Abonyo & another v Republic (Criminal Appeal E069 & E070 of 2022 (Consolidated)) [2025] KEHC 767 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEHC 767 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E069 & E070 OF 2022 (CONSOLIDATED)

SC CHIRCHIR, J

JANUARY 30, 2025

BETWEEN

CHARLES ODHIAMBO ABONYO ALIAS OMERAA ALIAS CHAROO ..... 1ST APPELLANT

NELSON NAGEVA RAVASA ..... 2ND APPELLANT

AND

REPUBLIC ..... REPUBLIC

(Being an appeal against the Judgment of the chief magistrate Hon. L. Kassan CM in Kakamega Criminal case NO. 719 of 2019 delivered on 19th September 2022)

JUDGMENT

1. The Appellants herein were charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code.

2. The particulars were that on 22nd day of February 2019 at Shikambi area in Kakamega township in kakamega central sub county within Kakamega county all being armed with crude weapons namely knives, pangas and metal rods robbed one techno mobile phone, 13kg gas cylinder and cash Kshs. 350/= all valued at Kshs. 22,350/= the property of the said Grace Ekiru Lokorikan and immediately before or immediately after the time of such robbery used actual violence against the said Grace Ekiru Lokorikan.

3. On count II, the 1st Appellant was charged with gang rape contrary to section 10 of the sexual offence *Act No. 3 of 2006*.

4. The particulars being on the 22nd day of February 2019 at Shikambi area in Kakamega central sub-county within Kakamega county in association with Patrick Okinda Charles alias Victor David Juma

Nyongesa alias Boy Jangili and Nelson Nageva Ravasa alias Mandela and Davis Kamadi intentionally and unlawfully caused your penis to penetrate the vagina of G E L

5. In Count V, the 2nd Appellant was charged with gang rape contrary to section 10 of the *sexual offences Act* No. 3 of 2006. The particulars being that on the 22nd day of February 2019 at Shikambi Area in Kakamega central sub- county within Kakamega county , in association with Charles Obonyo Odhiambo,, alias omera alias Charoo, Patrick Okinda Charles alias Victor, David Juma Nyongesa alias Boy Jangili and Yusuf Davis Kamamdi intentionally and unlawfully caused his penis to penetrate the Vagina of G E L without her consent.

6. The 1st Appellant was found guilty on count 1 and sentenced to serve 50 years in prison. The 2nd Appellant was found guilty of count 1 and 5 and sentenced to 20 years in count 1 and 10 years in count 5. The sentences were to run concurrently.

7. The Appellants herein were charged as the 1st and 3rd accused persons respectively.

8. They were dissatisfied with the outcome and each filed an Appeal.

9. The 1st Appellant set out the following grounds:

    a. That the learned trial magistrate erred in law and facts in presiding over a trial that did not met the threshold of a fair hearing as stipulated under article 50 (2)(c)(g) & (j) of *the constitution*.

    b. That the learned trial magistrate failed in law by not observing and considering that the probability of positive identification at the scene of crime was irregular.

    c. That, the learned trial magistrate erroneously convicted and sentence the appellant on evidence of a single witness regarding identification hence failing to appreciate that there was no evidence of identification parade.

    d. That the learned trial magistrate grossly misdirected himself in law and facts in convicting and sentencing the appellant in light of inconsistent farfetched, flimsy fabricated, disjointed, malice and suspicious evidence of prosecution without appreciating that the same was not water tight enough to sustain a conviction.

    e. That the learned trial magistrate did not observe and consider that there was a systematic, planned and implemented strategy to implicate him with the crime.

    f. That the learned trial magistrate erect in law and facts by shifting the burden of proof to him and there upon mis- evaluating his plausible defence of Alibi.

    g. That the learned trial magistrate grossly violated the dictates of section 169 (2) of the C.P.C by not stating the section under which he was sentenced and the points for determination properly relating to the matter at hand.

    h. That in all manner and circumstances the sentence imposed was harsh and excessive and not consideration of the period spent in remand custody.

10. He later filed a supplementary grounds of appeal where he pleaded as follows:

    a. That the trial court erred in law and in fact in convicting the appellant on inconclusive, uncorroborated evidence of identification and failed to remind itself of the specific weakness which had appeared in identification evidence relied on.

    b. That the trial court erred in law and in fact in denying legal representation to the appellant contrary to Article 50 (2) (g) hence unfair trial.

c. That the trial court erred in law and in fact its judgment in double standardizing its decision thus biased on the 1st accused.

d. That the mandatory nature of sentence under section 296 (c) of the CPC is unconstitutional and not warranted on plea.

e. That the trial court erred in law and in fact in not making a finding that the failure to conduct identification parade on the 1st accused to determine PW1's correctness of identification of the 1st accused was fatal to this case.

f. That the trial court erred in law and in fact in not weighing the conflicting evidence that were inconsequential to this case.

