Mureithi v Republic (Criminal Appeal E014 of 2022)
[2023] KEHC 21803 (KLR) (9 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21803 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E014 OF 2022

LM NJUGUNA, J

AUGUST 9, 2023

BETWEEN

BENJAMIN MUREITHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of Hon. W. Ngumi at Siakago Law Courts Criminal Case No. 44 of 2019 Delivered on 4th June 2021)

JUDGMENT

1. The appellant has appealed the decision of the court Siakago Criminal Case No. 44 of 2019 *vide* petition of appeal dated 14th January 2022. The appellant prayed that the appeal be allowed, the conviction be quashed and the sentence set aside and he be released. The grounds for appeal are as follows:

    a. That the learned magistrate erred in both facts and law by convicting and sentencing the appellant on charges leveled against him but not proved by the prosecution beyond reasonable doubt;

    b. That the Honourable sentencing court erred in law and fact by convicting the appellant without identification procedure being followed;

    c. That the learned magistrate erred in both facts and law by relying on speculative hearsay evidence to convict the appellant;

    d. That the learned magistrate erred in both facts and law by convicting the appellant based on a defective charge sheet;

e. That the learned magistrate erred in both facts and law by rejecting the appellant's defense without giving cogent reasons; and

f. That the learned magistrate erred in both facts and law by sustaining a conviction based on insufficient and contradictory evidence.

2. The appellant faced 3 counts, the first being the charge of rape contrary to section 7 of the *Sexual Offences Act* No. 3 of 2006 whose particulars were that on 18th October 2019 in Mbeere sub-county within the Embu County, the accused person intentionally and unlawfully inserted his penis into the vagina of MW. The alternative charge was committing an indecent act with an adult contrary to section 11A of the *Sexual Offences Act* No. 3 of 2006 stating that on 18th October 2019 in Mbeere sub-county within the Embu County, the accused person intentionally and unlawfully touched the vagina of MW without her consent.

3. The second count was robbery with violence contrary to section 295 read together with section 296(2) of the *Penal Code*, that on 18th October 2019 in Mbeere sub-county within the Embu County, the accused person while being armed with a knife and an imitational firearm robbed MW of a mobile phone make Neon Storm valued at Kshs. 7,000/= and during the time of the robbery raped the said MW.

4. The third count was being in possession of cannabis sativa contrary to section 3(1) as read together with sections 3(2)(a) of the *Narcotic Drugs and Psychotropic Substance Control Act* No. 4 of 1994, that on 18th October 2019 in Mbeere sub-county within the Embu County, the accused person was found in possession of 10 rolls of cannabis sativa which was not in its medicinal preparation form.

5. The appellant herein pleaded not guilty and the plea was entered. The prosecution called 4 witnesses to make their case.

6. PW1 was the complainant who stated that the accused person was not known to her before the day of the incident. That she had been given his number by a friend of hers, the contact was meant to help her get a job. That the said contact led her from Nairobi to Kiritiri (Embu County) where the contact sent a boda boda rider in the company of 2 other people to come and take her to him. That on the way, the boda boda rider and one of the other people left her with the other person who led her against her will into a bush and at knife point, took her phone and raped her severally. That later in the night, she found her way to Gitaru Police Post where she reported the incident and stayed for the night. That the next morning she was transferred to Kiritiri Police Station where she recorded a statement and was escorted to Embu Level 5 Hospital where she was treated and P3 and Post Rape Care (PRC) Forms were filled. She identified the assailant as the accused person present in court.

7. On cross examination, PW1 stated that she did not know the name of her assailant but could be able to identify him. That the incident occurred on the night of 17th -18th October 2019 and she was treated on 19th October 2019 when the P3 form was filled. That the person who gave the number to her is not a witness in the case and the number was found on the internet. That the assailant released her at around midnight when she found her way to the police post. On re-examination she stated that she was able to identify the accused person at the time because when they met, there was daylight.

8. PW2 was P.C. Elizabeth Leamo of Kiritiri Police Station who was also the investigating officer in the case. She stated that when the complainant reported the case, she (PW2) began her investigations and went upto the place where the incident happened. That the relevant exhibits were collected as evidence. That further, she set herself up as bait using the phone number the assailant had used to lure

the complainant, under the guise that she is also looking for a job. That for security reasons, she was accompanied by her colleagues PW3 and another.

9. That when she called the phone number, the accused person led her step by step in a similar manner to the facts presented by the complainant, to the place where the incident happened. That when the accused began to harass her and they started getting deeper into the bushes, she alerted PW3 and the other officer who came and rescued her. That the accused was arrested and taken to the police station. On cross examination she stated that she had gotten the phone number of the accused person from the complainant once she was able to replace her line following loss of her phone. She further confirmed that she arrested the accused person after conducting her own extensive investigation and the accused person was identified by complainant as the assailant. That the accused person was arrested at Kwa Murindi.

