



Onyango & another v Republic (Criminal Appeal E122 of 2022 & Criminal Appeal (Application) E123 of 2022 (Consolidated)) [2023] KEHC 3373 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3373 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E122 OF 2022 & CRIMINAL APPEAL
(APPLICATION) E123 OF 2022 (CONSOLIDATED)**

RPV WENDOH, J

APRIL 20, 2023

BETWEEN

HARISON OCHIENG ONYANGO 1ST APPELLANT

EVANCE OKINYI NYAGABE 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(From original conviction and sentence by Hon. P. N. Areri Principal Magistrate in Migori Chief Magistrate's Criminal Case No. E285 OF 2022 delivered on 21/11/2022)

JUDGMENT

1. This is an appeal by Harison Ochieng Onyango and Evance Okinyi Nyagabe (1st and 2nd Appellants) against the judgment of Hon Principal Magistrate, Migori which was delivered on 21 /11/2022.
2. The appellants were jointly charged with two charges of robbery with violence contrary to Section 296 (2) of the Penal Code. They are alleged to have robbed Enid Okach and Everlyne Muhonja of properties listed in the charge sheet. They were also charged with the offence of gang rape contrary to Section 10 of the *Sexual Offences Act* in that on the same night, they defiled a child R.A. In the alternative, they were charged with the offence of committing an indecent Act with a child contrary to Section 11 (1) of the *Sexual Offences Act* in that they caused their genital organs to come into contact with the child's genitalia.
3. The prosecution called a total of seven (7) witnesses. When called upon to defend themselves, the appellants gave sworn testimonies and the 2nd appellant called one witness in support of his case. On Count I the 1st appellant was convicted of handing stolen goods contrary to Section 322 (1) of the Penal Code. He was acquitted of Count II, and Count III. The 2nd Appellant was convicted of Count



1 and 2 and was also convicted on Count III for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. On Count 1 and II the 2nd Appellant was sentenced to death. On Count III the 2nd Appellant was sentenced to 20 years imprisonment. The 1st appellant was sentenced to seven years imprisonment.

4. The appellants are aggrieved by the judgement of the trial court and preferred Criminal Appeal No. E 122 of 2022 Evans Okinyi vs. Republic and E 123 of 2022 Harrison Ochieng vs. Republic which were consolidated to proceed as Criminal Appeal 122 of 2022. The grounds of appeal as consolidated are as follows:-
 1. That the charge sheet was defective because it was not stamped and signed by the prosecutor and that the date was not indicated save for 5th April;
 2. That the identification parade Forms were not signed by the officer who conducted the parade;
 3. That substitution of the charge sheet just before judgment was unconstitutional and violated Article 50(2) (j) and (k);
 4. That the offences of robbery with violence and gang rape were not proved to the required standard.
5. The appellants therefore pray that the convictions be quashed and sentences be set aside and that they should be set at liberty forthwith.
6. This being a first appeal, it behoves this court to re-examine all the evidence tendered in the trial court, analyse it and arrive at its own conclusions. This court is mindful of the fact that it neither saw nor heard the witnesses testify, See Okeno vs. Republic (1972)EA 32.

Prosecution case

7. On the night of 5/4/2022, PW2 Enid Okatch was in her house at Stella, together with PW1 Evaline Muhonja, her house girl, and three (3) of PW1's children namely B. A aged 12 years; B. A. aged fifteen years and a baby by name T.
8. They went to sleep at about 10:00p.m. They were suddenly woken up by intruders at about 2:00a.m to 4:00 a.m
9. PW1 was asleep in the same room with PW4 while PW2 slept in her room with PW3 and the baby. PW1 said that all the lights had been switched off. The person who entered their room demanded money and she gave him Kshs. 4,800/= which was her salary and her phone Intel; that the person was armed with a panga which he banged on PW2's door. PW1 and PW3 were removed from their room and taken to PW2's room where they were ordered to lie down and remain quiet; that the person started to demand for Kshs. 100,000/= from PW2 which she denied having. He also demanded for a gun which PW2 denied having. PW2 offered him the car but he declined. He threatened to take away one child. After demanding to know the ages of the girls, they took away PW4 and from there PW1, PW2 and PW3 heard PW4 screaming. PW1 was not able to see the face of the person who came to their room save that he wanted to defile her but she told him she was suffering from Blood pressure. PW1 stated that she could not confirm how many people attacked them but she heard other voices from the sitting room instructing the one to guard them well. They remained at that position till about dawn when they realized that the robbers had left and they went to seek help. They later realized that the people had stolen a TV, hoofer, radio, bicycle, shoes, clothing, money and cell phones. PW2 reiterated what PW1 told the court and added that her phone that was stolen was infinix and she was not able to see any of the robbers. She identified the photographs that were taken of the scene.



