



**Odhiambo v Republic (Criminal Appeal E026 of 2023)  
[2024] KEHC 7906 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7906 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL APPEAL E026 OF 2023  
MS SHARIFF, J  
JUNE 28, 2024**

**BETWEEN**

**OSCAR ODHIAMBO ODHIAMBO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal arising from the conviction and sentence by Hon. S. O. Temu  
(SPM) in Nyando S.O. A Case No. 31 of 2020 delivered on 5th April 2023)*

**JUDGMENT**

**A. Case Background:**

1. The appellant was charged by a subordinate court with the offence of Sexual Assault contrary to section 5(1)(a) as read with Section 2 *Sexual Offences Act* No. 3 2006 and was sentenced to serve 10 years as guided by section 5(2) of the *Sexual Offences Act*.
2. The particulars were that on the 30<sup>th</sup> day of May 2020 at about 4pm at [particulars withheld] within Kisumu County, the appellant had unlawfully sexually assaulted CAO by using his fingers to penetrate her vagina.
3. Upon arraignment the appellant pleaded not guilty, and the case proceeded to hearing where the complainant, represented by the prosecution produced four witnesses while the defense had no witnesses.

**B. Evidence:**

4. PW-1 CA, a form three student at the time, testified that on 30<sup>th</sup> May of 2020, she had gone to pick firewood and had met the appellant on the road and greeted him by hand and proceeded on her way. The appellant then followed her and held her shoulder. She managed to free herself from his hold and



- get away but the appellant driled her and she fell. The appellant then removed her skirt and then proceeded to lie on her, covering her mouth, and inserted his fingers into her vagina. She went quiet due to the pain before screaming. The appellant urged her not to tell anyone what had happened and he then ran away.
5. PW1 stated that on her way home she met one Josephine and John and she told them what had happened but they did nothing. She then went home and told her mother and in-laws about the incident. PW1's mother then took her to the Chief's Camp at [particulars withheld] where a report was made. Thereafter the complainant was referred to [particulars withheld] Hospital. Upon presenting herself at [particulars withheld] Hospital, the complainant was referred to Nyakach Sub-County hospital whereat she was treated and the P3 form was duly filled. She presented the P3 form and a Certificate of Birth as exhibits PExh1 and PExh2, respectively.
  6. On cross-examination, the victim revealed that the appellant was the only person on the road at the material time and the he was dorn in a white T-shirt which had black sides.
  7. PW-2 AOO informed the court that on 30<sup>th</sup> May 2020, he had heard the complainant crying and on investigation found her in a torn, dirty skirt. She then informed him and his mother that the appellant, Oscar had pushed her down and inserted his fingers in her vagina as they struggled. PW2, his wife and the victim's mother then took the complainant to hospital where she was examined and treated. The witness further stated that he was familiar with the appellant and that the appellant's mother had informed the complainant's father that the appellant had not returned back home on the day of the incident. Further that when they went to [particulars withheld] Police Post, they found that the appellant had already been apprehended.
  8. PW3 Okungu Mike, a Clinical Officer stationed at Nyakach hospital when the complainant was referred there for treatment. He reported that on 30<sup>th</sup> May 2020, the complainant, a 17-year-old at the time, had arrived in hospital in torn clothes. On examination he established that the complainant had painful injuries to her thorax and abdomen along with swelling in her *labia majora* and *labia minora* and had some vaginal discharge due to a broken hymen. He filled the P3 using his treatment notes, and both were presented before the courts as exhibits PExh1 and PExh3, respectively. The witness assessed the degree of injury as harm.
  9. PW4, Benard Macharia, was the Investigating Officer. He confirmed that on 30<sup>th</sup> May 2020, a report had been made at Boya Police Station over indecent assault and witness statements were recorded. A P3 form was issued to the complainant who was with her brother. The Investigating Officer recovered the dirty and torn clothes that the complainant was wearing at the time of the incident, and they were produced as prosecution exhibits: Blouse PExh4, Bra PExh5, Skirt PExh6, and Pant PExh7 and a certificate of birth (PExh1).
  10. After evaluating the prosecution case, the trial court found that the appellant had a case to answer to and he was thus placed on his defence.
  11. Upon being placed in his defense, the appellant gave a sworn statement stating that on the date of the incident, the complainant's parents had called his father and told him that they were looking for him and he was later arrested by the chief and taken to the police station. He further stated that he had not committed the offence.
  12. At the conclusion of the trial, the trial court evaluated the evidence presented by both sides and found the appellant guilty of the offence of Sexual Assault and on 5<sup>th</sup> April 2023, it sentenced him to 10 years imprisonment, to commence from the date of plea, that is, 4<sup>th</sup> June 2020.



### C. Appeal:

13. The appellant, being aggrieved by both the conviction and the sentence, filed this appeal on the following grounds: -
  - i. The trial magistrate's decision was against the weight of the evidence adduced before the court by the appellant,
  - ii. The trial magistrate erred in law in failing to analyze all the evidence tendered before the court by the appellant,
  - iii. The trial magistrate arrived at his decision in a cursory and perfunctory manner and with bias.

### D. Submissions

14. The appellant submits that he and the complainants were friends and due to their disapproval of this friendship, the family framed him. He further submits that the fact that the complainant stated that the struggle and incident took place at a public road and went on for an hour and yet no one saw them, goes to prove that the complainant was coached.
15. The respondent did not file any submissions.

