



REPUBLIC OF KENYA



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**Ndemba v Republic (Criminal Appeal E033 of 2023)
[2024] KEHC 7809 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7809 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL E033 OF 2023**

**JN KAMAU, J
JUNE 27, 2024**

BETWEEN

BOUSTON MANDELA NDEMBA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon R. M. Ndombi (SRM) delivered at Vihiga in Senior Principal Magistrate's Court in Criminal Case No 828 of 2019 on 4th May 2022)

JUDGMENT

Introduction

1. The Appellant herein was charged jointly with four (4) others not before this court with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code Cap 63 (Laws of Kenya) and gang rape contrary to Section 10 of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
2. He was tried and convicted by the Learned Trial Magistrate, Hon R. M. Ndombi (SRM) who sentenced him to fifteen (15) years imprisonment for the offence of gang rape and thirty (30) years imprisonment for the offence of robbery with violence. She ordered that the said sentences run concurrently.
3. Being dissatisfied with the said Judgement, on 31st October 2023, he lodged the Appeal herein. The same was dated 19th July 2023. He set out twenty one (21) grounds of appeal.
4. His Written Submissions were dated 14th December 2023 and filed on 20th December 2023 while those of the Respondent were dated and filed on 7th March 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.



Legal Analysis

5. 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.
6. 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.
7. Having looked at the Appellant's Petition 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:-
 - a. Whether or not the Appellant's right to legal representation was infringed upon;
 - b. Whether or not the Prosecution proved its case beyond reasonable doubt; and
 - c. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.
8. The court dealt with the said issues under the following distinct and separate heads.

I. Right to legal representation

9. Grounds of Appeal Nos (2) and (3) of the Petition of Appeal were dealt with under this head.
10. The Appellant invoked Article 50(2)(h) of *the Constitution* of Kenya 2010 and relied on the case of *David Macharia Njoroge vs Republic* [2011] eKLR where it was held that it was not every person who had the ability to defend himself on his own and if justice was to be done, he ought to be helped by a lawyer who had been trained for the task.
11. It was his contention that he was entitled to legal representation during trial at the State's expense but that he was not provided with the same. He asserted out that since his right to fair trial was violated he was then entitled to an acquittal.
12. On its part, the Respondent submitted that the right to legal representation was not absolute but that there were situations where it could be limited. It argued that it must be established that the accused would suffer substantial injustice if he or she was not accorded legal representation.
13. It further submitted that for the Appellant to have benefitted from the omission by the Trial Court to accord him legal representation that was provided by the State, he had to demonstrate that from the commencement of trial, he had intimated his inability to afford legal representation and that substantial injustice would occur if was not accorded legal representation as was held in the case of *Charles Maina Gitonga vs Republic* [2020] eKLR.
14. It was categorical that the record indicated that there was no evidence showing that he was incapacitated during trial for lack of representation but that it was clear that he participated in the trial by cross-examining the Prosecution witnesses and prepared his detailed defence. It added that he therefore understood the charges that he was facing and the evidence that was presented during trial.



15. There was no indication in the proceedings of the lower court that the Appellant requested the court to give him time to instruct a counsel who would represent him during trial.
16. Be that as it may, this court found and held that the Trial Court was under an obligation to have informed him of his right to be represented by counsel as was mandated by Article 50(2)(g) of the Constitution of Kenya, 2010.
17. Notably, Article 50(2)(g) of the Constitution of Kenya provides as follows:-

