighbours, causing the attackers to flee. PW1's wife sought refuge at a neighbour's house, and the next day, PW1 took her to Kwa Wanga Hospital and later to Nairobi Women's Hospital. They reported the attack to the Directorate of Criminal Investigations (DCI) office in Kibera. By 4 p.m. that same day, PW1 was informed that the appellant had been arrested.
7. PW1 was summoned to Kilimani Police Station, where he recorded a statement alongside the appellant. He mentioned knowing the appellant from around the estate before the incident. Unfortunately, PW1's wife later passed away in May 2015.
8. The appellant's mother, FMM (PW2), testified that on the night of the incident, the appellant came to her home at 8:30 p.m., crying and causing a disturbance. She initially refused to let him in but eventually allowed him inside with the help of a neighbour, Oran. The appellant mentioned a fight occurring outside but gave no further details.
9. Three days later, the appellant returned to PW2's home demanding money and threatening to break her door. After she refused, a neighbour named Haran reported that the appellant had threatened his life. PW2 sought Haran's help to escort her to church and later found the appellant asleep at her business in Toi Market. She summoned Haran and others, who took the appellant to the chief's camp and reported his disruptive behaviour to the police.
10. While at the chief's camp, PW2 saw PW1 arrive with a woman, who was limping and identified the appellant as one of the attackers. PW2 was later summoned to Kilimani Police Station to record a statement.
11. Constable Daniel Muragari (PW3) from the Kibera DCI office confirmed that the appellant was handed over to the police on 7th September 2014 by members of the public for threatening his mother. A search on the appellant revealed six rolls of suspected cannabis, and the arresting officers found a combat jacket with him. PW3 noted that a report of a gang rape had been filed the previous night, and the complainant had identified the appellant as one of the attackers.
12. Sgt. Isaac Murogo (PW4) confirmed PW3's testimony, stating that he helped transfer the appellant to Kilimani Police Station. Nurse Irene Onyango (PW5) submitted a post-rape care report from their



- clinic, where the victim, Phoebe Asiyu, had been treated. Her injuries, including bruises and a whitish discharge, corroborated her rape account.
13. Dr Joseph Maundu (PW6) from Nairobi Police Surgery examined the complainant on 8th September 2014, documenting injuries to her ankle and confirming prior treatment at MSF Kibera. He also examined the appellant, who had no visible injuries.
 14. Government analyst Henry Kiptoo Sang (PW7) performed DNA analysis, concluding that the seminal stains on the victim's clothing matched the appellant's DNA. Additionally, analyst James Michael Welimo (PW8) confirmed that the six recovered rolls contained cannabis.
 15. Investigating Officer Robina Oiye (PW9) confirmed that the appellant denied ever serving in the police force. Her investigation included preparing an exhibit memo and collecting blood samples from the appellant for DNA testing. The appellant was eventually re-arrested and taken to Kilimani Police Station, where charges were filed.
 16. In his defence, the appellant claimed his mother accused him because of conflicts with his stepfather, who mistreated him. On 4th September 2014, after returning from mechanical training, he confronted the stepfather, angering his mother. On 7th September 2014, he visited her workplace at Toi Market to assist her. Still upset, she called his brother Duncan, a police officer, and Harun Otieno. They took the matter to the DC's office, where his mother and stepfather had a private conversation with PW3 and PW4. Afterward, the appellant and his brother were handcuffed and taken to Kilimani Police Station, though Duncan was later released.
 17. After a full trial, the appellants were convicted accordingly. The appeal was canvassed by way of written submissions by the parties which have been duly considered and there is no need to rehash them.
 18. For the offence charged in count I, 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.
 19. 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.”



20. Rape is defined under section 3 of the *Sexual Offences Act* to mean, the intentional and unlawful penetration of a person's genital organ into another's genital organ without their consent. In *R v Oyier* [1985] KLR pg 353, the Court of Appeal held as follows: -

“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. 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. 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.”

21. PW1 recounted a harrowing ordeal where the appellant in the appellant in the company of other assailants not before court stormed his house and raped his wife in his presence. He described the ordeal as the assailants shoved him under the bed and raped his wife in turns. Her screams alerted neighbours making the attackers flee. At the time of the hearing of the case, PW1's wife was deceased and was not available to testify. Her witness statement was produced as a prosecution exhibit PEX13 and admitted into evidence.
22. She described how, while the appellant among other attacked stormed their house undressed her and raped her in turns. After the incident, she sought refuge at a neighbours house. She was taken to hospital the next day. A medical report confirmed bruising and a whitish discharge, consistent with rape (PW5). On 8th September, Dr. Joseph Maundu (PW6) also documented her injuries. DNA analysis by Henry Kiptoo Sang (PW7) matched seminal stains from her clothes with the appellant's DNA.
23. The victim now deceased also identified him as one of the attackers at the chief's camp.
24. Accordingly, the prosecution proved that there was intentional and unlawful penetration of the victim's genital organs, without her consent.
25. On identification of the appellant, PW1 who was present during the ordeal identified the appellant after he was arrested. In addition, he recognized him having previously interacted with him the previous night. There was therefore no margin for error or mistaken identity. The appellant's conviction for the offence of gang rape is therefore affirmed.
26. In count II, the appellant was charged with for the offence of robbery with violence. The key ingredients for a robbery with violence charge are found in section 296(2) of the *Penal Code*. It provides as follows-

“if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death”.

