Republic v Kipchumba & another (Criminal Appeal E030 of 2023)
[2023] KEHC 24466 (KLR) (31 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24466 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E030 OF 2023

RN NYAKUNDI, J

OCTOBER 31, 2023

BETWEEN

REPUBLIC ..... APPELLANT

AND

ALLAN KIPCHUMBA ..... 1ST RESPONDENT

DENNIS KIBIWOTT ..... 2ND RESPONDENT

(Being an Appeal from the decision of Hon. C. Menya in Eldoret Chief Magistrates Criminal Case 055 of 2021 delivered on 17th March 2023)

JUDGMENT

Coram: Before Justice R. Nyakundi

Mr. Mugun for the State

1. The appeal herein arises from the judgment in Eldoret Chief Magistrates' Criminal Case 055 of 2021 delivered on 17th March 2023. The respondents were charged with the offence of gang defilement contrary to section 10 of the *Sexual Offences Act*. The particulars of the charge were That on the 16th day of December, 2020 in Keiyo South sub-county within Elgeyo Marakwet County, having a common intention, one after another, caused the penetration caused the penetration of the Vagina of MJ (name redacted to protect the identity on account of her being a minor), a girl aged 14 years old. In the alternative, they were charged with committing an indecent act with a child.

2. The respondents pleaded not guilty and the matter proceeded to full hearing. The appellant called three witnesses in support of its case.

3. PW1 MJJ testified That at the time of the incident, she was 14 years old. It was her testimony That That on 16the December 2020 at around 7:00p.m, she was on a motor cycle going to

Cheplongural to visit relatives. The rider stopped the motor cycle and demanded for sex to which she refused to indulge the thought. He threatened to beat her up but she remained adamant and the rider abandoned her by the road. She opted to walk back home and on the way, the 1st Respondent met her and pretended to help but she declined. He was then joined by three people who started touching the complainant, threw her to the ground and took her underpants off. She testified That two of them held her legs as the other penetrated her in turns. She knew her perpetrators as they were her neighbours.

4. PW2 DR Bowen Michael produced P3 Form on behalf of Dr. Tabaan. It was his testimony That the general medical history provided was That the complainant was defiled by four people. On examination of her genitalia, she was found to be having a healed hymenal tear at 3, 6 and 9 o'clock position. He testified That the conclusion was That the complainant was defiled.

5. PW3 PC Mercy Akeno testified That she was the investigation officer. She testified That the complainant reported to her That she had been defiled by four people who she knew as her neighbours. When she visited the scene, there appeared to be signs of a struggle. After receiving the P3 Form, she was persuaded That the accused persons committed the offence. She produced the complainant's birth Certificate and underwear as exhibits in the matter.

6. The prosecution closed its case and the respondents were put on their defence. They gave unsworn evidence, raising the defence of alibi. Upon considering the evidence and the testimonies of the witnesses, the trial court acquitted the accused persons. Being aggrieved with the decision of the trial court, the appellant instituted the present appeal premised on the following grounds;

    1. That the learned magistrate erred in law and fact by acquitting the accused persons whereas there was overwhelming evidence in support of the prosecution's case.

    2. That the learned Magistrate erred in Law and fact by holding That an identification parade should have been conducted whereas this was not a case of identifying a stranger but a case of recognition since the accused persons were well known to the victim before the offence and therefore an identification parade was unnecessary.

    3. That the learned magistrate erred in law and fact by holding That the evidence of the victim That she knew the accused persons should have been corroborated by chief in total disregard of the provisions of sections 124 of the *evidence Act* Cap 80 Laws of Kenya.

    4. That the learned magistrate erred in law and fact by holding That the victim did not property identify the accused persons and yet she testified That they were people That she knew before the offence occurred and she used the motorcycle lights to see them.

    5. That the learned magistrate erred in law and fact by ignoring or disregarding the evidence of the investigating officer who testified That the scene looked disturbed proving That there was a struggle and That she found the victims pant at the scene.

6. That the learned Magistrate erred in law and in fact by failing to convict the accused person's in-light of the overwhelming evidence proving That indeed the accused persons raped the victim.