“Every accused person has the right to a fair trial, which includes the right to choose, and be represented by, an advocate, and to be informed of this right promptly.”
18. Failure by the Trial Court to have informed him of this right was a great omission. Having said so, it was not always that such omission had to cause an accused person injustice as it could be remedied by way of a retrial if such accused person had been completely prejudiced.
19. In this particular case, the Appellant proceeded with the trial without ever having asked that the Trial Court to give him time to instruct counsel who would represent him. This court thus came to the firm conclusion that his constitutional and fundamental right to fair trial had not been breached merely because the Trial Court did not inform of his right of legal representation under Article 50(2)(g) of the Constitution of Kenya.
20. In view of the delays that would be occasioned by recalling witnesses due to failure by trial courts to promptly inform accused persons of their right to choose and be represented by an advocate and to be informed of this right promptly under Article 50(2)(g) and the right to have an advocate assigned to the accused person by the State and at State expense and bearing in mind substantial injustice that would otherwise result as provided in Article 50(2)(h) of the Constitution of Kenya, trial courts are called upon to comply with these provisions of the law when an accused person was first presented to court and before taking the plea as this was indeed the best practice.
21. In the absence of proof of the Appellant’s assertions regarding his right to fair trial, this court was therefore not persuaded that the same was infringed rendering the trial a nullity and necessitating a retrial.
22. In the premises foregoing, Grounds of Appeal Nos (2) and (3) were not merited and the same be and are hereby dismissed.

II. Proof of Prosecution Case

23. The court dealt with the above issue under the following distinct and separate heads.

A. Robbery with violence

24. Grounds of Appeal Nos (1), (4), (6), (7), (9), (10), (14), (15), (16), (17) and (19) were dealt under this head.
25. The Appellant submitted that it was trite law that where the only evidence against a defendant was evidence of identification or recognition, a trial court was enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it could safely make it the basis of a conviction.
26. He pointed out that as the incident took place at night, care ought to have been taken to ensure that the perpetrator of the offence was positively identified. He placed reliance on the case of Wamungu



- vs Republic (1989) KLR 424 where it was held that where the only evidence against a defendant was evidence of identification or recognition, a trial court was enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it could safely make it the basis of conviction.
27. It was his contention that although the complainants testified that during the entire robbery, the electricity light at the home was brightly lit and that they interacted with the robbers at close quarters, they did not give their description in the first report that they made to the Police on the particular night. He was emphatic that that was a fatal flaw to the Prosecution's chances of relying on the evidence of identification later in the event that the robbers were arrested.
 28. In that regard, he further placed reliance on the case of Maitanyi vs Republic [1986] KLR 198 where it was held that where the evidence of identification was made in difficult circumstances, the court is required to consider whether the prosecution adduced other evidence to corroborate the evidence of identification. He asserted that in his case no other evidence was adduced to support the prosecution's evidence of identification.
 29. On its part, the Respondent was emphatic that the Appellant was positively identified. It asserted that Philister Nyaranga (hereinafter referred to as "PW 1(sic)") testified that the room was well lit as there was an electric bulb that was on and hanged in the middle of the room. It further added that PW 1(sic) stated that she had previously seen the Appellant and that he was known to her as Boston and hailed from Ebusikhale Village, the home area of Jesca Nyaleso Osome (hereinafter referred to as "PW 2"), her mother.
 30. A perusal of the proceedings of the lower court showed that on 23rd May 2019, at midnight, PW 1(sic) and PW 2 testified that they were asleep when they had a loud bang at the door. PW 2 stated that when she switched on the light of the one (1) bedroomed, they saw several men standing before them. PW 1(sic) said that she was able to see the faces of her attackers as the electric light was on. She told the Trial Court that at some point, her attackers blindfolded her but removed the piece of cloth and saw their faces.
 31. Inspector Andrew Chege (hereinafter referred to as "PW 5") carried out an identification parade and both PW 1(sic) and PW 2 identified the Appellant as having been part of the gang that broke into their house to rob them on two (2) occasions being on 23rd May 2019 at 12.00 midnight and 24th May 2019 at 4.00am.
 32. The lighting conditions in the one-bedroomed house were conducive for positive identification. At one point the Appellant's Co-Accused threatened to kill PW 1(sic) because she had recognised him but the Appellant retorted that it was not necessary to kill as there would be more things to steal. That was sufficient time for PW 2 not to have been mistaken about his face.
 33. In addition, the Appellant was not a stranger to both PW 1(sic) and PW 2 as they hailed from the same area at Ebusikhale. It was therefore clear from the evidence that was adduced by the Prosecution that PW 1 and PW 2 positively identified the Appellant as having been one of the attackers on the two (2) material nights. His argument that the Prosecution needed to adduce other evidence to corroborate his identification therefore fell on the wayside.
 34. The fact that several items that were stolen from PW 1's(sic) and PW 2's house and the Appellant were found in his Co-Accused's house squarely placed the Appellant herein as one of the perpetrators on those material nights.
 35. Turning to the issue of whether or not the Prosecution demonstrated the elements of the offence of robbery with violence herein, the Appellant relied on the case of Oluoch vs Republic [1985]KLR



