



REPUBLIC OF KENYA



**Lelei v Republic (Criminal Appeal E054 of 2023)
[2024] KEHC 5838 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5838 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CRIMINAL APPEAL E054 OF 2023**

JR KARANJA, J

MAY 24, 2024

BETWEEN

RICHARD KIBIWOTT LELEI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence in Kapsabet Chief Magistrate's Court Sexual Offence Case No. 154 of 2020 delivered on 27th July 2023 and 8th August 2023 by Hon. S.M. Mookua, CM)

JUDGMENT

1. The Appellant, Richard Kibiwott Lelei, appeared before the Chief Magistrate at Kapsabet facing a charge of Rape, Contrary to Section 3(1) of the *Sexual Offences Act*, in that on the 17th August 2020, Nandi East within Nandi County, he intentionally and unlawfully caused his male sexual organ to penetrate the anus of KOO without his consent.
2. After a full trial, the Appellant was convicted and sentenced to a term of ten (10) years imprisonment. Being dissatisfied with the conviction and sentence, the Appellant preferred the present appeal on the basis of the grounds set out in the petition of appeal filed herein on 22nd August 2023 by Anassi Momanyi and Company Advocates.
3. At the hearing of the appeal which proceeded by way of written submissions, the Appellant was represented by Learned Counsel, Mr. Wainaina, while the Learned Prosecution Counsel, Ms. Asiyo, represented by the State/Respondent.

The appeal was opposed by the Respondent and this court, having considered the same on the basis of the supporting grounds and the rival submissions had a duty to reconsider the evidence and draw its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witness (See, *Okeno v Republic* (1972 EA 32)).



4. In that regard the prosecution case was briefly that the Complainant, KOO (PW1), a tractor driver from Rarieda Siaya County was on the 1st August 2020 at home in Rarieda when he was called on phone by the Appellant who lured him to come to Nandi County for a job. The Appellant was then a “soldier” at Siret Estate within the County. He sent the necessary bus or transport fare to the Complainant who arrived in Nandi Hills on the 16th August 2020 and met the Appellant at about 6:00pm.
5. The Appellant took the Complainant to his house at [Particulars Withheld] Factory and after taking their supper the two retired to bed. At midnight, the Appellant ordered the Complainant to remove his clothes and remain naked. The Complainant declined and this resulted in the Appellant forcefully removing his clothes threatening him with a panga (machete) and a knife before sodomizing him three times.
6. On the following morning, the Complainant sought treatment at the Nandi Hills Hospital and was advised to report to the police and he did so. He was then handed a medical P3 form (P. Exhibit 1) which was filled and signed by a Clinical Officer at the Nandi Hills County Hospital, Tom Kipkosgei Kilel (PW4).
7. PC. Jackson Ogutu (PW2), of Nandi Hills Police Station received the necessary report from the Complainant and later arrested the Appellant from whom he recovered a knife (P. Exhibit 3) and some oil substance (P.Exhibit 4). PC Geoffrey Onyengo (PW3), investigated the case and thereafter preferred the present charge against the Appellant.
8. The Appellant’s defence was a denial that he committed the offence. He testified that he went to his rural home from his work place at Siret on the 17th August 2020 and implied that he was framed by the Complainant’s brother with whom he had differences.
9. On account of the usual administrative transfers of Judicial Officers, the trial proceeded before the Senior Principal Magistrate and the Chief Magistrate who concluded the case by rendering the impugned judgment in which he found that the case against the Appellant had been proved beyond reasonable doubt.
10. In arriving at the said finding the trial court relied on the decisions of the Court of Appeal in *Republic v Oyier* (1985) KLR 353 and by the Supreme Court Uganda in the case of *Bassita v Uganda* SC. Criminal Appeal VO 35 of 1995, and held that: -

“What the courts held in the above case is a good guide herein. The evidence tendered before the court confirms that the Complainant was raped. The Complainant led the police to where the Accused Person was arrested from. Though the Accused Person alleged that he was elsewhere, that explanation was not plausible.

The Complainant gave straight forward evidence on how he met with the Accused Person who led him to his residence. Furthermore, they knew each other before the incident. Therefore, the contention by the Accused doesn’t discredit the Complainant’s truthful and consistent testimony on the attack.

In conclusion; the prosecution has proved its case beyond reasonable doubt.”

11. Basically, Section 3(1) of the *Sexual Offences Act* defines rape as follows: -

“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.”

Under Section 43(1) of the *Act*, an act becomes intentional and unlawful if it is committed in any coercive circumstances in such as use of force or threats of harm against the victim of the offence of rape or any other sexual offence.