7. The parties prosecuted the appeal vide written submissions.

Appellant's Case

8. It is the appellant's case That the prosecution proved the elements of the offence of gang rape beyond reasonable doubt. Learned counsel for the state urged That there has never been any doubt That the complainant was a girl aged 14 years old at the time of the commission of the offence. According to the birth certificate produced as Exh 1, the complainant's date of birth is 21/01/2006. This is proof That indeed she was 14 years old when the incident took place. On the positive identification of the accused, counsel submitted That the complainant testified That she was defiled in turns by 4 people, two of who were present in court and the remaining two still at large. She identified the two who'd been arrested as the accused persons. On page 10 paragraph 21-22, page 11 paragraph 1-2, paragraph 4-5, paragraph 7-11, page 12 paragraph 6-7, paragraph 17 and page 13 paragraph 4 of the trial court proceedings, the trial court captured the complainant stating as follows:

> " ... It was the accused who are in court, they are neighbours at home. I know them, Kibiwott was not arrested. They are people I always I see around our home area
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> ... Accused 2 removed my inner wear. Kibiwott actually smashed me on the ground.
>
> ... There was no consent, accused 1 removed my panty. The person cyclist said he shall raping me. They agreed Kibiwott followed then Allan raped. I knew them from their voices. They are people I know very well. 4 people including the accused were chasing the good Samaritan. I was raped by 4 people. Kipchumba and Kibiwott held my legs.
>
> ...the other accused is Kipchumba is you... I knew him previously.
>
> ... I saw them through the lights.
>
> ...There are 2 Kipchumbas.
>
> ... Accused being among them. I know them. Identified them through their voices. "

9. Counsel submitted That the Respondents were not strangers to the complainant. They were well known to her as neighbours and therefore, this is evidence of recognition more than identification of a stranger. Further, That she was able to recognise the accused by their physical appearance and their voice. With regard to the weight to be attached in a case of recognition, counsel referred the court to the case of Anjononi & Others v Republic [1976-1980] 1566. Counsel conceded That the offence was committed at night and by a singular identifying witness. Regarding the testimony to be attached to a single identifying witness, he referred to the decision of the court in Cleophas Otieno Wamunga v Republic [1989] eKLR where the court urged caution in considering the same. Counsel submitted That the complainant testified That she was able to recognise the Respondents by their appearance and by their voice. She knew them as her neighbours. She was aided in That endeavour by the light from the Respondent's motor cycle. This testimony was not shaken in her cross-examination.

10. It is the appellant's case That at page 7 paragraph 12-16 of her judgement, the trial magistrate stated That she was alive to the complainant said she knows the Respondents from home but That it was necessary to call the chief of the area or community policy officers to further identify the accused persons. For what reason? He stated That the learned trial magistrate allowed herself to fall into error by requiring a multiplicity of witnesses to prove recognition. Further, That section 143 of the *Evidence Act* is quite categorical That no number of witnesses shall be required for proof of any fact. No reason was advanced in cross-examination to show That she was blind or had faulty eyesight or suffered from any infirmity That could make her not recognise her neighbours. She should have accepted That evidence of recognition.

11. Counsel for the state cited the case of Wanjiru d/o Wamerio v Republic 22 EACA 521 on what common intention implies and the case of Eunice Musenya Ndui v Republic [2011] eKLR on the ingredients of common intention. He urged That there is sufficient evidence to show That the Respondents had a common intention to defile the complainant in turns. Further, That of keen interest of the court should be paragraph 9-10 where the complainant said That the Respondents and their confederates agreed That the motor cyclist would be the first, then Kibiwott (the 2nd Respondent) followed by Kipchumba (the 1st Respondent) and the Kipchumba who is still at large. Every single one of the Respondents caused their genital organ to penetrate That of the complainant. The second ambit of their common intention can be inferred from the fact That each of the Respondents played a key role in subduing the complainant and facilitating the others to defile her. Looking specifically at page 11 paragraph 4-113, the complainant testified That she was defiled by 4 people who had forceful intercourse with her in turns. She described the role of the 2nd Respondent as the one who removed her undergarment. The 1st Respondent helped in removing her panty and held her legs. He urged That there was adequate evidence of common intention.

12. Counsel submitted That the only issue for determination was whether the respondents were properly recognised. The respondents were people with whom she was so familiar with That an I/D Parade would have been otiose had it been done. Further, That it was also not necessary to bring a multiplicity of witnesses to prove That the complainant was familiar with the Respondents. he urged the court to substitute the lower court's order of acquittal and substitute it with an order of conviction.

Respondent's Case

13. The respondent's advocates filed submissions on 28th July 2023. Counsel urged That the evidence of the complainant (PW1) raises the issue whether in the circumstances she was able to identify the accused persons in the manner she said she did. According to her, she identified them through the light of the motor cycle. At the time, she was being held on the ground. The complainant talked of a third person whom she knew as Kipchumba and had spent considerable time with him but was not in court with the accused persons. This should have prompted the police to have an identification parade to ensure That the accused were properly recognized. As a general rule, dock identification is worthless. Counsel cited the cases of Ajode vs. Republic [2004] eKLR and Muiruri & Others versus Republic (2002) 1KLR 274 in support of this submission.

