



**Wycliff v Republic (Criminal Appeal E065 of 2022)
[2024] KECA 988 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KECA 988 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL E065 OF 2022
F SICHALE, FA OCHIENG & WK KORIR, JJA
JULY 26, 2024**

BETWEEN

ONGERA NYAKUNDI WYCLIFF APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Eldoret
(H. Omondi, J.) dated 22nd January, 2020 in HC.CRA No. 17 of 2016)*

JUDGMENT

1. This is a second appeal filed by the appellant, Ongera Nyakundi Wycliff who in count I had been charged with the offence of robbery with violence contrary to section 296 (2) of the [Penal Code](#). In count II he was charged with the offence of rape contrary to section 3 (1) (a) (b) and (3) of the [Sexual Offences Act](#) with an alternative charge of committing an indecent act contrary to section 11(1). He was convicted of the offence of rape and sentenced to serve thirty (30) years' imprisonment.
2. The appellant was dissatisfied with the said outcome and his first appeal suffered the fate of dismissal. Undeterred, the appellant is now before us in this second appeal. In the supplementary grounds of appeal dated November 15, 2023, the appellant listed 4 grounds of appeal. These are: -
 - “i. That the learned Judge erred in upholding the conviction in the face of inconclusive evidence.
 - ii. That the learned Judge erred in upholding an unduly harsh sentence.
 - iii. That the analysis of the law by the learned Judges was incomplete, defective and prejudicial to the appellant.



- iv. That the conviction and sentence are wholly unsafe and ought to be quashed/ set aside.”
3. On December 5, 2023 when the appeal came up before us for hearing, learned Counsel, Mr. Oyaro for the appellant relied on the appellant’s filed submissions dated November 15, 2023 with a brief highlight.
 4. Miss Githaiga, learned Counsel for the respondent also relied on the respondent’s submissions dated November 27, 2023. She too made some brief oral highlight.
 5. It was the appellant’s contention that no seminal fluid of the appellant was found on the victim; that the appellant was at the *locus in quo* to assist the victim and not as a perpetrator of the offence of rape; that the appellant was convicted on the basis of uncorroborated evidence of the victim who at the time was badly beaten and in bad shape as a result of what had just befallen her.
 6. In the alternative, the appellant urged us that should we find that the conviction was merited, we consider reducing the sentence of thirty (30) years’ imprisonment given the minimum sentence under Section 3(3) of the [Sexual Offences Act](#) and more so considering the support he accorded the victim post the rape. Several authorities were cited in support of the appellant’s contention. We shall advert to some of them in the course of our determination of this appeal.
 7. In the respondent’s submissions dated November 27, 2023, it was contended that the offence of rape was established as there was no consensus; that there was proof of penetration; that the appellant was the perpetrator of the offence; that the appellant was one of the thieves who had robbed the victim and as PW1 sought help from him, he agreed on condition that he has sex with her. At the time, the victim was lying on the ground and the appellant hit her on the chest and stomach, rolled her over, removed her underwear and had sex with her.
 8. It was further contended that the offence of rape is not proved by the presence of spermatozoa as it is sufficient to prove penetration. Reliance was placed on the decision of [Erick Onyango Ondeng v Republic](#) 2014 eKLR for this proposition. Further, that P3 confirmed that the victim had bruises and lacerations on her genitalia. On the question of identification, it was submitted that the victim knew the appellant and she recognized him using his voice as he was a neighbour; that the appellant in a bid to cover his tracks went and brought his mother, Rebecca who was a fellow church member of PW1.
 9. On the sentence, the respondent contended that whereas the minimum sentence under S.3 (3) of the [Sexual Offences Act](#) is 10 years, the section also provided for a maximum sentence of life imprisonment.
 10. The appeal before us is a second appeal. Our mandate in respect of a second appeal was well enunciated in this court’s decision of [Karingo v Republic](#) [1982] KLR 213 at page 219 wherein this Court stated thus: -

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did ([Reuben Karoti S/O Karanja v Republic](#) [1956 17 EALA 146].”
 11. We have anxiously considered the totality of the evidence, the submissions, the authorities cited and the law.
 12. PW1 Rebecca Mumbi Kavusu was on her way home on July 3, 2014. The time was about 7.45 pm . Two people passed her only for one to return. She was hit on the head and she fell down. She was



robbed of her items and shortly after, another person came and engaged her in a conversation. She was able to recognize this person from his voice as being the appellant who is a neighbour. The person told her that his mother was Rebecca who goes to the same church with PW1. PW1 requested for help and the appellant agreed to help her on condition that she had sex with him. She was rolled over and the appellant had sex with her. Thereafter, the appellant left only to return with his mother, DW2. PW2 and PW3 came to the scene after the rape ordeal. The rest of the evidence of the prosecution witnesses was not in support of evidence of the offence of rape.

