



REPUBLIC OF KENYA



KENYA LAW
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**Karanja v Republic (Criminal Appeal 13 of 2020)
[2023] KECA 674 (KLR) (9 June 2023) (Judgment)**

Neutral citation: [2023] KECA 674 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 13 OF 2020
MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA
JUNE 9, 2023**

BETWEEN

MOSES NDUNGU KARANJA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the judgment High Court at Kitui (F.A Ochieng & Achode, JJ.) delivered on 31st January 2012 in Criminal Appeal No. 110 of 2008)

JUDGMENT

1. The appellant, Moses Ndungu Karanja was charged with 4 counts as follows;
2. In count I, he was charged with the offence of robbery with violence contrary to section 296 (2) of the *Penal Code*. The particulars of the charge were that on September 11, 2006 at about 1.30 am in Kiambu District within the former Central Province, jointly with others not before the court, while armed with dangerous weapons namely pangas, he robbed Stephen Njihia Ndegwa PW1 (Stephen) of cash Kshs 500 and immediately after such robbery used actual violence on Stephen.
3. In count II, he was charged with the offence of robbery with violence contrary to section 296 (2) of the *Penal Code*. The particulars of the charge were that on September 11, 2006 at about 1.30 a.m in Kiambu District within the former Central Province, jointly with others not before the court, while armed with dangerous weapons namely pangas, sticks and stones, he robbed NN PW3 (N) of a mobile phone make Siemens C35 valued at Kshs 2,500 and immediately after such robbery threatened to use actual violence on N.
4. In count III, he was charged with gang rape contrary to section 10 of the *Sexual Offences Act*. The particulars of the charge were that on September 11, 2006 at about 1.30 am in Kiambu District within the former Central Province, together with others not before the court had carnal knowledge of N (PW3) without her consent.



5. In count IV, he was charged with unnatural offence contrary to section 162 of the [Penal Code](#). The particulars of the charge were that on September 11, 2006 at about 1.30 a.m in Kiambu District within the former Central Province, together with others not before the court, had unlawful carnal knowledge of EW (E) PW4 through her anus.
6. He was also charged with alternative charges of indecent act to an adult contrary to section 11 (6) of the [Sexual Offences Act](#). The particulars were that, on the same day, he indecently and unlawfully assaulted NN by touching her private parts namely her vagina.
7. He was also charged with alternative charges of an indecent act to an adult contrary to section 11 (6) of the [Sexual Offences Act](#). The particulars were that; on the same day, he indecently and unlawfully assaulted NN by touching her private parts namely her vagina, and that he indecently and unlawfully assaulted EW by touching her private parts, namely, her buttocks.
8. The appellant pleaded not guilty to the charges, and during the hearing, the prosecution called 8 witnesses.
9. The trial magistrate acquitted him of count I for the offence of robbery with violence of Stephen, but convicted him of counts II, III, IV having found that the offences were proved to the required standard. For count II, the trial court sentenced him to death as by law prescribed, and suspended the sentences in counts III and IV.
10. The appellant was aggrieved by the decision and appealed to the high court which upheld the convictions and sentence.
11. He was further aggrieved by the high court's decision and now appeals to this court on grounds set out in a home made memorandum of appeal and in a supplementary appeal where he asserted that the high court was in error when it upheld the convictions and sentence framed on a defective charge sheet; in failing to appreciate that he was not properly identified; in finding that the offence of rape was proved, when there was no evidence of penetration; and in failing to evaluate the evidence that was before the trial court.
12. At a virtual hearing, Ms Christine Mugo, learned counsel for the appellant stated that the appellant had filed written submissions which she would be relying on in their entirety. On behalf of the State, learned counsel, Mr Omondi stated that he would be submitting orally in respect of the issues raised in the appellant's appeal.
13. In his written submissions, the appellant begun by asserting that the charge sheet was defective for the reason that his alias name of "Kaimosi", and the weapons used during the attack were included in an amended charge sheet during the trial; that this was prejudicial to him, and invalidated the whole trial, as it was contrary to section 214 (1)(i) of the [Criminal Procedure Code](#); since he did not take a plea in respect of the amended charge sheet.
14. Next, the appellant submitted that the offence of rape was not proved to the required standard as the medical report did not disclose that PW3 and PW4 suffered injuries, that the HIV and syphilis tests were negative and neither were there organisms or spermatozoa present, though pus cell were seen in the vagina of PW3 and the anus of PW4. The appellant submitted that as a result, penetration was not proved, and so nothing connected him to the offences of rape or sodomy.
15. Finally, the appellant contended that the high court failed to properly re-evaluate the evidence, particularly as the court merely stated that it had discharged its duty of re-evaluating evidence and applied the relevant law.



