Osman & another v Republic (Criminal Appeal E001 of 2024)
[2024] KEHC 16410 (KLR) (17 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16410 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E001 OF 2024

JN ONYIEGO, J

DECEMBER 17, 2024

BETWEEN

RAJAB OSMAN ..... 1ST APPELLANT

HASSAN SAID HASSAN ALIAS LAVA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence by Hon. Otuke S. O in CM' Court at Garissa Court Criminal Case No. E11 of 2022 delivered on 17.01.2024)

JUDGMENT

1. The appellants were jointly charged and convicted of the offence of rape contrary to section 3(1) (a) (c) (3) of the *sexual Offences Act* No. 3 of 2006.

2. The particulars of the charge in respect of count one were that Hassan Said Hassan alias Lava (2nd appellant) on 06.04.2022 at around 0500 hrs at [Particulars Withheld] within Tana River County he intentionally and unlawfully caused his penis to penetrate the vagina of B.K. by use of force, intimidation and threats.

3. In the alternative count, he (2nd appellant) was charged with the offence of committing an indecent act with an adult contrary to section 11A of the Sexual Offence *Act No. 3 of 2006* particulars being that on 06.04.2022 at around 0500Hrs at [Particulars Withheld] within Tana River County, he intentionally touched the breasts, buttocks and vagina of B.K. with his hands and penis against her will.

4. Count II, the particulars of the offence were that Rajab Osman(1st appellant) on 06.04.20.202 at around 0500 Hrs at [Particulars Withheld] within Tana River County, he intentionally and unlawfully caused his penis to penetrate the vagina of J.N. by use of force, intimidation and threat.

5. In the alternative count, he (1st appellant) was charged with the offence of committing an indecent act with an adult contrary to section 11A of the Sexual Offence *Act No. 3 of 2006* with the particulars being that on 06.04.2022 at around 0500 Hrs at [Particulars Withheld] within Tana River County, he intentionally touched the breasts, buttocks and vagina of J.N. with his hands and penis against her will.

6. The appellants entered a plea of not guilty and as such, the prosecution lined up a total of 6 witnesses to prove its case. The appellants were consequently found guilty and sentenced to 25 years' imprisonment each.

7. Aggrieved by the conviction and sentence, they preferred their respective appeals and further amended petitions which are similar in content dated 19.09.2024 but filed in court on 25.09.2024. Despite the amended petitions filed separately, grounds of appeal were similar in nature as the same contested the sentence by the trial court. It was urged that the same was not only harsh but also severe in the given circumstances.

8. It was urged that the appellants were first time offenders and that they ought to have benefited from the least sentence as provided for under article 50(2) (p) of *the constitution*. The trial magistrate was thus faulted for having exercised his discretion capriciously. This court was therefore urged to set aside the sentence by the trial court and substitute the same with its own.

9. The respondent on the other hand filed submissions dated 04.09.2024 urging its case against the appellants that the offence was proved to the required standard. The prosecution submitted that at no point was the burden shifted to the appellants as the prosecution witnesses were subjected to rigorous cross examination by the appellants and their evidence was not shaken.

10. On sentence, the prosecution urged that the same was not excessive and therefore within the law. That the trial court exercised its discretion judiciously noting the circumstances of the case and as such, the same ought not be interfered with. In the end, this court was urged to dismiss the appeals and uphold the findings of the trial court.

11. This being a first appeal, this court is duty bound to re-evaluate, re-assess and re-consider the evidence tendered before the trial court a fresh and make its own finding and or determination bearing in mind it did not hear nor listen to the witnesses testify to be able to assess their general demeanour.

12. The role of the first appellate court was set out in the case of Okeno vs Republic [1972] E.A 32 as follows; "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..."