10. PW3 reiterated how they were attacked but she was not able to identify any of the robbers.
11. On her part, PW4 told the court that after they were woken up by the robbers, they took her with PW1 from their bedroom, to PW2's room. They made demands for money and when her mother (PW2) could not give them cash, one of the robbers took her back to her bedroom, asked her where money was and when she denied knowing, he got angry, threw her down, stepped on her then ordered her to remove her clothes, put his genitalia into hers and defiled her. When she screamed, the person threatened to kill her. After he finished defiling her, he switched on the electric lights. She was also able to see two other persons who were in the sitting room disconnecting the television because the lights were on. She was taken back to the mother's bedroom. After the robbers left, she was taken to hospital for examination and a report made to police the next day.
12. PW5 Rogers Ragot testified that on 9/4/2022, he went to repair his phone but the phone was found to be expensive to repair and was referred to a young man who told him that his friend had a phone for sale. The person called the friend and both of them went to Salah Bakery. They met the friend with the mobiles, a Samsung and itel in make. He chose the Samsung but he had a deficit of Kshs. 600/= . The person accompanied him to get the balance and the brother sent money on his phone which he sent to the person's phone in batches of Kshs. 100/= . The recipient of the money was Evans and he was given the phone. He went back to school and police went there and demanded for the phone which they said had been stolen. He disclosed that he bought it from Evans, the 2nd Appellant. PW5 identified the first appellant as the person whom he found at the bakery. He went back to school and was later called to attend an identification parade where he identified both appellants. PW5 identified the Mpesa statement (EXNO. 7) through which he paid Kshs. 600/= to the 2nd Appellant. He said that the 2nd Appellant gave him the charger and asked him to call him if ever the phone had a problem.
13. PW6 Peninah, a clinical Officer at Awendo Sub County Hospital recalled examining the complainant (PW4) on 6/5/2022. PW6 found some bruises on her outer labia, vagina walls were bruised, hymen was perforated. PW5 filled the P3 Form and PRC forms.
14. PW7 PC Victor Nyandimo of Uriri police station received a report of robbery and defilement and he commenced investigations. He recalled that among the items stolen were Samsung and Itel phones. He visited the scene, took photographs. Through the DCI, he was able to trace the Samsung phone at Bware Area; that the line being used on the phone was said to be one of Rogers Ragot (PW5). They arrested PW5 from school and he led to where the phone was recovered. PW7 then produced the Mpesa statement in which Evans Nyagabe was paid 600/= and that led to the arrest of the 2nd appellant who upon interrogation named the first appellant as the person who sold the phone; that (PW5) Rogers identified the appellants on a parade. He produced the Samsung phone as PEXNO.5. He produced the identification parade Forms.
15. In his sworn defence, the first appellant (DW1) stated that on 9/4/2022, he met the 2nd Appellant who told him he had a phone to sell and since his son wanted to buy a phone, he gave it to the son but the son did not like it. Before he returned it to the 2nd Appellant, he called and asked if the 1st Appellant would go for it because he had a client; that the 2nd appellant came for the phone with a young man (PW5) and he gave it to them. He was later arrested for allegedly selling the phone.
16. The 2nd appellant, Evans Okinyi stated on oath that on 8/4/2022, the 1st appellant went to his shop with phones which he wanted to sell but he was not interested in buying and he left his contact; that on 9/4/2020, Rogers (PW5) went to his shop to repair a phone but when it could not work and as PW5 wanted a phone, DW2 took him to the 1st appellant's home where they found him with two phones itel and Samsung and he said that the price was Kshs. 5,000/=; and that PW5 paid him 4,400/= and



then PW4 sent DW2 the balance of Kshs.600 on his phone; that when arrested on 27/4/2022 and asked who sold the phone to PW5, he named Ali, 1st Appellant; that PW5 identified the 1st appellant on the parade at Uriri.

