Onsongo v Republic (Criminal Appeal E009 of 2024)
[2025] KEHC 13351 (KLR) (25 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13351 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E009 OF 2024

WA OKWANY, J

SEPTEMBER 25, 2025

BETWEEN

ANDREW MORIASI ONSONGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment and Sentence delivered in the Chief Magistrate's Court at Nyamira CMCCR (SO) No. 30 of 2017 by Hon. W.K. Chepseba, Chief Magistrate on 24th January 2023)

JUDGMENT

Background

1. The Appellant herein, Andrew Moriasi Onsongo, was charged with the offence of rape contrary to Section 3(1)(a) and (b) as read with Section 3(3) of the *Sexual Offences Act* No. 3 of 2006, and in the alternative, committing an indecent act with an adult contrary to Section 11(A) of the same Act. The particulars of the charge were that on the 15th day of July 2017 at Maroko Sub-Location in Manga Sub-County within Nyamira County, intentionally and unlawfully caused his penis to penetrate the vagina of TKO without her consent.

2. He denied the charges after which a full trial was conducted in which four prosecution witnesses testified. The Appellant gave sworn evidence in his defence. At the conclusion, the trial court convicted him of rape under Section 215 of the Criminal Procedure Code and sentenced him to five (5) years' imprisonment.

3. Dissatisfied with the trial court's decision, the Apellant lodged this appeal raising nine grounds of appeal which may be summarized as follows: -

a. That the trial court erred in convicting him where the prosecution had not proved the offence beyond reasonable doubt.

b. That the medical evidence was fabricated and unreliable.

c. That the trial court ignored contradictions and inconsistencies in the prosecution's case.

d. That the sentence of five years was manifestly excessive and unlawful.

Duty of the First Appellate Court

4. As the first appellate court, I court must re-evaluate, reconsider, and analyse afresh the entire evidence presented before the trial court, while bearing in mind the fact that the trial court had the advantage of observing the witnesses as they testified. In David Njuguna Wairimu vs. Republic [2010] eKLR where it was held thus: -

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."
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> (See also Okeno vs. Republic [1972] EA 32).

Summary of the Evidence

5. The complainant, PW1 TKO, testified that on 15th July 2017 around 3:00 p.m., while returning from her farm, she met the Appellant who lured her to his home under the pretext of showing her land to till. Once at his home, the Appellant placed her on his bed, forcibly ripped off her undergarments, and raped her. She bled from her vagina, felt weak, and screamed even though no one responded. She thereafter sought the Appellant's help for medical treatment, but he dismissed her, offering instead to hire a motorcycle for her which she declined. As she staggered away, she met villagers, narrated her ordeal to them, and was later taken to hospital and the police station where she identified the Appellant as her assailant.

6. PW2, Vincent Nyakundi, the Sub-Chief, confirmed that upon being alerted, he went to the Appellant's house and found the complainant inside and the Appellant at the doorway. He called police officers, who took both parties to Sengera Police Station. The complainant informed him she had been raped.

7. PW3, Cyrus Aruba Mariko, a clinical officer, examined the complainant on 17th July 2017. He found bruises on the labia minora, a vaginal tear, and mild bleeding. He concluded that there was evidence of rape, filled a P3 form, and noted that the injuries were about two days old.

8. Testifying for the investigating officer, PW4 PC Kelvin Mbuno, stated that the complainant had reported on 16th July 2017 that the Appellant lured her to his house, locked the door, and raped her. After the ordeal, he gave her Kshs. 40/= for transport to hospital. She later informed villagers, and with the Sub-Chief's help, the Appellant was arrested and charged.

9. In his defence, DW1, the Appellant, denied committing the offence. He stated that the complainant was his former girlfriend from 2014–2015 and that she fabricated the charge after discovering he had married another woman. He maintained he did not see her on the date in question, denied forcing her into his house, and asserted that he merely gave her Kshs. 40/= as transport.

10. The appeal was canvassed by way of written submissions, which I have considered.

Issues for Determination

11. From the record of appeal and the parties' submissions, I find that the following issues arise for my determination: -

    a. Whether the prosecution proved the offence of rape beyond reasonable doubt.

    b. Whether contradictions in the prosecution's case were material.

    c. Whether the medical evidence was reliable.

    d. Whether the defence was adequately considered.

    e. Whether the sentence imposed was lawful.