11. The 2nd appellant's petition of Appeal was based on the following grounds:

a. That the learned trial magistrate grossly erred in both law and facts in presiding over a trial that seriously offended section 36 (2) of the sexual offense Act.

b. That the learned trial magistrate grossly erred in both law and fact in presiding and subsequently sentenced him without considering that the parade was conducted in breach of section 46 of the FSO

c. That the learned trial magistrate grossly erred in both law and facts in basing a conviction and sentence on him on uncorroborated, inconsistence flimsy and inadequate evidence.

d. That the learned trial magistrate grossly erred in both law and facts by shifting the burden of prove on which seriously offended section 107 and *evidence act*.

e. That the learned trial magistrate grossly erred in both law and facts in failing to appreciate defence and therefore dismissed it without proper evidence

f. That the learned trial magistrate grossly erred in both law and facts in failing to summon the crucial witness without any reason.

12. The two Appeals were consolidated and this Appeal was designated as the lead file. The Appeal was canvassed by way of written submissions.

1st Appellant's submission

13. It is this Appellant's first submissions that the prevailing conditions at the time did not allow for proper identification of the perpetrator; that the identification was by a single witness and hence the court ought to have treated the said evidence with caution. It is further submitted that the said single witness further contradicted herself on the evidence of identification. It is submitted that the 2nd Accused who was not found guilty of the crime falsely implicated the Appellant

14. The Appellant further submits that he was not informed of his right to legal representation and was not given an Advocate , notwithstanding the gravity of the offence he was charged with.

15. The Appellant further submits that the court was biased towards him as it acquitted the 2nd, 4th and 5th Accused while finding him guilty yet the circumstances appertaining to identification were the same.

16. The 1st Appellant finally submits that the sentence meted out to him was excessive , seeks for a reduction and urges the court to consider the provisions of section 333(2) of the criminal procedure code in determining the appropriate sentence.

2nd Appellant submissions

17. It is the 2nd appellant's submissions that there were contradictions and inconsistencies in the complainant's testimony on the issue of identification; that she did not know the number of people who attacked her for instance and that illumination was not sufficient for purposes of identification. He further submits that the investigation officer's testimony was equally contradictory on when and how he was arrested.

18. He further submits that the complainant's two children aged 15 and 13 years thought alleged to have been eye – witnesses were never called to testify.

19. On the identification parade, he submits that there was no compliance with section 46 of FSO and that the manner in which it was conducted was prejudicial to him.

20. It is further submitted that there was no medical evidence linking him to the raping of the complainant. In totality , he states the evidence presented made the conviction unsafe.

Respondent's submissions

21. On whether the evidence of identification was inconclusive, the respondent submits that the 1st appellant was arrested based on the evidence of his co-accused; that according to the complainant , her bedroom was well lit and that she was able to identify the 1st appellant in her room as the person who pulled away her blanket and demanded for her phone , Mpesa an PIN and KCB accounts. It is further submitted that the duration spent with the attackers by the complainant ample enough to for sufficient identification; that the fact that the complainant only identified the Appellant does not make her evidence unreliable and that the fact that no identification parade was conducted on this Appellant was not fatal to the prosecution's case.

22. On the issue of legal representation, the respondent submits that the appellant never requested for legal representation and was denied.

23. The respondent did not respond to the 2nd Appellant's Appeal.

Summary of the evidence.

24. Pw1 was the complainant. She testified that on 22/2/2019, she was attacked by the 5 people, who entered her house while she was asleep. She stated that she was woken up by the sound of someone pulling off her blanket; when she opened her eyes, she found herself surrounded by a group of men. She screamed and the 1st Appellant ordered her to shut up. The 1st Appellant sat next to her on the bed. The security light from outside was illuminating her room, she was able to identify them . They were armed with crude weapons.

25. She identified the 1st appellant as the person who pulled her blanket and demanded for her phone, pin number and accessed her Mpesa and KCB account and forced her to use fuliza. She stated that the 1st accused asked her to remove her panties which she complied. The 3rd accused then took her to another room and raped her. He did not use a condom , she stated.

26. After the attackers left, she and her children stayed indoors until morning, when she informed a neighbour and later the police.