where the Court of Appeal set out the elements robbery with violence as being that at the time the offence was committed, the offender was armed with any dangerous and offensive weapon or instrument or the offender was in company with one or more person or persons or at or immediately before or after the time of the robbery the offender wounded, beat, struck or used other personal violence to any person.

36. The Appellant further cited the case of *Dima Denge Dima & Others vs Republic Criminal Appeal No 300 of 2007* (eKLR citation not given) where it was held that the three (3) elements of robbery with violence were to be read disjunctively and not conjunctively. He argued that although the evidence that was adduced by the Prosecution was that he was armed with a panga on the material day, the same was not produced as an exhibit before the Trial Court and consequently, the Prosecution failed to prove the offence against him to the required standard.
37. On its part, the Respondent also placed reliance on the cases of *Oluoch vs Republic* (Supra) and *Dima Denge Dima & Others vs Republic* (Supra) and submitted that as per the evidence adduced by the Prosecution witnesses, it was apparent that the Appellant was armed and that he was in company of four (4) others at the time of robbery and that he used actual violence at the said time.
38. Section 295 of the Penal Code stipulates that the elements of robbery with violence are :-
 - a. That the offender is armed with any dangerous weapon or offensive weapon or instrument;
 - b. That the offender is in the company of one or more persons;
 - c. That or if at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.
39. PW 1(sic) confirmed having seen the Appellant and his Co-Accused namely, Alex and they were armed with knives. Her evidence was that they held her neck and she started struggling with them. As a result, they injured her cheek and neck. The Clinical Officer, Paul Muturi Mbuoo (hereinafter referred to as "PW 1") tendered in evidence the Post Rape Care (PRC) Form and P3 Form which showed that PW 1(sic) sustained injuries during the atrocious attacks by the Appellant and his Co-Accused persons.
40. It was evident from the evidence of both PW 1(sic) and PW 2 that the Appellant was in the company of others during the attacks. There was robbery. Indeed, PW 2 testified that the Appellant and his Co-Accused persons robbed them of their bags, sheets, duvets, plastic chair, sugar and curtains and ran off.
41. Her further evidence was that he and his Co-Accused persons took sufurias, jiko, clothes, three (3) curtains and PW 1's (sic) clothes, Kshs 190/= and bags during the second attack. She stated that their attackers were armed with pangas, knives, metal rods and torches. Her evidence was corroborated by that of PW 1(sic) and that of No 111246 PC Dismas Kibet (hereinafter referred to as "PW 3") and No 73329 Sgt Jared Atoni (hereinafter referred to as "PW 4").
42. PW 4 tendered in evidence assorted clothes, photo album, NHIF card, Exercise Book Chama, Sisco Phone (black), Death Certificate, Birth Certificate for PW 1, Bus fare receipt, Bag (white and black), inventory and receipt for the Sisco phone which were recovered from the said Alex's house. Both PW 1 and PW 2 testified how the Appellant was part of the gang that raped PW 1 (sic).
43. It was clear from the aforesaid evidence that the Appellant was in the company of his Co-Accused persons, they were armed with a sharp object and that during, immediately before and after the offence they wounded PW 1(sic). They placed a panga on PW 2's neck as they as they raped PW 1 (sic) and robbed them of the items that were recovered from the Appellant's Co-Accused person's house.



