Waithera v Republic (Criminal Appeal E030 of 2022)
[2023] KEHC 18423 (KLR) (Crim) (25 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18423 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E030 OF 2022

LN MUTENDE, J

MAY 25, 2023

BETWEEN

DUNCAN NDEGWA WAITHERA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the original conviction and sentence in Sexual Offence Case No. 43 of 2013 at the Chief Magistrates' Court Kibera by Hon. Mutua – SPM on 14th February, 2022)

JUDGMENT

1. Duncan Ndegwa Waithera, the Appellant, was charged with the offence of rape contrary to Section 3(1) (a) (b) as read with Section 3(3) of the *Sexual Offences Act* No. 3 of 2006. Particulars of the offence being that on the night of 15th October, 2013 within Nairobi County, he intentionally and unlawfully caused his penis to penetrate the anus of DK without his consent.

2. In the alternative, he faced the charge of committing an indecent act with an adult contrary to Section 11(A) of the *Sexual Offences Act*. Particulars being that on the 15th night of October, 2013 within Nairobi County he intentionally and unlawfully caused his penis to come in contact with the anus of DK against his will.

3. Having been taken through full trial, the appellant was found guilty, convicted and sentenced to serve twenty five (25) years imprisonment.

4. Aggrieved, he proffered this appeal on grounds that the trial court erred in law and fact by failing to find that the elements of the offence of rape were not conclusively proved to warrant a conviction; the appellant was not issued with witness statements as required by the law under Article 50 (2) (j) of the *Constitution*. The court failed to evaluate evidence as a whole and independently, before arriving at the

decision; and, that the complainant was not a credible witness whose evidence could not be relied on as it was not tested under oath.

5. Briefly, facts of the case were that PW2 PN woke up in the morning and found his elder brother, the complainant, who was mentally challenged? telling people that he had been raped through the anus throughout the night. He identified the appellant as his assailant. The matter was reported to the Police and the complainant was subjected to medical treatment. Upon conclusion of investigations, the appellant was arrested and charged.

6. Upon being placed on his defence the appellant testified to the events of 16th October, 2013. He stated that on the material date, he heard a knock at 6.30 am and when he opened the door, he saw people who accused him of being one of those who rape people. He denied the allegation but they arrested and took him to the Police Station where he was asked to give Kshs 50,000/- but he declined. He pointed out that in his testimony the complainant said that his assailant was not in court.

7. The appeal was canvassed through written submissions. It is urged by the appellant that the complainant did not describe evidence of the struggle that occurred, having stated that he only told the assailant to stop, which was behavior inconsistent with a person in danger. That medical evidence adduced failed to prove that the appellant committed the offence and the complainant engaged in sexual activity on the 15th October, 2013. That absence of presence of sperms meant that the case was poorly investigated.

8. That the appellant having not been supplied with witness statements before trial and on time was in violation of a right to fair trial under Article 50 (2) of the *Constitution*, 2010.

9. That the trial court failed to consider the defence put up that he could not engage in sexual intercourse due to torture he underwent in 2003.

10. He concluded his argument by urging the court to consider reviewing the sentence to a lesser one in event that it did not find the appeal having merit.

11. The Respondent through learned Prosecution Counsel, Ms. Zaphida Chege opposed the appeal. She submitted that the complainant stated the sequence of events on the fateful day and identified the appellant as the perpetrator as he interacted with him previously; a person well known to PW2 and PW3. That the fact of retardness and evidence of bruises on the anus was confirmed by Doctors who testified.

12. On the question of fair trial, it is urged that the court directed severally that the appellant be supplied with witness statements and although the court did not specifically confirm compliance, the statements were supplied. The inference was based on the fact of the appellant having stated that he was ready to proceed but had not been supplied with the first report and P3 Form which was supplied and when an advocate came on record, the issue of non-disclosure was not raised.

13. That the trial court looked at the case in totality as well as the mitigation raised prior to reaching the determination.

14. This being a first appellate court, as submitted by the appellant, the has a duty of reconsidering exhaustively what transpired at trial and reach its own conclusions. This duty was well captured in the case of *Okeno v Republic* [1972] EA 32. Where the Court of Appeal stated that:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R* [1957] E A 336) and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting

evidence and draw its own conclusions - *Shantilal M. Ruwala v R* [1957] EA 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses - See *Peters v Sunday Post* [1958] EA 424".

15. The first issue this court should grapple with is whether the complainant herein was a credible witness?

16. PW2 PN, the younger brother of the complainant told the court that the complainant was mentally unstable since birth. He could however communicate in Kiswahili and in event of something happening he would inform them. Dr. Wamukhama Victoria, a Consultant Psychiatrist examined the complainant on the 9th May 2018, and found his speech incoherent. She opined that he had severe intellectual disability.

17. PW1, the complainant was called to testify, having stated his name and where he resided the court took note of his disability therefore was stood down.

18. Section 2 of the *sexual offences Act* (SOA) defines a person with mental disabilities as:

> " person with mental disabilities" means a person affected by any mental disability irrespective of its cause, whether temporary or permanent, and for purposes of this Act includes a person affected by such mental disability to the extent that he or she, at the time of the alleged commission of the offence in question, was - (a) unable to appreciate the nature and reasonably foreseeable consequences of any act described under this Act; (b) able to appreciate the nature and reasonably foreseeable consequences of such an act but unable to act in accordance with that appreciation; (c) unable to resist the commission of any such act; or (d) unable to communicate his or her unwillingness to participate in any such act;

19. An application was made by the Prosecution to have the complainant testify through an intermediary on the ground that he was mentally unstable, an application that was allowed. An intermediary is defined by Section 2 of the SOA as:

> A person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children's officer or social worker;

20. Section 2 of the SOA defines a vulnerable person as:

> A child, a person with mental disabilities or an elderly person and "vulnerable witness" shall be construed accordingly.

21. PW2 was the complainant's brother, hence a relative who was within the category of an intermediary. The complainant herein was a vulnerable person who could testify through an intermediary having had mental disability.

22. Section 31 (1) (c) of the SOA provides that:

> (1) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is –

(c) A person with mental disabilities

23. The court having observed the complainant and guided by the report from the Psychiatrist acted in accordance with the law by allowing the complainant to testify through an intermediary. He could not be dismissed as a person who lacked credibility.

24. Section 3 (1) of the SOA provides :

(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.

25. In the case of *Republic v Oyier* [1985] KLR. 355 the Court of Appeal stated that:

> " The mental element is to have intercourse without consent, or not caring whether the woman consented or not: *DPP v Morgan* [1975] 61 Cr Appl. R 136 HL The prosecution must prove either 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; Archbold Criminal Pleading Evidence and Practice 40th Edn pp 1411 – 1412 paragraph 2881 and *R v Harwood K* [1966] 50 CR App R 56. So if 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."

26. To prove the case, the Prosecution was required to prove beyond reasonable doubt that :

(i) There existed an act that caused penetration into the genital organs of the complainant.

(ii) It was done intentionally and unlawfully.

(iii) There was no consent to the act; and,

(iv) Positive identification of the assailant.

27. The complainant through the intermediary, his brother, told the court that his assailant removed his clothes and raped him. He alluded to having worn a pair of trouser and shirt on the fateful date. That he locked the door, applied oil on his anus and raped him. The act was stated to have been committed on the 15th October, 2013. PW3 Cyrus Kamande Wairimu met the complainant at 7.00 am who looked weak and withdrawn. Since the complainant, under normal circumstances used to be jovial, he enquired what was wrong and the complainant told him that he had been sodomized; for this reason he informed his brother.