27. The attackers took her mobile phone, gas cylinder, Kshs. 350/=. She was escorted to Kakamega County General Hospital for treatment. She further stated that she identified the 3rd Accused in the

identification parade. As regards the 1st Accused , she stated that he was close to her and talked to her. He could identify him.

28. On cross- examination by the 3rd accused, she testified that she was able to identify him through the security light. She stated that the security light was so bright that it illuminated inside the house through the window covered with a net. That the 1st Accused was not far from her bed and she could see him clearly ; that he had pimples and scratches. On cross- examination by the 2nd accused, she had stated that there were 5 thugs in her house and 3 remained inside , while the others were asked to man the gate outside.

29. PW2 was the clinical officer at Kakamega County Referral & Teaching hospital. He produced the complainant's P3 and PRC form as well as the treatment chits. He stated that on examination the complainant was found with spermatozoa in her vagina.

30. PW3 was Corporal Samuel Kisa, DCI kakamega, North. He told the court that on 7/3/20119, in the company of corporal Joseph Munyoki and Pc Dickson, they were on patrol duties when they arrested the 2nd accused David Nyongesa who was a robbery suspect. Upon interrogation , the suspect led them to the 2nd Appellant who was in webuye.

31. On cross- examination by the 2nd accused, he confirmed that he arrested him after his accomplice led them to him; that he never recovered anything from him although he had been arrested in connection with other offences.

32. On cross- examination by the 3rd accused, he confirmed that the 3d Accused was arrested at Muliro Gardens, around midnight, and that he was armed with a pistol.

33. Pw4 was the arresting officer. He told the court that they had received complains of a series of robberies in Kakamega and the 5 Accused persons had been implicated. On the material day they received a report of a robbery incident in Kakamega, they went there and at Green hotel they found Accused 1 (the 1st Appellant). He knew him before ,as he had arrested him before, in his house in webuye. On cross-examination he stated that the 1st Appellant was then being arrested in respect to a different case.

34. PW5 was inspector Muronik , then standing in for inspector Evelyn who had since been transferred. He told the court that the 2nd Appellant herein was identified by the complainant in an identification parade. The complainant while she could not identify the then 2nd , and 5th Accused persons. He stated that the 2nd Appellant was satisfied with the identification process. On cross -examination by the 1st accused he confirmed that there was no identification parade conducted on him.

35. PW6 testified that he was on duty when they received a report of a break- in at Shikambi area and on arrival at the scene, they found that the complainant had been robed of her mobile phone, TV set, Gas cylinder. They also found out that the complainant had been raped.

36. On cross examination by the 1st accused the witness confirmed that the 1st Accused was arrested after the 2nd accused directed them to him.

37. PW7 was the investigations officer. She testified that she was called while at home and informed about the robbery . she went to the station , recorded the complainant's testimony then took her for medical examination. That through the identification parade held, the complainant only identified one suspect. She further sated that she took some samples to the government chemists but the results were not out by the time she was testifying. She produced the P3 and the PRC as exhibit 1 and 2 respectively.

38. On cross- examination by the 1st Appellant she stated that he was implicated by his co- accused. . On cross- examination by the 2nd Appellant she stated that he was identified in the identification parade.

39. Upon being put on their defence the Appellants and their fellow co- accused persons provided sworn statement.

40. The 1st Appellant testified as Dw1. He told the court that on the material day , he was at Kakamega , where he worked as a mechanic until 6pm; that he never went elsewhere . ; that on 4/11/2019 he was about to enter a room where he had booked a when he was confronted by 2 policemen; that he was interrogated and they considered him rude on his answers . Thus they laid trumped up charges on him.

41. The 2nd Appellant testified as DW3. He stated he was a mason and on the material day he was doing some plastering work in webuye.; that the work lasted up to 7/3/2019. On his way home on the 7/3/2019 , he saw police chasing people. He also ran and he was arrested. He was first taken to webuye police station then to Kakamega. He gave out his name . There was a tussle involving him and the police and he fell and injured his face in the process. The complainant arrived in the station while the tussle was going on ,and that is how she came to know that he had a scar on his face , and the same reason why it was easy for her to pick him out in the identification parade, he stated.

42. At the conclusion of the hearing the trial court acquitted the 2nd , 4th and 5th Accused. The Appellants herein were convicted on the basis that they had been positively identified by the complainant.

Analysis and Determination

43. This is a first Appeal and the role of this court is well settled. It is its duty to review the evidence, evaluate it and arrive at its own findings. An appellate court must also bear in mind that unlike this court the trial court had the benefit of seeing and hearing witnesses first- hand.