Analysis and Determination

Proof of the offence of rape

12. Section 3 of the *Sexual Offences Act* provides as follows: -

    3. Rape

        1. A person commits the offence termed rape if—

            a. he or she intentionally and unlawfully commits an act which causes 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.

        3. 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.

13. Section 3(1) of the *Sexual Offences Act* requires proof of penetration and lack of consent. The prosecution was required to establish the following elements in order prove a charge of rape: -

    i. That sexual intercourse or an act of penetration occurred;

    ii. That there was lack of consent; or

    iii. That the consent was obtained by threats and intimidation.

14. The Prosecution presented the testimony of the victim PW1 and the Clinical Officer PW3 in support of their case. PW1 described the manner in which the Appellant lured her into his house on the pretext of giving her a farming job and forcefully raped her without her consent. She stated, in part, as follows: -

> " ... He asked me to go see the place where I could work for him. I went to the Accused's place. He gave me a chair. I sat... The Accused took me into his house and he took me up to his bed. He put me on his bed then raped me. The Accused removed my pant and he slept with me. I mean the accused person slept on top of me. The Accused person put his private parts inside my vagina that is my body. He put his penis in my vagina. I started bleeding through the vagina. I felt weak and tired. I screamed for help... I screamed while on the Accused's bed. The Accused grabbed me this way (demonstrates) and took me to the bed and I screamed. My screams did not go far. I also screamed at the time the Accused person was having sexual intercourse with me...."

15. The trial Court was satisfied that the complainant's testimony pointed ed the elements of the offence of rape and could sustain a conviction. Section 124 of the *Evidence Act* which stipulates: -

> 124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.
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> Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

16. The above principles were explained in George Kioji vs. Republic, Cr. App. No. 270 of 2012 where the Court of Appeal held thus: -

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

17. I have considered the entire testimony of the victim and I find that she gave credible evidence that the Appellant penetrated her without consent. Her evidence was corroborated by the medical findings of PW3 who noted fresh vaginal injuries. In Republic vs. Oyier [1985] KLR 353, the Court of Appeal held that the complainant's testimony alone may suffice if credible, but in this case, corroboration was presented through irrefutable medical evidence. I find that the prosecution proved penetration and absence of consent beyond reasonable doubt.

Contradictions in the case

18. The Appellant pointed to inconsistencies such as whether he was previously known to PW1 and the timing of the medical examination. I find that these discrepancies were minor and did not go to the root

of the case. As stated in Twehangane Alfred vs. Uganda [2003] UGCA 6, only material contradictions that affect the substance of the charge can vitiate a conviction.

Medical evidence

19. I find that the testimony of PW3 was consistent with the account of PW1 as his findings of bruises and bleeding supported the allegation of recent, forceful penetration. I further find that the claim of fabrication of evidence is baseless. In Kassim Ali vs. Republic [2006] eKLR, the court held that medical evidence is corroborative but not indispensable. In the instant case, I find that the medical evidence strongly supported the complainant's testimony.

The Defence

20. I note that the trial court considered the Appellant's defence was but rightly rejected it. The Appellant's claim of a past relationship with the complainant remained unsubstantiated, and no evidence was adduced to demonstrate malice. In a nutshell, the defence evidence did not displace the prosecution's compelling case.

Sentence

21. Section 3(3) of the *Sexual Offences Act* prescribes a minimum of ten years, which may be enhanced to life imprisonment for the offence of rape. The Appellant was however sentenced to five years' imprisonment. The sentence imposed was therefore technically illegal for being below the statutory minimum.

22. Courts have consistently held that trial courts have no discretion to impose a sentence below the statutory minimum. In Christopher Nyoike Kahindi vs. Republic [2017] eKLR, the Court of Appeal emphasized that mandatory minimum sentences under the *Sexual Offences Act* are binding. Similarly, in M.K vs. Republic [2015] eKLR, the court stated that a sentence below the statutory minimum is unlawful and must be enhanced to meet the requirements of the law.

