M v Republic (Criminal Appeal E060 of 2023)
[2024] KEHC 11747 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11747 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E060 OF 2023

LW GITARI, J

SEPTEMBER 26, 2024

BETWEEN

EM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant was charged in the principal Magistrate's Court at Nkubu with the offence of rape contrary to section 3(1) (a) (b) (c) as read with Section 3(3) of the Sexual Offences Act, No 3/2006. The particulars were that on the 18th day of May 2022 at around 1900hours at (particulars withheld) Sub-location (particulars withheld) Sub-county within Meu County, intentionally and unlawfully caused his penis to penetrate the vigina of SG aged 52 years old without her consent. He was also charged with an alternative count of committing an indecent act with an adult contrary to Section 11(A) of the Act. The appellant denied the charges. However, after a full trial the appellant was found guilty, convicted and sentenced to serve ten years imprisonment.

2. The appellant was dissatisfied with both the conviction and sentence and filed this appeal based on the amended supplementary grounds which are as follows :-

    1. That, the learned trial magistrate erred in both law and fact by sentencing the appellant to serve 10 years imprisonment without analyzing the light used at the scene to identify the appellant.

    2. That, the learned trial magistrate erred in both law and fact by failing to note that the investigation was shoddy.

    3. That, the learned magistrate erred in both law and fact by rejecting the appellant defense without giving cogent reasons.

The appellant prays that the appeal be allowed, the conviction be set aside and he be set at liberty.

3. The prosecution opposed the appeal ad has urged the court to find that the appeal lacks merits and should be dismissed in its entirety.

The Prosecution Case.

4. They respondent called four witnesses in support of their case.

5. PW1 SG is the complainant. She testified that on 18/5/2022 at about 7:00pm she was coming from the shop where she had gone to buy rice. While she went through her shamba, the appellant held her by the chest and threw her to the ground. He then dragged her from the footpath and blocked her mouth. She asked him whether he wanted to kill her and he replied that she should let him do what he wanted to do. The appellant then raped her twice after removing her pants which he tore in the process. The appellant was rescued by her son M. The appellant fled. The next day she went to Nkubu Police Station and reported the matter. She was referred to Kanyakine Sub-county hospital where she was treated. She handed over the torn pants to the police and it was tendered in court as evidence., exhibit 1. The complainant testified that she knew the appellant before and they are related as the appellant is her nephew.

6. M (PW2) testified that on 18/5/22 he was on his way home when he found the appellant raping the complainant who is his mother. It was about 7:00pm. He told the court that he caught the appellant red handed and recognized him as he is his cousin.

7. No. 106703 PC (woman) Valentine of NKubu Police Station was the investigating officer. She testified that o 19/5/2022 she was at the police station when the complainant went there and reported a cse of rape against the appellant. She recorded her statement and issued her with a P3 Form to go for treatment. She was treated and a P3 Form was filled. The complainant recognized the appellant as they are related. She was rescued by her son. She then arrested and charged the appellant.

8. PW4 was Timothy Mberia a Clinical Officer at Kanyakine Sub-county Hospital. He has eleven years working experience. He testified that the complainant was examined on 19/5/2022 by his former colleague S. Kaimatheri, who he had worked with for two years. She was aged 52 years and gave a history of having been raped by someone known to her. On examination, she had injuries on the neck, tenderness, bruises and scratch marks on the face, nose and upper lips. Viginal examination showed a discharge. She had tenderness on the labia minor and majora and multiple bruises on labia. The hymen was broken no spermatozoa was seen. He concluded that the fact o9f the tenderness of both labia major and minora, broken hymen and injuries on the vigina, there was forceful penetrative sexual intercourse. He produced the P3 form and treatment nots. The prosecution case was then closed.