10. PW3 is P.C. Anthony Nyaga Mugo of Kiritiri Police Station who testified that on 26th October 2019 she was tasked to go and assist PW2 with investigations. That PW2 requested him to remain on standby as she was set to meet her contact at around 6PM and they took 2 different vehicles. That he was trailing PW2 and when she met her contact, they started heading towards a hotel but soon they went into the bushes. That he went and arrested the person who was in the company of PW2, handcuffed him and took him to the police station and the items in his bag were also booked. On cross examination he indicated that he did not know the accused person and had no personal vendetta against him. That the accused person was arrested at Kivaa market Machakos County

11. PW4 is Humphery Mwende Ndwiga, the clinical officer who examined the complainant at Embu Level 5 Hospital and filled the P3 and PRC forms which were produced as part of the evidence. He testified that the victim was 22 years old and had not had sexual intercourse before the incident. That upon his examination, there were no spermatozoa cells seen though the hymen was broken. He confirmed that there had been penile penetration.

12. At the close of the prosecution's case, the accused person was put to his defense and he gave a sworn statement.

13. In his statement as DW1, the appellant stated that on 27th October 2019 he had left his house at 4.00AM to go about his miraa business. That while at the stage, he got into an altercation with a stranger, who he later learned was a police officer. That the officer in the company of his colleague arrested the appellant and took him to the police station where he was forced to sign as the owner of items which did not belong to him. That the following day he was charged in court with the offence of rape and yet he had never seen the complainant before that day in court.

14. He stated that the phone number which the officers allegedly used to track and arrest him was not noted in the investigation diary nor in the complainant's statement. That the date of the tele-conversation was not stated in court and the investigating officer also never confirmed arresting anyone at Kivaa. That PW2 said that one phone was recovered upon arrest and the other was recovered at the station and he interprets that as the fact that the police planted the phones on him in order to implicate him. He further stated that upon his arrest, no identification parade was conducted. He stated that he is not the owner of the phone number produced by the investigating officer and he does not know who it belongs to.

15. DW2 is Judith Mwende, wife of the accused person stated that on 27th October 2019, she woke up at 3AM to prepare breakfast for her husband, who thereafter left the house. That at around 10AM, her husband called her saying that he had been arrested at his place of work. On cross examination, she said that she could not tell what her husband usually does when he goes to work.

16. The appellant, in his written submissions stated that failure by the prosecution to hold an identification parade left errors of mistaken identity and for this he cited the Nigerian case of *Bakare v State* (1987) NUULR (PT52) 579. The appellant further took issue with the dates on the OB as indicated on the P3 form as OB02/19/10/2019 and on the charge sheet as OB02/18/10/2019. He also took issue with the fact that the P3 and PRC forms were filled out 17 days after the alleged incident. He is also not satisfied that the evidence of PW4 is proof enough to convict him of rape and that the complainant may well not have been a virgin at the time of the incident.

17. It is his submission that given the fact that the complainant did not know the assailant but could identify him if she saw him, an identification parade should have been done. In addition, he stated that the complainant in her testimony said that she had only seen the accused person during the incident and then in court, meaning that she identified him in court and not at an identification parade. That an identification parade could only be waived when the complainant knew her assailant for sure as was held in the case of *Fredrick A. Jude v Republic* (2004) eKLR.

18. The appellant also submitted that the prosecution failed to produce the fundamental information of the Safaricom line and M-pesa transaction that would have confirmed the person who sent the money to the complainant as she had claimed in her testimony. That even at the end of the prosecution's case, the mobile data was not produced in court. In conclusion, he submitted that there is an unaccounted-for lapse in time between when the complainant travelled from Rongai to Embu on 16th October 2019 and when the incident occurred on the night of 17th -18th October 2019 which raises reasonable doubt as to who the assailant was.

19. The respondent submitted that the prosecution had indeed discharged the burden of proof sufficiently to sustain the conviction. It relied on sections 3(1), 43(1) and 7 of the *Sexual Offences Act* No. 3 of 2006 in stating that the evidence by PW4 was enough proof that rape occurred as the complainant did not consent to the sexual activity and the medical examination showed broken hymen with hymenal fragments bleeding on the slightest touch.

20. It submitted that the date on the charge sheet may depart slightly from the facts but this does not render the charge sheet fatally defective and for this argument they relied on the case of *Bisonga v Republic* (2014) eKLR. That emphasis is on the recording of the charge itself as the court observed in section 134 of the *Criminal Procedure Code* and in the case of *Sigilani v Republic* (2004) 2 KLR, 480. The respondent submitted that in any event, an objection such as a slight error on the charge sheet ought to have been raised earlier rather than later as contemplated under section 382 of the *Criminal Procedure Code*. They stated that the charge sheet discloses the offence clearly and that is sufficient.

