Hared v Republic (Criminal Appeal E029 of 2023)
[2024] KEHC 16051 (KLR) (18 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16051 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E029 OF 2023

JN ONYIEGO, J

DECEMBER 18, 2024

BETWEEN

ABDULLAHI OSMAN HARED ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence by Hon. Mugendi Nyaga, in Wajir Principal Magistrate's Court Criminal Case No. E014 of 2022 delivered on 22.12.2022)

JUDGMENT

1. The appellant herein was charged and convicted of the offence of rape contrary to section 3(1) as read with (3) (3) of the *Sexual Offences Act* No.3 of 2006. The particulars of the offence were that on 11.09.2022 at Wajir County, he intentionally and unlawfully caused his penis to penetrate the vagina of QMA without her consent.

2. He was also charged with an alternative charge of committing an indecent act with an adult contrary to section 11(A) of the *Sexual Offences Act* No. 3 of 2006. Particulars were that on 11.09.2022 at Wajir County, he intentionally touched the vagina of QMA with his penis against her will.

3. Upon conducting full trial in which the prosecution called five witnesses, the appellant was convicted and sentenced to 10 years imprisonment. Aggrieved by the said conviction and the sentence, he filed the instant appeal on the following grounds:

    i. That the trial court failed to analyse and consider his defence.

    ii. That trial court shifted the burden of proof to him.

    iii. That the trial court despite the prosecution failing to prove its case beyond reasonable doubt convicted and thereafter sentenced him.

4. The appeal was canvassed by way of oral submissions. In his oral submissions, the appellant denied committing the offence herein as he claimed that the prosecution's evidence was marred with contradictions. That prior to the incident herein, he was mentally unstable when he was charged with a different offence and consequently acquitted. It was his case that there is no way he could be held liable for committing the offence herein in the given said state of mind. As such, he urged this court to acquit him or reduce his sentence.

5. The respondent on its part submitted that penetration was proved by the complainant's testimony and further, by the evidence of PW2. It was further submitted that the complainant did not consent to the sexual act with the appellant as was evident from her testimony. It was further stated that the allegation on mental instability was not part of the grounds listed on the petition of appeal and as such, the same was merely an afterthought. It was submitted that the appellant was positively identified and therefore, properly convicted.

6. On sentence, it was contended that the sentence was proper in the circumstances of the case and was not excessive as the penalty section provides for a prison term of up to life imprisonment.

7. As a first appellate court, I am obliged to re-evaluate the evidence afresh and arrive at my own independent conclusion. I am however reminded to bear in mind that I neither saw nor heard the witnesses testify and give due regard to that. [See *Okeno vs R* (1972) EA 32].

8. Brief facts of the case are that, on 11.09.2022, at around 4.00 p.m., Pw1 QMA had gone to fetch firewood when the appellant accosted, strangled and raped her for about one hour. According to her, the appellant was a stranger to her and neither had they agreed to have sex. It was her evidence that upon the assailant letting her go, she screamed and the members of the public together with her mother responded. That she was taken to Abakore hospital for treatment as other members of the public together with the area chief left to search for the assailant. She averred that she identified the appellant as he had a mark on his nose and that he was still dressed in the very clothes that he was in at the time when he raped her.

9. PW2, HMD, mother to PW1 testified that on the day in question, she was at home when PW1 left to fetch firewood. After sometime, she heard some screams and upon heading to the direction of the said screams, she found PW1 crying and screaming. Together with other women, they carried PW1 home as other members of the public pursued the assailant by following the footprints that were left on the soil. The assailant was thus arrested and thereafter locked up in a room awaiting the police who re-arrested him.

10. PW3, MIJ, area assistant chief testified that on 11.09.2022 at around 5.00 p.m., he was on his way from a mosque when he ran into the members of the public who informed him of the incident. That upon talking to PW1 who described all that had happened, he directed some women to take PW1 home as others joined in search of the assailant. He averred that on their way to (Particulars withheld) , they saw the appellant run away and so, they followed him. Upon interrogating him, the appellant confessed to committing the offence and further stated that he hailed from Alikure. He locked the appellant in a room at Dalsan Hospital as they waited for the police to come and re-arrest him.

11. PW4, No. xxxxxx PC BB, the arresting officer recalled that he was assigned this case by his boss as he informed him that a suspect had been arrested by members of the public. Upon proceeding to the scene, they found the appellant locked in a room at Dalsan Hospital. He rearrested him and then took him to Abakore police post. He stated that he booked the appellant in their post and the following day, handed him over to the DCI at Habaswein.

12. PW5, No.xxxxxx, PC PR, the investigating officer stated that upon receiving information from the DCI Habaswein, he went for the appellant and re-arrested him. That he took statements from the complainant and the appellant. He reiterated the evidence of the other prosecution witnesses in stating that the appellant raped the complainant. It was his evidence that he took the complainant to Habawein Sub County hospital for treatment and later charged him with the offence herein.

13. PW5, Vincent Ochieng, a medical officer at Habaswein Sub County Hospital testified and produced the P3 Form, treatment notes and Lab request forms as Pex. 1,2 and 3 respectively. It was his testimony that on examination of the complainant, he found that the genitalia was normal, no lacerations and there was visible darkened blood on the vagina opening. On spectrum examination, there were no bruises on the vaginal wall. However, there was dark red blood oozing from the cervical hole and as such, an impression of sexual assault was made. Upon conducting a high vaginal swab, no spermatozoa was found. Nevertheless, red blood cells were seen. According to him, he could not conclude that there was a sexual assault as the physical and genital examination were normal. In the same breadth, he concluded that the blood seen in the genitalia was due to menses.

14. Upon being placed on his defence, the appellant in his sworn statement denied committing the offence. He stated that at the time in question, he was at Alikure and not Abakore.

15. I have considered the grounds of appeal and the submissions by both the appellant and the prosecution counsel against the evidence adduced at the trial court. The issues for determination are; whether the prosecution proved its case against the appellant beyond reasonable doubt and secondly; whether the sentence imposed was manifestly harsh and excessive in the circumstances.

16. The statutory definition of rape is provided under section 3 (1) of the *Sexual Offences Act* which provides that:(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."[See Court of Appeal in the case of *Republic v Oyier* [1985] KLR 353].

17. PW5 testified that he examined the complainant from head to toe and found everything normal. Further, that he could not conclude that there was a sexual assault as the physical and genital examinations were normal. The foregoing notwithstanding, the complainant testified that the appellant strangled and raped her. This testimony in as much as it was uncorroborated, remained unchallenged even in cross examination.

18. It is trite that there is no requirement under Section 124 of the *Evidence Act* for evidence in sexual offences to be corroborated by medical evidence before a conviction can be reached. In *Kassim Ali vs Republic* (2006) eKLR the Court of Appeal held that examination to support the fact of rape is not decisive as the fact of rape can be proved by the evidence of a victim of rape or by circumstantial evidence. Further, in *AML vs Republic* (2012) eKLR, the same court held that the fact of rape is not proved by way of a DNA test but by way of evidence. In *J.W.A. vs Republic* 2014 (2014) eKLR the court held that corroboration in sexual offences is not mandatory.

19. It is therefore clear from the above authorities that medical evidence to connect an accused person to the offence of rape is not a mandatory requirement for a conviction to be sustained. The foregoing notwithstanding, a court can convict on the basis of the evidence of a single witness if it believes that the evidence of the victim is trustworthy. All that the court is required to do is to warn itself of the dangers of convicting on the evidence of a single witness and convict if it is fully satisfied that the evidence points to the culpability of the accused. [See *Chila vs Republic* (1967) EA 722; *Stephen Nguli Mulili vs Republic* [2014] eKLR and Section 124 of the *Evidence Act*].

20. In this case, having perused and analyzed the evidence of the complainant alongside other witnesses and not forgetting the fact that the trial magistrate who saw the complainant testify was satisfied with her testimony, it is my humble view that indeed, the complainant was penetrated.

21. On identity, the complainant testified that when the appellant accosted her, it was at around 4.00 p.m. That the appellant strangled and thereafter raped her for about one hour. According to PW2, she stated that when she heard PW1 scream for help, it was around 5.00 p.m.; in the same breadth, PW3 also testified that the said incident happened when he had just left the mosque. The said evidence points towards the fact that the incident happened during daytime. Therefore, there was sufficient light to aid proper identification which was favourable and free from any possibility of error. The same notwithstanding, the time the appellant and the complainant spent together was sufficient enough to enable proper identification. [See the Court of Appeal in the case of *Wamunga v Republic* (1989) KLR 424].

22. From the foregoing, it is evident that the complainant clearly identified the appellant as the person who sexually abused her and described him to the members of the public who followed him through his foot prints. That the appellant upon noticing that he was being followed ran until he was arrested. Even from his conduct in running away, one can draw reasonable inference on his culpability. Under section 124 of the *evidence*, a court can convict on a sexual offence if satisfied that the victim is truthful or believable. In this case the court was satisfied that pw1 was truthful. I have reason to doubt the appellant was positively identified as the perpetrator.

23. On whether there was consent from the complainant, the fact that the complainant upon being raped screamed for help from the members of the public, was indicative enough that indeed, there was no consent prior to the sexual activity happening. In the same breadth, it was the testimony of the complainant that the appellant strangled her before pushing her down and thereafter removing her clothes before inserting his penis into her vagina. All this evidence points towards the fact that the complainant did not give consent for the sexual intercourse.

24. In view of the above, it is my finding that, the prosecution properly proved that there was no consent obtained from the complainant prior to the sexual activity happening. In the end, I am satisfied that the prosecution proved beyond reasonable doubt that it was the appellant who raped the complainant. I therefore find and hold that the conviction of the appellant was safe.

25. Turning to the issue of sentence, in as much as the appellant did not submit on the same, I do note that he sought that the sentence meted out be set aside or be reduced. It is trite that sentencing is at the discretion of the trial court but such discretion must be exercised judiciously. The discretion is however limited to the statutory minimum and maximum penalty prescribed for a particular offence. [See *Wanjema v Republic* (1971) EA 493].

26. The punishment prescribed for the offence of rape in section 3 (3) of the *Sexual Offences Act* is a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

27. The Court of Appeal, on its part, in *Bernard Kimani Gacheru vs Republic* [2002] eKLR restated that: "It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case".

28. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some irrelevant material factors, or acted on a wrong legal principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have

passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

29. Likewise, in this case, nothing was presented before this court to demonstrate that the sentence by the trial court was illegal or that the trial court used his discretion capriciously.

30. In the end, I dismiss the appeal against conviction and sentence as the same is devoid of any merit.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS DAY OF 18TH OF DECEMBER 2024

J. N. ONYIEGO

JUDGE