16. On his part, Mr Omondi opposed the appeal and submitted that this being a second appeal, only matters of law were capable of being determined by this court; that both the high court and the trial court had reached concurrent findings on identification of the appellant, which conclusions this court should not disturb; that the courts below considered the charges and found that the offence of robbery with violence was proved to the required standard. It was submitted that the attacks were carried out by more than one assailant, and there was sufficient evidence that showed that they were armed and meted out violence on their victims; that as a consequence, the offence was proved.
17. Regarding the sexual assaults, counsel submitted that the trial court and the high court analysed evidence of PW3 and PW4 together with the medical evidence, and concluded that the offence of rape was proved. In so far as identification was concerned, it was pointed out that having forewarned itself on the dangers of proceeding to convict the appellant on the evidence of single identifying witnesses, the High Court nevertheless concluded that the appellant was properly identified; that though the assault took place at night, the presence of bright light and their having spent a long time with him, enabled PW3 and PW4 to see him. As a result, they could identify him at an identification parade; that therefore, the evidence of identification was free from error.
18. With regard to the complaint that the charge sheet was defective, it was contended that the appellant did not object to its having been amended during the hearings, and that he understood the charges that he faced.
19. This is a second appeal. By dint of the provisions of section 361 of the [Criminal Procedure Code](#), we are enjoined to consider only matters of law and not matters of fact. See *Joseph Njoroge v Republic* [1982] KLR 388. Bearing this in mind, we are of the view that the issues for consideration are;
 - i. whether the charge sheet was defective;
 - ii. whether the appellant was properly identified;
 - iii. whether the offences of rape and sodomy were proved; and
 - iv. whether the High Court failed to re-evaluate the evidence.

Before addressing the issues raised, a brief outline of the facts that were before the trial court is necessary. While Stephen PW1 was asleep in his house on the morning of September 11, 2005, at about 1:30 am, the door of the house was hit with a stone shattering the timber. Two assailants entered the house, while others were left outside. The assailants ordered Stephen to give them his mobile phone and money, and he gave them Kshs 1,500 and his phone. As they left the house, they cut his leg with a panga. It was his evidence that there was sufficient light to enable him recognise one of the attackers as the appellant whom he knew as, Moses Ndungu Karanja alias, “Kaimosi”.

20. On the same morning, N PW3, was asleep in her house with her husband, KM PW5, their children and her cousin E PW4, when suddenly people flashing torches entered her bedroom. They demanded money and their mobile phones from them. They pushed her husband under the bed, took her phone that was on a cupboard and Kshs 1,000 from the pocket of her husband’s trousers. Then, one of the assailants dragged her outside to the fence while another took her cousin PW4 to an incomplete bedroom. A third assailant guarded her husband in the bedroom. The one who had taken her outside raped her, while the other sodomised her cousin. The person who raped her then pushed her back into the house, and exchanged positions, with the one who was guarding her husband. The person guarding her husband took her back outside and proceeded to rape her. They also took turns sodomising PW4 whereupon, they marched PW4 to a neighbouring home which was about 1 ½ kilometers away, and then released her.