14. It is the respondents' case That it was the complainants' testimony That accused number two (2) was arrested at Baringo and accused one (1) was arrested at night though the dates of arrest were not clear from the evidence. It was the testimony of the accused one (1) That on the day of the offence he was at Eldama Ravine and was not near the scene of crime. Therefore forthwith

raising alibi defence. During the commission of the alleged offence it was at night and therefore it is safe to say That the complainant could not make out the faces of the accused persons. The complainant stated That she knew the accused persons from home, however her testimony ought to have been corroborated by an independent person to confirm That indeed they come from That area. The trial court did correctly find this and rightly acquitted the accused persons.

Analysis & Determination

15. The duty of this court as an appellate court was set out in the case of Okeno V. Republic [1972] EA 32 where the court stated as follows:

> " The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala -V- R. (1975) EA 57). 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 court's 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."

16. Upon considering the petition of appeal and the submissions to the appeal, the following issues emerge for determination;

> Whether the trial court erred in acquitting the respondents

17. Though the prosecution pleaded six (6) grounds to challenge the judgement of the trial court centrally the acquittal of the respondents was on the efficacy, veracity, reliability, and correctness of identification evidence. The impugned identification in this appeal revolves around the circumstances in which any evidence of identification fails or succeeds to acquit or convict an accused person. Such questions include:For how long did the witness have the accused under observation?At what distance?In what light?Was the observation impended in any way, such as by passing traffic or a press of people?Had the witness ever seen the accused before and how oftenWhat time elapsed between the observation and the subsequent identification to the police?Were there any discrepancies between the initial description given by the witness and the actual description of the accused? See Turnbull (1977) QB 224

18. The crux of this appeal is premised on the identification of the perpetrators. From my analysis of the evidence, the sequence of events began at 7pm and as such, it is clear That there was no natural light available but there was a light from the motorcycle of one of the perpetrators. The sequence of events is corroborated by the medical evidence to the extent of the rape having taken place. However, the identification of the respondents was majorly by recognition of their voices. I am alive to the fact That the evidence was That of a single witness. In the case of Roria v Rep (1961) EA 583, the court held That a fact may be proved by the testimony of a single identifying witness but That does not lessen the need for testing with great care the evidence of a single identifying witness in respect of identification if conditions favouring identification are difficult. In Sammy Kanyi Mwangi v Republic [2010] eKLR; Criminal Appeal No. 60 of 20006 (Nakuru) the Court of Appeal pointed out That caution should be exercised when relying on the evidence of a single witness. The Court stated That:

> " The law is clear That a fact may be proved by the testimony of a single witness and there is therefore no compulsion for the prosecution to summon a multiplicity

of witnesses. But this Court has consistently been cautious about reliance on such evidence particularly in cases relating to identification...."

19. This Court is alive to the proviso to Section 124 of the *Evidence Act* which exempts the evidence adduced in sexual offences cases from the requirement of corroboration, if That is the only evidence available. It provides as follows: -

> 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.
>
> It is my considered view That it was not necessary for the trial court to call other witnesses to call chief from the area or community policing officers to confirm if the respondents were from the area. The accused persons never denied coming from That area at any time during the hearing. Further, from the pre bail report, it is evident That the respondents reside in That area.
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> Regarding the evidence of voice identification, the court said the following in Mbelle v Rep 1984 KLR 626: The court should ensure That;
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> a. The voice was That of accused;
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> b. The witness was familiar with the voice and recognized it;
>
> c. The conditions obtaining at the time it was made were such That there was no mistake in testing as to what was said and who said it.

20. In Karani v Rep (1985) KLR 290 at page 293 the Court of Appeal said:

> " Identification by voice nearly always amounts to identification by recognition. Yet here as in any other case care has to be taken to ensure That the voice was That of the appellant, That the complainant was familiar with the voice and That he recognized it and That there were conditions in existence favouring safe identification".

21. In Choge v Republic [1985] KLR 1 the Court of Appeal also held That:

> " There can be no doubt That evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification, since it would be identification by recognition rather than at first sight."

