Kadolo v Republic (Criminal Appeal E048 of 2023)
[2024] KEHC 11345 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11345 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E048 OF 2023

GMA DULU, J

SEPTEMBER 26, 2024

BETWEEN

EMMANUEL LESHA KADOLO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((From the conviction and sentence in Criminal Case No. E009 of 2022 delivered on 3rd May 2023 by Hon. D. M. Ndungi (PM) at Taveta Law Courts)

JUDGMENT

1. The appellant was convicted of rape contrary to section 3(1)(a)(b) as read with Section 3(3) of the *Sexual Offences Act* No. 3 of 2006, the particulars of the offence being that on diverse dates between 16th October 2021 at unknown time within Taita Taveta County, intentionally and unlawfully caused his penis to penetrate the vagina of RRN without her consent.

2. On conviction, he was sentenced to fifteen (15) years imprisonment to run from 11th April 2022 when he was first placed in custody.

3. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied upon the following amended grounds of appeal:-

    1. The learned trial Magistrate grossly erred in law and facts in finding that the prosecution proved the case of rape against him beyond reasonable doubt.

    2. The learned Magistrate erred in law and facts in failing to analyse and evaluate the entire evidence noting that the appellant had reasonably established a defence when the victim consented to marriage as per the first record in the OB at the police station and that the complainant's age was 28 years.

3. The learned trial Magistrate erred in both law and facts in failing to find that PW2 the mother of the complainant concocted and fabricated the allegations against the appellant and further influenced the complainant (PW4).

4. The learned trial Magistrate erred both in law and in facts in failing to consider the provisions of Section 333(2) of the *Criminal Procedure Code* yet the appellant had been in custody from the time of arrest until he was incarcerated.

5. The learned trial Magistrate erred by failing to consider that the sentence imposed to the appellant was manifestly harsh and excessive in all the circumstances in contravention of Article 50(2)(p) of the *Constitution* of Kenya 2010, hence seeks High Court's interpretation of the mandatory minimum sentence in Section 3(1)(3) of the *Sexual Offences Act* No. 3 of 2006.

4. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.

5. This being a first appeal, I have to start by reminding myself that as a first appellate court, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see *Okeno v Republic* [1972] EA 32.

6. I have also to bear in mind that the burden was on the prosecution throughout to prove all the elements of the offence charged. The appelland had no burden to prove his innocence – see Section 107, 108 and 109 of the *Evidence Act* (Cap.80). The standard of proof was beyond reasonable doubt as this is a criminal case.

7. In their effort to prove their case, the prosecution called four (4) witnesses. On his part, the appellant tendered sworn defence testimony and did not call any additional witnesses.

8. The elements of the offence of rape for which the appellant was convicted, are firstly, sexual penetration, secondly, lack of consent and thirdly, the positive identity of the culprit.

9. In the present case however, there is an additional factor of the alleged victim being a person with mental disability.

10. With regard to the element of sexual intercourse, the complainant PW1 Rukia Neema testified that the appellant, whom she knew before, met her at the river cleaning utensils and took her to his house where he had sexual intercourse with her for the night.

11. PW3 George Ombayo a Clinical Officer at Taveta Sub County hospital, testified that the complainant alleged at the hospital that she was raped, and on examination she was found with injuries in the vagina, which confirmed physical trauma or sexual penetration.

12. In my view, the evidence of PW1 on sexual intercourse was believable, and in line with the provisal to Section 124 of the *Evidence Act* (Cap.80) it can be relied upon to prove a fact, without further corroboration. I thus find it to be believable as she had nothing to gain by falsely implicating the appellant in the sexual act, and the medical evidence of PW3 corroborated the said sexual encounter.

13. I now turn to consent was there absence of consent? From the evidence on record, it is evident that the lack of consent is pegged mainly on the alleged mental incapacity of the victim PW1.

14. In my view however, lack of consent to sexual activity was not proved for the following reasons. Firstly, there is no evidence on record tendered in the trial by either PW1 or any other witnesses, that the appellant forced the complainant in indulging in sexual acts, or that he misled her. The evidence on

record is infact that each of them voluntarily went into the house of the appellant, and together spent the night there and engaged in sexual intercourse.

15. Secondly, there is no evidence on record that the appellant knew that the victim PW1 was mentally retarded or that he had reason to know the allegedly deficient mental condition of PW1. In any case, no medical evidence on the mental status of PW1 at the time of the alleged incident, was tendered in court.

16. Lastly, on the same issue of consent, in my view, with the legal provisions on the rights and freedoms of every person enshrined in the *Constitution*, it cannot be said that mentally retarded persons will lose their right or freedom to engage in sexual activities, unless the culprit has deliberately tricked or taken undue advantage of him or her, which is not the case herein.

17. I thus find that the prosecution did not prove beyond any reasonable doubt that the sexual intercourse herein was without the consent of PW1.

18. As for the culprit, in my view, the evidence on record is cleare and sufficient. It was proved beyond any reasonable doubt that the appellant was the culprit since there was no possibility of mistaken identity, as the two knew each other before, and they met in broad light before proceeding to the house of the appellant for the night. Thus though the appellant stated in his sworn defence that he was merely called and arrested at the village headman's house for unexplained reason, that defence was an afterthought.

19. Since I have found that lack of consent to the sexual intercourse was not proved by the prosecution beyond any reasonable doubt, I have no other option but to allow the appeal.

20. I thus allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 26TH DAY OF SEPTEMBER 2024 IN OPEN COURT AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistants

Appellant

Mr. Sirima for State