



**Omollo v Republic (Criminal Appeal E006 of 2024)
[2025] KEHC 684 (KLR) (28 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 684 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL E006 OF 2024
JN KAMAU, J
JANUARY 28, 2025**

BETWEEN

BOAZ OKETCH OMOLLO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of Hon R. M. Ndombi (SRM) delivered at Vihiga
in Principal Magistrate's Court in SO Case No 23 of 2019 on 29th March 2022)*

JUDGMENT

Introduction

1. The Appellant herein was jointly charged with two (2) others with the offence of gang rape contrary to Section 10 of the [Sexual Offences Act](#) No 3 of 2006. He had also been charged with an alternative offence of committing an indecent act with an adult contrary to Section 11(1) (A) of the [Sexual Offences Act](#). He was tried and convicted on the main charge by the Learned Trial Magistrate, Hon R. M. Ndombi, Senior Resident Magistrate who sentenced him to fifteen (15) years imprisonment.
2. Being dissatisfied with the said Judgement, on 22nd January 2024, he lodged the Appeal herein. His Petition of Appeal was dated 17th October 2023. He set out two (2) grounds of appeal. He was granted leave to file an appeal out of time on 5th October 2023.
3. His Supplementary Grounds of Appeal dated 22nd August 2023 and filed on 22nd January 2024 together with his Written Submissions dated 19th August 2023 were exactly the same as his Petition of Appeal. He filed additional Written Submissions dated 2nd April 2024 on 13th June 2024. The Respondent's Written Submissions dated 9th September 2024 were filed on 26th September 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.



Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.
6. Having looked at the Appellant's Grounds of Appeal, his Written Submissions, and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-
 1. Whether or not the minimum mandatory sentence that was meted upon the Appellant was unconstitutional; and
 2. Whether or not the sentence that was meted upon the Appellant herein ought to have run from the date of his arrest.
7. The court therefore dealt with the said issues under the following distinct and separate heads.

I. Constitutionality or Otherwise of the Sentence

8. Grounds of Appeal No (1) of the Petition of Appeal which was also Ground of Appeal No (1) in the Supplementary Grounds of Appeal was dealt with under this head.
9. The Appellant relied on *Mombasa Petition No 97 of 2021 Edwin Wachira & 9 Others* (eKLR citation not given) and *Ponoo vs Attorney General (Supra)* (sic) the holdings which appeared to be that each case should be decided on its own facts and a distinct sentence meted out.
10. He averred that he rescued the Complainant herein, EAN (hereinafter referred to as "PW 1") after the petrol of the motorcycle she was being ferried in got finished. He asserted that they decided to marry instantly on that night and they had sexual intercourse. He contended that she asked him to go and repair her shoe that had been damaged during her struggle with the person who raped her the previous night and that he locked her in the house to run the errand.
11. He asserted that she was coached to turn against him, his lover, which resulted in him being hauled to court and given a lengthy sentence. He denied knowledge of the rape by one Simon but admitted to having had sexual intercourse with her voluntarily. He submitted that this was not a case of gang rape as there was only a single rapist. He urged this court to mete upon him a lesser prescribed sentence preferably being the time that he had already served.
12. On its part, the Respondent submitted that in the case of *Francis Karioko Muruatetu & 5 Others vs Republic* [2017] eKLR, the Supreme Court had held that mandatory sentences were unconstitutional to the extent that they deprived the court discretion to mete out appropriate sentences but that on 6th July 2021, the same court clarified that the said case applied to murder cases only and not to any other sentence.
13. It also referred this court to the cases of *Eldoret Shadrack Kipchoge Kogo vs Republic* (eKLR citation not given) and *Wanjema vs Republic* (1971) E.A. 493 where the common thread was that an appellate



court ought not to interfere with the discretion of the trial court to sentence unless the sentence was manifestly low or excessive in the circumstances of the case.

