Kiragu v Republic (Criminal Appeal E168 of 2021)
[2023] KEHC 411 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEHC 411 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E168 OF 2021

EM MURIITHI, J

JANUARY 26, 2023

BETWEEN

KENNETH MWAKI KIRAGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the conviction and sentence by Hon P.M Wechuli SRM in Tigania Cr. Case No. E011 of 2021 delivered on 19/9/2021)

JUDGMENT

1. Kenneth Mwaki Kiragu, the appellant herein was charged with the offence of rape contrary to section 3(1)(a) as read with section 3 of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 7/5/2021 at about 0010 hrs in Tigania Central Sub County within Meru County, he intentionally and unlawfully caused his male genital (penis) to penetrate the vagina of CGM a female adult aged 23 years old without her consent.
2. He denied the charges but upon full trial, he was found guilty, convicted of rape and sentenced to 20 years imprisonment.

The Appeal

3. On appeal, he raised 6 amended grounds as follows:
    1. The learned trial magistrate erred in law and fact by failing to note that the finding of the clinical officer did not support the offence of rape.
    2. The learned trial magistrate erred in law and fact by failing to note that the sentence was harsh and excessive in the circumstances of this case.

3. The learned trial magistrate erred in law and fact by failing to note that the evidence from safaricom data was not adduced to support the claim by the complainant.

4. The learned trial magistrate erred in law and fact by failing to note that key witnesses were not called.

5. The learned trial magistrate erred in law and fact by failing to order the sentence of 20 years to start from the date of arrest according to section 333 (2) of CPC.

6. The learned trial magistrate erred in law and fact by rejecting the appellant defense without giving cogent reasons.

Duty of the Court

4. This being a first appeal, this court is obligated to re-evaluate the evidence afresh, assess the same and make its own independent findings and conclusions, bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno v R* (1972) EA 32.

The Evidence

5. PW1 C.G.M, the complainant herein, testified that:

> "I am 24 years old. I am a farmer. I have gone up to college. I did secretarial course. On 3/5/2021 at 8 am EM called and asked if am employed. She said someone is looking for a customer care desk employee. She sent me Mwaki's number and she gave him my number. He called and said he is a director of Mikinduri sub county hospital. He gave me a number of manager Janice. Janice said there is a vacancy. Mwaki asked for my documents. I send to him through whatsup. He asked for registration fee of Ksh. 1850. I send via mpesa. It was 0715xxxx17 Names were Kiragu. He said I had been registered same day he asked that I send money to buy items like badge and apron that I will use. I send. He then asked for 370. I sent. We agreed I report on 5th. On 5th I called Janice and him. He said he shall take me to work next day on 6th they had gone somewhere. On 6th he said I send Ksh 400/- to get my number. I sent Ksh 400. I took a motorcycle with my brother. I arrived at Mikinduri market at 1pm. I called Mwaki and Manager Janice to take me to work. Janice said she was far. Mwaki reached town at 2 pm. He left again. I waited for him with my brother and Motorcycle. He came back at 4p.m I told my brother and rider to leave. Mwaki left again. At 6p.m I called Janice. He said he was coming to take me to work. At 6.30 p.m Janice said Mwani was going to take me to doctors house to sleep. He came and took me to those houses in town. He said the house belongs to a doctor. He took my phone to allegedly fix in an application for use. He went and came back. He said he was going to Kenol and phone will take 4 hours to fix the application. That was 7p.m. at 10p.m he came. At 10.30 p.m I enquired for my phone. He said the doctor will come with it. At Midnight he was holding a bed sheet. He switched off the lights. He covered me with the sheet and struggled me with it. He said if I scream he will kill me. He removed his clothes. Removed my skirt and raped me. At 5 am he said shall bring my phone. I did not see him again. I waited until 7am. I went to town. Borrowed a phone and called my mum. I wrote a statement and went to hospital. A p3 was filled. (p3-mf11). It was my first time to see Mwika. He is in the dock."

6. On cross examination, she stated that:

> "You told me you are a director of the hospital. You were not my friend. We were communicating as I came. Everyone gave me your number. We met at 2p.m. Came again at 4 then 6. You met me at an electronics shop where I was seated. We did not go anywhere at first. Sat at the shop until 6 p.m. You took me to the house at 6.30 pm. You are the one who took me to the house. You told me it is the doctors house. There were other houses. You went with my phone. You even asked for Ksh 630/- to put in an application. 630 was not to pay for the house you came back at 7p.m. I was not drunk. We did not take any drink. You had forceful sex with me. I did not tell you not to leave."