22. Upon considering the testimonies in the trial court and the record of the court, including the pre bail report, I find That the trial magistrate erred in acquitting the respondents on the basis of identification being inconclusive. It is evident That the respondents were the neighbours of the complainant and as such she was familiar with their voices. Further, there was no evidence adduced to show That the conditions obtaining were such That there was a mistake in testing the voices of the respondents. I think it is not common knowledge That 7.00pm is always a darkest moment where visibility is impaired. It also depends with the season of the moon. It is trite That recognition is more reliable than identification particularly when

one speaks of strangers. Generally, it has come to be appreciated in law That witnesses given their human infallibility make mistakes of recognising even their close relatives and friends. In my considered view, That statement as may sound general may only appear to be applicable if there is a long passage of time of encounter or contact between the assailant and the victim. The chronology of the events on the material day are clearly documented by the victim to this case. The scope of recognition dependent wholly on what the victim visualised in the first instance as tailored to the facts of this particular case. The guidelines on identification in the Turnbull case (supra) do not require use of a rigid form of words to construct, interpret and debunk recognition evidence with a mind set geared towards the direction of an acquittal of an accused person. The question is whether using the guidelines the trial court is able to find and establish evidence capable of supporting a disputed identification evidence to warrant a conviction. The trial court should be mindful of the quality of evidence than the quantum of it as against the accused person. Where the trial court decides the identification evidence in question is of such a poor quality is an obligation to warn himself or herself and to give reasons as to why the witness probative value evidence on identification is wrong, why he or she is not convinced That the witness in question did not know the accused or accused persons in advance and not very well to be able to positively place them at the scene of the crime. In the disputed judgement first and foremost the quality of the identifying evidence depended solely on the glance by the complainant and the long observation made during gang rape incident. Moreover, my appreciation of the principles the Turnbull case contemplate a position in which the learned trial magistrate must assess not only the evidence of identification at the close of the prosecution case but also in tandem with the defence case. The mistakes of sources of light from the motor cycle and judicial reliance That 7.00pm is always very dark for any visual identification to take place to me is not a convincing one. Why was there conclusion by the learned trial magistrate That the star witness made a false impression of the events and circumstances in which the identification of the accused persons or the respondents for That matter in this case. The rigid rule on identification was applied by the learned trial magistrate which for me occasioned prejudice and injustice to the victim to the offence. In my consideration the specific weakness in the recognition evidence by the prosecution was never specifically addressed by the trial court so That the cumulative effect of it suspects of a crime were unfairly declined innocent. In my judgement when the quality is good as for example in this case based on period of observation or in satisfactory conditions by a neighbour, a close relative, or a workmate or the like the safety of conviction should not be ignored at the expense of administering justice fairly and proportionately within the requirements of criminal law. So That critical factor and being the real issue in this appeal calls upon this court to rule That there was no mistaken identification to warrant orders of acquittal by the learned trial magistrate. As a basic rule, it is merely useful on identification evidence the trial court to appreciate in minute details the nature of evidence and circumstances surrounding That identification of the suspects. The fact That a witness identifies the suspect but the suspect denies it indeed is no ground to discrete it That evidence as being of poor quality of mistaken to proof a fact in issue as laid down in Section 107 (1) of the *Evidence Act*. On the evidence presented in the lower court indictment there is no dispute That the offence of gang rape was committed. The predominant issue was for the court to determine whether the visual identification of the accused persons/respondents by the star witness was sufficient to establish a prima facie case to call upon the defence to contradict or controvert it by equivalent strong cogent evidence. In my view, the quality of identification evidence in this case was not and is not poor when on scrutiny within the scope of the Karani, Choge, and Turbull cases (supra). The credibility and reliability of it never was never tested in the realm of evidence law, demeanour, truthfulness,

honesty, convincingness, and persuasiveness of a witness. What did the trial court avoid telling us? The time of observation, the distance, the illumination, obstruction, and whether the accused having been seen before or known by the witness any other reasons were given for not remembering them. It is clear to me That under Section 382 of the CPC the order on acquittal occasioned an injustice to the victim of gang rape. The same be and is hereby reversed and substituted with a conviction as against the respondent.

23. Pursuant to the powers granted to this court vide section 354 of the Criminal Procedure Code, I hereby reverse the acquittal by the trial court and find the respondents guilty of the offence of gang rape.

24. Section 10 of the Sexual Offences prescribes the punishment for gang rape as follows;

> "Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life."

25. I note That mandatory minimum sentences were declared unconstitutional vide the case of Maingi & 5 others v Director of Public Prosecutions & another Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) where G.V Odunga J stated as follows;

> To the extent That the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of *the Constitution*. However, the Court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences. (emphasis mine)

26. In conclusion, the appeal succeeds with the following declarations to abide.

    1. A warrant of arrest be issued and served upon the respondents commanding them to attend further proceedings before this court for purposes of mitigation, aggravating factors, submissions, and admissibility thereof from the basis of the sentencing verdict.

    2. A status conference of compliance be held on the 15th of November 2023 or any such appropriate date as the OCS Eldoret Police Station could have complied with clause one (1) of this judgement.

It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 31ST DAY OF OCTOBER 2023

In the Presence of

Mr. Mugun for the state

.....

R. NYAKUNDI

JUDGE