Masika v Republic (Criminal Appeal E003 of 2021)
[2025] KECA 478 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KECA 478 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL E003 OF 2021

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

MARCH 13, 2025

BETWEEN

LEONARD SIFUNA MASIKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court at Bungoma (Kiarie, J.) dated 4th October, 2017 in HCCRA No. 123 of 2019)

JUDGMENT

1. Leonard Sifuna Masika, the appellant herein, was charged at the Chief Magistrates Court in Bungoma with the offence of rape contrary to section 3(1) (a) as read with section 3(3) of the SOA; that on the night of 16th May 2015, at [Particulars withheld] village in Bumula sub-county within Bungoma county, he intentionally and unlawfully caused his penis to penetrate the vagina of DA[1], by force, threats and intimidation. He denied the charge, and after trial, was convicted and sentenced to serve forty-nine [1] Initials used to protect her identity years imprisonment. His appeal to the High Court against the conviction and sentence was dismissed.

2. The evidence which was before the trial court, and eventually considered by the first appellate court was as follows:- DA, who testified as PW1, was in her house in [Particulars withheld] in the company of Seth (PW2) when they heard the volume of music emanating from PW2's house increase. Since PW2 had not left anyone in the house, he went to check, but he encountered a man who slapped him with a panga across the face, and ordered him back to PW1's house. DA was ordered to lie down on the mattress. The man also ordered PWl to tie a rope on PW2's leg and one hand, who under threat, obliged.

3. The attacker said he had been sent to kill PW2 as well as anyone who was with him inside the house. The attacker then took a knife and beckoned PW1 to accompany him out of the house where he cut the

clothes line, then returned into the house with PW1 in tow. He took them through various phases of intimidation, telling them he had been paid Kshs.20,000/- to carry out his declared mission, plugging an iron box into the electricity connection and threatening to use it to disfigure them or stab them with a knife.

4. Eventually PW1 requested to be allowed to use the toilet, the attacker accompanied her out. PW2 then got his chance to escape. Upon realizing that PW2 had escaped, the attacker got more incensed, led PW1 to a sugarcane plantation, and while holding the knife against her throat, ordered her to unbutton his trouser and remove it as well as his underwear and then ordered her to hold his penis. The attacker then removed her underpants, saying he was not having any pleasure and pushed his penis into her vagina in what she described as lasting five minutes. Shortly, SE, PW3, shone a torch light and the attacker fled. PW1 reported the matter to police and was eventually taken to hospital.

5. Dr. Mansur Ramsan who testified as PW5, produced the medical report on behalf of Dr. Adoka, who had examined PW1. The clinical findings were that she had bruising on the vaginal orifice which was one day old; and in his opinion the complainant was raped and harmed. Ultimately arrests were made, and PW1 identified the appellant at an identification parade conducted at the police station.

6. PW2, SO, gave a similar narrative to the point where PW1 requested to go to the toilet and he got an opportunity to make his escape. He was able to pick out the appellant as the person who attacked saying that he was able to identify the appellant because on the night of the attack there was electricity light and the appellant had not covered his face. Further, that they engaged in a conversation where the appellant taunted them.

7. SE who testified as PW3 was attracted by the sound of someone screaming for help in the sugarcane plantation and using his torch, located PW2 and went to her aid. He described her as looking nerve wrecked and shaken even as she described how she had been raped by a very strong man who had a knife which was left at the scene.

8. After the incident, PW2 encountered the appellant on two different occasions, and on the separate occasions, and in the last encounter, he managed to alert police who arrived and arrested the appellant.

9. The appellant's defence was that he was at Bumula market when police arrested him and later subjected him to an identification parade and that the whole case was a frame-up by police

10. The learned Judge in dismissing the appeal pointed out that, the appellant was not charged with a capital offence so as to justify his lament that he was not accorded legal representation by the State; that even though both the complainant and PW2 did not give the description of the assailant, both indicated to those they came into contact that they were in a position to identify the culprit; and the failure by the investigating officer to elicit and record the description could not be the basis of faulting the identification of the appellant as there was sufficient light and the duration was ample for a positive identification. The learned judge stated thus:

> "... the incident occurred at about 10 pm. Both said there was electricity light and that the attacker did not attempt to disguise himself. Though no evidence was led on the duration the attacker took, it is obvious it was some considerable time. From the time the attacker entered into the complainant's house to the time to the time he dragged her into a sugarcane plantation where he raped her, I make a finding that the circumstances prevailing at the time were conducive for a positive identification. There was a lot of conversation between the attacker and the victims and he was not in any hurry to leave."

