Akatum alias Maman v Republic (Criminal Appeal E03 of 2020)
[2023] KEHC 18266 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEHC 18266 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL E03 OF 2020

SM MOHOCHI, J

JANUARY 26, 2023

BETWEEN

SOLOMON AKATUM ALIAS- MAMAN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the Judgement, Conviction and sentence in SPM'S Cr. Case No. 07 of 2019 - Kabarnet, Republic v Solomon Akatum Alias-Maman, delivered by P.C. BIWOTT, S.P.M. delivered on 15.1.2020)

JUDGMENT

Introduction

1. This appeal flows from a criminal trial of a gang rape contrary to section 10 of the *Sexual Offence Act* No. 3 of 2006 of a 76-year old senior citizen by the Appellant and his accomplice at large-two young men.

2. Feeling dissatisfied the Appellant preferred this instant appeal by filing to grounds of appeal that he subsequently amended twice with grounds seven grounds that I have clustered and condensed as hereunder;

    a. That, the trial court erred in law and fact as it failed to hold that the charge sheet in this case was defective and he was deprived of a fair hearing.

    b. That, the trial court erred in law by convicting on the basis of inconclusive identification.

    c. That the trial erred in law and fact by shifting the burden of proof from the prosecution to the appellant.

d. That, the learned trial erred in law and fact in convicting without satisfaction in evidence of "penetration" as an ingredient of the offence.

Written Submissions

The Appellant filed written submissions which he amended twice with the leave of the court, regurgitating his assertions and highlighted the same during hearing as follows;

No *Prima facie Case* was established

That no *Prima facie Case* case was established because he pleaded "not guilty", he was not arrested at the scene of crime and that the trial court "confounded" the witness evidence, I would hasten to add that no elaboration of "confounded" was offered.

Ground One

Defective Charge Sheet, and denial of a fair hearing

3. The appellant argued that he was denied of fair trial by referring to (Pg. 22 line 9 of the proceedings copies) urging that a continued adjournment of hearing his case by the trial magistrate were biased and discriminating contravening the provisions of Article 27 (4), 25 C and 50 (2) of the *constitution* in respect of human rights and fundamental freedoms and fair hearing and he cited The Supreme Court of India in the Case of *Natasha Singh v Republic* that held that;

> " Fair trial is the main object of the criminal procedure and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interest of the accused, the victim and the society and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned and as a human right thus under no circumstances can a person's right to fair hearing be jeopardizes."

Ground Two

Inconclusive Identification evidence

4. The appellant referred to the witness evidence (Page. 6 line 19, Page 7 line 24-25, Page 14 line 12, Page 15 line 14) arguing that his identification by the walking sticks found at the alleged scene of crime was null and void to this case because (Page. 18 line 11) PW4 was very clear as he confirmed that as pastoralists all Pokot men use walking sticks and therefore it was difficult to identify a stick from another unless it had a special mark feature. He sought to rely on the case of *R v Turnbull* (1976) EA 3 ALLER 549 which held that;

> " .....the judge should direct the jury to examine closely the circumstance in which the identification by each witnesses came to be made. How long did the witness have the accused under observation? At what distance? In what right? Was the observation impeded in any way as for example by passing traffic or a press of people? Had the witness even seen the accused before? How often? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"

5. He cast doubts on the truthfulness of the complainant testimony saying, she should have raised alarm (Pg. 6 line 10- 11) to stop one Kampi whom she alleged passed by the scene of offence with a spot light

to help her home and she was inebriated not to be able to identify the said Kampi who never assisted her nor talked to her he points out the record of appeal at (Pg.13 line 23) , (Pg.13 line 24, Pg.4 line 20), (Pg. 16 line 13), (Pg.6 line 10) and (Pg. 13 line 13) to showcase the inconclusiveness of the identification evidence citing the case *Karani v Republic* (1985) KLR 290 where the court held at page 293 that;

> " identification by voice nearly always amounts to "identification by recognition. Yet here as in any other cases, care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were no conditions in existence favouring safe identification"

Ground Three

The Burden of Proof was Shifted from the prosecution to the Appellant,

6. The Appellant argued that; Before instituting criminal proceedings there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case, and the case was never proved beyond any reasonable doubt and to fortify his assertion he referred the incoherent manner to Pg 2 of the Record of appeal discussing at length the flight and disappearance of his co-accused from the proceedings claiming a biased and discriminative action won the part of a witness! PW3 (pg.16 line 11), Contradictions or inconsistencues of PW1 (pg. 6 line 4) whether is was dark or not, (pg.7 line 9) the time of attack (pg. 6 line 10-11) whether she screamed or not, whether is was sagat or not (pg. 7 line 15) claiming of having been framed and fabricated allegation at (pg. 7 line 18-19)

7. The appellant claims that investigating officer did not visit the scene of crime to ascertain the true state of events and as such the burden was shifted to his disadvantage citing the cases of *Metro Politan Bank Ltd v Pooley* (1885) 10 App. Case. 201 *William v Spautz* (1992) 66 NSWLR SRS, *R v Humphrys* (1977) AC and *R v DPP and others Exparte Qian Guo Ju and Anor* Misc. App No. 453 of 2012. It was observed that "A prosecutor must be able to demonstrate that he was a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution would be malicious and actionable."

