Sheikh v Republic (Criminal Appeal E021 of 2025)
[2025] KEHC 18868 (KLR) (17 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18868 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E021 OF 2025

JN ONYIEGO, J

DECEMBER 17, 2025

BETWEEN

ABDILATTIFF MOHAMED SHEIKH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence by Hon. J. Omwange – PM delivered on 30.06.2025 in Garissa CM's Court in Criminal Case No. E008 of 2023)

JUDGMENT

1. The appellant was charged with the offence of rape contrary to Section 3(1) as read with Section 3(3) of the *Sexual Offences Act*. Particulars of the charge were that on diverse dates between 14.02.2023 and 17.02.2023 at (Particulars withheld) Lodge in Garissa Township within Garissa County, he intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of one M.Y.N. without her consent.

2. The appellant also faced an alternative count of committing an indecent act with an adult contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. Particulars were that on diverse dates between 14.02.2023 and 17.02.2023 at (Particulars withheld) Lodge in Garissa Township within Garissa County, he wilfully and intentionally touched the genital organ namely vagina of M.Y.N. with his genital organ namely penis without her consent.

3. He was convicted and sentenced to 20 years' imprisonment.

4. Being dissatisfied with the conviction and the sentence, the appellant preferred an appeal to this court vide a petition of appeal amended on 15.10.2025 on the following grounds:

    i. That the trial magistrate erred in law and fact by convicting and sentencing him yet the prosecution did not prove its case to the required standard.

ii. That the trial magistrate erred in law and fact by convicting him yet the prosecution's evidence was marred with inconsistencies.

iii. That the trial magistrate erred in law and fact by failing to consider his mitigation.

iv. That the trial magistrate erred in law and fact by failing to consider that the sentence meted out was not only harsh but also extreme.

5. He urged this court to consider his appeal and quash the conviction and thereafter set aside the sentence herein.

6. The appeal was canvassed by way of written submissions.

7. The appellant in his submissions dated 15.10.2025 urged that the prosecution did not prove its case beyond any reasonable doubt. That the allegation that PW1 remained at the lodge for three days without any attempt to flee was not plausible. It was urged that the complainant's failure to explain how she found herself at the lodging remained unsubstantiated and speculative and as such, PW1 was not a credible witness. He placed reliance on the case of Omuroni vs Republic (2002) 2 EA 508 where the court held that:

> " Trial courts can decide cases one way or another on the basis of demeanour of a witness or witnesses particularly where the issue of credibility of such witness is decisive. In such a case, the trial judge must point out instances of demeanour which he noted and upon which he relies..."

8. That the complainant's evidence cannot be relied on as the same was riddled with inconsistencies.

9. In the same breadth, the appellant faulted the trial court for failing to consider his defence. He stated that it was not proved that the lodging was the scene of crime hence he was not liable for the offence herein. On sentence, he urged that the same was harsh noting the circumstances of the case. He relied on the Court of Appeal Case of William Okungu Kittiny vs Republic [2018] eKLR where the court affirmed that sentencing should be individualized and proportionate to the circumstances of the offence and the offender. He urged this court to allow his appeal as prayed.

10. Mr. Owuor, the prosecution counsel in opposing the appeal filed submissions dated 21.10.2025 urging that the trial court's finding was sound. That the prosecution proved the essential elements for the offence of rape beyond any reasonable doubt. Counsel placed reliance on the case of Karanja vs Republic [1983] KECA 35(KLR) where the court held that:

> " In a proper case, the court may in testing a defence of alibi and in weighing it with all the other evidence, to see if the accused person's guilt is established beyond any reasonable doubt, take into account the fact that he had not put forward his defence or his alibi if it amounts thereto, at early stage in the case and so that it can be tested by those responsible for the investigation and prevent any suggestion of afterthought."

11. According to him, the alibi raised by the defence was not tenable as the appellant was placed at the scene of crime and therefore, the same was simply an afterthought. On sentence, reliance was placed on the case of R vs Ruth Wanjiku Kamande, criminal Appeal No. 102 of 2018 where the court held that there are circumstances where the court is at liberty to mete out the mandatory sentences. To that end, this court was urged to uphold the finding of the trial magistrate.

12. PW1, Maua Yusuf Muhumed stated that on 14.02.2023, she left home at about 8.00 p.m. to take a pneumonia injection. After receiving the jab, she began to vomit. While she was vomiting, the appellant approached her, gave her water and a capsule, and then took her away. That she later found herself at (Particulars withheld) Lodge, where the appellant was present with a knife and threatened to kill her. She recounted that she remained at the lodge for three days, during which time the appellant broke her phone and raped her. She explained that when she regained her senses, she found herself naked not withstanding that she had originally been wearing a dira, a gombis, and had covered her head.