14. It submitted that the Trial Court considered the severity of the offence, the principles of proportionality, deterrence, rehabilitation, mitigating and aggravating factors, and the trauma that PW 1 would have to live with for the rest of her life and meted upon Appellant herein, the minimum prescribed sentence. It therefore urged this court to uphold the sentence as the same was lawful.
15. In its decision of 20th December 2023 in John Andere vs Republic [2023] eKLR and Simon Odhiambo vs Republic [2023] eKLR, this very court was satisfied that the Prosecution established the offence of gang rape against the Appellant and his Co-Accused, Simon Odhiambo. The Appellant's assertion that what was proven was rape and not gang rape was therefore rendered moot.
16. Notably, Section 10 of the [Sexual Offences Act](#) provides that:-

“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 (emphasis court).”
17. If the Appellant was convicted of rape as he seemed to suggest was what ought to have been applicable herein, the trial court still had the discretion to sentence him between fifteen (15) years and life imprisonment. This is because the Trial Court still had the discretion to mete out a sentence that was above ten (10) years imprisonment.
18. Section 3(3) of the [Sexual Offences Act](#) states 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 (emphasis court).”
19. As the Respondent correctly pointed out, the Trial Court actually meted upon the Appellant the least prescribed sentence for the offence of gang rape. This court did not therefore find the sentence that was imposed on him to have been unconstitutional.
20. Given the aggravating factor of holding PW 1 hostage in the Appellant's house, this was a case that ought to have attracted a higher sentence against him. Be that as it may, this court was not persuaded that it should enhance the sentence because it had not warned him of the consequences of appealing and further because the Respondent did not seek an enhancement of the sentence to which he would have been given an opportunity to respond and/or make an informed decision of how he wished to proceed after being warned of the risk of enhancement of his sentence.
21. In the premises foregoing, Grounds of Appeal No (1) of the Petition of Appeal which was also Ground of Appeal No (1) in the Supplementary Grounds of Appeal were not merited and the same be and are hereby dismissed.

II. Time Spent in Custody

22. Ground of Appeal No (2) in the Petition of Appeal was the same as Supplementary Ground of Appeal No (2) and was hence dealt with under this head.



23. The Appellant pleaded with this court to consider Section 333(2) of the Criminal Procedure Code which related to the period that he spent in custody and Section 38(1) of the Penal Code. The Respondent did not submit on this issue.
24. Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides that:-
- “Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
- Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”
25. The duty to take into account this period is also contained in the Judiciary Sentencing Policy Guidelines where it is provided that: -
- “The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”
26. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in the case of *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.
27. A perusal of SO No 05 of 2019 *Republic vs Boaz Oketch Omullo* showed that the Appellant herein was arrested on 4th January 2019 and arraigned in court on 27th January 2019. The file was closed and consolidated with SO No 23 of 2019 *Republic vs Boaz Oketch Omullo & 2 Others*. In this latter file, it indicated that he was arrested on 4th January 2019 and arraigned in court on 6th May 2019.
28. It was evident that he did not post bail. The period between 4th January 2019 and 28th March 2022 when he stayed in custody while the trial was going on ought to have been taken into account. As the Trial Court did not appear to have considered this period while sentencing him, this was a suitable case for this court to allow the same.
29. In the premises foregoing, Grounds of Appeal No (2) and Supplementary Ground of Appeal No (2) were merited and the same be and are hereby allowed.

Disposition

30. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Petition of Appeal that was dated 17th October 2023 and filed on 22nd January 2024 was not merited on his conviction and sentence. They are hereby upheld as they were both safe.
31. However, for the avoidance of doubt, the period between 4th January 2019 and 28th March 2022 when the Appellant stayed in custody while the trial was going will be taken into account while computing his sentence in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
32. It is so ordered.



DATED AND DELIVERED AT VIHIGA THIS 28TH DAY OF JANUARY 2025.

J. KAMAU

JUDGE