The learned Judge upheld both the conviction and quipped that the sentence was well deserved and he would not interfere with it.

11. Being aggrieved with the outcome, the appellant has filed the present appeal setting out the grounds as follows:

    a. The learned Judge erred by upholding the conviction and sentence imposed against the appellant yet failed to re-evaluate the whole evidence.

    b. The learned judge failed to find that the element of identification was not established against the appellant as the mode of arrest was not established and the evidence by the prosecution was maliciously intended to fix the appellant.

    c. The learned judge erred in law by upholding the conviction and sentence yet failed to find that the trial was unfair and against the tenets of Article 50 of *the Constitution*.

    d. The learned judge erred in law by upholding the sentence of 49 years imprisonment which is harsh, vengeful and inhuman as it extends beyond the life span of a human being.

    The appellant thus urges that the appeal be allowed, conviction quashed and sentence set aside.

12. This is a second appeal, and our remit is circumscribed to consideration of matters of law, only by dint of section 361 of the *Criminal Procedure Code* to the effect that this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. (See Chemogong vs. R [1984] KLR 61; Ogeto vs. R [2004] KLR 14 and Koingo vs. R (1982] KLR 213). The test to be applied on second appeal is whether there was any evidence on which the trial court could reasonably find as it did. (See Reuben Karari S/o Karanja vs. R [1956] 1 E.A.C.A. 146).

13. In his supplementary submissions, the appellant raises concern regarding the first report, which he says did not give a description of the assailant to enable the police make arrest, that the charge sheet indicates his date of arrest as 2nd September 2015, which was 4 months after the incident and it was not the complainant who led police to his arrest, thus urging us to draw an inference that it is a clear indication that the case was frame up. He maintains that evidence of first report often proves a good test of which the truth and accuracy of subsequent statement may be gauged and provides a safeguard against later embellishment or deliberately made- up case.

14. The respondent points out that the learned judge, while acknowledging that the witnesses did not give a description of the attacker, nonetheless held that such omission was not fatal to the prosecution case, pointing out that the witnesses were categorical that they had come into contact with the attacker and were in a position to identify him from the first encounter with PW3, and subsequently with the police that they were able to identify during the attack.

15. We are aware of the position stated in the case of James Tinega Omwenga vs. Republic CA. Criminal Appeal No. 59 of 2011 [Nakuru), where this Court differently constituted held:•

> "..., that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade, at which the witness is afforded an opportunity to affirm his identification pointing out the suspect is a dock identification which in some cases is regarded as worthless."

16. In our considered view, the lament about lack of description in the first report is cushioned by the fact that PW1 on her first encounter with PW3, was clear that she was able to see and identify her attacker,

a position echoed by PW2 when he made the report to the police and this gained further momentum with the subsequent identification parade which was conducted.

17. As regards identification, the appellant contends that the identification parade did not meet the mark, as it only had 6 members as confirmed by the witnesses, yet in the identification parade form the investigating officer added the number of people and names so as to fill the gaps in the prosecution case. The appellant insists that in this case, he was among 6 members, yet according to the procedure, an identification parade should include 8 members, who should be of the same physique and should be of at least the same height, same physical appearance, among others. The appellant contends that he was given a smartphone with headphones while others were not given the phones, a move which he says was tailored to secure a conviction.

18. In response to this limb, counsel for the respondent submits that there were two identification parades conducted where PW1 and PW2 were able to positively identify the appellant from the other members of parade and that this was not only sufficient, but also ruled out the possibility of error, unlike the situation where there is only a single identifying witness. Further, that the appellant was satisfied with the parade and did not make any objection, and he cannot, during a second appeal, raise questions concerning his identification by the two witnesses. It is argued that the two witnesses corroborated each other in their identification of the appellant as they had adequate opportunity for the witness to see the accused.