44. The chain of events was unbroken. The Trial Court thus proceeded correctly when it found that all the ingredients of proving the offence of robbery with violence had been satisfied and hence convicted him accordingly. The Appellant's assertions that the case against him was not proved as was envisaged in the case of *Oluoch vs Republic* [1985] KLR thus fell by the wayside.
45. In the premises foregoing, Grounds of Appeal Nos (1), (4), (6), (7), (9), (10), (14), (15), (16), (17) and (19) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

B. Proof of gang rape

46. Grounds of Appeal Nos (5), (8), (11), (12), (13) and (18) of the Petition of Appeal were dealt with under this head.
47. The Appellant invoked Section 2 and 10 of the *Sexual Offences Act* and placed reliance on the case of *Mark Oiruri Mose vs Republic* [2013] eKLR where it was held that so long as there was penetration whether only on the surface, the ingredient of the offence was demonstrated and that penetration need not be deep inside the girl's organ. He questioned whether the elements of gang rape were proved beyond reasonable doubt.
48. He blamed the Trial Court for failing to analyse his defence of alibi because it was raised late. He argued that although the Trial Court held that the Prosecution had no ample time to investigate the alibi defence, it never complained or filed submissions complaining that it had not time to investigate the same.
49. He submitted that the Prosecution ought to have invoked Section 212 of the Criminal Procedure Code to seek more time to rebut his defence but not for the Trial Court to say that the defence witnesses were lying.
50. In that regard, he placed reliance on the case of *Erick Otieno Meda vs Republic Criminal Appeal No 55 of 2015* (eKLR citation not given) where it was held that the burden of proving falsity if at all of an accused person's defence of alibi lay on the Prosecution.
51. On its part, the Respondent submitted that the courts have held that the defence of alibi must be raised at the earliest opportunity as held in the case of *Isaiah Sawala alias Shady vs Republic* [2021] eKLR.
52. It was its contention that the Appellant did not raise defence of alibi but all he stated was that at the time of the robbery he was at home sleeping. It added that he failed to call any witness to corroborate on his whereabouts on that night.
53. PW 1 (sic) testified that on the material night of 23rd May 2019, the Appellant and his Co-Accused person raped her with the Appellant being the first to do so. Her evidence was unwavering and was corroborated by that of PW 2, PW 3, PW 4 and scientific evidence of PW 1.
54. Indeed, PW 1 found that the raping of PW 1 (sic) was both vaginal and anal. He stated that she had bruises on the neck and chin and had vaginal discharge and high vaginal swab showed visible pus cells on microscopic exam. He concluded that she was gang raped with the probable type of weapon being a human part, the penis.
55. Turning on the issue of the Appellant's defence of alibi, this court had due regard to the definition of "alibi" in the *Black's Law Dictionary*, 10th Edition. It was defined as "A defence based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time".



56. The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. The East Africa Court of Appeal came to a similar conclusion in the case of *Republic vs Sukha Singh S/O Wazir Singh & Others* [1939] 6 EACA 145.
57. It is also trite law that once a respondent raises an alibi defence, the onus shifts to the prosecution to displace the same as was held by the Court of Appeal in the case of *Victor Mwendwa Mulinge vs Republic* [2014] eKLR.
58. In this case this court noted that defence of alibi was raised at the defence hearing and not at the beginning of the trial. The Prosecution did not rebut the same despite having the option of doing so as provided in Section 309 of the Criminal Procedure Code Cap 75 (Laws of Kenya) that provides that:-
- “If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.”
59. Be that as it may, weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find the Appellant’s alibi evidence not to have been watertight enough to have weakened the inference of guilt on his part.
60. On the contrary, the Prosecution established its case of robbery with violence and gang rape against the Appellant herein beyond reasonable doubt and the Trial Court therefore acted correctly when it convicted him for the said offences. It was evident that the Appellant and his Co-Accused person had a common intention of raping her.
61. Notably, the ingredients of gang rape are that the offence must have been committed in the company of others and the offence was committed with common intention. This court had due regard to the case of *Republic vs Oyier* (1985) KLR where it was held that lack of consent was an essential element of rape. As PW 1(sic) did not consent to having sex with the Appellant and one of his Co-Accused persons, the offence of gang rape was established.
62. In the premises foregoing, Grounds of Appeal Nos (5), (8), (11), (12), (13) and (18) were not merited and the same be and are hereby dismissed.

