



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ali v Republic (Criminal Appeal E054 of 2023)  
[2025] KEHC 902 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 902 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CRIMINAL APPEAL E054 OF 2023  
AN ONGERI, J  
JANUARY 24, 2025**

**BETWEEN**

**OMAR SALALE ALI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence of Hon. E. G. Nderitu (CM)  
in Voi CM Sexual Offence Case No. 9 of 2018 delivered on 24th May 2019)*

**JUDGMENT**

1. The Appellant Omar Salale Ali was charged with the offence of rape contrary to Section 3(1)(a)(c) as read with Section 3(3) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the charge were that on 12<sup>th</sup> June 2018 at around 1900 hours at Voi Sub county within Voi Sub County within Taita Taveta County, the Appellant had carnal knowledge of one J.M.N against her consent.
3. A summary of the prosecution evidence was that J.M.N an elderly woman aged 70 and a resident of Maungu, Ndovuni village was going to her house from the shops along a path passing near a water tank when she found the Appellant standing near the water tank which had a kiosk made of the four pillars of water tank.
4. The complainant said she knew the Appellant who used to work at the slaughter house where she used to go and buy meat.
5. The Appellant held the complainant and dropped her on spread cartons boxes and he strangled her. He tore her underpants and raped her.
6. The complainant said she felt pain and she bled. The Appellant threatened to kill her if she continued screaming.



7. The complainant said she reported to Maungu Police Station and she was referred to Maungu Health Centre where she was treated.
8. The Appellant was arrested at the slaughter house and charged with the offence of rape.
9. The Appellant who denied the charge said he used to work at the slaughter house and he knew the complainant. He said on the material day he was at work in the morning. He did not see the complainant on that day.
10. The trial court found the Appellant guilty as charged and sentenced him to twenty (20) years imprisonment.
11. The Appellant has appealed to this court against conviction and sentence on the following grounds:
  - i. That the learned trial Magistrate erred both in law and fact in failing to appreciate that the Appellant's identification was not positive.
  - ii. That the learned trial Magistrate erred both in law and fact by convicting the Appellant yet failed to find that the prosecution had not proved penetration beyond reasonable doubt.
  - iii. That the sentence imposed was both harsh and excessive since it was applied in mandatory terms as provided by the statute and failed to consider the Appellant's mitigation and the facts and circumstances unique to the case.
12. The parties filed submissions as follows:-

(No submissions on cts)
13. This being a first appeal, the duty of the first appellate court is as follows:- The Court of Appeal in *Okeno vs Republic* [1972] EA 32 held that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs Republic* (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M Ruwala v R* (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters vs Sunday Post* [1958] EA 424.”
14. The issues for determination in this appeal are as follows:-
  - i. Whether the Appellant was properly identified.
  - ii. Whether the prosecution proved its case to the required standard.
  - iii. Whether the sentence is excessive.
15. On the issue of identification, I find that the complainant knew the Appellant whom she used to see at the slaughter where he was working.



16. On the issue of prove of the charge, the elements of the charge of rape are as follows; section 3 (1) of the *Sexual Offences Act*

- “(1) A person commits the offence termed rape if—
- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
  - (b) the other person does not consent to the penetration; or
  - (c) the consent is obtained by force or by means of threats or intimidation of any kind.”

17. The main ingredients of the offence of rape created in section 3 (1) of the *Sexual Offences Act* include intentional and unlawful penetration of the genital organ of one person by another, coupled with the absence of consent in the case of Republic vs. Oyier [1985] KLR 353 the Court of Appeal held that;

- “1. The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.
2. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.
3. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact.”

18. I find that there is evidence of penetration and lack of consent.

19. I find that the conviction is secure and the sentencing lawful.

20. I dismiss the appeal and I uphold both the conviction and sentence.

**DATED, SIGNED AND DELIVERED THIS 24<sup>TH</sup> DAY OF JANUARY 2025 VIRTUALLY AND IN OPEN COURT AT VOI.**

**ASENATH ONGERI**

**JUDGE**

**In the presence of:-**

Court Assistant: Maina

The Appellant present at Manyani Prison