13. She testified that the appellant was also naked. She added that the appellant had struck her on the mouth thus breaking her teeth which she later replaced. She further claimed that the appellant bit her on the left hand. She stated that she was taken to the hospital where she was examined and issued with a p3 form dated 17.02.2023 and treatment notes marked PMFI A and B. She explained that she bled from her genital organs and that she did not know how she left the lodging to be outside. She maintained that the accused had raped her for two days and that she lost consciousness and understanding during the period she was with him. She positively identified the accused in court as the person who raped her.

14. On cross-examination, she stated that she did not know who had paid for the lodging and denied that she had paid for the same. She insisted that she was outside Islamic Hospital vomiting when the accused met her.

15. PW2, Nasra Mohamed Muhumed testified that on 14.02.2023, her sister, PW1, left their home to go to Islamic Hospital for medication. On 17.02.2023, she found her sister at (Particulars withheld) Lodge, bleeding and her clothes torn prompting her to cover her with a lesso before taking her to Garissa General Hospital. She explained that her sister bled from the vagina and that at the hospital she learnt that her sister's virginity had been broken. She added that the family had searched for the complainant for three days until the date she found her.

16. She stated that PW1 was with Abdilatif, whom she knew before. She explained that at the lodging, they gathered information that the appellant, positively identified as Abdilatif, had booked the lodging after he revealed that the complainant was his wife. She said that the appellant threatened her, warning that he would place her sister's naked body photos on social media. She referred to the P3 form and treatment notes, marked PMFI 1A and B, as the medical documents that had been filled.

17. PW3, Mohamed Farah Shire testified that on 16.02.2023, while he was at his house in Soko Ngombe, his neighbor Nasra (PW2) approached him while searching for her sister. He said that he advised her to report the matter to the police station which she did the following day. Shire recounted that later, while outside Jamiah Mosque, he saw a crowd gathered at (Particulars withheld) Lodge opposite the mosque. He went to the scene and found Maua (PW1) lying naked and unconscious at the gate of the lodge.

18. He stated that the appellant was present speaking to the complainant asking her what had happened. Shire stated that the appellant had a phone and since he knew him before as they lived nearby, he held him, took the phone and forced him to unlock the phone. On checking the phone, he saw photographs of the victim naked and videos showing her bleeding and unconscious inside a room at the lodge.

19. He stated that he called PW2 and Abdiakim. PW2 arrived and covered the victim, while Abdullahi, her brother, came and attempted to beat the appellant. Shire said that he called the OCS, who was on leave, and then contacted the deputy ocs. He explained that he took the appellant to the police station and handed the phone to the investigating officer, while PW2 took the victim to Garissa General Hospital for medical attention. On cross-examination, he stated that he actually saved the appellant

from being killed. He added that although he did not know the number of the phone, he was the one who recovered it from the accused.

20. PW4, Doctor Shafi Omar Ahmed, a Clinical Officer at Garissa County Referral Hospital attached to the Sexual Gender Based Violence Centre, stated that on 19.02.2023, he received a client at the centre, a 23-year-old lady identified as M.Y, who had gone missing from her home for four days. He said that she was a mentally ill patient who appeared mentally unstable wearing blood-stained clothing.

21. On examination, he found that her external genitalia was normal but there was per vaginal bleeding. He observed that there were no tears or bruises on the labia, but the hymen was broken and showed a first tear at the 6 o'clock and 12 o'clock positions. He stated that there was an awful smell accompanied by greenish and white discharge. Laboratory tests revealed the presence of blood but no sperms, and there was indication of infection. He concluded that there was evidence of recent penetration. He referred to PMFI 1A, B, and C, which were produced in court as exhibits 1A to 1C respectively.

22. PW5, No. 95716, Sergeant Hawa Ahmed, the investigating officer in the matter, having taken over from Police Constable Uhuru Mango after he had been transferred to Mandera stated that she had worked with him for two years. She said that the incident occurred at (Particulars withheld) Lodge and that the investigating officer had recorded the complainant's statement together with those of the witnesses, after which the appellant was arrested. She noted that the complainant bled during the incident and that blood-stained clothes were recovered. She marked them as PMFI 2 and produced as P. Exhibit 2. She confirmed that the appellant was positively identified in court and referred to P. Exhibit 1A–C as the documents relating to the complainant. On cross-examination, she stated that the initial investigating officer had indeed been transferred and that P. Exhibit 2 was recovered from the complainant.

