Keya v Republic (Criminal Appeal 89 of 2021)
[2023] KEHC 234 (KLR) (25 January 2023) (Judgment)

Neutral citation: [2023] KEHC 234 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL 89 OF 2021

REA OUGO, J

JANUARY 25, 2023

BETWEEN

CALEB MASINDE KEYA ALIAS KALE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence in BUNGOMA CM CR. Case No. 53 of 2020 (Hon. G. Adhiambo PM) delivered on 3rd August 2021)

JUDGMENT

1. The appellant was convicted of the offence of rape contrary to section 3 (1) (a) (c) of the *Sexual Offences Act* No 3 of 2006 and sentenced to 12 years imprisonment. According to the particulars of the charge, on 25th and July 26, 2020 at Chelekei area in Kimilili sub-county of Bungoma county, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of LON by use of force.

2. The appellant dissatisfied with the judgment of the trial court lodged his petition of appeal on August 11, 2021 challenging the finding on both the conviction and sentence. The appellant challenges the finding of the trial court on grounds that his defence of alibi and evidence that the complainant was his wife was not considered; and that the trial magistrate also relied on contradicting evidence.

3. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come to its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or demeanour. (See *Okeno v Republic* [1972] EA 32 and *Pandya v Republic* [1975] EA 336).

4. The prosecution case before the subordinate court was that the complainant in the company of friends visited a hotel and when it was time to go home, they called the appellant who operates a boda boda to carry the complainant home. The appellant then took an abrupt detour and took the complainant

to his home and had penetrative sex with her, without her consent. The prosecution in support of its case called 4 witnesses.

5. LON (Pw1) testified that on the material day she was with her friend MAW (Pw2) when they decided to visit 'U Relax Hotel' in the company of Kemboi. They took refreshments at the hotel until 8:00 p.m. when they decided to go to Pw2's house in Lugulu. The appellant was called to carry Pw1 and Pw2. When the appellant arrived, both Pw1 and Pw2 boarded his motorcycle, but he asked Pw2 to alight and requested Kemboi to ride with her. The 2 motor cycles left for Lugulu, however at Misikhu Total petrol station, the appellant took a diversion and switched off the head lights so that Pw2 and Kemboi could not catch up with him. Pw1 testified that the appellant took her to his home and squeezed her neck when she attempted to scream. She then explained her ordeal as follows:

> " He then tore my belt and trouser. This he did immediately after he got to the house. From there he raped me. He forcefully inserted his penis into my vagina without my consent."

6. She was with the appellant until 4:00 a.m. when he gave her a phone to ring Pw2 and she spoke to Pw2 who told her that she had her phone. Pw1 left the appellant's home at around 6:00 a.m. trying to trace her way. The appellant then found her by the road and carried her on his motorcycle to Misikhu resort where Pw2 had slept. She reported the incident at Bahai police station and sought treatment at Kimilili sub county hospital.

7. Pw2 testified that on the material day the appellant picked them up at 8:00 p.m. to take them home but when they reached the market, the appellant asked her to alight and directed her to board Kemboi's motorcycle. Since the appellant did not know her house, she asked him to ride behind Kemboi. Pw2 recalled that the appellant then proceeded to ride the motor cycle in very high speed and he left the tarmac road. He switched off the lights of the motor cycle and they lost track of him. They rung both Pw1 and the appellant but their calls were unanswered. The following day, Pw1 told her what had transpired. Pw2 saw bruises on the right side of Pw1's neck, her trouser was torn and her belt cut.

8. BAM (Pw3) testified that she is a clinical officer at Kimilili sub-county hospital. She testified that Pw1 came to the facility on July 26, 2020 with a history of being raped on July 25, 2020 at around 10:00 p.m. Pw3 told the subordinate court that the laboratory test red blood cells were seen in her urine, the HIV test was negative as well as the pregnancy test and the VDRL test was non reactive. On carrying out physical examination, they found the genitalia normal. The P3 Form noted that she was not under the influence of alcohol or drugs and had scratch marks on her right neck. The scratch marks were inflicted by finger nails. Pw1 was given post exposure prophylaxis for sexual transmitted disease and HIV as well as emergency contraceptives. It was noted that Pw1 had penetrative sexual unprotected intercourse and had scratch marks for attempted struggling. She testified that Pw1 was raped by a person well known to her and following the penetrative sex her menses began.

9. No 64094 PC Richard Utolo (Pw4) testified that Pw1 came to the station and reported that she had been raped. He recorded her statement, kept exhibits, and told her to seek treatment. He embarked on searching for the appellant and arrested him on August 4, 2020. His investigation revealed that Pw1 knew the appellant as Kale and that the 2 were not in a relationship.

10. The trial magistrate in his ruling found that the prosecution had established a *prima facie* case and the appellant had a case to answer.

11. The appellant took to the stand testifying as Dw1. He told the trial magistrate that Pw1 was his wife and that he had lived with her in Eldoret for 6 months after which she had an abortion. This caused a strain in the relationship and she went to live in Nairobi from 2017 to 2018. The appellant remarried but Pw1 would threaten and beat his new wife. In 2020 he moved to Chelekei with his new wife.

In June 2020, Pw1 came to Misikhu searching for him and they spoke after which she asked for his forgiveness as she had left with his household items. Dw1 testified that he told Pw1 that he could not have 2 wives and that he already had 2 children. Pw1 then became furious and started insulting Dw1 and he was forced to take off. On August 4, 2020 his neighbour raised an alarm while her maize was being stolen, but the perpetrator left his motorcycle behind. They took the motorcycle to the police station and while at the police station he was informed that a complaint had been lodged against him by Pw1. The officers told him to give them Kshs 2,000/- so that the case could be dropped but he refused to do so. When he could not give the officers money, he was charged.

12. The appellant's father, John Masinde (Dw2) testified that when he went to the police station, he was asked to pay Kshs 2,000/- following a disagreement between the appellant and Pw1. He testified that the appellant and Pw1 used to live together in Eldoret but disagreed and Dw1 married another wife.

13. The appeal was dispensed by way of written submissions and both parties have filed their respective submissions.

14. The appellant on the issue of contradictions and inconsistencies on the prosecution evidence pointed out that Pw1 testified that she did not have a phone and the appellant gave her a phone to ring Pw2 and when she spoke to Pw2 she told her that she had her phone. On the other hand Pw2 testified they were calling the appellant's as well as Pw1's phones. The appellant submitted that there were contradictions in the prosecution evidence and placed reliance in the case of *Ajode v Republic* [2004] KLR 81].

15. The respondent on the other hand submitted that it is not clear who had the appellant's phone but the discrepancy is so minor and does not go into the substance of the charge against the appellant. In *Philip Nzaka Watu v Republic* (2016) eKLR the court held that:

> "However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomenon exactly the same way. Indeed as has been recognized in many decisions of this court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question".

16. I have considered the submissions of both parties as well as the evidence before the subordinate court and note that indeed there was some contradiction in the prosecution evidence in regard to the possession of Pw1's phone at the time of the offence. However, I find that the discrepancies are trivial and not fundamental as to cause prejudice to the appellant. The Court of Appeal in *Joseph Maina Mwangi vs Republic* Criminal Appeal No 73 of 1993 stated as follows on the issue of discrepancies:

> "In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of *Criminal Procedure Code* viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences."

17. The only issue for consideration is therefore whether the prosecution proved its case to the required standard, if so whether the sentence was manifestly too high. The appellant submitted that the prosecution had a duty to prove that the parents of Pw1 knew of their marriage. The prosecution was required to avail Pw1's parents as well as the arresting officer. The appellant maintained that Pw1 was his wife and he had her phone number.

18. The respondent maintained that it proved all the ingredients for the offence of rape and that the appellant was positively identified as the perpetrator.

19. The offence of rape is provided for under section 3(1) of the *Sexual Offences Act* and a person commits the offence of rape if;

> " He or she intentionally and unlawfully commits an act which causes penetration with his or genital organs;
>
> a) The other person does not consent to the penetration; or
>
> b) The consent is obtained by force or by means of threats or intimidation of any kind."

20. The respondent was therefore required to prove the element of penetration. Pw1 testified that the appellant forcefully inserted his penis into her vagina without her consent. Her evidence was corroborated by the finding in P3 form which concluded that Pw1 was raped as there was penetrative unprotected intercourse. Pw1 gave clear evidence that she did not consent to have penetrative sex with the appellant. In the case of *Republic vs Oyier*[1985] KLR 353 the Court of Appeal held that;

> " 1. 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.
>
> 2. 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.
>
> 3. 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."

21. The prosecution evidence reveal that Pw1 resisted to have sexual intercourse with the appellant and tried to raise the alarm by screaming but the appellant kept squeezing her neck. Pw1 testified that the appellant pulled and dragged her into his house. The appellant then tore her belt and trouser and proceeded to rape her. Pw2 also confirmed that when she saw Pw1 the following morning, she noticed the scratch marks on her neck. Pw4 corroborated Pw1's evidence as he testified that at the time the complainant made her report, her belt was cut and the zipper to her trouser damaged. Pw4 testified that there was evidence of struggle and force.

22. Was the appellant person responsible for the offence? The P3 form reveal that the appellant was a person well known to Pw1. Pw4 also testified that Pw1 knew the appellant as Kale. Pw1 testified that the appellant picked them outside U Relax hotel and she saw his face as there was lighting outside the hotel. Pw2 testified that they were with the appellant outside the restaurant for 15 minutes before they left. Pw1 further explained that the appellant did not turn the lights on in his house, but at around 6:00 a.m. when the sun was up she was able to clearly see him. She also asked the appellant for his phone to make phone calls and he took her back to Misikhu in the morning. She was therefore able to positively identify the appellant whom she knew as Kale.

23. The appellant disputed the prosecution evidence laid against him. According to the appellant, he had lived with Pw1 while he was in Eldoret in 2017. Although he claimed that Pw1 was his first wife, I find this to be untrue as the appellant's father, Dw2, did not know the name of Pw1. Further the accused did not raise the issue of Pw1 being his wife when he cross-examined her. In any event, it was immaterial that the appellant knew and had a relationship with Pw1 in 2017. He did not obtain consent from the complainant before having sex with her. Having considered the prosecution evidence against the defence mounted by the appellant, I find that the prosecution established that the appellant had forceful penetrative sex with Pw1 without her consent.

24. The offence of rape was therefore proved against the appellant to the required standard. Section 3 (3) of the *Sexual Offences Act* provides that a person guilty of the offence of rape 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. The appellant was sentenced to 12 years imprisonment and in my view the sentence meted on the appellant was legal. I do not find that the trial magistrate abused his discretion and find no reason to disturb both the conviction and sentence. The decision of the trial court is hereby affirmed and the appeal is dismissed accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 25TH DAY OF JANUARY 2023

R.E. OUGO

JUDGE

In the presence of:

For the Appellant

For the Respondent

.....C/A