13. PW1, B.K. recalled that on the material day, while in the company of PW4 and PW5 and while heading to work, the appellants accosted them. She stated that upon reaching a flat known as [Particulars Withheld], the appellants while armed with knives blocked their way. That they decided to run away and sought for refuge at PW2's shop as he was already awake and preparing mandazis. It was her evidence that upon entering that shop, the appellants while threatening PW2 demanded that they open the shop. That there were security lights at the shop hence she was able to identify their faces clearly.

14. That the assailants threatened to kill pw2 by placing a knife on his neck, stomach and back. As they attackers demand for them to get out, the 2nd appellant was at the door while the 1st appellant was on the window trying to enter the house. That they robbed the shop owner by taking his money and phone.

On sensing danger, they surrendered and got outside. The 2nd accused ordered her to follow him into the bush where there was a perimeter wall and a luggay. At that point, he ordered her to bend.

15. That he pulled up her dress up as he tore her panty using a knife. As he tried to insert his penis inside her vagina by force, he failed to go through hence he ordered her to suck his penis to lubricate it an order she complied with. After sucking, he ordered her to bend again. That he had sex with her without her permission. After finishing, he ordered her to lick his sperms on his penis.

16. It was her testimony that the 2nd appellant lit his phone and directed it towards his face while asking PW1 to properly note the face as he belonged to a gang known as Kayole. He proceeded to warn her of dire consequences should she report the incident.

17. PW2, WK testified that on the morning in question, he was preparing mandazis at his shop when three ladies passed by. That after some time, the trio ran back towards his shop screaming and so, they entered his shop and locked it. According to him, the two men armed with knives approached him and ordered him to direct the trio to get out or else, they would kill him.

18. It was his evidence that the appellants robbed him cash and a mobile phone together with some of his customers who had passed by to buy mandazis. That while still there, he saw one man pushing himself through the window of the shop where the trio were and so, he ran to the village elder to report. That upon returning, he found that two girls had been abducted while another escaped. He identified the appellants as responsible for the attacks.

19. PW3, Shaffie Omar, a clinical officer stated that he examined PW1. He stated that upon examination; the hymen was broken but not fresh, there was whitish vaginal discharge and HVS was done but no sperms were found. Generally, there was no obvious injuries to the genitalia and in conclusion, it was his opinion that there was a possibility of rape. He produced Pex 1(a) and treatment notes as Pex 1(b). In the same breadth, he stated that for victim J.N. 21-year-old lady, on examination, he noted that the head and neck were normal, the thorax and abdomen was also normal while there was small cut wound in the middle finger of the right hand.

20. On vaginal examination; he found no tears, no injuries on the vaginal wall, a broken hymen although not fresh, massive PV discharge white in colour. According to him, the victim had previously delivered and therefore, there were no injuries seen but the same notwithstanding, there was a possibility of rape. He produced the P3 Form for J.N. as Pex. 2(a) and treatment notes as Pex. (b). In cross examination, he stated that it's not a must for sperms to be in a victim's genitalia.

21. PW4, JN stated that on 06.04.2022 they woke up at 5.00 a.m. with BK and RM to go for work. When they reached at Mums area, they met three boys/men. One man went to B and the other two approached her and B.K. Upon being chased by the trio, they ran to a shop belonging to PW2 where they sought refuge. The appellants followed them and demanded that they apologize to them. That out of fear, R opened the door when she met accused one holding a knife and thereafter, he ordered them to give them everything they had and she gave Kshs.100/= to the 1st appellant.

22. The 1st accused on the other hand got hold of her hand together with R but fortunately enough, R escaped.

23. The 1st accused threatened her with a knife placed on her neck when he took her to the water Lagar, ordered her to remove her panty but upon refusing, he tore it using a knife and thereafter ordered her to bend over. That when he tried to penetrate her, it was not possible hence ordered her to turn and suck his penis which she did and thereafter bent again for sex which he did including anal sex. He later

ordered her to lick the sperms on his penis. It was her evidence that the 1st appellant raped her and when the 2nd appellant joined them, he also desired to rape her.