28. On the same date the complainant was seen at the Nairobi Women Hospital. According to the evidence of PW6 John Njuguna, a Clinical officer, he was examined and found with anal injuries. The anus was white with a loose sphincter. He could not hold stool.

29. On the 17th October, 2013, the complainant was examined by Dr. George Kungu Mwaura following allegations of sodomy. He found bruises on his anus and concluded that he had been sodomised.

30. Section 2 of the SOA defines penetration as:

> " The partial or complete insertion of the genital organs of a person into the genital organs of another person;."

31. It is argued by the appellant that sperms having not been detected, the medical evidence fell short of proving the offence. The absence of semen perse cannot defeat the fact of penetration having occurred. If the act of penetration is committed and the natural objective of stimulation does not occur then there would be no semen present.

32. Further, in the case of *Mark Oiruri v Republic*, Criminal [2013] eKLR the Court of Appeal stated that:

> "...In any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. Many times the attacker does not fully complete sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ..."

33. The fact of penetration in this case was confirmed by medical evidence.

34. As to whether the act was intentional and unlawful; circumstances amounting to such acts are provided for in Section 43 of the SOA and in the instant case Section 43(4)(e) comes into play. It provides thus:-

> (4) The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection
>
> (e) Mentally impaired;

35. The complainant testified that he was in pain as the penetration occurred. It cannot be envisaged that he was rational, had the knowledge and acted voluntarily in respect of the decision to engage in the sexual contact. This was evidence of lack of consent.

36. The complainant identified the appellant as the assailant. He said he was a neighbour. PW2 knew the appellant as the neighbour to their aunt, with whom the complainant lived.

37. PW3 identified the complainant as a person who would sleep where they stored equipment for work, while the appellant who worked next to them would sleep in the scrap metal store. On cross examination he stated that the appellant knew the complainant very well. Evidence adduced pointed to the fact of the complainant having known the appellant prior to the act therefore the identification in issue was positive.

38. On the question of fair trial, Article 50(2)(j) of the *Constitution* provides:-

> Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
>
> To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

39. On the 3rd March, 2014, the court ordered the appellant to be supplied with witness statements. Although the prosecution had two (2) witnesses, the case was adjourned on that ground. On the 21st March, 2014, a similar order was made by the court. When the matter came up on 6th June, 2014 the appellant was not ready to proceed as the P3 Form had not been availed. On that ground the case was adjourned. On the 24th day of September, 2014, the appellant notified the court that he was ready to proceed save that he had not received the first report and the P3; and, the court directed that expenses for photocopying those documents were to be met by the court. For that reason, the case did not proceed. On the 22nd December, 2014, the prosecution sought an adjournment, the appellant who was ready to proceed sought to be given a nearer date. In the year 2015, April, the appellant retained services of an advocate who did not raise the issue of disclosure as correctly submitted by Counsel for the Respondent. The case subsequently proceeded from the 14th July, 2017 without the issue of statements being raised. Looking at the events that transpired, it is apparent that the trial was fair as material evidence the Prosecution intended to rely on was disclosed prior to witnesses taking the witness stand.

40. In determining the matter, the learned trial magistrate considered evidence adduced by both the Prosecution and Defence, hence the entire evidence was considered.

41. On the question of sentence imposed, Section 3(3) of the SOA provides thus:

> 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.

42. Looking at the record the appellant had nothing to state in mitigation which may have been evidence of no remorse. However, notably he was a first offender. Pursuant to the provisions of Section 333(2) of the CPC the appellant was in custody from 16th October, 2013 up to 1st April, 2015 when he was released on bond. This was a period that should have been taken into consideration by the trial court. For these reasons, I affirm the conviction, but, set aside the sentence meted out which I substitute with a sentence of ten (10) years imprisonment having considered time spent in custody. The sentence of ten (10) years imprisonment be effective from the 10th day of February, 2022.

43. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI,

THIS 25TH DAY OF MAY, 2023.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Appellant

Mr. Kiragu - ODPP

Court Assistant – Mutai