Mamianyanga v Republic (Criminal Appeal 4 of 2021) [2024] KEHC 11303 (KLR) (27 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11303 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL 4 OF 2021

AC MRIMA, J

SEPTEMBER 27, 2024

BETWEEN

WYCLIFFE MAYUU MAMIANYANGA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal arising out of the judgment, conviction and sentence by Hon. M.I.G Moranga (SPM) in Kitale Chief Magistrate's Court Criminal Case (S.O.) No. 228 of 2019 delivered on 27 th January 2021)

JUDGMENT

Background:

1. Wycliffe Mayuu Mamianyanga, the Appellant herein, was charged with of the offence of Rape contrary to Section 7 of the *Sexual Offences Act*.
2. The particulars of the offence were that, on the 3rd day of October 2019 within Trans-Nzoia County, intentionally caused your genital organ namely penis to penetrate the genital organ namely vagina of SSW by force and threat without her consent.
3. The Appellant faced an alternative charge of committing an indecent act with an adult contrary to Section 11(A) of the *Sexual Offences Act*.
4. The particulars of the offence were that on 3rd day of October 2019 within Trans-Nzoia County, intentionally caused contact between his genital organ namely penis and the genital organ namely, vagina of SSW, without her consent.
5. At the trial Court, the Appellant was found guilty and accordingly convicted for the offence of rape.
6. He was sentenced to 15 years imprisonment.

The Appeal:

7. Dissatisfied with the conviction and sentence, the Appellant raised the following grounds of appeal in urging the Court to quash the conviction and set aside the sentence: -

    1. That the learned trial magistrate erred in failing to hold that the complainant and other prosecution witnesses did know I the appellant and hence I was not the perpetrator of the alleged offence.

    2. That the learned trial magistrate erred in failing to find that the evidence of PW5 exonerated I the appellant form the offence in dispute and further the prosecution failed to prove penetration.

    3. That the learned magistrate erred in failing to consider the credible defence put forth by I the Appellant.

8. In his submissions in support of the appeal, the Appellant stated that the evidence of the Clinical Officer exonerated him and that the Prosecution failed to prove penetration.

9. It was his case that while PW4 stated that the complainant had gonorrhoea, no tests were conducted to ascertain whether he contracted the disease in violation of the requirements of Section 36(i) of the *Sexual Offences Act*.

10. It further was his case that that since there was no spermatozoa in the evidence of PW5, the aspect of penetration was not proved. He submitted that the filing of P3 Form 3 days after his arrest occasioned him miscarriage of justice.

11. In conclusion, the Appellant submitted that his defence was not considered and that he had established his alibi on the material date.

12. He urged this Court to allow the appeal, quash the conviction and set-aside the sentence.

The Respondent's case:

13. The Respondent urged its case through written submissions dated 11th June 2023. It was its position, based on the decision in Peter Wanjala Wanyonyi -vs- Republic (2018) eKLR that it established beyond reasonable doubt penetration, lack of consent and the identity of the perpetrator.

Analysis:

14. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono vs. Republic [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in Ajode v. Republic [2004] KLR 81.

15. This Court is, therefore, supposed to determine whether the offence of rape or committing an indecent act with an adult was proved beyond reasonable doubt and, if so, whether it was committed by the Appellant.

16. The starting point is how the offence of rape is described in law. Section 3 of the *Sexual Offences Act* No. 3 of 2006 (hereinafter referred to as 'the Act') defines 'rape' as follows: -

    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.

(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.

(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

17. From the above definition, the ingredients of the offence of rape, therefore, include proof that the victim was not a minor, proof of penetration, proof of the perpetrator and proof that the consent was not freely given.

18. On looking at those aspects in this judgment, this Court shall consider each of them singly. I must however confirm that the evidence was well captured in the judgment under appeal and I hereby adopt the same as part of this decision by reference.

19. In a snapshot, six witnesses testified before the trial Court. However, the Complainant, SSW, did not testify as she was mentally challenged and was not well oriented of time and events. The Complainant's sitter-in-law one EN testified as PW1, the complainant's elder brother one WMW, testified as PW2, Emmanuel Wepukhulu Wanyonyi, a neighbour to the complainant testified as PW3. Musa Chepkiyen, a Clinical officer attached at the Endebes Sub- County Hospital testified as PW5,PC Violet Ounoi, the Investigating Officer testified as PW4. PW6 was Dr. Felister Mwangi, a Consultant Psychiatrist.

20. The Court will now endeavour a consideration of the ingredients of the offence of rape.

Age of the complainant:

21. The age of the complainant was not contested in this appeal. Witnesses and even some of the exhibits on record indicated that the complainant was 36 years old at the time of the alleged sexual molestation.

22. The complainant was, hence, not a minor in law.

Penetration:

23. The evidence on penetration was attested to by several witnesses.

24. It was PW1's evidence that on the material day, the complainant left home and did not return. As it was getting dark, family members decided to look for the complainant, more so since she was mentally-challenged.