Defence Case

9. The learned trial magistrate ruled that the appellant had a case to answer and he placed him on his defence. He opted to give a sworn statement and told the court that he did not commit the offence. He alleged that he found some illicit brew which was hidden in his home. The complainant and her son went and confronted him. Thereafter he was arrested and charged. He further stated that the case is a falsehood and a conspiracy between the complainant and her son to frame him falsely. In cross-examination he stated that he did not see the complainant deliver the said illicit brew to her home. The learned trial magistrate held that the prosecution had sufficiently proved its case against the appellant, he convicted him and sentenced him to serve ten (10) years imprisonment.

The Appeal

10. The appeal is based on the following grounds:-

    1. That, the learned trial magistrate erred in both law and fact by sentencing the appellant to serve 10 years imprisonment without analyzing the light used at the scene to identify the appellant.

    2. That, the learned trial magistrate erred in both law and fact by failing to note that e investigation was shoddy.

    3. That, the learned magistrate erred in both law and fact by rejecting the appellant defense without giving cogent reasons.

11. The appeal was canvassed by way of written submissions.

Appellants Submission

12. He submits that the prosecution failed to prove the case against him as the evidence tendered by the prosecution was not sufficient to sustain a conviction. This is based on the contention that the light which enable the appellant to identify him was not stated., That the incident took place at night and the complainant did not tell the court the light she used to identify him. He relies on the case of Maitanyi Versus Republic (1986) KLR 198, Cleophas Okeno Wamunga Versus Republic, Kisumu Criminal Appeal No. 20/1989 KLR 783.

13. The appellant further submits that the learned magistrate rejected his defence without giving cogent reasons.

Respondents Submissions

14. The respondents submit that all the ingredients of rape were proved beyond any reasonable doubts. That the appellant was well known to the complainant and PW2 and the issue of identification does not arise. It is also submitted that the excepts of the trial court judgment unequivocally shows that the defence of the appellant was considered and that the existence of a grudge was not a defence and was rightly discounted in light of the overwhelming evidence reaching to the appellants conviction. On sentence it is submitted that Section 3(3) of the Sexual Offences Act provides that a person guilty of the offence of rape under the 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. Thus, the sentence was legal. The respondent relies on the case of Shadrack Kipkoech Kogo Versus Republic where the Court of Appeal held that sentence is an exercise of discretion by the trial court and an appellate court will not interfere with the exercise of discretion unless it is shown that the court took into account an irrelevant factor, or ignored relevant factors acted on wrong principles or that the sentence is excessive as to amount to an error in principle. He submits that the appeal lacks merit and ought to be dismissed

Analysis and Determination:

15. I have considered the record of the lower court and the submissions by the parties. I find that the issues which arise for determination are :-

    1. Whether the appellant was positively identified as the perpetrator.

    2. Whether this court should interfere with the sentence which was imposed by the learned trial magistrate.

16. This is a first Appeal and this court is mandated to analyse the evidence, re-evaluate it and come up with its own independent finding. The appellant is charged with rape contrary to Section 3 of the Sexual Offences Act which provides as follows:-

> 3. Rape
>
> (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. The ingredients of the charge are :-

1. Penetration
2. The other person (victim) does not consent.
3. Positive identification of the perpetrator.

Penetration

18. The fact of penetration is proved by the testimony of the victim corroborated by medical evidence.

19. Section 2 of the Sexual Offence Act. Defines Penetration as follows:- " The partial or complete insertion of the genital organ into the genital organ of another person"

20. Thus, penetration need not be the complete insertion into the genital organ partial insertion is sufficient to proof penetration. In this case the complainant testified that the appellant raped her by forcing her to have sexual intercourse with him without her consent. The appellant denied that he committed the offence. There is no allegation by the appellant that the complainant had consented to the sexual intercourse. I have no reason not to believe the complainant hat she had not consented to the rape. The fact rape was also corroborated by the testimony of PW2 who suddenly came across the appellant when committing the offence. The fact of penetration was corroborated by the testimony of PW4 the Clinical Officer who examined the complainant and found that there was tenderness of both majora and minora, hymen was broken. He testified that the injuries on the vigina were as a result of penetrative sexual intercourse. The prosecution did discharge the burden to proof the fact of rape.