27. As regard the offence of robbery with violence, the issues for consideration by this court are whether the appellant was positively identified and whether the prosecution did prove its case beyond reasonable doubt. The evidence on record does prove that the PW1 and his wife were attacked at their home by the appellant and other assailants.



28. During the attack, the assailants were armed with a pistol and demanded Kshs. 10,000 threatening that the gang would take violent action if not paid. PW1, fearing for his safety, gave the appellant Kshs. 200, the only money he had at the time. The appellant forcefully shoved PW1 under a bed and barricaded him with basins to prevent interference. The assailants then tied up PW1's wife and raped her. The presence of multiple assailants, armed threats, and actual violence formed the basis of the robbery with violence charge.
29. As already stated, the appellant identified the appellant as one of the assailants. He also witnessed the incident which took place for a considerable amount of time before his wife raised an alarm. In his defence, the appellant did not talk about the incident at all.
30. From the material placed before the court, PW 1 was very clear on the facts of the incident, and his evidence was not shaken on cross-examination. It is my considered view that the appellant was properly and positively identified and apprehended after the incident. I find the testimony of the prosecution's witnesses to be reliable direct evidence of visual identification against the appellant.
31. For consideration is whether force was used to rob the victim. It was the testimony of prosecution witnesses that the appellant was armed with a pistol. This was used to threaten PW1 and later used to physically assault him and sexually assault his wife and as a result they were robbed. The use of violence was therefore present. This court is satisfied that the prosecution proved that the appellants robbed and used actual violence to harm the complainant. Their conviction on count II for the offence of robbery with violence was therefore safe and is affirmed.
32. In count III, the appellant was charged with being in possession of narcotic drugs contrary to section 3(1)(b) as read with section 3(2)(b) of the [Narcotic Drugs and Psychotropic Substances \(Control\) Act No. 4 of 1994](#). It was the prosecution's case that the appellant was found in possession of cannabis. Arrest and Search: On 7th September 2014, Constable Daniel Muragari (PW3) testified that members of the public handed over the appellant to the police, alleging he had threatened his mother's life. During the search, PW3 found six rolls of a substance suspected to be cannabis on the appellant. PW8, a government analyst, testified that he examined the six rolls and confirmed they contained cannabis, a narcotic drug. He prepared a report, which was submitted to the court as evidence.
33. This evidence establishes the appellant's unlawful possession of a narcotic substance, supporting the charge against him. It is my finding that the prosecution proved the charge in count III beyond reasonable doubt. The conviction thereto was safe and is affirmed.
34. In count IV, the appellant was charged with possession of public stores contrary to section 324(2) as read with section 36 of the [Penal Code](#). The evidence against the appellant was provided by PW3, who testified that the appellant was arrested while wearing a police combat jacket. This testimony was corroborated by PW4, who confirmed that the jacket was identified as government property, and the appellant, not being a police officer or authorised personnel, was unlawfully in possession of it.
35. However, the trial court's record indicates that the prosecution did not establish the specific security features that would authenticate the jacket as official police gear. The identification of such security features is essential in proving that the item in question belongs to public stores and is not a counterfeit or civilian imitation. Without clear identification of these features, the prosecution's case is weakened, as it fails to demonstrate beyond reasonable doubt that the jacket in the appellant's possession was indeed public property and subject to restricted access under the law.
36. It is my view that the offence charged in count IV was not proved beyond reasonable doubt. The appellant's conviction in the said count is therefore unsafe and is set aside.



37. The appellant was sentenced as follows: 30 years' imprisonment for gang rape (Count I), 20 years for robbery with violence (Count II), 3 years for possession of narcotic drugs (Count III), and 2 years for possession of public stores (Count IV). The sentences for Counts I and II were to run concurrently, while the sentences for Counts III and IV were to run consecutively with each other and with Counts I and II. In total, the appellant received a cumulative sentence of 35 years' imprisonment.
38. During sentencing, the trial court considered the mitigation and that he was a first offender.
39. The offences in Counts I and II involved aggravating circumstances. The victim was gang-raped in the presence of her husband, violating her right to human dignity as guaranteed under Article 28 of the Constitution. She was observed having difficulty walking the following day. The appellant displayed no remorse throughout the trial. Thus, the sentences for Counts I and II are appropriate given the circumstances.
40. The sentence for Count III is also justified, aligning with the provisions of the Narcotic Drugs and Psychotropic Substances (Control) Act, No. 4 of 1994.
41. It noteworthy, that during sentencing, the trial court failed to consider the time spent in remand custody. Guided by the law, the court is of the view that the period ought to be specifically noted, as failure to do so would amount to denying the applicant a right due to the failure of the court to discharge an obligation bestowed upon it by law (See Ahmed Abolfathi Mohamed v Republic [2018] eKLR)
42. The upshot of the above is that the appeal is partially succeeds and hereby orders as follows:
 - I. The appeal against conviction and sentence in Counts I, II and III fails and is dismissed.
 - II. The appeal against conviction and sentence in Count IV is allowed and the sentence imposed by the trial court is set aside.
 - III. The sentence imposed in Count I and II shall concurrently while the sentence imposed in Count III shall run consecutively with the sentence imposed in Counts I and III.
 - IV. The appellant shall serve a cumulative sentence of thirty-three (33) years which shall run from 7th September 2014 the date of the appellant's arrest pursuant to section 333(2) of the Criminal Procedure Code, Cap 75 Laws of Kenya.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 24TH DAY OF OCTOBER 2024

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D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Ms. Maina h/b for Ms. Omurokha for the Respondent

Achode Court Assistant