III. Sentencing

63. Grounds of Appeal Nos (20) and (21) of the Petition of Appeal were dealt with under this head.
64. The Appellant did not submit on the issue of his sentence. On its part, the Respondent submitted that the sentence was lawful and should be upheld considering the nature of the offences and the trauma that was caused to the victims.
65. Notably, the Appellant was found guilty of the offence of robbery with violence and gang rape.
66. Section 295 of the Penal Code states that:-
- “Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.”
67. Further, Section 296 (1) and (2) of the Penal Code provides as follows:-



1. Any person who commits the felony of robbery is liable to imprisonment for fourteen years.
 2. If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.
68. 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.”
69. The Trial Court sentenced the Appellant to fifteen (15) years imprisonment for the offence of gang rape and thirty (30) years imprisonment, which sentences for the offence of robbery with violence, which sentences were to run concurrently.
70. Despite there being emerging jurisprudence to reduce sentences under the [Sexual Offences Act](#) as can be seen in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where the Court of Appeal held that Section 8 of the [Sexual Offences Act](#) must be interpreted so as not to take away the discretion of the court in sentencing offences, the African Charter on Human and Peoples' Rights on the Rights of Women in Africa provided that any practice that hindered or endangered the normal growth and affected the physical and psychological development of women and girls should be condemned and eliminated. Rape was one of those practices and actions. It must therefore be condemned in the harshest terms.
71. Rape was a crime that robbed the victim all her dignity and carried lifelong trauma. It was an unforgivable crime because the perpetrator took something valuable to the victim by force and unexpectedly. It was similar to the effects of the offence robbery with violence that left victims shocked and traumatised. It was even more traumatic when the same victim was raped and robbed at the same time. Worse off, the offence of robbery with violence was committed on two (2)) consecutive days. The crimes smacked of pure malice and impunity.
72. In view of the atrocity that was meted on PW 1 and PW 2 herein, this court found and held that this was one of the instances that the sentence ought to be higher than what was meted upon the Appellant. However, in view of this court's discretion on sentencing, it left the sentence of fifteen (15) years and thirty (30) years imprisonment which were to run concurrently, undisturbed.
73. Going further, this court was mandated to consider the period the Accused person spent in remand while his trial was on going in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
74. The said Section 333(2) of the Criminal Procedure Code 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” (emphasis court).

75. Further, Clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines provide 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.”

76. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.

77. Notably as the charge sheet was missing on the record of appeal herein as at the time of writing this Judgment, this court was forced to use the date of his arraignment in court for calculation of the period he had spent in custody during trial.

78. The Accused person was first arraigned in court on 28th May 2019. He was sentenced on 13th June 2022. He therefore spent about three (3) years sixteen (16) days in custody during trial. A perusal of the lower court proceedings indicated that the Trial Court did not take into consideration the said period while sentencing the Appellant. This was a period that therefore ought to be taken into consideration while computing his sentence.

Disposition

79. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Petition of Appeal that was dated 19th July 2023 and lodged on 31st October 2023, was not merited and the same be and is hereby dismissed. The Appellant’s conviction and sentence be and is hereby upheld as they were both safe.

80. For the avoidance of doubt, the period from 28th May 2019 until 12th June 2022 be and is hereby taken into account while computing his sentence in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

81. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 27TH DAY OF JUNE 2024

J. KAMAU

JUDGE

