Ngacha v Republic (Criminal Appeal E046 of 2022)
[2023] KEHC 17685 (KLR) (24 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17685 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E046 OF 2022

AK NDUNG'U, J

MAY 24, 2023

BETWEEN

JOHN MATU NGACHA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Sexual Offences Case No 71 of 2020 – Kithinji A.R-CM)

JUDGMENT

1. The Appellant in this appeal, John Matu Ngacha, was convicted after trial of rape contrary to section 3(1) (a) (c) as read with (3) of the *Sexual Offences Act*, No 3 of 2006. On 03/06/2022, he was sentenced to ten (10) years imprisonment. He has appealed against both conviction and sentence.

2. The particulars of the offence were that on 20/11/2020 at around 2300hrs in Laikipia central sub county within Laikipia county willfully and intentionally caused his genital organs, namely penis, to penetrate the vagina of DNN aged 23 years old without her consent.

3. The Appellant through his Advocate filed a petition of appeal dated 13/06/2022 challenging the conviction on the following grounds;

    i. The learned magistrate erred convicting the Appellant whereas medical evidence did not support the charge.

    ii. The learned magistrate erred convicting the Appellant on evidence that was contradicting.

    iii. The learned magistrate erred by holding that the fact that the complainant spent the night at the Appellant's house would have led the Appellant to commit the offence.

    iv. That the totality of the evidence did not support the commission of the crime.

4. The appeal was disposed of by way of written submissions. Learned counsel on record for the Appellant submitted that the trial court contravened section 169 (2) of the *Criminal Procedure Code* by failing to state the section of law that the Appellant was convicted under as required. That as indicated on the P3 form, the matter was reported four days after the alleged offence and there is no explanation why the complainant waited for four days to report the matter. That the medical evidence did not support the charge of rape and the court convicted the Appellant based on the complainant's evidence without recording the reasons for believing that she was telling the truth as required. He further submitted that the complainant's trouser which zip was allegedly destroyed by the Appellant was not produced and that the trial court failed to address all those issues and was directed to the fact that the complainant spent the night in the Appellant's house.

5. The learned prosecution counsel supported the conviction and sentence. Counsel submitted that according to the evidence on record, penetration of the Appellant's penis into the complainant's vagina was through coercive means and it was therefore intentional and unlawful according to section 43 of the *Sexual Offences Act*. It is urged that the trial court in its judgment was satisfied that the complainant was telling the truth in line with section 124 of the *Evidence Act*. On proof of lack of consent, counsel submitted that the evidence on record reveals that the complainant did not consent since she testified that the Appellant forcefully removed her top and damaged her trousers' zip. That she further stated that she struggled and resisted but the Appellant overpowered her. After the ordeal, she also informed her brother that she was raped which shows that she had not consented. That the Appellant was positively identified by the complainant and other prosecution witnesses.

6. On contradictions on dates as noted by the Appellant, counsel submitted that the trial court considered the contradictions on dates and found that the same did not go to the root of the matter. That the complainant herself testified that she was raped on 20/11/2020 which was corroborated by the evidence of PW2 and the P3 form which indicated the date as 20/11/2020. As to the non-compliance with section 169(2) of *Criminal Procedure Code*, it submitted that the trial court complied with the said section from the onset by stating the charges and the sections and concluding by saying that the Appellant was convicted on the principal count of rape hence, the trial court duly complied with the said section.

7. This being the first appellate court, my duty is well spelt out, namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.

8. I have therefore considered the submissions and the authorities relied by the parties. I have had due regard to the evidence as recorded in the trial court. I have borne in mind, however, that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.

9. The Appellant's counsel raised a preliminary issue in that, the judgement by the trial court was afoul of section 169(2) of the *Criminal Procedure Code* for the trial court failed to record the section that the Appellant was convicted under. The said section provides;

> (2) In the case of a conviction, the judgment shall specify the offence of which and the section of the penal code or other law under which, the accused person is convicted, and the punishment to which he is punished." (Emphasis supplied).

10. Section 169(2) requires the court to specify the offence and the section of the law for which the accused person is convicted. In the present case, the trial court does not seem to have specified the section of

the law for which it was convicting the Appellant at the tail end of the judgement. The trial magistrate while convicting the Appellant recorded as follows;

> "...I therefore proceed to convict the accused on the principle count of rape."

However, the charges and the provision under which the Appellant was charged were indicated at the onset of the judgement.