19. We acknowledge the definition given in Black's Law Dictionary that: 'a police identification procedure in which a criminal suspect and other physically similar persons are shown to the victim or a witness to determine whether the suspect can be identified as the perpetrator of the crime'

20. Under chapter 42 section (5) of the National Police Service Standing Orders:

> Where a witness is asked to identify an accused or suspected person, the following procedure shall be followed:
>
> a. the accused or suspected person shall always be informed of the reasons for the parade and that he or she may have a counsellor or a friend present when the parade takes place;
>
> b. the police office-in-charge of the case, although he or she may be present, shall not conduct the parade.
>
> c. the witness or witnesses shall not see the accused before the parade;
>
> d. the accused or suspected person shall be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as him or her;
>
> e. where the accused or suspected person is suffering from any disfigurement, steps shall be taken to ensure that it is not specially apparent;

Section 7 (1) spells out that the purpose of the parade is “to ensure a fair and correct identification when the whereabouts of the accused or suspected person is known to the police, but there is some doubt as to whether he or she is the person so accused.”

21. We cannot fault the submission by the appellant that identification parades are held to enable eyewitnesses to identify the suspect whom they allegedly saw. In this process, the eyewitness ability to identify the suspect is tested with accuracy. On the issue relating to the identification parade, the learned judge pointed out that there are some minimum requirements to be observed before one is

conducted and acknowledged that neither PW1 nor PW2 had given a description of the attacker, although in his view this was not fatal to the prosecution case in light of other existing evidence relating to identification.

22. We take note that both the trial court and the first appellate court were keenly aware of the shortcomings in the conduct of the identification parade, and considered other evidence available, which led to positive identification. However, we do not share the view that failure to hold such parades weakens the evidential value and all that remains will be dock identification, in this instance. We say so because in this instance, the appellant was readily identified by PW2 whose opportunity for identification we shall address in the subsequent part of this judgment and he is the one who alerted police, leading to the appellant's arrest.

23. The appellant capitalizes on the fact that the investigating officer PC Ngeno who testified as PW6, said the parade had about 6 people, to this effect:

> "...we paraded about 6 men who were all resembling accused in terms of body build. I even tried to disguise the accused by giving him a mobile phone and earphones trying to hide the identity of accused person to confirm if accused person could be identified... he, was positively identified by the state."

24. In a departure from what the investigating officer said, Inspector Maalim, PW7, who produced the parade form on behalf of Inspector Hillary Lungu, was categorical that:

> "...There were 8 people. This record shows 8 people. The 10 must have been mistaken. Minimum are 8 not 6.
>
> You were conducted with (sic) parade with 8 people. You said there was no objection with the manner in which parade was conducted"

25. There were two fundamental flaws with the conduct of the parade, one is the contradiction between the evidence of the two police officers as to the number of persons constituting the parade, and in the face of such contradiction, the benefit of doubt must be resolved in the appellant's favour. Secondly is the sad fact that the appellant was the only member who was starkly different, with a phone in his hand and earphones to boot. He stood out like a sore thumb, and was greatly prejudiced. However, even the benefit that the identification parade was flawed, and violated the Service Standing Orders, it would still not be fatal, as it was not the only basis for identification

26. It is the appellant's further contention, that the opportunity for identification was not adequately established and, in this regard, he draws from the case of Matianyi vs. Republic (1986) KLR 198, where this Court (differently composed), in holding that inquiry as to the intensity of light is essential in testing the accuracy of identification, observed that:

> "It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and it position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into."

27. In opposing the appeal on this limb, it is submitted on behalf of the respondent that the trial court noted that PW1 and PW2 had sufficient time to see the appellant as the electricity lights were on and that both the trial court and the 1st appellate court were convinced that the witnesses had the capacity to identify the accused by the face at the time of the incident. The trial court had this to say regarding the opportunity for identification:

> " I have considered the circumstances of the attack. According to PW1 and PW2, it happened at 11.00 p.m. in an area lit by electric light. According to PW1 and PW2, the accused, PW1 and PW2 were in close quarters and talked together for a while. The attack is said to have commenced at 11:00 p.m. and it ended some time the next morning. It is said that PW1 was rescued at 2.00 am, whereas the time frames cannot be exact, it is clear that the ordeal lasted a long while, such that people can become familiar with physical features and each other's facial features."