44. I have considered the petitions of Appeals , the lower court record and the submissions of the parties and have identified the following issues for determination:

    i. Whether the 1st appellant was denied fair hearing as stipulated under article 50 (2) (c)(g) & (j) of *the constitution*.

    ii. Whether the Appellants were positively identified

    iii. Whether the trial court offended section 36 (2) of the sexual offense Act.

    iv. Whether the trial court conviction was based on inconsistent and uncorroborated evidence.

    v. Whether the offence of robbery with violence and Gang rape were proved.

    The Right to legal representation.

45. The 1st Appellant has complained that he was not given an advocate, neither was he informed about his right to legal representation.

46. On the Right to legal representation Article 50 gives the right to a fair hearing, one of the components of which is the right to legal representation. Article 50(2)(h) provides:

> " Every accused person has the right to a fair trial, which includes the right to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly."

47. In the case of William Oongo Arunda (Hitherto referred to as Patrick Oduor Ochieng) v Republic [2022] KECA 23 (KLR) the court of Appealconsidered the right the right to legal representation and the right to be informed , and addressed it as follows: " that the operative circumstance that triggers the necessity of legal representation in criminal proceedings is where substantial injustice would occur

arising from the complexity and seriousness of the charge against the accused person, or the incapacity and inability of the accused person to participate in the trial. The court also noted that it should be standard practice in every criminal trial for the accused person to be informed, at the onset, of his right to legal representation since *the Constitution* demands it. However, in the present appeal, the appellant did not raise the issue of legal representation either in the trial court and the High Court, and the record of the trial court shows that the appellant participated in the trial and cross-examined the witnesses, and it is not evident that he suffered any or any substantial injustice. For these reasons, we do not find any merit in the appellants arguments that their rights to a fair trial on under articles 50(2)(g) and 50(2)(h) of *the Constitution* were violated."

48. The lower court record does not indicate that a request for legal representation was made . Further It is evident that the Accused persons were quite enlighten. The questions they put to the prosecution witnesses were impressively relevant. Each of the prosecution witnesses was examined by each of the accused persons. William Oongo's decision (supra) was by the court of Appeal and am duly guided. Am not convinced that in the circumstances of this case the right to fair trial was violated.

Whether the Appellants were properly identified

49. In this case the identification was by a single witness, namely the complainant. The 1st Appellants' case is that identification was not satisfactory as there was not enough illumination; that no identification parade was conducted for purposes of his identification. The question is whether this evidence by PW1 the complainant, a single identifying witness and at night is sufficient to find the accused persons guilty of the offence of robbery with violence.

50. In Ogeto –vs-Republic, [2004] 2KLR, the court of Appeal held: "It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken".

51. The case of R. –vs-Turnbull & Others, (1973)3 ALL ER 549, sets out the factors that the court should take into account when the only evidence turns on identification by a single witness. The court stated:- "...the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance....?"

52. In respect to the identification of the 1st Appellant, no identification parade was conducted. The complainant testimony in this regard went as follows: that there was a lot of light coming through a transparent curtain that covered the window; that the 1st Appellant is the one who pulled off the blanket; he is the one who ordered her to shut up when she began to scream. He is the same person who asked her to surrender her phone and instructed her to transfer her money in the mpesa and KCB accounts; he sat next to her on the bed. Finally it is the same accused person who ordered her to remove her panty; and all the time, he was the one talking to her. The witness was in close proximity to the 1st Appellant , and he kept talking to her. Am satisfied that this exchange gave the witness sufficient time to identify him. The complainant's testimony remained constant and firm under cross- examination on the fact that the security light illumination through a the transparent curtain was sufficient. It is my finding therefore that the 1st Appellant was positively identified.

53. The identification of the 2nd Appellant was through an identification parade. The complainant told the court that the 2nd Appellant was the one who took her to a different room to rape her, after the 1st Appellant had ordered her to remove her panty. Vaginal examination by the clinical officer indicated that there was spermatozoa in her vagina.

54. According to the 2nd appellant, there were discrepancies on how the identification parade was conducted since according to PW1, he had pimples and a reddish cheek and during the identification parade, he was the only person who had scratches on his cheeks hence the identification was biased.

55. Chapter 42 paragraph 7(5) (d) & (e) of the National Police Service Standing Orders provides: (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;

56. A perusal at the identification parade form for the 2nd appellant (3rd Accused) indicate that the parade had nine individuals with similar identification as the suspect and others had scars a similar to the suspect. His claim therefore he was the only person with the mark is not plausible . In any event the accused did sign that he was satisfied with the manner in which the parade had been conducted.

Whether the provisions of section 36 of the *sexual offences Act* was violated?

57. Section 36(1) of the *Sexual Offences Act* provides as follows:

> " Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."