11. The question for determination is whether failure to state the section at the convicting stage was fatal to the conviction and sentence. I am guided by the Court of Appeal decision in *Anthony Kamau Githuka v Republic* [2013] eKLR where the court held that;

> "We also agree with counsel for the state that unlike the situation in the case of *Abdi Isaac Osman and others v R*, (*supra*) the provision under which the appellant was charged is clearly indicated at the onset of the judgment of the trial court and the particulars given. At the conclusion of that judgment the trial magistrate finds the appellant guilty as charged and convicts him accordingly. In our view section 169 of the *Criminal Procedure Code* was therefore complied with."

12. As submitted by the Respondent's counsel, the charges and the provision under which the Appellant was charged were indicated at the onset of the judgement. Useful guidance abounds in the decision in *Ephantus Mutembei Bauni v Republic* [2016] eKLR where the court held that;

> "In the present case, the trial court did properly specify that it was convicting the Appellant for the offence of attempted defilement. It only failed to specify the section that creates that offence. This court has already set out in paragraph 9 of this Judgment, Section 9 of the *Sexual Offences Act*. That section creates both the offence and punishment for the offence of attempted defilement. In this court's view, the failure to specify the section of the law for the offence the trial court convicted the Appellant off must have been an oversight. The offence clearly exists in our laws and that oversight in this court's view did not prejudice the Appellant. That complaint in my view therefore is without merit and it is rejected."

13. Although the judgment did not specify the exact section of the law under which it convicted the Appellant, it is clear that the trial court convicted the Appellant on the principal count of rape. I also find this omission did not occasion a failure of justice and that it is an error that is curable under section 382 of the *Criminal Procedure Code*, which provides as follows:

> "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this *Code*, unless the error, omission or irregularity has occasioned a failure of justice"

14. Moving on, the Appellant was charged with rape. The main ingredients of the offence of rape created under section 3 (1) of the *Sexual Offences Act* include intentional and unlawful penetration of the genital organ of one person by another, coupled with the absence of consent. It follows therefore that the prosecution was required to prove the following;

    i. Penetration which is supposed to be intentional and unlawful;

ii. Lack of consent; and

iii. Identity of the perpetrator.

15. The evidence on record was as follows. PW1, the complainant testified that she was contacted by her brother, PW2 about a job offer. She proceeded to Nyahururu and met Loise, PW3. The Appellant contacted her and told her that the job was available at Jikaze. She met the Appellant on 20/11/2020 at 6:30pm who was to take her to her new place of work. They boarded a boda boda and at 7:00pm, they arrived to their destination but she was taken to a one roomed house. The Appellant left claiming that he was going to get the other girl who worked for him. He returned after two hours, cooked and the complainant expressed her concerns. At all this time, the complainant had travelled with her baby who slept at 10:00pm and the Appellant requested her to place the child on the bed.

16. She testified that the Appellant slept but got up and asked her to sleep and not to fear him. He thereafter forced her top out. He damaged her trouser zip, pushed her on the bed, jumped over her and forced his penis into her vagina. She was unhappy about the ordeal and she sat on the chair till morning. She informed the brother about the ordeal and she went home about midday and proceeded to hospital where she was treated. She also reported the matter to the police.

17. On cross examination by the Appellant, she testified that she was not forced to enter the house since the Appellant had mentioned that a lady worker was to join them. She testified that she did not know whether the door was locked as it was late at night and she was new there. She further testified that she texted the Appellant using her mother's phone requesting for a refund of Kshs.200/- being the fare she had used to go to meet the Appellant. She testified that she struggled and resisted a lot as the Appellant was forcing her clothes out and, in the process, her trouser zip got damaged. She further testified that she was not aware that her mother had demanded Kshs.200,000/- from the Appellant and she never intended to extort money from the Appellant. She stated that she suffers from blood sugar.

18. On re-examination, she testified that she resisted rape but she was ailing.

19. PW2 was the complainant's brother. He testified that he was contacted by Loise Wangechi, PW3 about a job opportunity. PW1 went to meet the said Loise on 19/11/2020 and on 20/11/2020, PW1 informed him that he was raped by the alleged job provider. He went and inquired from Loise about the perpetrator and on 21/11/2020, he went home where he informed their mother about the ordeal and took the complainant to hospital. He was later arrested for threatening the said Loise but was later released.

20. On cross examination, he testified that the complainant was diabetic and that she had texted the Appellant requesting for reimbursement of her fare.

21. PW3 Loise Wangechi, testified that she was texted by the Appellant who was her customer asking her to get a lady to work at his Mpesa shop at Makutano. She contacted PW2 who sent PW1 to her. She met PW1 on 19/11/2020 who talked to the Appellant through her phone. She later sent the Appellant the complainant's number. On cross examination, she testified that PW2 met her at home and informed her that the Appellant had raped the complainant.

22. PW4 was the complainant's mother. She testified that PW2 called her and informed her about a job offer. PW1 left the next day to meet the alleged employer. She gave her fare and she was to get a refund of the same. PW1 returned the next day but she appeared pale. On the following day, PW2 went home and informed her that PW1 was raped. PW2 took the complainant to the hospital.

23. On cross examination, she testified that the Appellant was to refund PW1 Kshs.200/- being the money she used as fare. That PW1 indeed requested for the refund through her phone. She denied asking

for money from the Appellant and it was indeed the Appellant who had offered them money and his motorbike for them to withdraw the matter. She testified that the complainant's trouser zip was destroyed but the Appellant repaired it.

24. PW5 PC Josephine Wairimu testified that a report was made at the station by PW1 who reported a case of rape. They were issued with a P3 form and referred to hospital. She recorded statements and the Appellant was arrested on 04/12/2020.

25. PW6, Dr. Paul Ogondo, a medical officer, testified that he examined the complainant on 25/11/2020 and his findings were that the genital area was normal, lab tests were negative, HB was low, urine test showed blood and glucose and some puss cells and urinary tract infection. She was diabetic. His conclusion was that everything was normal. He testified that he prepared the P3 and the PRC form which he produced as Pexhibit 1 and Pexhibit 2 respectively. On cross examination by the Appellant, he testified that there were no spermatozoa.

26. The Appellant in his sworn testimony confirmed that he offered a job to the complainant and on 20/11/2020, he met her and they proceeded to his house. They agreed on payment and they slept together in his house. They left the house the following morning and he gave the complainant Kshs.150/- for she wanted to buy some items. In the evening, he called her to know whether she had arrived but she texted him demanding for money. He denied raping the complainant and testified that the complainant and her mother wanted to extort money from him. He testified that he was called by PW3 who informed him that she was at Nyahururu police station where he went and he was arrested. On cross examination, he confirmed that he spent the night with the complainant and denied raping her.

27. That was the totality of the evidence before the trial court. The first issue to determine is on identity which is not in dispute. The Appellant himself confirmed to the trial court that he spent the night with the complainant in the same house. He did not dispute the identity.

28. The other issue is whether penetration was proved. The medical evidence produced by PW6 did not corroborate the complainant's evidence on penetration. The doctor testified that everything was normal pertaining to the complainant's genetalia. Nothing unusual that could have suggested that the complainant was raped.

29. It is however trite law that the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence. (see *Kassim Ali v Republic* Cr Appeal No. 84 of 2005 (Mombasa)(unreported)

30. This is in line with the proviso to section 124 of the *Evidence Act* which provides that a trial court can convict on the evidence of the victim of a sexual offence alone provided that the trial court believed or was satisfied that the victim is telling the truth and secondly it must record the reasons for such belief. The said section 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."

31. To my mind, Section 124 of the *Evidence Act* can only be complied with if the "reasons" are "recorded in the proceedings" indicating that the "Court is satisfied that the alleged victim is telling the truth".

32. I have perused the judgment of the learned magistrate and note that although he dealt with the evidence of the complainant at length, he did not specifically record that he believed that the complainant was telling the truth and the reasons for believing her. This was contrary to the requirement under Section 124 that the reasons be recorded in case of conviction of the accused where the court basis its conviction on satisfaction that the alleged victim is telling the truth.

33. When analyzing the evidence, this is what the trial magistrate stated;

> '' On cross examination, she stated that she really struggled with the accused. She resisted. Her zip got damaged in the course of the struggle. She stated that she was sick so she could not withstand the strength of the accused. This piece of evidence shows lack of consent on the part of the complainant. The accused forced himself on her. He took advantage on the fact that she was weak for being diabetic. This action by the accused action cannot go unpunished. In his defence, he has corroborated a significant part of the prosecution case but he has denied raping the complainant. This defence by the accused does not in any way cast doubt on the prosecution case. He also submitted that the prosecution case is marred with contradiction as there was mismatch on the dates that the PRC form was filled and the date that the offence was said to have been committed. To the court this contradiction does not go to the root of the issues for determination by the court. As I have stated the main issue is whether the accused committed the offence levelled against him or not. Which from the evidence on record, I am convinced that the accused raped the complainant on the material night after luring her into his house with the pretence that he would offer her job. A job opportunity that was not forthcoming".

Nowhere in the judgement does the trial magistrate indicate the reasons why he believed the complainant was telling the truth.

34. The Court of Appeal in *John Mutua Munyoki v Republic* [2017] ably interpreted the requirement under Section 124 of the *Evidence Act* as follows;

> " The trial court felt that the complainant was a truthful witness worth of believing. But given what we have stated regarding her credibility we doubt whether this assessment is correct. In reaching this conclusion which was also adopted by the High Court, the trial court was trying to rely on the proviso to section 124 of the *Evidence Act*. However we think that the trial court went about it the wrong way. What is required as we have already pointed out is for the trial court to be satisfied first, that the victim is telling the truth and thereafter record reasons for such belief. It was thus not sufficient for the trial court to have merely held that, "therefore owing to the nature of the offence, having duly warned myself wish to state that I believe that the child herein, PW1 was telling the truth of the occurrences of the material night when the accused was taking her to school." What or where are the reason(s) for the belief?"

35. Further clarity on the need to record the reasons for believing a witness is found in the High court decision in *Robert Wekesa Simiyu v Republic* [2019] eKLR where the court held that;

> " If a child gives clear and concise evidence that is not easily shaken, that would be a parameter for measuring the truthfulness of the witness. All that Section 124 of the *Evidence Act* requires is that the reasons for believing the witness be recorded. There are no strait-jacketed reasons that must be recorded. What matters most is the impression made on the trial magistrate by the overall evidence of the witness. Those are the reasons he must record." (emphasis added).

36. The requirement to record the reasons for believing the evidence of a victim of a sexual offence is couched in mandatory terms. In our instant case, the only available prosecution evidence was that of the complainant. That evidence lacked corroboration whatsoever as even the medical report did not confirm penetration. Section 124 of the *Evidence Act*, however, would still have allowed a conviction to stand if the trial magistrate had complied with the requirement to record the reasons why the court believed the evidence of the complainant.

37. As observed earlier, this being a first Appellate court, am duty bound to re- evaluate the evidence and make my own independent findings thereon. However, I have to be alive to the fact that I never saw neither heard the witnesses testify. Certainly, this court is disadvantaged in that it had no occasion to observe the demenour of the witnesses and particularly the complainant whose sole evidence was the basis of the conviction herein. That opportunity was a preserve of the trial court.

38. Granted, a sexual offence is a very serious intrusion and violation against any individual. I would place it high up even above a robbery given the resultant lifelong trauma and attendant dangers including possible exposure to life threatening diseases. On the other hand, and tied to the seriousness of a sexual offence, parliament in its wisdom has prescribed very stiff penalties for perpetrators. The scales of justice would demand that a prosecution of a sexual offence must be meticulously undertaken and all legal requirements adhered to by all players including the trial court.

39. The failure by the trial court to comply with the requirement under Section 124 of the *evidence Act* renders the conviction of the Appellant unsafe. The reasons for believing that the complainant was telling the truth needed to be specifically recorded. I echo the words of M. Thande J in High Court Criminal Appeal No.69 of 2018 *SM v Republic* where the learned Judge stated -

> 28. The criminal matter the subject of this appeal involved the sexual offence of defilement. Under the proviso to Section 124 conviction can be based on the testimony. The court must however record the reasons for which it is satisfied that the victim is telling the truth.
>
> 27. In the impugned judgment, the trial magistrate simply stated: "The complainant testified before me and I found her to be a truthful witness.
>
> 28. Although the trial court stated that it found the Complainant to be a truthful witness, no reason were recorded for drawing that conclusion. As such, the imperative of the proviso to section 124 was not met.
>
> 29. the reliance on the uncorroborated evidence of the Complainant alone in the circumstances of the case, and failure by the trial court to state the reason for which it was satisfied that the Complainant was telling the truth, rendered the conviction of the Appellant unsafe."

40. From the foregoing, the appeal herein is successful and is allowed. I quash the conviction and set aside the sentence. The Appellant is set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT NANYUKI THIS 24TH DAY OF MAY 2023

A. K. NDUNG'U

JUDGE