



**Ochieng v Republic (Criminal Appeal 42 of 2024)
[2025] KEHC 6946 (KLR) (27 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6946 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 42 OF 2024**

DR KAVEDZA, J

MAY 27, 2025

BETWEEN

COLLINS OUMA OCHIENG APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 11th July 2024 at Kibera Chief Magistrate’s Court Sexual Offences Case No. E100 of 2023 Republic vs Thomas Otieno Odongo & Collins Ouma Ochieng)

JUDGMENT

1. The appellant was jointly charged with another not before this court for the offence of gang rape contrary to section 10 of the Sexual offences Act, No. 3 of 2006. He was sentenced to serve fifteen (15) years imprisonment.
2. Aggrieved, he filed an appeal challenging his conviction and sentence. In the petition of appeal, he challenged the totality of the prosecution’s evidence against which he was convicted. He urged the court to quash his conviction and set aside the sentence imposed.
3. This is the first appellate court, and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence which was before the trial court and come to its conclusions on that evidence without overlooking the conclusions of the trial court, but bearing in mind that it never saw the witnesses testify.
4. PW2, the complainant, testified that on 1st September 2023, between 11:00 pm and midnight, after leaving her workplace at a bar in Kibra, she was accosted by four men. They forcibly took her to a house, tore her clothes, and raped her in turn. Threatened with harm if she screamed, she was detained until 1:00 pm the following day. Upon release, she sought treatment at Nairobi Women’s Hospital and reported the incident to the police. She identified the appellant and his co-accused in court as among



her assailants, noting two others were not apprehended. She confirmed meeting the appellant on the incident day and, under cross-examination, maintained her account, stating she was 29 years old.

5. PW1, a Clinical Officer at Nairobi Women's Hospital, testified on behalf of his colleague, Kennedy Mbugua, whose handwriting and signature he recognised. He confirmed that on 2 September 2023, the complainant, C.A., sought treatment for alleged rape. She reported pubic pain and exhibited whitish discharge, bruises, and an old torn hymen. The GVRC, PRC, and P3 forms were produced as exhibits.
6. PW3, the Investigating Officer, confirmed the complainant reported the incident at Kibra Police Station. He corroborated her testimony, issued a P3 form, which was completed and exhibited, and noted that community policing members brought the appellant to the station, where they were arrested and detained.
7. At the close of the prosecution's case, the appellant and the co-accused gave sworn testimonies in their defence. They denied the offence, asserting they were arrested separately at their homes and taken to the police station, where the complainant identified them as her assailants.
8. The appeal was canvassed by way of written submissions which have been duly considered and there is no need to rehash them. I find that the main issues for consideration are whether the prosecution proved its case beyond reasonable doubt and whether the sentence was harsh and excessive in the circumstances.
9. 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.”
10. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof.
11. On the element of penetration, the complainant (PW2) testified that on the material date, four men, including the appellant and his co-accused, forcibly took her to a house. There, they tore her clothes and raped her in turn, threatening harm if she screamed. She was detained until 1:00 pm the following day, after which she sought treatment at Nairobi Women's Hospital and reported the incident to Kibra Police Station. PW2 identified the appellant and co-accused in court as among her assailants, noting two others were not apprehended. Her account was consistent under cross-examination.



12. PW1, a Clinical Officer, corroborated her testimony with medical evidence, confirming pubic pain, whitish discharge, bruises, and an old torn hymen, as documented in the GVRC, PRC, and P3 forms tendered as exhibits.
13. PW3, the Investigating Officer, verified the report and the issuance of the P3 form, noting the appellant and co-accused were arrested following community intervention. The appellant's and co-accused's defence of mistaken identity lacks evidential support, outweighed by PW2's testimony and medical corroboration, proving gang rape beyond reasonable doubt.
14. The totality of the evidence demonstrates that the prosecution discharged its burden, proving all elements of rape. The trial court's findings were well-founded, and the conviction is safe.
15. The appellant was sentenced to fifteen (15) years imprisonment. During sentencing, the trial court considered the appellant's mitigation, the pre-sentence report however the trial court did not consider the time spent in remand custody.
16. In the premises, the appeal is found to be lacking in merit and is dismissed in its entirety. However, the sentence of fifteen (15) years imprisonment shall run from 7th September 2023 the date of the appellant's arrest pursuant to section 333(2) of the [Criminal Procedure Code](#), Cap 75 Laws of Kenya.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 27TH DAY OF MAY 2025

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Mutuma for the Respondent

Tonny Court Assistant.