13. In his sworn statement of defence the appellant told the trial court that whilst on his way to his house, he heard a cry. On shining his phone light, he saw a person who had a head injury who said she had been attacked by two men. He went back to his mother who called a village elder. Help was organized for PW1 who was then taken to Moi Teaching and Referral Hospital.
14. DW2 Rebecca Bosibori is a fellow church member of PW1. On the material day, she was called by her son, the appellant. She had found PW1 on the ground bleeding. PW1 told her that she had been beaten and robbed. DW2 organized for transport to take her to hospital.
15. We have anxiously considered the evidence adduced by the prosecution and in particular PW1. It is common ground that PW1 was attacked during hours of darkness. She was attacked by two people who put her down and hit her. The injury on her head caused bleeding. According to her she was able to identify the appellant as he was a neighbour. In her examination in chief PW1 told the court as follows: -

“Shortly one of the two returned and asked why I was bleeding and lying down. He asked if I was a thief. I said I was from church. From the voice I could recognize him as a neighbor. Wycliff Nyakundi the 1st accused. My face was swollen and I could not see well. The person told me his mother is Rebecca and is from the same church with me. I told him to assist me to hospital. He said he can only assist me if I have sex with him. (breaks into tears). He hit me on the chest and stomach. He rolled me over tore my pants and started having sex with me. He stopped, left and after 10 minutes returned and continued with the sex and thereafter, he returned with his mother and other people.”

16. In re-examination, she stated:

“It was about 7.45 pm when I alighted. It was dark when the two people passed me. I did not identify them then. They passed and returned. I cannot say who of the two hit me. I did not scream. The first accused was not found with anything. After I was hit, I was dragged into a bush. the one who returned questioned me in a common voice. My eyes were swollen and I could not see clearly. As we talked about the church he calmed down. When I recognized the voice, I did not let him know that I had recognized him. He said his mother is a member of the church and is also called Rebecca. His mother came to the scene. He may have told her assuming that the issue of rape will not arise. I did not tell anyone at the scene including the mother that it was the accused who raped me. I informed my husband the same day. I was informed the 1st accused was arrested the next day. I have not framed him, he demanded for sex before assisting me. He is a neighbour and I know him well. The party is at home. The torn clothes were disposed off at the hospital. The 1st accused was also taken to hospital for examination.”

17. From the above excerpts of PW1’s evidence, it is clear that PW1’s evidence was that he recognized the appellant who was the 1st accused in the trial through voice identification. Her narration of the



sequence of events was that whilst on her way, two people passed only for one to return and attack her. There does not seem to be any recognition of any of the two people who passed her and shortly after returned to accost her. It would appear that the appellant whom she says was a neighbour, was not one of the two assailants. According to PW1 the appellant appeared after the robbery. The appellant then undertook to help her on condition that she had sex with him.

18. It is noteworthy to point out that it is indeed strange that the appellant would disclose the particulars of his mother as one who goes to the same church with PW1 after he had committed such a heinous crime. If anything the appellant would not give any information to PW1 that would lead to his arrest. We think the most reasonable thing to do for the appellant is not to have given further particulars of himself at the time he raped PW1, if at all.
19. In our view, we entertain doubts as to whether the appellant was one of the two gangsters that waylaid PW1, robbed her of her items and raped her or whether the appellant came to the scene as a good Samaritan after hearing PW1's plea for help. It is because of this doubt that we think the conviction was not safe.
20. Accordingly, the conviction is hereby quashed and sentence set aside. We direct that the appellant be forthwith released from custody unless he is otherwise lawfully held.

DATED, SIGNED & DELIVERED AT NAKURU THIS 26TH DAY OF JULY, 2024.

F. SICHALE

JUDGE OF APPEAL

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F. OCHIENG

JUDGE OF APPEAL

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W. KORIR

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