24. According to her, the appellants only left her when they heard voices of people who were nearby. She thereafter went to Garissa County Referral Hospital for treatment. Later, together with B and R they went to record their statements at Madogo police station. On the way to the police station, they saw the suspects whom they identified to the police who effected arrest upon them.

25. PW5, RM testified that on 06.04.2022 she was with PW1 and PW4 heading for work when three men blocked their way as one drew a knife. That they sought refuge at PW2's shop as the men followed them. The said men threatened PW2 as they demanded that he open the door to the said house. It was her evidence that one of the men entered through the window and ordered them to open the door.

26. That she complied and upon coming out, they found the 2nd accused holding a knife towards her. On surrendering, she gave them Kes. 100 as the 1st accused held her hand together with that of PW4. Meanwhile, the 1st accused put a knife on her neck and ordered her to follow him towards the Catholic church wall. Luckily, she managed to escape and returned to her house.

27. PW6, PC Boniface Kiptala testified that he was the investigating officer in this matter. He reiterated the evidence of PW1, PW4 and PW5 on how the appellants accosted them on their way to work and ended raping PW1 and PW4. According to him, the trio reported the matter together. That he gave them a P3 form to be filled. That upon recording their statements, the trio saw the appellants walking along the road and informed the police who effected arrest upon them. It was his evidence that he visited the scene of crime and further carried out investigations that led to the charging of the appellants.

28. The prosecution closed its case and by a ruling delivered on 20.07.2023, the appellants were called upon to defend themselves against the charges preferred against them.

29. DW1, HSH in his sworn testimony stated that he was a watchman at [Pariticulars Withheld]. That on the material day, he was heading to work when the police arrested him and forced him to admit that he had raped a girl. He was taken to Madogo police station and later taken to Court. According to him, he was innocent as he had simply been framed. In cross examination, he stated that he faced another Criminal Case No. 256/2022 wherein he was charged with the offence of causing grievous harm and the same was due in court on 22.08.2023. He denied being a member of Kayole gang and that he was not armed at the time of the incident.

30. DW2, RO testified that on the day in question, he was heading home at 5pm when he met a police officer who stopped him. It was his case that he was not aware why he was stopped and arrested. He denied committing the offence as he alleged a frame up.

31. The issues for determination in this appeal are follows;

    i. Whether the appellants were positively identified.

    ii. Whether penetration was proved.

    iii. Whether the complainants consented to the act.

    iv. Whether the sentence was excessive.

32. Section 3(1) of the *Sexual Offences Act* states that a person commits the offence of rape if;

    a) He or she intentionally and unlawfully commits an act which causes penetration with his or 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."

33. The prosecution was therefore required to establish penetration, absence of consent, and that the accused persons herein were the perpetrators of the act.

34. Section 2 of the *Sexual Offences Act* defines penetration to mean the 'partial' or complete insertion of the genital organs of a person into the genital organs of another. [See Alex Chemwotei Sakong vs Republic [2108] eKLR].

35. The Court of Appeal in Martin Nyongesa Wanyonyi vs Republic Criminal Appeal No. 661 of 2010, (Eldoret), citing Kassim Ali vs Republic Criminal Appeal No. 84 of 2005 (Mombasa) where it was stated that:

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

36. It therefore follows that the evidence in relation to penetration is that, even without considering the presence or otherwise of medical evidence, an offence of this nature can be proved by oral evidence of a victim of rape or circumstantial evidence as long the court is satisfied that the victim is truthful.

37. PW1 and PW4 narrated how the appellants accosted them on their way to work and threatened them before raping them. According to PW1, the 2nd accused person had unconsented sex with her and likewise, PW4 also narrated that the 1st accused had unconsented sex with her. PW3 corroborated the evidence of the complainant that upon examining them, he found that they indeed had been raped. Pw1, pw2 and pw4 stated that they were able to see the attackers clearly through security lights at the shop of pw2. Further, pw1 said that after the ordeal, accused 2 lit his phone light and turned it towards his face while telling her to properly see his face as a kayole gang. This was enough light for positive identification.