8. He further Sought to rely on *Philip Muiruri Wdaruga v Republic* (2016) eKLR. It was held thus "It is trite law that an accused person should only be convicted on the strength of the prosecution case and not on the weakness of his defence."

Ground Four and Five Combined

That "penetration" as an ingredient was never proved

9. The Appellant argued in submission that Penetration being an ingredient of Rape, was not conclusively proved, he sought to attack PW5's medical expert evidence (pg. 20 line 6,8 and 9) that PW1 had pain in the hips, had lower abdominal pains and while passing urine trying to deduce his own medical opinion to counter the witness testimony and citing the case of *Oketh Okale and Others v Republic* (1965 EA SSS the court held that

> " In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and admissible for a trial judge to put forward a theory not canvassed in evidence or in counsel's speech. The burden of proof in criminal proceedings is through out on the prosecution and it is a duty of the trial court/judge to look at the evidence as a whole."

10. He invited the court to keenly re-evaluate the evidence on record, find out that he never admitted the offence in defence or that he clearly understands Kiswahili well and that he is still learning to speak Kiswahili to date.

Respondents Submissions

11. The Respondent made oral submissions on the following terms;That the Appeal was opposed and that the conviction and sentencing was sound based on sufficient evidence presented before the trial court.That the law does not bar the prosecution from calling witnesses who might be related and what is required is proof by evidence.That the standard prescribed under section 11(a) of the *sexual offences Act* 2006 was metThat the sentence imposed was the minimum prescribed and was sound without any need to be disturbed.The Court was invited to consider the aggravating nature of the offence.That all ingredients of the offence were satisfied.

12. This Court has a legal obligation to re-analyze, re-evaluate and assess the evidence adduced in the lower court so as to form its own conclusion(s) in line with the settled principles established in the case of *Okeno v Republic* {1972} E.A, 32 at pg 36 EA 424,

> "An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellant's court own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the Trial Court has had the advantage of hearing and seeing the witnesses."

13. The Court has scrutinized the entire record of Appeal, proceedings before the subordinate court and exhibits produced and without any contradiction find that the Appellant was arraigned and entered plea, he indicated he understood Kiswahili, during the trial he never raised the issue of language barrier, his trial was numerously adjourned at his instigation and at no point did he raise bias concerns before the trial court. The Court thus finds that all due process rights, fair trial procedures were obtained during the course of the trials, upon conviction, during mitigation and sentencing.

14. The Appellants Mitigation included, the unequivocal admission of the offence to showcase his remorsefulness and to benefit from the minimum sentence. He now appears to change his position in this regard.

Prosecution's Case

15. The complainant, Sworn testimony as PW1. She recalled that on 14th March 2019 at 8 pm she waylaid, dragged into a valley by two young men physically assaulted and gang-raped. That the appellant briefly fled when someone appeared with a flash light but immediately came back to continue raping the victim until 5am in the morning. The complainant knew the appellant well and in her testimony the complainant was assaulted by the appellant who was talking to her as he committed the crime

16. The Appellant was identified positively by PW1, PW2 PW3 and PW4 with PW1 placing him at the Scene of crime and the three witnesses PW2 PW3 and PW4 all identifying a stick belonging to the appellant that was recovered from the scene, the appellant being well known to all the witnesses and which evidence remained unshaken on cross examination with PW1 stating in cross examination "I was near the road. It was at 8.00pm when you raped me accused 2 assisted you. I resisted, you talked

to me, I recognize you well", PW2 Stating, "when we went to apprehend the appellant when he saw us he told us he knew why we were there... he identified the Stick "maman" had in the market on the day of the incident..." "I had seen you with the MFI- (a) on the day of the incident before the crime was committed", PW3 stating " was equally corroborating the fact that the stick belonged to the Appellant" and PW4 narrated how the Complainant came to his compound early morning on 15/03/19 at 6 am he identified the stick as the Appellant having been his friend for 10years pointing out the unique features thereon, his evidence corroborates the gang rape as this was the first stop after the attack by the complainant

17. PW5, Chrisopher Chesire, a Clinical Officer at Chemolingot sub county hospital examined PW1. He confirmed she had been gangraped, He duly filled and produced her P3 Form dated 17th March 2019, the P3 Form marked as EXH3 and treatment notes dated 15 March 2019 EXH2 and Lab results as EXH4 respectively and in cross examination the witness stated that "I saw the patient personally and confirmed she was raped. She knew her assailants".