7. PW2 EM, testified that:

> "I am a secretary of [Particulars Withheld] secondary school. On 3/5/2021 I was at work. Mwaki send me a message through face book. He said they need a worker as a desktop customer care taker at Mikinduri. I had never met him. We were just friends on Facebook. We had chatted before. I told him to send me his no. He said they needed someone that day. Since I had finished college with Christine I exchanged their contact. I asked Mwika and he said he was working on it. On 14/5/2021 I was from work. I was arrested. I wrote a statement. He was called Ken Mwaki on facebook. It had his face as a profile picture. He is in dock. I worked with complainant for 2 years."

8. The accused did not cross examine this witness.

9. PW3 P.C Linah Nyambane of Mikinduri police station and the investigating officer herein took the complainant to the hospital, recorded her statement and arrested the appellant. On cross examination, she stated that, "We arrested you at Makutano. We did not beat you."

10. PW4 Geoffrey Murithi Muthomi, examined the complainant whose hymen was torn but not fresh and she was not pregnant. He filled the P3 form on 21/5/2021 which he produced as pex 1. He stated that although he did not find anything due to the time taken to fill the P3 form, rape could still have occurred.

11. On cross examination, he stated that he did not know who had committed the offence.

12. In his unsworn defence, the appellant, DW1 testified that:

> "The charges are false. That day I left home and went Maua to see my late brother's land. On reaching town I was arrested, beaten and taken to Mikinduri. I was brought to court. I have my deceased brother's children at home. I take care of them. I just saw the complainant on the farm at Maua. She was at the house."

Submissions

13. The appellant urged that the medical investigation in this case fell short by failing to prove penetration, and broken hymen is not proof of rape, and cited *R v Jacob Mutegi* HCCRA No. E002 of 2020. He faulted the prosecution for failing to show the essential link between the penetration and the appellant, and relied on the Court of Appeal case of *David Kuria Mwarangu v R* (2014) eKLR. He urged that the sentence of 20 years meted out on him was harsh and excessive in the circumstances. He urged that the attendant of Dar Salam Lodge ought to have been called to proof that the appellant hired the house where the incident allegedly took place. He faulted the trial court for rejecting his defence

and failing to order the 20 year sentence to start running from the date of his arrest in line with the provisions of section 333 (2) of the *Criminal Procedure Code*. He enjoined the court to scrutinize the whole testimonies tendered by the prosecution witnesses together with the defence and reach a better conclusion. He prayed for his appeal to be allowed and cited *Philip Muiruri Ndaruga v R* (2016) eKLR.

14. The respondent urged that it proved all the ingredients of rape beyond reasonable doubt and relied on *R v Oyier* (1985) KLR 353 and *Anjononi & others v R* (1989) KLR. It urged that the 20 year sentence meted out to the appellant was indeed lenient, given the fact that the appellant was a serial rapist who used social media account to lure innocent young girls who were looking for employment with non-existent jobs. It prayed for dismissal of the appeal in its entirety and the conviction and sentence of the trial court to be upheld.

Analysis and Determination

15. Having considered the pleadings and the submissions of the parties together with the authorities relied on, the issues for determination are (a) whether the offence was proved beyond reasonable doubt; (b) whether some keys witnesses were not called to testify; whether the appellant's defence was considered; and (c) whether the sentence was harsh.

Proof of the Offence

16. The offence of rape is defined under Section 3 of the *Sexual Offences Act* to mean, the intentional and unlawful penetration of a person's genital organ into another's genital organ without their consent.

17. From the said definition, the ingredients of the offence of rape therefore, include intentional and unlawful penetration of the genital organ of one person by another, coupled with the absence of consent.

18. The Court of Appeal in *R v Oyier* (1985) KLR pg 353, held as follows:-

> " 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. 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. 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."

19. The complainant narrated how PW2 sent her the appellant's number, who had posed as a prospective employer. In a desperate attempt to secure the said employment, the complainant strictly followed the appellant's instructions by first sending him money through Mpesa and later agreeing to meet him in town in order to be taken to the place she would supposedly be working. When the appellant showed up in town, it was already 6 p.m and he took the complainant to a house to sleep. As part of his well-orchestrated plan to rape her, he took her phone to allegedly install an application, which he did not return. They slept but at midnight, the appellant, who was holding a bed sheet "...switched off the lights. He covered me with the sheet and struggled me with it. He said if I scream he will kill me. He removed his clothes. Removed my skirt and raped me. At 5 am he said shall bring my phone. I did not see him again." She confirmed during cross-examination that the appellant had forceful sex with her.

20. The only significant thing noted by PW4 at the time of examining the complainant was her torn hymen, but he hastened to add that it had taken long to have the P3 form filled.

PW1 testified that she saw the appellant on 6th at 2.00 p.m. Unknown to her, she would later spent the night with the appellant, who in turn raped her in the dead of night. This court finds that although the complainant had not seen the appellant prior to the incident, she spent considerable amount of time with him to be able to identify him in the dock as the perpetrator of the offence herein. That evidence was corroborated by PW2 who testified that although she had never met the appellant before, they were friends on Facebook and the appellant had put his face as his profile picture, therefore she was able to identify him in the dock.

Failure to call key witnesses

21. The witness who ought to have been called to testify, who according to the appellant, was vital, was the attendant of the Dar Salam Lodge, where the alleged offence took place. It must be remembered that, whether a witness should be called by the prosecution is a matter within their discretion and an appellate court will not interfere with the exercise of that discretion unless it is shown, for example, that the prosecution was influenced by some oblique motive (see *Oloro s/o Daitayi & others v R*. (1950) 23 EACA 493). See also Mwangi v. R (1984) KLR 595. Here, the prosecution called a total of 4 witnesses who gave consistent and corroborative testimonies of how the offence had taken place. This court thus finds that the failure by the prosecution to call the said attendant was not fatal to its case. See also section 143 of the *Evidence Act*.

Appellant's Defence

22. The defence raised by the appellant in his unsworn testimony was one of denial. The complainant had no difficulty placing the appellant at the scene of the crime. The trial court properly found that it was indeed the appellant who had taken advantage of the complainant's hopelessness to secure gainful employment to rape her, through force, threats and intimidations. That ground of appeal, being wholly unmerited, thus fails.

23. Accordingly, the prosecution proved that, it was the appellant who had intentionally and unlawfully caused his genital organ to penetrate that of the complainant, without her consent.

Harsh Sentence

24. The sentence for the offence of rape is provided under section 3(3) of the *Sexual Offences Act* as follows:

> " 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."

25. It is not in doubt that the appellant used social media to prey on the complainant, who was a genuine job seeker and he deserves to be punished for it. In this court's considered view, the 20year prison term meted out to the appellant was excessive in the circumstances, where although said to be a serial rapist, no previous conviction records were produced.

26. The appellant was arrested on 15/5/2021, and there is no record of his release on bail. On 17/6/2021, a Probation Officer's Report was availed which was adverse to the appellant and the trial court noted that, "Bond withheld for now." The trial then proceeded to its logical conclusion, and in the absence of any indication that the appellant was ever released on bail, this court presumes that the appellant was in custody during the entire trial period. The trial court was thus obligated by the provisions of

section 333(2) of the *Criminal Procedure Code* to factor in that pre-trial period during sentencing, and its failure is reviewable.

27. According to *Wanjema v Republic*, Criminal Appeal No. 204 of 1970 (1971) EA 493, 494, (Trevelyan J.) on appellate interference with the sentence of a trial court:-

> 'An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case.'

ORDERS

28. Accordingly, for the reasons set out above, the Court finds that the appellant's appeal from conviction is without merit and it is dismissed.

29. On the test in *Wanjema v. R* (1971) EA 493 for appellate interference with the sentencing discretion of the trial court, the appellant's sentence of imprisonment for 20 years is set aside and substituted with an imprisonment for 10 years, which is the minimum sentence under section 3 of the Sexual Offence Act.

30. The appellant's 10year sentence shall be computed from 15/5/2021, when he was arrested.

Order accordingly.

DATED AND DELIVERED THIS 26TH DAY OF JANUARY 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in Person.

Mr. Masila Principal Prosecution Counsel for DPP.