21. On the identity of the perpetrator, the testimony of the complainant is that the appellant was the culprit. She testified that "I was held on the chest by the accused and he threw me on the ground". He dragged me from the footpath and blocked my mouth. The accused pulled me and tore my pants, he held me, fell me to the ground and lay on me".

22. The chain of this evidence shows that the complainant could clearly see and know that the assailant was the appellant and no other person. The complainant said it was about 7:00pm. She could not have failed to recognize the person she knew very well as she was her relative. It is trite law that when it comes to the identification of the perpetrator of a crime the cognition is better than identification of a stranger. Evidence of identification of a stranger requires scrutiny to ensure that it is free from possibility of mistake. See Wamunga Versus Republic (1989) KLR In Ogeto Versus Republic (2004) eKLR the court stated that there is need to test the with greatest care the evidence of a single witness especially when it is shown that the conditions did not favour a positive identification.

23. In this case the testimony of the complainant was corroborated by the testimony of PW2 who found the appellant in the act of rape. The appellant was well known to the two. The appellant also talked to PW2. PW1 said she saw the appellant. When the appellant cross-examined the appellant, he did not challenge her testimony that she saw him. This is also the same when he cross-examined the PW2 looking at this testimony, there does not seem to have been darkness that would have prevented the PW1 & 2 to confuse the appellant for another. Furthermore, the appellant talked with PW1 and the PW, they could not have failed to recognize him. The trial magistrate was satisfied that the appellant was not a stranger to both the complainant and PW2. That they both knew him very well prior to the material day and there was no room for mistaken identification. He concluded that the appellant was positively recognized and identified.

24. I find that the conclusion was based on the evidence placed before the learned magistrate. He had the chance to see the witnesses and asses their demeanor. I find that the learned magistrate properly addressed his mind to the circumstances prevailing at the scene and that the complainant knew the appellant prior to the incident and arrived at the right conclusion that the appellant was recognized as the perpetrator. PW3 testified that the complainant said, she recognized the appellant as he was her relative. I find that there is no doubt that the appellant was well known to the PW1 & PW2. They could not have failed to recognize him. I come to the conclusion that the testimony of PW1 & 2 is reliable and sufficiently proved that the appellant was the perpetrator. The issue of recognition was no raised when PW1 and 2 testified but the learned magistrate properly considered it in his defence.

25. The appellant has challenged the sentence imposed on him as being unconstitutional. Section 3 (3) of the Sexual offences Act provides that the minimum sentence for rape is ten years.

26. In Shadrack Kipkoech Kogo Versus Republic in Court of Appeal Eldoret 253/2003. The court stated that sentence essentially an exercise of discretion by the trial court and the appellate court will not interfere with the exercise of the discretion unless it is shown that in passing the sentence the court took into account an irrelevant factor, applied wrong principles or short of that the sentence was excessive and therefore an error in principle and must be interfered with.

    See also Wanyama Versus Republic (1971) EA 493. The appellant faulted the learned trial magistrate for sentencing him when the charge was not proved.

27. I note that ten (10) years is the minimum sentence for the offence of rape. The sentence was not excessive nor harsh. The sentence was lawful and I find no reason to interfere with it. The sentence meted out was legal.

28. The appellant has alleged that his defence was not considered. This is far from the truth. The defence was considered and was rejected as it was an afterthought. The ground has no merits

Conclussion

29. Having considered this appeal, I find that the conviction of the appellant was safe. The appeal is without merits and is dismissed.

SIGNED, DATED AND DELIVERED THIS 26TH DAY OF SEPTEMBER, 2024.

HON. LADY JUSTICE GITARI

JUDGE

In The Presence Of:-

Court assistant – Tupet