17. DW3, Peter Odhiambo, told the court that he works with the 2nd Appellant. He knows the appellants as very good friends who are always together. He recalled that PW4 went to their shop to repair his phone and when they could not repair it, he was referred to the 1st Appellant and that later, 600/= was sent to the 2nd Appellant as labour. He did not see the phone that was allegedly sold.
18. Having considered the grounds of appeal and the evidence tendered, the issues for consideration are:-
 1. Whether the charge was defective ;
 2. Whether the offence of defilement was proved;
 3. Whether the offence of robbery with violence was proved;
 4. Whether the sentences are harsh and excessive.
19. The appellants were arraigned before court on 25/5/2022. The charge sheet was duly stamped by the OCS Uriri Police Station, and the office of the ODPP. The charge was further amended on 19/9/2022. The new charge included a new charge. The said charge was signed by the magistrate but not stamped or signed by the OCS or ODPP. I also note that the date had not been properly indicated but on 2nd count, it was amended to indicate the year as 2022. The question is whether the charge is invalidated by the mere fact that the ODPP and OCS did not sign the charge. Section 134 of the Criminal Procedure Code provides the ingredients necessary in a charge sheet. In Isaac Omambia vs. Republic (1995) eKLR the court discussed the said ingredients when it said as follows:-

“In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: 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.”

20. The Court of Appeal in Peter Ngure Mwangi =vs= Republic (2014) eKLR

“A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in Yongo v R, [198] eKLR that:

“In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:

- (i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,
- (ii) when for such reason it does not accord with the evidence given at the trial.”



21. The Court of Appeal in Peter Saban Laitin vs. Republic, Criminal Appeal 483 of 2007 went to add that the defect should be such that it is prejudicial to the appellant. The court said:-

“The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant.”

22. In this case, the appellant’s contention is that the amended charge was not signed or stamped by the ODPP and OCS. As regards the date, the year the offence was committed had been omitted but was amended. In any event this case was already partly heard and witnesses had testified to the date when the offence was allegedly committed when it was amended. The first charge was proper. Section 382 of the Criminal Procedure Code sets out defects that will not render the charge defective. The Section provides as follows:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

23. In the case at hand, the first charge sheet had been duly stamped. A mere stamp and signature were missing from the substituted charge sheet that could not render a charge invalid since the charge sheet contained the particulars that disclosed the offence that the appellants faced. That ground fails.

24. The appellants also complained of the parade forms produced by the investigating officer. In my view the parade forms were not properly produced. The Court was not informed why the officer who conducted the parade did not produce them in court. The officer needed to inform the court whether he complied with Police Force Standing Orders during the conduct of the parade. The Forms were of no consequence and did not add any value to the prosecution case.

Whether the offence of defilement was proved:

25. To prove an offence of defilement, the prosecution must prove the existence of the following:-

1. Proof of Age of the complainant;
2. Proof of penetration;
3. Proof of identity of the perpetrator.

26. BAO (PW4) told the court that she was fifteen (15) years at the time of the offence and was in Form 1 by then. PW6 also estimated the age of the complainant (PW4) to be fifteen (15) years.



27. In the case of Francis Omuroni vs. Uganda Court of Appeal No. 2 of 2000, the Court said :-

A part from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

28. The above case was quoted with approval in Joseph Kieti Seet vs. Republic (2014) eKLR. In this case, only the complainant and her sister PW3 confirmed that PW4 was fifteen (15) years. The same was corroborated by the medical officer (PW6) who examined the complainant and estimated her age to be fifteen (15) years. The complainant was a minor aged fifteen (15) years.