21. PW3 stated that before they left, one of the assailants flashed his torch light on his face and demanded to know if she knew his name. She told him she did not know him. She later reported that she recognised him as somebody she used to see on the road, and that at the fence there was security lights, which enabled her identify the appellant. She was able to pick him out in an identification parade conducted by IP Philemon Kimutai PW8.
22. PW4 was dragged to an incomplete room and ordered to remove her clothes. She refused and was sodomised by two of the assailants. The third refused to sodomise her, because he said she was young. Thereafter, she was taken to a neighbouring home about 1 ½ km away and then released. She was able to clearly see and identify the persons who sodomised her with the help of security lights from the nearby building, and because of the length of time she spent walking with them. She identified the appellant during an identification parade conducted by IP Philemon Kimutai.
23. PW7 Sergeant Barbans Ngeno/ the investigating officer went to the scene and confirmed that the light in the nearby building was very bright and enabled both PW3 and PW4 to see and identify the appellant.
24. PW 2, Dr Samson Gitonga of Kiambu District Hospital testified that after he examined the complainants, he found a whitish discharge with pus cells in the genitals of PW3 and the anus of PW4, but he did not find any injuries or spermatozoa in either of the witnesses. He testified that it was possible for an adult victim to be raped without sustaining physical injuries, and that one may rape or sodomise a victim without ejaculating, and therefore spermatozoa would not be present.
25. The appellant was placed on his defence and called two witnesses. He denied being at the scene, and stated that he was with his girlfriend on the material night. Both DW2 Antony Njenga and DW3 Lucy Waithera testified but their evidence did not shed any light on the appellant whereabouts on the night in question.
26. Having outlined the facts, we now turn to the issues. Beginning with the complaint that charge sheet was defective. The appellant asserted that he was not afforded an opportunity to take the plea again after his alias name; “Kaimosi” and the weapons used in the robbery namely, pangas, sticks and rungus were included in an amended charge sheet, during the proceedings, on August 15, 2007 which omission he stated was contrary to the requirements of section 214 (1) (i) of the [Criminal Procedure Code](#).

The section provides;

“(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that-

- i. where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;
- ii. where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution



shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2)

(3)"

27. In the instant case, on August 15, 2007, the prosecutor Mr Marete applied to include certain amendments in the charge sheet as follows;

“Prosecutor: I apply to amend (*sic*) the charge sheet to include the alias names of the accused ie Kaimosi as the name indicated in the statements and also the dangerous weapons used namely, pangas, sticks and rungus.

G W Macharia (Mrs) SRM Sidani: No Objection

G W Macharia (Mrs) SRM Court: Amendment allowed.

G W Macharia (Mrs) SRM”

Thereafter, Mr Sidani proceeded with cross examination of PW7 Sergeant Barbans Ngeno.

28. The above excerpt indicates that the court did not call upon the appellant to take a plea again after the charge sheet was amended. In addition, the court also failed to inform him of his right to recall any of the witnesses who had already testified. It is also apparent that Mr Sidani who was representing the appellant also overlooked the omissions.

29. In addressing this issue, this Court in the case of *Josphat Karanja Muna vs Republic* [2009] eKLR had this to say;

“... the spirit of section 214 is to afford an accused person opportunity to recall and cross-examine witnesses where the amendments would introduce fresh element or ingredient into the offence with which an accused person is charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of name or of a word. Here the name Ben Chege Gikonyo was amended to read Ben Cheche Gikonyo. We do not accept that the non compliance with the provisions of section 214 of the Criminal Procedure Code resulted into injustice to the appellant.”

30. In terms of the above cited authority, there is no question that the provision should be construed in accordance with the circumstances of each case. It becomes apparent that the requirements of the provision were not meant to be invoked each and every time an amendment, particularly one concerning inclusion of an alias name or weapons used in the commission of the offence. In this case, the amendments sought to include the appellant’s alias name of “Kaimosi”, and the dangerous weapons used during the robbery. Neither amendment changed the nature of the offences that the appellant faced.

31. In the case of *David Irungu Murage & Antony Kariuki Karuri v R*, Cr No 184 of 2004, this Court stated;

“We have carefully scrutinized the records of the two courts below and are satisfied that the irregularities and the omission arising from the lack of opportunity to plead did not occasion a failure of justice and whatever irregularities were committed were curable under section 382 of the CPC.”



32. In effect, we see no prejudice that was occasioned to the appellant. He clearly understood the nature of the amendments. In any event, we are satisfied that the omissions were curable under section 382 of the *Criminal Procedure Code*. This ground of appeal, therefore, fails.
33. As to whether the appellant was properly identified, we begin by observing that the appellant was acquitted of Count I, because Stephen PW1 was unable to identify him. But the trial court convicted him on counts II, III and IV.
34. Concerning counts II and III, PW3 testified that the appellant robbed her of her mobile phone and thereafter proceeded to rape her outside by the fence. At that time, she was able to identify him with the aid of the bright lights from a nearby building, and also pick him out in an identification parade.
35. In relation to count IV, PW4 identified the appellant was one of the persons who sodomised her with the assistance of security lights from the nearby building, and after the length of time she spent walking to a neighbouring house with him. She was able to pick him out at an identification parade.
38. PW7, the investigating officer confirmed that the light from the nearby building was very bright and that this could have enabled both PW3 and PW4 to see and identify the appellant.
39. On the basis of this evidence, both the trial court and the high court were satisfied that the appellant was properly identified by PW3 and PW4. In view of the concurrent findings, we too are satisfied that there was no error or mistake in the appellant's identification. This ground is therefore without merit.
40. The appellant also complained that the offence of rape and sodomy were not proved to the required standard, since the medical evidence did not prove that there was penetration.