21. The respondent also stated that the identification of the appellant was correctly done as the complainant saw him clearly in daylight and at night, there was moonlight. They finally submitted that section 179(1) of the *Criminal Procedure Code* empowered the trial court to convict under Section 3 of the *Sexual Offences Act* even though the accused person had not been charged under that section. They urged the court to uphold the decision of the trial court both on the conviction and the sentence, noting that the court is free to enhance the sentence.

22. From a thorough perusal of the evidence and written submissions, I find the following issues for determination:

    a. Whether or not the prosecution proved their case beyond reasonable doubt;

    b. Whether the accused person was properly identified;

    c. Whether or not the charge sheet was defective; and

d. Whether or not the court based its conviction on contradictory evidence.

23. On the issue of whether the prosecution proved its case beyond any reasonable doubt; Pursuant to section 109 of the *Evidence Act*, the burden of proof lies with the prosecution to prove the case beyond any reasonable doubt. According to *Duhaime's Criminal Law Dictionary*, reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.

24. In the present case, I have noted that the investigating officer put out a robust investigation and made an arrest. The evidence produced before the court is above par and the trial court correctly relied on it to reach its decision. The appellant claimed that the trial magistrate failed to consider his defense in reaching the decision. The role of the defense case in a criminal matter is to punch holes in prosecution's case. The defense case was duly considered by the trial court in reaching its decision. I disagree with this position and note that the testimony of DW2 failed to create, at the very least, a sufficient alibi for his defense. In the case of *Kiarie v Republic* [1984] KLR held:

> "An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable."

25. On the second issue of whether the accused person was properly identified, the appellant stated that there was no evidence that an identification parade was conducted in accordance with *National Police Service Standing Orders* for purposes of correctly identifying the accused person.

26. PW1 stated that she saw the accused person when there was still daylight and she spent close to 5 hours in his company and when it became dark, she stated that there was moonlight and so she was able to see the accused person. After the incident, PW1 stated that the next time she saw the accused person was in court in the dock. This is therefore a dock identification which in certain similar instances is sufficient to identify. In the case of *Silas Ndwiga Nyaga & another v Republic* [2107] eKLR the court cited with approval the case of *John Nduati Ngure v R* (Criminal Appeal No. 121 of 2014) where the court stated: -

> "The Appellant has argued that he ought to have been subjected to an identification parade and that the learned magistrate erred in law in relying on the evidence of a single identification witness to convict him. As we understand the law on identification of suspects, identification parades are useful but they are not always mandatory; dock identification may be sufficient if a trial court may, depending on the circumstances of the case, find the identification to be sufficient. We suppose this is what the Court of Appeal meant in *Muiruri & Others v Republic* (2002) Iklr 274....Evidence of visual identification in Criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger whenever the case against a defendant depends wholly or to a great extent on the correctness of identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification"

27. In the circumstances, it is my view that the dock identification is sufficient to convict considering the amount of time spent and the time of day when the accused met with the complainant. Additionally, there is the issue of the phone number that was used to lure the complainant and the investigating officer into the trap laid by the accused person. I note that there was no testimony from the mobile

service provider to confirm that the phone number indeed belonged to the accused person. This, as I see it, would have been key to the case. Notwithstanding, I am confident that my sentiments on identification as stated above are sufficient to address the issue. The court also notes that the appellant led the investigating officer to the recovery of some items belonging to the complainant.

28. On the issue of whether the charge sheet was defective, section 134 of the *Criminal Procedure Code* provides:

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

In my view, the charge sheet contained all the necessary information to enable the court rightfully enter its judgment. In the case of *MG v Republic* (Criminal Appeal E051 of 2021) [2022] KEHC 14454 (KLR) the court was guided by the decision of the Court of Appeal in the case of *Benard Ombuna v Republic* [2019] eKLR where it was held:

> " In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

29. On the related issue of whether or not the conviction was based on contradictory evidence, the appellant argued that the evidence produced showed discrepancies in the OB numbers appearing on the P3 form and on the charge sheet. It is my view that the discrepancies do not change the purpose and effect of the documents produced. On this, I am guided by the case of *Joseph Maina Mwangi v Republic* (2000) eKLR, the court considered this issue and held that:

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

30. In conclusion I do not find good ground to depart from the decision of the trial court. I therefore find and hold that this appeal against conviction and sentence fails. The same is hereby dismissed.

31. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 9TH DAY OF AUGUST, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent