



REPUBLIC OF KENYA



KENYA LAW
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**Omondi v Republic (Criminal Appeal E014 of 2024)
[2024] KEHC 16322 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16322 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E014 OF 2024
DR KAVEDZA, J
DECEMBER 17, 2024**

BETWEEN

PAUL JOSHUA OMONDI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered by
Hon. Temu (SPM) on 6th March 2024 at Kibera Chief Magistrate's Court
Sexual Offences Case no. E126 of 2023 Republic v Paul Joshua Omondi)*

JUDGMENT

1. The appellant was charged and convicted on three counts of offences: Count I, gang rape contrary to section 10 of the *Sexual Offences Act* No. 3 of 2006, and counts II and III, robbery with violence contrary to section 295 as read with 296(2) of the *Penal Code*. He was sentenced to serve thirty (30) years imprisonment for Count I and twenty (20) years imprisonment for both Count II and Count III. The sentences were set to run concurrently.
2. Aggrieved, he filed the present appeal, he challenged the totality of the prosecution's case. He complained that the trial court failed to consider his defence. He urged the court to quash his conviction and set aside the sentence imposed.
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 four (4) witnesses. PW1, L.N., the complainant and a Rwandan citizen, testified that on 29th November 2023, while returning home from prayers with a man named [particulars withheld], they encountered two men, one being the appellant. The appellant held a knife



- to her side and dragged her towards a nearby bush adjacent to Jamhuri Police Station, while the second man restrained [particulars withheld] and brandished a knife.
5. She pleaded with the appellant to treat her carefully due to her pregnancy, but he refused. He ordered her to take off a kitenge she had and spread it on the ground. He then forcefully had sex with her twice, both with and without a condom. He had a knife to her throat throughout the whole incident. The appellant stole her phone and Kshs. 200, while the other man took another phone but returned her SIM card.
 6. After the incident, they were released, and [particulars withheld] advised her to report the matter to the police. The police referred her to Nairobi Women's Hospital, where she received medication. She also visited Kawangware Hospital, where both facilities confirmed she had no infection. On her way back to the police station, she identified the assailants and informed the police, leading to their arrest.
 7. She produced the following documents in court: a P3 form and a PRC form dated 29th November 2023, a receipt for an Airtel phone worth Kshs. 1,000, and a receipt for a Samsung Galaxy phone worth Kshs. 22,000.
 8. PW2, JBK, corroborated PW1's testimony, stating that they recognised the appellant as the incident occurred during daylight. The appellant struck him in the face with a knife, ordered him to remain silent, and then covered his face. The assailants also stole his Tecno phone, for which he presented a receipt in court.
 9. PW3, John Njuguna, a clinical officer at Nairobi Women's Hospital presented the P3 and PRC forms for the complainant on behalf of his colleague who was not available to testify. He stated that her neck was tender, her private parts and vagina were normal, and her hymen was broken but healed. Further, he averred that she was pregnant at the time and that her information was constant with non-consensual sexual activities. The day she was treated, she was wearing a kitenge covered in mud.
 10. PW4, PC Caroline Otunga, the investigating officer, testified that on 29th November 2024, she was informed of a rape report at the police station. She recorded statements from PW1 and PW2, then sent PW1 to Nairobi Women's Hospital for medical examination. Upon returning with her P3 and PRC forms, PW1 identified the assailants in a park. Police arrested the appellant, who was taken to the station and charged, while the other suspect had already fled by the time officers arrived.
 11. In his defence, the appellant testified that on 30th November 2023, he was making a short call by the roadside when two police officers, along with two conductors, arrested him. The officers demanded payment, which the conductors paid, allowing them to go free, but he was not released. The complainant then arrived and identified him, after which the officers began to harass him. The following day, he requested to go to the hospital to verify if he had had sexual intercourse with the complainant, but his request was denied. He maintained that he had been framed.
 12. After a full trial, the appellant was 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.
 13. 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.



14. 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.”
15. 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.”
16. PW1 recounted a harrowing ordeal where the appellant in the company of another assailant forcefully robbed and raped her. She described the ordeal as the assailants shoved her to the ground with a knife on her throat and raped her. Despite her pleas for mercy since she was pregnant, they persisted. She described how the two assailants raped her in turn in the presence of PW2.
17. After the incident, PW1 and PW2 reported the matter to the police and were referred to the hospital for examination and treatment. A medical report confirmed bruising on the neck and whitish discharge from the vagina. This was consistent with penetration.
18. Accordingly, the prosecution proved that there was intentional and unlawful penetration of the victim’s genital organs, without her consent.
19. On identification, the appellant accosted both PW1 and PW2 during the day, taking time to steal their phones and remove their SIM cards in their presence. Additionally, the complainant positively identified the appellant in a park, which led to his arrest. Throughout the offence, there was no possibility of error or mistaken identity. This court finds that the appellant was positively identified as the perpetrator of the offences, based on the consistent, well-corroborated, and compelling testimonies of the prosecution witnesses. The appellant’s conviction for the offence of gang rape is therefore affirmed.



20. In counts II and III, the appellant was charged with 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”.

21. 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 PW2 were attacked by the appellant and other assailants.

22. The key issue for consideration in the offence of robbery with violence is whether force was used to rob the victims. Prosecution witnesses testified that both assailants were armed with knives, which they used to threaten PW1 and PW2. The victims were subsequently robbed of their phones and cash. PW2 sustained head injuries, while PW1 suffered neck injuries and was sexually assaulted. The use of weapons and resulting harm to the victims clearly demonstrate the violent nature of the robbery, supported by multiple assailants and actual violence.

23. The appellant was identified by the complainants. In his defence, he denied the incident and claimed he was framed.

24. PW1 and PW2 provided clear and consistent testimony, which was unshaken during cross-examination. It is my view that the appellant was positively identified, and his arrest followed the incident.

25. The prosecution established that force was used to rob the victims, evidenced by the appellant's use of a knife to threaten, assault, and sexually attack PW1 and PW2. The use of violence was evident. The court finds the appellant's conviction on counts II and III for robbery with violence to be safe and affirms the conviction.

26. He appellant was sentenced to serve 30 years imprisonment for the offence of gang rape and 20 years imprisonment for each count of robbery with violence, with the sentences running concurrently. During the sentencing proceedings, the court considered the appellant's mitigation, noting that he was a first-time offender and taking into account the circumstances of the offence.

27. The record reveals significant aggravating factors, particularly the vulnerability of PW1, who was pregnant at the time of the offence. This made her particularly vulnerable to the violent acts committed. Given these aggravating circumstances, the sentence imposed by the trial court was deemed appropriate. I therefore affirm the sentence imposed.

28. The upshot of the analysis is that the appeal is found to be lacking in merit and is dismissed.
It is so ordered.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 17TH DAY OF DECEMBER 2024

D. KAVEDZA

JUDGE

In the presence of:



Appellant present

Mburugu for the Respondent

Achode Court Assistant.