The high court also considered this allegation and stated thus;

“On the charges of a sexual assault in count 3 and 4 PW4 testified that she saw PW3 in the process of being raped as she herself was being let out of the house to be sexually assaulted. PW3 also saw PW4 being sodomised as she herself was being raped. They corroborated each other in their evidence since they each witnessed the other being violated. PW2 Dr Gitonga of Kiambu District Hospital testified that he found a whitish discharge with puss cells in the genitals of PW3 and the anus of PW4 when he examined them. He however, found no injuries or spermatozoa on either of the two witnesses. The Doctor testified that it was possible for an adult victim to be raped without sustaining, physical injuries. He also testified that a man, may rape or sodomise a victim without ejaculating, and there would therefore be no evidence of spermatozoa”.

41. For the offences of gang rape or indecent assault to be proved, it is essential for the prosecution to demonstrate that i) there was penetration without consent; ii) the sexual assault was in association with another or others, or with common intent, in the company of another or others who commit the offence of rape and iii) the perpetrator was positively identified.
42. Penetration under section 2 of the Act is defined as;

“...the partial or complete insertion of the genital organs of a person into the genital organ of another person.”

In the case of *Mark Oiruri Mose v R* [2013] eKLR this Court explained penetration thus;

“...Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa



be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ..."

43. The evidence of PW3 and PW4 was that they were raped and sodomised in turn by the appellant and his accomplices, which demonstrated that they were gang raped and sodomised. Light coming from a nearby building was sufficiently bright and enabled them to see each other as they were sexually assaulted.
44. In addition, Dr Gitonga who examined PW3 and PW4 found a whitish discharge with pus cells in the genitals of PW3 and the anus of PW4, but he did not find any injuries or spermatozoa in either of the witnesses. He explained that it was possible for an adult victim to be raped without sustaining physical injuries, and that since one may rape or sodomise a victim without ejaculating, spermatozoa would not be present. So that, notwithstanding that the medical report did not indicate that there was penetration, the corroborated evidence of PW3 and PW4 together with the presence of pus cells pointed to sexual assault of the witnesses without their consent. Therefore, the complaint that rape or sodomy was not proved is unfounded.
45. On the assertion that the high court did not re-evaluate the evidence that was before the trial court, because it merely stated that it evaluated the evidence, we have considered the judgment and find that the court re-analysed the evidence and arrived at its own independent conclusion. We say this because, the appellant was charged with the offences of robbery with violence contrary to section 296 (2) of the *Penal Code* and gang rape contrary to section 10 of the *Sexual Offences Act*, indecent act under section 162 of the *Penal Code*.
46. In upholding the conviction for the offence of robbery with violence, the high court assessed the evidence thus;
 - “9. From the record, the robbers numbered more than one, were armed with pangas and they assaulted PW3 and PW4 in the process of robbing PW3 of her mobile phone. These are the ingredients of the offense of robbery contrary to Section 296 (2) of the Penal Code. Anyone of these ingredients if proved is enough to form the basis of a conviction for the offence of robbery contrary to Section 296 (2) Penal Code. In this case all the ingredients were proved and we find that the offence of robbery contrary to section 296 (2) of the Penal Code was proved...”
47. As pertains to the sexual offences which we have discussed earlier, the court analysed the evidence and concluded thus;
 - “12. We are therefore satisfied that during the robbery PW3 was raped and PW4 was sodomised. PW3 reported immediately to her husband when she returned to the house that she had been raped, and both PW3 and 4 were examined within hours of the assault.”
48. As such, there can be no doubt that the high court re-evaluated the evidence. Similarly, our re-examination of the evidence in so far as it pertains to matters of law leads us to the same conclusion. Accordingly, as were the courts below, we too are satisfied that the offences of robbery with violence, rape and indecent assault committed by the appellant were proved to the required standard and as a consequence the conviction was safe.
49. In sum, the appeal is unmerited and is dismissed.



It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

S. OLE KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