23. DW1, Abdilatif Mohamed Sheikh from Garissa Town stated that he was a casual worker at a pharmacy shop and that he was aware of the charges he was facing. He explained that on the alleged date of the offence he was at Sankuri, where he lived with his mother, and that he later headed to Garissa Town carrying milk to deliver near Jamia Mosque. He stated that while he was waiting for the person who was to collect the milk, Blacky Abdiakim Ali and Mohamed Farah Shire arrived. He explained that he had a grudge with them and that they had fought before.

24. According to him, upon arrival, the duo attacked him, accusing him of raping their sister. He insisted that he was framed since he had not committed the alleged offence and did not know anything about it. He added that they had even intended to kill him but one of them intervened and instead, they took him to the police station. He said that he was released but was attacked again and taken back to the police under the OCPD. He maintained that he was framed.

25. I have considered the grounds of appeal, record of appeal and rival submissions by both parties. The issues for consideration are whether the prosecution proved its case beyond any reasonable doubt and whether the sentence meted out was excessive. The offence of rape and the ingredients of the same are provided for in Section 3(1) of the *Sexual Offences Act* No. 3 of 2006 as follows: -

> 3.(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;
>
> (c) the consent is obtained by force or by means of threats or intimidation of any kind.

26. The above definition was espoused in the case of Siri v Republic (Criminal Appeal 62 of 2019) [2023] KEHC 26311 (KLR) (8 December 2023) (Judgment).

27. The complainant testified how on the material day, she left home at about 8.00 p.m. to take a pneumonia injection. After receiving the jab, she began vomiting, and while she was vomiting the appellant approached and gave her water and a capsule, and then took her away. She later found herself at (Particulars withheld) Lodge, where the appellant threatened her with a knife. She said she remained there for three days, during which period the appellant broke her phone and raped her.

28. The complainant gave a detailed testimony on how she was raped and her virginity broken. When pw2 and pw3 found her outside the lodging where she was raped, her clothes were soiled with blood. She was with the appellant at the material time. Pw4 the doctor who examined her confirmed that her clothes were soaked in blood and that her hymen was freshly broken. I have no doubt that the complainant was sexually assaulted.

29. Who was the assailant? Pw1 said she was sexually assaulted by the appellant a person she knew before. Pw2 and pw3 confirmed that they found the appellant with the complainant outside the lodging while bleeding. The offence took place for about three days. Obviously there was positive identification hence no mistaken identity. From the evidence on record, the only evidence relied on record is that of the complainant. Under section 124 of the *evidence Act*, in sexual offences, a court can convict based on the evidence of a single witness without seeking corroboration as long as the court is satisfied of the truthfulness of the witness. See the case of Arthur Mshila Mange vs Republic, Criminal Appeal No. 24 of 2014 [2016] eKLR].

30. Having laid the basis above, I am in agreement with the trial magistrate who heard the complainant testify and in his view, believed her having warned himself of the dangers of convicting using uncorroborated evidence. I have no doubt the assailant was the appellant.

31. On consent, it's the complainant's case that she did not consent to the sexual acts. 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."

32. The complainant narrated how after drinking water and a capsule offered by the appellant, she lost consciousness and later found herself at (Particulars withheld) Lodge, where the appellant threatened her with a knife. She said she remained there for three days, during which the appellant broke her phone and raped her.

33. Having carefully considered the evidence by the prosecution and in particular the complainant and the defence raised by the appellant, it is my view that the sexual intercourse was not consensual. The same was buttressed by the fact that the appellant resorted to blackmailing PW1's sister of displaying the compromising photos of PW1 online.

34. Having reviewed the appellant's defence, I find that the same was a sham as it did not displace the strong evidence of the prosecution. There was no doubt that the complainant properly identified the appellant as the perpetrator of the sexual assault. The alibi defence was not raised earlier enough to enable the prosecution fully cross examine the appellant. The same was an afterthought. See Erick Otieno Meda v Republic (2019) e KLR.

35. On sentence, the issue is whether the sentence of 20 years was harsh and excessive, Section 3 (3) of the Sexual Offence Act prescribes the penalty for the offence, 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."

36. Sentencing is at 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.

37. In the case of Shadrack Kipchoge Kogo vs Republic Criminal Appeal No. 253 of 2003 (Eldoret), the Court of Appeal stated as follows;

> " Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"

38. However, I must express some observation to the extent that the conduct of the complainant staying in a lodging for three days without raising an alarm is also questionable. This is a behavior suggestive of complicity. Equally, under article 50 (2)(p) of *the constitution*, the appellant is entitled to the least prescribed punishment for that offence. In the circumstances, the sentence of 20years is hereby substituted with 10 years. The period spent in remand custody of 2 years 9 months and 2 days was taken care of by the trial court.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF DECEMBER 2025

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J.N.ONYIEGO

JUDGE