58. This section is not crafted in mandatory terms as affirmed by the court of appeal in the case of Mutingi Mumbi –v- R. Cr. Appeal No. 52 of 2014 (Malindi) where it was held as follows: -

> " Section 36(1) of the Act empowers court to direct a person charged with an offence under the Act to provide samples for tests including for the DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not concluded in mandatory terms."

59. Thus it is only where there is no other evidence linking an accused person to the act of rape or defilement, that a NA test becomes necessary as a form of identification. In the present case , the identification by the complainant was satisfactory and question of who raped the complainant was a non- issue so as to warrant compliance with section 36 of the *sexual offences Act*.

60. In any event, the 2nd Appellant was convicted of Gang rape and section 10 of the *sexual offences Act* defines gang rape as : Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape ....."and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.

61. Thus even if the 2nd Appellant was not the actual culprit on the act of rape , all that the prosecution was required to prove was that the 2nd Appellant was in the company of those who raped the complainant. This complain is without merit .

Whether there was contradictions, inconsistencies and doubtful evidence.

62. The 1st appellant raised issues of inconsistencies and contradictions in the testimony of the complainant and statement. He pointed out that the complainant talked of seeing five people , then later on she talked of seeing three. In the case of Joseph Maina Mwangi v Republic, Criminal Appeal No. 73 of 1993 the Court of Appeal held as follows on issues of contradictions and inconsistencies: "In any trial, there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of the CPC vis whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence."

63. The attackers may have been three or five, but this confusion , should not and cannot be held against the accused in the face of traumatic experience she was undergoing. In any case the discrepancies in my view do not go into the substance of the case ,or appear to have been an attempt on the part of the complainant to deliberately lie to court.

Whether the offence of robbery with violence was proved.

64. In Oluoch vs Republic [1985] KLR the offence of robbery with violence was defined as :"Robbery with violence is committed in any of the following circumstances: a).The offender is armed with any dangerous and offensive weapon or instrument or; b).The offender is in the company of one or more person or persons or; c). At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person ....."

65. It is the presence of any of the above elements that qualifies the offence as robbery with violence. There was evidence that the Appellants were in each others company and company of other persons, and the complainant was robbed

66. I have addressed myself to the issue of gang rape. But to address the facts as presented, there was evidence that the complainant was raped. This was the evidence of the complainant as well as the medical officer. The Appellants were in the company of each other and one or two more persons . The main ingredients of gang rape is the act of rape and the attackers being in a group.

67. In the end, am satisfied that the conviction of the Appellants for the crimes of robbery with violence and gang rape was safe.

Sentence

68. The 1st Appellant was convicted of the offence of robbery with violence and sentenced to 50 years in prison. Section 296(2) of the penal code prescribes a minimum sentence of death. Thus the 1st Appellant got away with a lenient sentence.

69. The 2nd Appellant was convicted to serve 20 years on the 1st count and 10 years on the 2nd count. The sentences were to run concurrently. I consider the sentence of 20 years for the offence of robbery with violence also lenient when considered against the minimum sentence of death provided under the law.

70. However I have taken note of the discrepancy in sentencing in respect of the 1st count. The first Appellant was sentenced to serve 50 years , while the 2nd Appellant was sentenced to 20 years for the same offence.

71. In the case of Marando –v- Republic 1980 KLR 114, The Court of Appeal held:- " The appeal against sentence causes us much concern. When two or more people are convicted of the same offence, it is wrong in principle to impose different sentences except for good reason. For instance, one man may have a bad record, but that is not the case here. The appellant is a first offender. The Judge gave no reason for sentencing the appellant to four years, and his co-accused to one day's imprisonment...."

72. In the present case the trial court has not given any reason for the discrepancy in sentencing. This may be viewed as a case discrimination for which no justification has been shown. There is therefore an error in principle and this court will interfere with it.

73. In conclusion I hereby proceed to make orders as follows:

    a). The Appeals against conviction are hereby dismissed.

    b). The sentence of 50 years imposed on the 1st Appellant is hereby set aside and substituted with 20 years imprisonment. The sentence is deemed to have taken effect from 11th November 2019 being the date when the 1st Appellant was arraigned in court. The sentence on the 2nd count remains undisturbed.

    c). The sentences meted against the 2nd Appellant on both counts are upheld and are deemed to have taken effect from the date of conviction at the trial court.

    d). The sentences in respect of each Appellant will run concurrently.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF JANUARY 2025.

S. CHIRCHIR

JUDGE.

In the presence of :

Godwin Luyundi- Court Assistant.