29. On penetration, PW4 clearly narrated what was done to her. The man who took her to her room undressed her and inserted his genital organs into hers. PW1, PW2 and PW3 heard PW4 scream once she was taken away. PW4 was examined by PW6 on 5/4/2022, the next morning, and she found that PW4 had suffered bruises to her labia, vagina walls and a perforated hymen. PW6 also confirmed that spermatozoa were present in the vaginal swab though it was not determined the source of the spermatozoa. The injuries and presence of spermatozoa were evidence that PW4 had taken part in a recent sexual act. There is therefore overwhelming evidence that PW4 was defiled. The 2nd Appellant complained that no DNA was done to establish the culprit. This issue of DNA was discussed in the case of Kassim Ali Vs. Republic (2006) eKLR where the court held:-

..... The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

30. The offence of Defilement is not necessarily proved through DNA or medical evidence.

Whether the 2nd Appellant was the perpetrator

31. PW4 was defiled at night. The complainants were woken up from their sleep at about 3:00a.m to 4:00a.m. Save for PW4, None of the other witnesses were able to identify any of the robbers. It is only PW4 who said she saw the 2nd Appellant as the person who defiled her because he switched on lights in the room where she was defiled. Section 143 of the [Evidence Act](#) provides that a fact may be proved by the evidence of a single witness unless a particular statute requires otherwise. Generally, the law is that evidence of a single identifying witness in unfavourable conditions should be treated with the greatest care. In the case of Abdallah bin Wendo & Another vs. Republic (1953) 20 EACA 166, at page 167, the court said:-

Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but the rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification; especially when it is known that the conditions favouring a correct identification were difficult".

32. In this case, the court warned itself of relying on the evidence of PW4 on identification by citing the case of Harrison Abdallah Mohammed vs. Republic (2017) eKLR and Wamunga vs. Republic (1989) KLR 424 where the court said:-

"Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."



33. The trial magistrate considered the provisions of Section 124 of the *Evidence Act* which provides that in sexual offences, corroboration is not mandatory and the court can rely on the unsworn evidence of the victim provided that the court records the reasons why it believes the said witness. In this case, PW4 told the court that after defiling her, the 2nd appellant switched on the electric lights in the room and that he also saw him in the sitting room where lights had been switched on to facilitate the removal of the Television. The court observed that the 2nd Appellant did not controvert PW4's testimony but that instead, the appellant kept smiling as PW4 testified. The court having observed the demeanour of PW4, and believed her evidence that she ably identified the appellant as the perpetrator, I have no reason to interfere with the said findings of facts by the trial court, I find PW4 identified the 2nd appellant as one of the robbers and the one who defiled her.

Whether the offence of Robbery with violence was proved:

34. In *Oluoch vs. Republic (1985) KLR*, the Court of Appeal identified the ingredients that form the said offence of Robbery with violence:-
- (a) The offender is armed with any dangerous and offensive weapon or instrument; or
 - (b) The offender is in company with one or more persons or
 - (c) At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes, or uses other personal violence to any person.
35. The courts have also held that the three ingredients are to be read not conjunctively but disjunctively. See *Dimo Dege vs. Republic Criminal Appeal 300 of 2007*. It means that one need not prove that all the ingredients exist. It is sufficient proof if one of the ingredients exists.
36. There is overwhelming evidence that PW2's household were visited by unwelcome visitors who harassed them on the night of 5/4/2022. PW1 and PW2 told the court that the person who first entered the room was armed with a panga. PW4 told the court that the person took her to her bedroom, her face, stepped on her and ultimately defiled her. The people then carried away a TV, radio, mobile phones and money. Although PW1, and PW2 did not see the other robbers, they could hear voices from the sitting room. PW4 saw two more robbers in the sitting room. All the three ingredients were proved.
37. The next question is whether the appellants properly identified as the robbers.
38. The 1st appellant was convicted for the offence of handling stolen property contrary to Section 322 (1) of the Penal Code. The appellants were arrested after they allegedly sold a Samsung phone to PW5. The phone was recovered from PW5 and because of the payment made by PW5 through Mpesa, to the 2nd Appellant he was first arrested and he in turn identified the 1st Appellant as the owner of the phone.
39. The charge indicates that PW1's ITEL phone and PW2's Samsung phones were among the things stolen during the robbery. However, in her testimony PW2 told the court that her phone that was stolen was an 'infinix' in make. The phone that was sold to PW5 was a 'Samsung'. It was produced in evidence as PEXNO.5. However, to this court's shock and surprise, the said phone was never shown to PW2 or any of the other witnesses to confirm whether it is the one stolen from PW2. PW2 never positively identified the said exhibit as her phone. In any event, an infinix phone is very different from a Samsung. And nowhere in the proceedings did the prosecutor attempt to amend the charge or clarify the description given by PW2. I believe PW1, PW3 and PW4 would, have shed light on the make of the phone had they been asked to.



40. Ordinarily, a phone will be easily identified from the IMEI number. In this case, the prosecutor never led any evidence to identify the phone that was recovered. The recovered phone should have been positively identified as the one stolen from PW2. The phone was later released to the PW2 though what was stolen was infinix. From their defence, both the Appellants did not lay any claim to the said phone. Even if it was the phone stolen from PW2, yet there was no evidence connecting PW2 to the phone that was recovered in PW5's possession.
41. There is no doubt that the phone produced in court was found with PW5. PW5 had bought it and both the appellants admitted that fact. They each blamed each other, that the other was the owner of the phone. Despite the fact that the said phone was in their possession, yet as observed above, it was not positively identified as the one that PW2 lost during the robbery.
42. The above notwithstanding, PW5 said that the appellants had another ITEL phone. DW3 told the court that the two appellants are very close friends and were always together. I have found earlier that PW4 positively identified the 2nd appellant as the person who defiled her because of electricity lights in the room. I am satisfied that he was placed at the scene of the robbery. He is one of the robbers who were at the complainant's home on the fateful night. The prosecution may have messed up on the identification of PW2's phone but the fact remains that the 2nd Appellant was placed at the scene of crime. Since the phone was not positively identified by PW2, this court finds that the trial court erred in finding that the 1st appellant who was not identified at the scene of crime, was guilty of handling stolen property.
43. From the defence case, it is clear that the appellants came into possession of the phone in an unlawful manner. It could have been stolen from elsewhere. That is why they blamed each other as for owning the phone. For that reason I would find the 1st appellant guilty of being in possession of suspected stolen property contrary to Section 323 of the Penal Code. I hereby quash the conviction on the charge of handling stolen property contrary to Section 322 (1) and (2) of the Penal Code and substitute it with the offence of possession of suspected stolen property contrary to Section 323 of the Penal Code.
44. As regards the 2nd appellant, I find that the conviction on both counts was well founded. Even if the recovered phone was not the complainant's, the 2nd appellant took part in the robbery at PW2's house and defiled PW4. The convictions were well founded. I confirm it.
45. The first appellant had been sentenced to seven years imprisonment. I hereby reduce the sentence to three years imprisonment and sentence will commence on the date he was sentenced. As for the 2nd Appellant, the first charge carries a death sentence and the court will not interfere. As for Count II, the complainant was aged fifteen (15) years and 2nd appellant was sentenced to serve twenty (20) years. The sentence is provided under Section 8(3) of the *Sexual Offences Act*.
- A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."
46. The 2nd appellant was given the minimum sentence on the said charge.
47. In the circumstances, I hereby hold the sentence in Count III in abeyance. The appeal partially succeeds in respect of the 1st appellant. As for the 2nd appellant, the appeal stands dismissed.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 20TH DAY OF APRIL, 2023.

R. WENDOH

JUDGE



In presence of ;-

Ms. Kosgei for State

Appellants (1st and 2nd) present in person

Ms. Nyauke –Court Assistant