23. While the trial magistrate exercised discretion in favour of the Appellant, that discretion was exercised contrary to statute, and this would have been minded to correct the illegality and enhance the said sentence. In this case however, since the Respondent did not file a cross appeal and the Appellant was not given prior notice/warning of the possibility that his sentence may be enhanced, it would not be proper to enhance the sentence in the circumstances of this case. I am guided by the decision in EGK vs Republic, [2018] eKLR where the Court observed:

> "Be that as it may, we note that the first appellate court enhanced the appellant's sentence from 40 years' imprisonment to life imprisonment. In so doing, the 1st appellate court cited the provisions of section 354 (3) of the Criminal Procedure Code. In our view, the trial magistrate had no discretion to sentence the appellant to 40 years as opposed to a sentence of life imprisonment. The sentence for incest under S. 20 (i) of the *Sexual Offences Act* is life imprisonment. In our view, the 1st appellate court had no jurisdiction to enhance the sentence without any cross appeal and without warning the appellant. This court has had occasion to consider an enhancement of sentence without a cross-appeal and without warning an appellant in the decision of JJW vs Republic [2013] eKLR wherein it states: -
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> > "We now consider the sentence and here we have difficulties in appreciating what the learned judge did and why he did it. As indicated above, we too feel the sentence that was pronounced upon the appellant and his colleague by the

Senior Resident Magistrate was not commensurate with the nature of the offence committed and the antecedents of the appellant which were in any case not stated save that they were first offenders and had been in custody for two (2) years. We too think the circumstances of the case called for a more severe sentence than what was awarded. However, what we do not appreciate is the manner in which the learned judge enhanced the sentence. It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under section 354(3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal." [Emphasis added]

24. In JOA vs. Republic, Cr. App. No. 25 of 2011 and Charles Muriuki Mwangi vs. Republic, Cr. App. No. 24 of 2014 it was held that in the absence of a cross-appeal, it was necessary for the court to warn the appellant that the sentence was likely to be enhanced, and having failed to do so, the appeal against sentence was allowed. In Mutuku vs. Republic, [1980] KLR 532, this Court set aside enhancement of sentence by the High Court due to inordinate delay on the part of the prosecution in making an application for enhancement.

25. In Josea Kibet Koech vs. Republic, Criminal Appeal No. 126 of 2009, it was held: -

> "Similarly, the State did not give any notice of enhancement of the sentence. In his submissions before us Mr. Omutelema conceded that the learned Judge of the superior court had no jurisdiction to enhance the sentence.
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> The learned Judge may be entitled to condemn the manner the offence was committed but in view of the foregoing we agree with Mr. Omutelema's submission that as there was no notice to enhance the sentence then what the learned Judge did was without jurisdiction. In the circumstances, this appeal is allowed to the extent that the sentence of 30 years imprisonment imposed by the High Court is set aside and in its place we reinstate the sentence of seven (7) years imprisonment to commence from the date the appellant was sentenced by the Senior Resident Magistrate."

26. In H.O.W. vs. Republic, Criminal Appeal No. 326 of 2010, the Court likewise held: -

> "Lastly on that aspect of sentence, the record shows that after the appellant had pleaded for leniency on sentence, the learned Judge recorded that he warned the appellant that the sentence could be enhanced. With respect that was not of any effect. The warning should have been done before the full hearing started and the appellant should have been asked if

he understood the warning and should have been given a chance to choose his next action on the matter in view of the warning. (Emphasis supplied)

All this was not done and thus the recorded warning after the appellant had addressed the court was a lip service to the course of justice.

We think we have said enough to indicate that this appeal must succeed. The appeal is allowed. Conviction quashed and the sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held." [Emphasis added]

27. In the instant appeal, there was no cross-appeal by the prosecution for enhancement of sentence before this court nor was there a warning to the Appellant by court that the sentence meted upon him could be enhanced; and there was no notice of enhancement, I reiterate my finding that it would not be proper to enhance the sentence.

Conclusion and Orders

28. Having re-evaluated the evidence, I find that the prosecution proved its case beyond reasonable doubt. The conviction for rape was safe and is hereby upheld. I also uphold the sentence passed by the trial court for the reasons I have stated in this judgment.

29. In conclusion, I find that the instant appeal is not merited and I therefore dismiss it.

30. Orders accordingly

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 25TH DAY OF SEPTEMBER 2025.

W. A. OKWANY

JUDGE