38. On identification, the Court of Appeal in the case of Wamunga vs Republic (1989) KLR 424 stated as follows:

> " It is trite law that where the only evidence against a defendant is evidence on 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."

39. In the case herein, the complainants together with PW5 narrated how on their way to work, they met the appellants and further how they chased them upto the point when they sought refuge in the house of PW2. That the appellants stood there threatening PW2 to open the house so that they could have the complainants and the same notwithstanding, the amount of time that the appellants walked PW1 and PW4 to the scene where they raped them, to me was sufficient to enable a proper identification.

40. In any event, they had already identified them at the shop of pw2 where there was sufficient security light. I have no doubt the appellants were positively identified and that is why the complainants were able to identify them the following day while on the way leading to their arrest. In any event, the graphic story given by pw1, pw2 and pw4 could not be a lie nor a fabrication. They did not know the appellants hence had no reason to frame them on this degrading and inhuman act. I do not find merit in the appellants' defence which is a mere denial.

41. On whether the complainants consented to the act, according to the proviso to Section 42 of the *Sexual Offences Act*, "a person is said to consent if he or she agrees by choice, and has the freedom and capacity to make that choice." In Republic vs Oyier [1985] eKLR, 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."

42. In the instant case, PW1 narrated how upon being led to the lager, the 2nd accused ordered her to undress and upon refusing, tore her pant using a knife which he was holding all through. In the same breadth, the fact that the 2nd appellant all through had a knife and kept threatening the complainant is clear evidence that PW1 unwillingly complied with the demands of the 2nd accused.

43. In the same breadth, PW4 also narrated how the 1st accused tore her pant using the knife that he was carrying. He placed the knife on her neck and proceeded to rape her. PW3 also stated that the physical examination of the complainant showed that she had a cut in her middle finger which he approximated to be a day old hence lending credence to the evidence of the complainant that she suffered the cut in the process of the threats that were exerted on her by the 2nd appellant.

44. The complainants reiterated that they did not consent to the sexual acts and the same was corroborated by the manner in which the accused persons directed them to the respective places where they undressed them and thereafter raped them.

45. This court after reviewing afresh the evidence of the parties as adduced before the trial court, reaches a finding that the prosecution proved its case beyond any reasonable doubt and as such, the court finds both the accused persons guilty of the offence of rape contrary to section 3(1) (a) (c) (3) of the *Sexual Offences Act* No. 3 of 2006.

46. On the issue as to whether the sentence of 25 years was harsh and excessive, section 3(1) of the *Sexual Offences Act* creates the offence of rape and provides for the ingredients of the offence to wit penetration and lack of consent whereas section 3 (3) of the Sexual Offence Act prescribes the penalty for the offence. Section 3 (3) of the *Sexual Offences Act* states as follows;

> " A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life."

47. It is trite that sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The discretion is however limited to the statutory minimum and maximum penalty prescribed for a particular offence. [See Wanjema vs Republic (1971) E.A. 493].

48. Having regard to the circumstances under which the appellants forcefully raped their victims in a degrading and dehumanizing manner, it is my view that indeed, they deserved a deterrent sentence commensurate to the offence they committed. They belong to prison and I have no sympathy to extend to them.

49. In as much as they contend that the sentence by the trial court was harsh, it was not shown that the same was illegal. The prayer that the court should have given them the minimum sentence provided

is not automatic. If there are aggravating factors like in this case, a court can enhance the sentence to the maximum which is life imprisonment. In my view, the appellants did not deserve that discretion as they dehumanized and lowered the complainants' self-esteem.

50. As such, I dismiss this appeal as I uphold the conviction and sentence by the trial court.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY OF DECEMBER 2024

J. N. ONYIEGO

JUDGE