### E. Analysis and Determination

16. It is the duty of the High Court, as the first appellate court, to evaluate and reconsider the evidence presented in the trial court to arrive at an independent conclusion while taking into account the fact that it did not see nor hear the witnesses testify. The duties of a first appellate court were set out by the Court of Appeal in *Kiilu and another v Republic* [2005] 1 KLR 174, where the stated that:

“An appellant on a first appeal is entitled to expect the evidence in its entirety to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. 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 findings and 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.”

17. Upon re-evaluation, re-analysis and re-scrutiny of the trial court's record, the memorandum of appeal and the submissions of the appellant, the main issues for determination are:
  - i. Whether the respondent had proved the charge of sexual assault contrary to section 5(1)(a) as read with section 2 of the *Sexual Offences Act*.
  - ii. Whether the trial court exhibited bias in arriving at its decision to convict the appellant.

### 18. Whether the respondent had proved the charge of sexual assault contrary to section 5(1)(a) as read with section 2 of the *Sexual Offences Act*.

In instances of sexual assault, it is incumbent upon the prosecution – the respondent to prove the following ingredients in order to establish an offence:

- a. Penetration.



- b. Identification of the perpetrator.

## Penetration

Section 5 of the *Sexual Offences Act* creates the offence of sexual assault in providing that:

1. Any person who unlawfully -
    - a. penetrates the genital organs of another person with -
      - i. any part of the body of another or that person; or
      - ii. an object manipulated by another or that person except where such penetration is carried out for proper and professional, hygienic or medical purposes.
    - b. manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.
  2. A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.
19. In *John Irungu v Republic* [2016] eKLR, the Court of Appeal pronounced itself on the essential ingredients of the offence of sexual assault as follows.

“... Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose.”

20. The complainant, PW1 testified that the appellant had inserted his fingers into her vagina and PW2 testified that she had reported the assault to him. PW3 testified that the complainant had injuries on her thorax and abdomen which may have been as a result of being dripped to and the struggle on the ground. He further testified that the victim had some vaginal discharge due to a broken hymen along with swelling in her *labia minora* and *labia majora*. PW4 testified that the complainant had arrived at his station in torn and dirty clothes to make a report regarding indecent assault. The testimonies of PW3 and PW4 further corroborated PW1's testimony that she had indeed been sexually penetrated by the appellant using his fingers.

## Identification

21. While visual identification may be used to arrive at a conviction, it is paramount that the identification is approached with great care and caution. In *Joseph Muchangi Nyaga & another v Republic* [2013] eKLR, the Court of Appeal stated that before acting on the evidence of visual identification, the court must inquire as to whether there was light, the nature of the light, its intensity, its location in relation to the accused and the amount of time the witness took to observe the accused so as to be able to identify him subsequently.
22. In *Anjooni and Others v The Republic* [1980] KLR, the Madam J.A expressed the following in differentiation between identification and recognition:

“... This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of



a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

23. The assault took place at 4pm and thus there was enough natural light. PW1 also testifies that they had initially greeted each other when they met on the road. On cross examination, PW1 gave the description of the appellant’s attire: that the appellant was wearing a white t-shirt which had black sides which means she had enough time to be able to observe the appellant and she thus remembered his mode of dressing. While these satisfy the conditions necessary for proper visual identification, this was a case of recognition. PW2 testified that he was familiar with the appellant, which was further confirmed by the appellant, who stated in his submissions that the complainant and him were friends who revised together during school vacations. I do find that identification was thus proved.
24. Upon re-evaluation of the trial record I do find that the ingredients of the offense were proved beyond any reasonable doubt. The defense failed to discredit this evidence. The appellant’s claim that the complainant had been coached by her parents due to their disapproval of their friendship is neither here nor there and the same is of no probative value. The appellant was convicted on solid evidence of the witnesses of the respondent.

#### **25. Whether the Trial Court Exhibited Bias in Arriving at its Decision to Convict the Appellant.**

Bias exists where a judge can be shown to have been so committed to a particular outcome that any evidence or testimonies presented may fail to alter the outcome of the case. Section 7 of the *Fair Administration Action Act* outlines the circumstances under which aggrieved parties may apply for review for or appeal any decisions of a court. It states that:

.

7.

- (2) A court or tribunal under subsection (1) may review an administrative action or decision, if-
- a. the person who made the decision-
  - iv. was biased or may reasonably be suspected of bias.

26. The trial court made its decision on the basis of the evidence and testimonies presented before it. The appellant has not substantiated the alleged bias. This ground must thus fail.
27. I do note that the trial court did consider the pre-sentencing report before meting out the sentence. In any event, despite the fact that the offence carries a statutory minimum mandatory sentence of 10 years which can be enhanced to life imprisonment as per section 5(2) of the *Sexual Offences Act*; the trial court properly exercised its discretion in the sentencing. I do not find that it acted in error or was biased in any way and thus this court cannot fault it in that regard. Therefore, this appeal against the conviction and sentence is hereby dismissed.

**DELIVERED, DATED AND SIGNED ON THIS 28<sup>TH</sup> DAY OF JUNE, 2024**

**M. S. SHARIFF**

**JUDGE**