25. They eventually found the Appellant in an abandoned house within the place where the Appellant lived. On pushing the door open, PW1 found the Appellant and the complainant lying on a mattress. She pulled the blanket which they had covered themselves and found that they having sexual intercourse in a near 'doggy style'.

26. She later recorded a statement with the police and escorted the complainant to hospital for treatment. She identified the complainant's treatment notes and test request form.

27. PW2 stated that they found the Appellant and the complainant [her sister] naked. That, the police were called and the Appellant arrested. The blankets and beddings were recovered by the police.

28. The testimony of PW3 was to the effect that when they arrived at the Appellant's place, he had a 'D-light lamp' and when they pushed the door open, they found the Appellant naked and having sex with the complainant from the rear.

29. PW5 examined the Appellant at the hospital. He found that her external genitalia were in order, but her internal genitalia had lacerations on the vaginal wall and had abnormal discharge. It was his testimony that swabs from the vagina indicated that she was infected with gonorrhoea, a venereal disease. He further indicated that there were no spermatozoa since the complainant was uncooperative and erratic and that the gadget they would have used to extract the specimen would have caused more damage.

30. There is no doubt that for the offence of rape to be committed, there has to be penetration. Section 2(1) of the *Sexual Offences Act* defines "penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

31. This position was fortified in Mark Oiruri Mose vs R (2013) eKLR when the Court of Appeal stated thus: -

> …. Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ…. (emphasis added).

32. Later, the Court of Appeal, then differently constituted, in Erick Onyango Ondeng v. Republic (2014) eKLR held as such on the aspect of penetration: -

> In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.

33. From the definition of penetration and the guidance by the Court of Appeal, it is the position that penetration may only be 'slightest and to the surface' to suffice in law. It, therefore, means that there may be instances where the slight penetration, depending on other factors including passage of time, may not be possible to be ascertained by way of medical evidence. Therefore, the failure to prove penetration by medical evidence does not ipsa facto mean that there was no penetration. It all depends on the peculiar circumstances of a case and the extent to which the trial Court believes the victim. However, in such instances, the Court must exercise extreme caution as to weed out miscarriage of justice including instances where a victim is framed up for ulterior motives.

34. Deriving from the above, the totality of the evidence of both the eye witnesses and the Clinical Officer point to the occurrence of a sexual encounter. PW1, PW2 and PW3 were eye witnesses. They saw the Appellant lying naked from the rear side of the complainant.

35. The Court has perused the medical examination report produced as an exhibit. The Report indicated that there were lacerations on complainant's vaginal wall. PW5 made the conclusion that it was an indication that there was sexual intercourse within 24 hours of examination.

36. The evidence of the Appellant did not challenge or dislodge the incidence of a sexual encounter. To that extent, it is this Court's finding that the trial Court did not err in the finding that there was penetration.

Identification:

37. PW1, PW2 and PW3 were eye witnesses. They gave a vivid account of the fact that when they pushed the door open, the Appellant was in there lying naked and having sex with the complainant from the back.

38. On his part, the Appellant's raised the claim of alibi. He denied committing the offence and narrated how he was arrested.

39. However, the witnesses stated that they recognized the Appellant, arrested him in the act, called the police and handed him over.

40. Recognition is a critical component in identification of a perpetrator. In Anjononi & Others vs. Republic [1980] KLR 59 the Court of Appeal made the following remarks;

> ...recognition of an assailant is more satisfactory, more reassuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another.

41. It is on record that PW1, PW2 and PW3 knew the Appellant well. They had known him variously as a resident of their area for a period of 4 to 5 years. They referred to the Appellant by his name and emphasized that the person they arrested and handed over to the police was no other than the Appellant.

42. On the basis of the foregoing, this Court finds and hold that the Appellant's identification by way of recognition was not in error. He was positively identified as the perpetrator.

Consent:

43. The Mental Assessment Report produced by PW6 dated 25th November 2019 indicated that the complainant suffered from psychosis.

44. It was PW6's evidence that during examination, the Complainant was jumping on chairs, did not know where she was neither did she know home. PW6 concluded that the complainant was unable to make logical decisions based on reality.

45. The concept of consent was discussed by the Court of Appeal in Republic -vs- Oyier [1985] KLR 35 as follows: -

    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.

46. There is evidence that the complainant was mentally-challenged and could not make any logical decisions. Such a person could definitely not have consented to a sexual endeavour. Therefore,

the Appellant intentionally and unlawfully caused his penis to penetrate the genital organ of the Complainant without her consent.

47. In the end, having considered the evidence and the law, this Court is satisfied that all the ingredients of the offence of rape were established beyond reasonable doubt and that it was the Appellant who as the perpetrator.

48. The appeal on conviction, therefore, fails.

Disposition:

49. As there was no challenge to the sentence rendered, it is prudent that this discussion ends here.

50. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.

51. Consequently, the following final Orders hereby issue: -

    a. The Appeal is wholly dismissed.

    b. The file is hereby marked as closed.

    It is so ordered.

DELIVERED,DATED AND SIGNED AT KITALE THIS 27TH DAY OF SEPTEMBER, 2024.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of: -

Wycliffe Mayuu Mamianyanga, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.