18. PW6, PC katana Onesmus of the Nginyang police station testified how the appellant was escorted by members of the public, to the station, on the 16th March 2019 on allegations of committing gang rape, he arrested the Appellant, issued the P3 form and referred the Complainant for medical attention and arraigned and charged the suspects, he produced EXH1 (a)"the shot stick"

Defense Case

19. Upon being put on his defense, the appellant DW1 elected to give sworn evidence. He states as follows;

> " I am Solomon Abwaton"... "I live in Kokwototo....", "I am a farmer...."
>
> "I am aware of the charges facing me...." "The charges are true...". "I have nothing to add on top....." That is all

20. After analysing the evidence, the submissions, the law and the ingredients of the offence and authorities, the trial court was persuaded that the prosecution had proved its case as required. It convicted the appellant and sentenced him to serve 15 years in prison.

Determination

21. The Scrutiny and analysis of the subordinate trial court reveals the Appellant upon charge entered plea of not guilty, his trial took place from the 19th march 2019 to the 15th January 2020 a period which the appellant fully participated making multiple applications, that were allowed in the nature of adjournments, cross-examination of prosecution witnesses, presenting and calling witnesses in defense and finally upon conviction mitigating before sentense and as such the court finds his argument(s) of being deprived off his due process and fair trial rights to be baseless.

22. The court finds that at no point was the burden of proof shifted from the prosecution to the appellant and that there is no obligation statutory or otherwise compelling the prosecution to present circumstantial evidence in the trial court.

23. This court's duty is to determine whether there were contradictions and inconsistencies in the prosecution evidence is to the extent that a reasonable person would be left in doubt as to whether the charges were proved, or whether the contradictions (if any), are so material that the trial court ought to

have rejected the evidence. As was held in Crim. App. No 139 of 2001, [2003] UGCA, 6 *Twehangane Alfred v Uganda* it is not every contradiction that warrants rejection of evidence. It subtly stated:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

24. Inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected. The question to be addressed is whether prosecution testimony is contradictory on the occurrence of the event and whether the contradictions (if any) are grave and point to deliberate untruthfulness or whether they affect the substance of the charge. In this regard, this court shall rely on the case of *Kamande v Republic* (Criminal Appeal E042 of 2021) [2022] KEHC 12947 (KLR) that cites with approval we the Court of Appeal of Nigeria in *David Ojeabuo v Federal Republic of Nigeria*[6] that held that:-

> "Contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial".

25. Applying the above tests to this case, I find no contradictions in PW1's PW2, PW3 and PW4 evidence relating to identification of the Appellant and PW 5 and PW6 relating to investigations and medical examination even if there are any, they are not substantial to the extent of affecting the conviction. Reasonable doubt is not mere possible doubt.

26. The appellant's submitted that PW1's evidence was uncorroborated. This argument fails to appreciate section 124 of the *Evidence Act* which provides: -

> "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> "Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth".

27. Upon evaluating the evidence, I find that this is not a proper case for the court to make an adverse inference on account of the insubstantial inconsistency that were minor to fatally affect the prosecution's case.

28. The aggravating factors weigh heavy; the appellant and co-accused waylaid the vulnerable complainant (a senior citizen aged 76 years old) who was inebriated and resting while on her way home, violently

dragged her into a ridge while hitting her hard, penetrated her in turns and despite a passerby (Sagat)with a spotlight disrupting the appellant and his accomplice who fled before the appellant returned alone and continued raping the complainant for the entire night up to 5.00am the next morning when he left the helpless victim at the scene of crime.

29. It must have been real ordeal as the medical evidence reveals. It is noted that the sentence given to the Appellant is provided in law but exercise of discretion by the trial court ought to have been exercised judicially. The trial court did consider the manner the offence was committed and traumatic effects on the victim clearly noting that the appellant deserved a stiffer and deterrent sentence, but considered him a 1st offender and his mitigation before sentensing.

30. The prosecution has not sought for enhancement of sentence to life imprisonment notwithstanding the circumstances herein warranting enhancement of sentence for the appellant. The acts of the appellant and his accomplice in the gang rape herein was not only brutal, inhuman and despicable.

31. The crime by the appellant and his accomplice left the senior citizen (complainant) with eternal dent in her integrity as a human being. They destroyed the pride, self-esteem, integrity and honour of the person. The gang rape has also left the victim to live the remaining part of her life with deep and chronic trauma, psychological, emotional and physical scars for the rest of her life.

32. The Appellant's admission in defense without remorse and regret further fortifies the need for deterrence sentense.

33. The aggravating circumstances of this case could even justify enhancement to life sentence. However, in exercise of my discretion, and owing to the Appellant's demonstration of reforming by undertaking multiple theological trainings as vouched by the prison authorities, I shall not disturb the 15 years' imprisonment by the trial court.

34. For purposes of Section 333 of the *Criminal Procedure Code*, the sentence shall commence from 28/2/2018 when he was first arraigned in court. I note he was never released on bond, hence the date of commencement of sentence.

35. This appeal thus fails.

36. I therefore find no merit in the appeal herein, both on conviction and sentence which I hereby dismiss. Orders accordingly.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT BY;

S. MOHOCHI (JUDGE)

26.1.2023

In the Presence of;

Appellant in Person

Mr. Abwacho for the Republic

Mr. Kenei C.A