12. The prosecution was therefore expected to provide sufficient, cogent and credible evidence to establish and prove beyond any reasonable doubt the aforementioned ingredients of the offence of rape as against the Appellant.

Ideally, such evidence ought to come from the victim’s own testimony and be corroborated by medical evidence or any other evidence (See, *Bassita v Uganda*) (supra).

13. Grounds one (1), two (2), three (3), six (6), Seven (7) and eight (8) of the Appeal are hinged on conviction and clearly imply that the conviction of the Appellant by the trial court was erroneous in both law and fact in as much as it was based on evidence which was insufficient, uncorroborated and devoid of credibility. Indeed, the Appellant’s submissions were geared towards showing that the conviction was both factually and legally improper.

14. This court’s opinion with regard to the conviction is that the entire case turned on the credibility of both the Complainant (PW1) and the Appellant as they were together at the time of the alleged incident. The fact that they communicated prior to their meeting and eventually met in Nandi County was not substantially disputed by the Appellant even though his defence implied that at no time did he meet the Complainant within the material period. He conceded to having previously know the Complainant. The two were not strangers to each other.

15. The question of credibility would however come into the fore after the ingredients of the particular offence are established against the subject.

Firstly, the intentional and unlawful act of penetration had to be established and to do this, the Complainant’s evidence was that his “ass hole” (anus) was penetrated forcefully by a male sexual organ (penis). The element of force indicated that the Complainant did not consent to the act thereby rendering it an intentional and unlawful criminal act.

16. Apart from what the Complainant said there was nobody who witnessed the act. The evidence of the Complainant in that regard stood on its own and if it were to be believed then it ought to have been corroborated by any other evidence pointing towards the commission of the act. Such evidence would invariably include medical evidence which would confirm the act of penetration having been committed against the Appellant.

17. Such evidence came from the Clinical Officer (PW4) and the medical report (P3 form) that he produced (P. Exhibit 1). However, the evidence was not clear and specific as to whether an act of penetration through the anus or sodomy was committed against the Complainant within the material period and by what means e.g. male sexual organ, blunt object etc.

18. The Clinical Officer stated that the Appellant’s frontal anal region was torn but not freshly and that the lacerations could have been caused by anything from a blunt object, penile penetration, physical trauma to an infection. He further stated that the lack of spermatozoa in the anal region did not itself



rule out penetration and physical injury to the region. This therefore implied that it was possible that the Complainant was sexually assaulted in the manner that he stated i.e. being sodomized or penetrated through his anus by a male sexual organ.

19. The history given to the Clinical Officer was that the Complainant had been sodomized by someone. He was therefore to be examined and treated accordingly. However, the medical report (P. Exhibit 1) showed that there was no evidence of a recent act of penetration although the Complainant admitted that he was involved in an act of sodomy. Such admission to a medical officer could have also been interpreted to mean that the Complainant consented to the unlawful act and therefore his allegation that he was forced into the act may not have been the truth.

20. From the foregoing, it may be deduced that the medical evidence did not corroborate the Appellants allegation of having been raped by a man whom he identified as the Appellant herein.

The Appellant denied the offence and offered an alibi which was disproved by the fact that he was with the Complainant within the material period. It was however, not his obligation to prove his innocence but rather the prosecution's obligation to prove the offence against him beyond reasonable doubt.

21. In the absence of adequate corroboration from the medical officer or any other quarters, the trial court based its conviction of the appellant on the credibility of the Complainant's evidence when it stated that: -

“The Complainant gave straight forward evidence on how he met the Accused Person who led him to his residence.

Furthermore, they knew each other before the incident. Therefore, the contention by the Accused doesn't discredit the Complainants truthful and consistent testimony on the attack.”

22. On matters of credibility, the trial court had the advantage of seeing and hearing the witnesses and was therefore better placed to base its findings on the credibility of the witnesses. This court therefore finds no satisfactory reason, legal or factual, to interfere with the Appellant's conviction by the trial court which is hereby upheld.

23. With regard to the sentence of ten (10) years imprisonment, it was lawful and compatible with Section 3(3) of the *Sexual Offences Act* in as much as it provided for the term as the minimum sentence.

However, considering the recent jurisprudence coming out of the Superior Courts on the concept of minimum sentences and regard being given to the circumstances of this case and especially that it was also likely that what happened between the Complainant and Appellant might have been consensual, the sentence imposed by the trial court was rather excessive and is hereby reduced to a term of three (3) years imprisonment.

24. Other than the alteration in sentence, the appeal is hereby dismissed.

Ordered accordingly.

DELIVERED AND DATED THIS 24TH DAY OF MAY, 2024.

J. R. KARANJAH,

JUDGE