This was reconsidered by the learned judge, who was equally satisfied that the opportunity and conditions for identification were favourable, taking into account the lighting conditions, proximity of the witnesses to the appellant and the amount of time spent. We find that the two courts took into account the factors for positive identification as highlighted in the Maitanyi case (supra); and we find no error in law or legal principle in that regard.

28. The appellant also raised issue with the production of medical evidence on grounds that the maker of the medical report was not called hence the person who testified was incompetent to produce the report. In reply, the respondent acknowledges that whereas Dr. Aduka prepared the report, it was produced by Dr Mansur who had worked with him for 5 years but argues that the introduction of that document was not objected to by the appellant and in any event, section 77 of the *Evidence Act* allows a report by a medical practitioner to be used in evidence and section 77(2) allows the court to presume the signature on such document to be genuine. Thirdly, that there is no basis for questioning the contents of the said medical evidence more so because the Appellant opted not to cross-examine PW5 who produced the medical reports. It is argued that he is therefore estopped from distancing the medical report from the proceedings in his case. We are invited to consider the position that although a medical examination would ordinarily be produced by its maker, this Court in Sibo Makovo vs. Republic, Criminal Appeal [1997] eKLR, was clear that:

> " It is trite law that if the maker of a document is not available the document can be produced only after another person identifies the signature of the maker and in terms as laid down in section 33 of the *Evidence Act* (Cap 80, Laws of Kenya) so far as relevant."

29. Under Section 33 of the *Evidence Act*, a document created by a person who cannot be called as a witness can still be admissible in court if the maker is deceased, cannot be found, is incapable of giving evidence, or if procuring their attendance would cause unreasonable delay or expense; the court will consider the circumstances of the case to decide on admissibility. Section 33 provides as follows:

> Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases-
>
> (a) relating to cause of death when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which

resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;

30. We thus express the same position as the respondent, that it is therefore not fatal for prosecution case when a medical report or any other expert evidence is produced by a person with expertise in the same field other than the original maker of the report, and where the maker and the one producing have worked together and can vouch for the handwriting and signature.

31. The other issue raised by the appellant was that the two courts below failed to consider his alibi defence. As concerns the alibi defence, the respondent's counsel submits that the alibi given by the appellant was insufficient to dislodge the strong case against him as the eyewitness account of PW1 and PW2, was too overwhelming to reach the irresistible conclusion that the appellant's credibility and the reliability of the evidence of his alleged alibi are highly questionable. In this regard, the respondent's counsel points out that the law on defence of alibi was set out in Erick Otieno Meda vs. Republic [2019] eKLR that:

"a.) an alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.

b.) an alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.

c.) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.

d.) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail."

32. From our perusal of the record, the issue regarding an alibi defence was not raised before the High Court. In addition, what the appellant refers to as an alibi defence is a misnomer, he merely described the events of the day he was arrested, saying he was at his barber shop when police went to fetch him, and does not explain where he was on the night of the incident. That in no way adds up to an alibi defence and this limb of the appeal is a complete non-starter.

33. On the question of the 49-year sentence that was meted out on the appellant as being harsh and inhuman, the respondent contends that section 3(3) of the *Sexual Offences Act* provides that:

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(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.

It is argued that the trial court considered the circumstances under which the offence was committed, how the victim was terrorized by the appellant who was armed with a panga and a knife, and raped her under threat of death. Given that the minimum sentence is 10 years and a maximum of life imprisonment, then the 49 year sentence being akin to life imprisonment was well deserved; but just on account of this Court's decision in the case of Evans Nyamari Ayako vs. Republic Criminal Appeal No. 22 of 2018, which defined the life imprisonment sentence to mean 30 years, the respondent concedes to a substitution of the life sentence to 30 years so as enable the appellant to return back to the society a reformed person so as to teach his descendants that crime is bad and attracts serious consequences.

34. The learned trial magistrate in enhancing the penalty, was very detailed in his ruling on sentence, taking into consideration how the survivor was so traumatized; and the High Court confirmed the sentence. This is not a life sentence in stricto sensu but a term sentence; we therefore find that the trial court properly exercised its discretion, and there would be no basis to warrant interfering with the sentence. The upshot is that the appeal lacks merit and is dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF MARCH, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR