KM v Republic (Criminal Appeal E027 of 2021)
[2023] KEHC 188 (KLR) (24 January 2023) (Judgment)

Neutral citation: [2023] KEHC 188 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E027 OF 2021

FA OCHIENG, J

JANUARY 24, 2023

BETWEEN

KM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant, KM was convicted for the offence of rape contrary to section 3(1) as read with section 3(b) of the *Sexual Offences Act*.

   The particulars of the offence were that on April 23, 2017, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of VK, without her consent.

   Upon conviction, the appellant was sentenced to 10 years imprisonment.

2. Being dissatisfied with the conviction and the sentence, the appellant lodged an appeal before this court.

   The memorandum of appeal was worded as follows;

   1. " That the trial magistrate erred in law and fact in the whole procedure in proceedings in court.
   2. That the learned trial magistrate erred in law and in fact in convicting the appellant and sentencing him to 2 years imprisonment without sufficient evidence in support.
   3. The trial magistrate erred in law and in fact in convicting and sentencing the appellant without taking into consideration the glaring contradictions by the prosecution witnesses.
   4. That the Trial Magistrate erred in law and in fact in convicting and sentencing the appellant without direct evidence, and only relied on circumstantial evidence which was not watertight and uncorroborated.

5. The Trial Magistrate erred in law and in fact by not appreciating the defence evidence, and not analyzing it properly.

6. The Trial Magistrate erred in law and in fact so as to the writing of judgment, as there were no issues to be determined by the judgment.

7. The Trial Magistrate erred in law and in fact by not taking into account the crystal clear mitigating factors adduced by the appellant's counsel."

3. Apart from the memorandum of appeal, the appellant lodged a second document titled "Mitigation Factors Challenging My Appeal."

The said document contains the appellant's submissions. Whilst the Memorandum of Appeal was filed by Messrs Momanyi Gichuki & Co. Advocates, the second document was filed by the appellant in person.

4. Thereafter, on December 10, 2021, the appellant's advocates, (M/s Momanyi Gichuki & Co Advocates) filed a "Supplementary Record of Appeal". In the said Supplementary Record of Appeal, the appellant stated as follows;

1. " The Trial Magistrates erred both in law and fact in not appreciating the fact that the investigation's officer was not called as an independent prosecution witness to demonstrate and collaborate (sic!) what PW1's evidence.

2. The Trial Magistrate erred in law and fact by not appreciating that clearly the complainant, PW1 consented to be involved in intercourse as she removed her clothes by herself.

3. The Hon Trial Magistrate failed to appreciate that the complainant, PW1, went to the appellant's house voluntarily for a mission she does not disclose to the Hon. Trial Magistrate.

4. The Trial Magistrate erred in law and fact by not appreciating and noting the crystal clear and glaring contradiction in PW1's evidence.

5. The Trial Magistrate erred in law and fact by not appreciating and noting that the evidence tendered recurred as a matter of necessity and law, that the evidence of PW1 was not collaborated (sic!) by the independent witness like the investigation officer, and explanation was tendered for the same."

5. I have deemed it prudent to set out the particulars of the memorandum of appeal, as well as the supplementary record of appeal because the two documents appear to contain inconsistencies.

In the supplementary record, the appellant appears to be conceding that he had sexual intercourse with the complainant, whilst in the memorandum of appeal, he appears to be denying having had any sexual relations with the complainant.

6. In his written submissions the appellant pointed out that the complainant was his niece. Therefore, in his considered opinion, the proper charge against him should have been incest, contrary to section 20(1) of the *Sexual Offences Act*.

The second issue he raised was that the evidence adduced by the complainant was not reliable. He described her evidence as falsehoods. According to the appellant, there was no explanation about how the complainant knew that she could not get pregnant, hence requiring "treatment".

7. Secondly, the appellant said that there was no clarity why money was given to him, or why a candle would have been lit during daytime.

Furthermore, the appellant believes that the prosecution ought to have called the 6 people who were said to have been within his compound at the material time.

His view was that there was a hidden motive behind the case. In any event, the fact that the complainant did not scream was, in the opinion of the appellant, an indication that the complainant cannot be trusted when she alleged that she had been raped.

8. The appellant told this Court that he has been HIV positive since the year 2000. He said that the complainant as well as the whole family were aware of his HIV status. Therefore, the appellant argued that because the complainant knew that she was telling untruths, she did not tell the doctor about the appellant's HIV status.

The other issue raised by the appellant was that there was no issue which required determination by the trial court. If anything, he believes that he had absolutely no case to answer.

Finally, the appellant complained that the trial court had sentenced him to a harsh and extreme sentence. In his view, the said sentence was contrary to the laid down principles which ought to govern sentencing.

9. He therefore asked this court to quash the conviction and set aside the sentence.

Being the first appellate court, I am enjoined to re-evaluate all the evidence on record, and to draw my own conclusion therefrom. However, I am alive to the fact that, unlike the learned trial Magistrate, I did not have the benefit of observing the witnesses when they were giving evidence. Therefore, if there should be a finding which the trial court made, based upon the demeanour of any particular witness, this court would only interfere with such finding if the appellant satisfied the court that the finding could not be sustained when it was put within the context of the totality of the evidence tendered.

PW1, V, was the complainant. She testified that on the material day she had gone to visit her aunt, who used to live at the home of the appellant.

10. PW1 said that the appellant was a herbal doctor, and that the complainant's aunt was being treated at the home of the appellant.

It was also the evidence of PW1 that the appellant was a witchdoctor.

Whilst PW1 was within the home, the appellant sent E to call her. E is a cousin of the complainant.

Although the complainant testified that she was not unwell, E persuaded her that she needed to be seen by the witchdoctor.

PW1 was accompanied by E and P, (who is her grandmother), when she went into the house of the appellant. All 4 of them sat on a mattress that was on the floor.

PW1 testified as follows;

> I heard the spirits sound. It was a male voice; 2 in number. I heard them say that I was bewitched and I would not give birth if I marry. So, the solution was I sleep with him to reverse the curse."

11. The foregoing was said when PW1 was being cross-examined by the appellant's advocate.

Prior to that, PW1 had testified as follows;

> I went there and he started talking. He told me that he had been told that I have sex with him, so that I will get pregnant when I will get married. I had no option but I gave in."

12. The detailed evidence makes it abundantly clear that the complainant tried to resist the appellant, but he then "called his demons".

The complainant heard the voices of the said 2 demons: and she then felt obliged to do as the appellant had said. She removed her clothes. The appellant then inserted his penis into her vagina.

When analysing the evidence, the learned trial Magistrate held that the complainant did not voluntarily consent to the sexual act by the appellant.

Having re-evaluated the evidence, I have absolutely no doubt whatsoever, that the complainant did not freely and willingly consent to sexual intercourse with the appellant.

13. She resisted the appellant's overtures. However, when he summoned his demons; and after the complainant heard the demons speak, she felt that she had no option but to give in.

Section 42 of the *Sexual Offences Act* defines "consent" as follows;

> For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice."

14. As the complainant felt that she had no option in the circumstances in which the appellant had summoned demons to talk to her, I find that she did not consent to having sex with the appellant.

She felt threatened and intimidated by the appellant and "his demons".

On his part, the appellant intentionally caused his penis to penetrate the vagina of VK.

As he did so without the consent of the complainant, the appellant acted unlawfully. Therefore, his conviction was founded upon cogent evidence.

Whilst the offence was committed during daytime, the appellant had lit a candle inside the room where the complainant was raped.

15. Considering that the appellant was a witchdoctor, who even summoned his demons to intimidate the complainant, I find that it was not strange for the appellant to have lit a candle at the time.

I also note that by the time when the appellant was committing the offence, both E and P had already left the room, where the complainant was with the appellant. Therefore, those 2 people did not witness what the appellant did to the complainant.

Furthermore, due to the intimidation and threat which the appellant visited upon the complainant, through "his demons", I fully appreciate why the complainant did not scream when she was being raped.

As regards the assertion that the charge sheet was defective, I find that there was no defect at all. The facts which were proved by the prosecution, revealed the offence of rape. Therefore, the prosecution was entitled to prefer the charge for the offence of rape, as against the appellant.

16. The fact that the complainant was a niece of the appellant did not alter the fact that the appellant raped her. There is no law which says that a person cannot rape his niece. Put differently, I know of no law which stipulates that when a man rapes his niece, he should only be charged with the offence of incest.

17. Meanwhile, as regards the sentence, section 3(1) of the *Sexual Offences Act* stipulates that a person who commits the offence of rape is liable to be sentenced to imprisonment for a term which shall not be less than 10 years, but which may be enhanced to imprisonment for life.

18. The learned trial Magistrate gave to the appellant an opportunity for mitigation, after he had been convicted. Thereafter, the appellant was sentenced to 10 years imprisonment.

19. I find that the said sentence was lawful. Therefore, there is no basis for interfering with the sentence.

20. In the final analysis, the appeal lacks merit: it is thus dismissed in its entirety.

DATED, SIGNED AND DELIVERED THIS 24TH DAY OF JANUARY, 2023.

FRED A. OCHIENG

JUDGE

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR