



REPUBLIC OF KENYA



**Shikoli v Republic (Criminal Appeal 56 of 2019)
[2023] KEHC 1026 (KLR) (15 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1026 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL 56 OF 2019
JWW MONG'ARE, J
FEBRUARY 15, 2023**

BETWEEN

DAVID SHIKOLI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of gang rape contrary to Section 10 of the [sexual offences act](#). The particulars of the offence were that on the December 23, 019 at [Particulars withheld] village, in Eldoret West Sub County within Uasin Gishu County, in association with another not before the court, alternately, intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of DA without her consent.
2. The Appellant pleaded not guilty and the matter proceeded to full trial. The prosecution called eight witnesses and the Appellant was placed on his defence. Upon considering the testimonies of the witnesses and the evidence adduced in court, the trial magistrate convicted him of the offence of gang rape and sentenced him to 20 years imprisonment.
3. The Appellant being dissatisfied with the conviction and sentence of the trial magistrate, the Appellant instituted this appeal vide a petition filed on April 9, 2019. The appeal is premised on the following grounds;
 1. That (I) pleaded not guilty to the charges.
 2. That the trial magistrate erred by convicting (me) on uncorroborated prosecution evidence.
 3. That the trial magistrate erred by convicting (me) on evidence not proved beyond reasonable doubt.
 4. That the trial magistrate erred in law and facts by convicting (me) on insufficient evidence.



5. That the learned magistrate erred in law by convicting (me) on flimsily and unreliable witnesses of the prosecution.
6. That the learned magistrate erred in discarding the Appellant's plausible defence.

The parties filed submissions on the appeal.

Appellant's case

4. The Appellant submitted that the prosecution did not prove its case beyond reasonable doubt. He contended that the evidence of PW1, the complainant, was inconsistent as she initially testified that she was attacked by one person but changed it to two people during cross-examination. He further submitted that the trial court erred in relying on the evidence of a single witness when convicting him. The Appellant faulted the medical report and stated that the medical officer had failed to conduct a conclusive report.
5. The Appellant submitted that the charge sheet was defective as the complainant had alleged to have been raped by the Appellant whereas the charge sheet contained a charge of gang rape. He argued that since he was alone, section 4 of the *sexual offences act* would have been the correct charge on the charge sheet. Further, it was his case that the trial court failed to consider his alibi defence which he considered an error.
6. The Appellant submitted that the charge was excessive and the trial court erred in failing to consider the time spent in remand as required by section 333(2) of the *Criminal Procedure Code*. The Appellant sought to have his appeal allowed.

Respondent's Case

7. In opposition to the appeal, learned counsel for the Respondent submitted that the charge sheet was not defective as it clearly stated the offence the Appellant had been charged with which is known in law. The Appellant was able to understand the charge he was facing and offered a proper defence.
8. Learned counsel stated that the offence was proved to the required standard as the evidence of the complainant was corroborated by PW1, the clinical officer who examined her and produced the P3 form as evidence.
9. Further, that the complainant was clear in that she did not consent to sexual intercourse with the Appellant and his accomplice.
10. It is the Respondent's case that identification was by recognition therefore there was no possibility of mistaken identity. Learned counsel stated that the alibi defence was an afterthought as it was raised at the tail end of the trial and the trial court was correct in disregarding the same. She urged that the offence was proved to the required standard and that the sentence imposed was sufficient. She asked the court to dismiss the appeal for lack of merit.

Analysis and determination

11. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. See *Okeno v Republic* [1973] EA 32; *Pandya v R* (1957) EA 336, *Ruwala v R* (1957) EA 570.
12. Upon considering the petition of appeal and the submissions of the parties, the following issues emerge for determination;



1. Whether the charge sheet was defective
2. Whether the prosecution proved its case to the required standard
3. Whether the sentence was harsh/excessive

Whether the charge sheet was defective

13. Section 134 of the *Criminal Procedure Code* provides;

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

14. It was held in *Sigilani v Republic*, (2004) 2 KLR, 480 that:

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.”

15. I have considered the record of appeal and the contents of the charge sheet and it reveals that it communicates the offence he was charged in a clear manner. Whether he committed the offence alone or with another person is an issue which was to be proved in court. I find that the charge sheet was not defective.

Whether the prosecution proved its case to the required standard

16. Under Section 10 of the *Sexual Offences Act*, for the Prosecution to obtain a guilty verdict in the offence of gang rape, it needs to prove the following four elements:
- a. Commission of rape; Penetration as defined by section 2 of the *Sexual offences act* without consent thereof;
 - b. In association with another or others, or any other with common intention, is in the company of another or others who commit the offence of rape
 - c. Positive identification of the perpetrator.

Whether penetration was proved

17. The complainant testified that the appellant raped her, evidence which was corroborated by PW1, the clinical officer who examined her. He examined her and filled out the P3 form conclusively determining that the complainant had been raped. The ingredient of penetration was proved beyond reasonable doubt. Further, the complainant testified that she had not consented to the act.

Identification

18. Identification was by way of recognition and was therefore conclusive in the circumstances. The complainant identified the perpetrators and further identified them to PW3 and PW4 who also knew them. Section 124 of the *evidence act* allows the court to take into account the evidence of a single identifying witness and therefore the trial court did not err in considering the evidence on identification by the complainant.



Whether the appellant was in the company of others

19. As per the provisions of section 124 of the evidence act, the trial court relied on the evidence of a single witness on the identification of the perpetrators. As I have found that the same was not erroneous, it follows that the identification of two perpetrators by the complainant was correctly considered and proved.

Whether the trial court failed to consider the alibi evidence

20. In *R vs Sukha Singh s/o Wazir Singh & Others* [1939] 6 EACA 145, the former Court of Appeal for Eastern Africa upheld a decision of the High Court in which it was stated: -

“If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped”.

21. Upon perusing the record of appeal, it is evident that the appellant raised the defence of alibi at a late stage of the case and therefore the same was an afterthought. I concur with the finding of the trial court that the same was not credible and hold that the trial court was correct to disregard it.

Whether the sentence was harsh/excessive

22. The petition of appeal does not disclose the ground upon which the appellant appeals the sentence despite the appeal being against the conviction and sentence. However, I shall consider the appeal against the conviction nonetheless. Section 10 of the Sexual Offences Act provides: -

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.

23. In my considered view, I find that the trial magistrate correctly assessed the circumstances of the case and the impact on the victim in determining the sentence to mete out. In the premises, I find no reason to interfere with the sentence. The conviction and sentence are hereby upheld and shall run from December 27, 2017 as per the requirements of section 333(2) of the Criminal Procedure Code. It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 15TH DAY OF FEBRUARY 2023

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J.W.W.MONGARE

JUDGE

Judgment delivered virtually in the presence of;

Appellant is Present

Ms. Sakari holding brief for Ms okok- Prosecution Counsel



Loyanae- Court Assistant.

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J.W.W.MONGARE

JUDGE

