



REPUBLIC OF KENYA



KENYA LAW
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**Wafula v Republic (Criminal Appeal E038 of 2021)
[2023] KEHC 27110 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 27110 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E038 OF 2021
SC CHIRCHIR, J
NOVEMBER 30, 2023**

BETWEEN

SOLOMON WAFULA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant herein Solomon Wafula was charged and convicted for the offence of rape contrary to Section 3 of the *Sexual Offences Act* No. 3 of 2006 (The Act), and sentenced to 10 years in prison.
2. The particulars of the offence were that on 20th August 2018 at sawawa area Bukhakungi Burundu location in kakamega north Sub County within Kakamega County intentionally and lawfully caused his penis to penetrate the vagina of LNN without her consent.
3. He was charged with an alternative count of committing an indecent Act with an Adult contrary to section 11(a) of the Act.
4. The appellant pleaded not guilty to the charges. He was tried, convicted of the offence of the main charge and sentenced to 10 years in prison.

Petition of Appeal

5. The Appellant was aggrieved by the judgment and proffered this appeal against the conviction and sentence. The appellant's grounds of appeal as set out in the Petition of Appeal are as follows:
 - a. That the learned trial magistrate erred in law by failing to note and consider that he was not accorded fair trial contrary to article 50 (2)(g), (h), (i)(j) of *the constitution*
 - b. That the trial court erred in law and in fact by failing to make finding that the case was not proved beyond reasonable doubt.



- c. That the learned trial magistrate erred in law and in fact by believing that penetration was proved by the prosecution.
- d. That the trial court erroneously convicted the appellant without medical or forensic evidence to link the appellant of the offence.
- e. That the trial court erroneously convicted the appellant without attempting to deal with the contradictions and inconsistencies by the prosecution witness.
- f. That the learned trial magistrate grossly erred in law and facts by failing to interrogate testimonies by prosecution witnesses potentially exculpating to the appellant.
- g. That the finding of the learned magistrate were against the weight of available evidence on record and defence not given due consideration.

Appellant's Submission.

6. It was the appellant's submission that the prosecution failed to prove its case to the required standard.
7. He avers that the testimony of the complainant was contradictory, as she contradicted herself regarding the time of the alleged incident . He further cast doubts on the integrity of the results of the medical examination arguing that several hours had lapsed between the time of the medical examination and the time of the alleged rape.
8. He further submits that he was not subjected to a medical test to prove that he is the one who committed the offence.
9. It is the Appellant's final submission that one crucial witness , a Mr. Maliki Onywere was not called to testify.
10. The Respondent did not file any submissions.

Summary Of The Evidence

11. Pw1 told the court that on the material day, she had been sent to the shop by her mother to buy cooking oil. she met the accused person who greeted her but she did not respond to the greetings. On coming back, she met the accused who had by the stripped off his clothes and was hiding in a bush. The accused grabbed her and pulled her in the bush. He tore her shirt and pants and raped her. she fell on the ground and started screaming. Her uncle came and the accused ran away.
12. She later informed her father and they both went to the accused homestead but accused ran away when they got to his house.
13. She claimed that the accused was their neighbour and that before the incident, she had spotted the accused who had been wearing a red t-shirt, black trousers and green slippers.
14. She further stated that they went to the hospital for the medical tests and later to the police station, to record her statement.
15. She identified the skirt she had worn and produced the treatment notes and her birth certificate. She gave her age as 19 years and produced her birth certificate in proof. She identified the accused in court. He said he knew him as they were neighbours; that the incident occurred at around 7 pm, and there was still some light. She further told the court that she could see the accused as he was on top of her, as he raped her and therefore he was at a close range. She further claimed that she had known the accused since she was young.



16. On cross- examination, she stated that the accused's full name is Solomon wafula. She reiterated that the accused was putting on a red T- shirt black trouser and green slippers. She reiterated that the accused ran away as the father pointed a light on him; that at the Accused's house her father shone a phone light on the accused as he ran away.
17. PW2 was the clinical officer attached to Navakholo sub-county hospital. He testified that on 21.8.2018, the complainant came and reported that she had been raped and upon performing some tests, spermatozoa and the epithelial cells were found in her vagina. According to the witness, the examination indicates that there was penetration.
18. On cross examination, he stated that the examination proved that the complainant had been raped; that the incident was reported to have occurred on 20.8.2018 while the examination was done on 21.8.2018.
19. PW3, the complainant father testified that he was at home at around 7 pm when the complainant came home crying stating that she had been raped by the accused, who she was able to identify.
20. He claimed that they went to the accused homestead in the company of the complainant; they did not find the accused in the parent's home. The Accused father then accompanied them to the Accused's house. When they entered the accused's house, the accused slipped out and ran away. He identified the accused in court and further told the court that the accused was is a neighbour and a son to his Aunt.
21. On cross- examination, the witness reiterated that he saw the accused running away but he could not recall how the accused was dressed.
22. The last witness was the investigations officer. He told the court that on 27.8.20218, he received a report on rape from the complainant and her father. On cross- examination he stated that one Maliki Onywere is the one who came to the rescue of the complainant.
23. The record shows that summons was issued against the alleged Maliki but he never turned up to testify.
24. The Accused was put on his defence and he opted to give a sworn testimony.
25. DW1, told the court that he knew the complainant since they are neighbours. He stated that on 20.8.2012, at around 5 pm, he met the complainant going to the shop. He stated that he heard the complainant scream and on hearing the scream he decided to run away. denied He claimed that the complainant is being used to frame him as there was a dispute between their two families. He further stated that the complainant's father later attacked him and he ran away again. Later his father told him that he was being accused of having raped the complainant.
26. On cross- examination, he admitted that he knew the complainant since they were young as they went to the same school. He said the dispute between the two families is connected to the death of their grandfather; that the grandfather died long before he was born. He was coming to know about the alleged dispute after he was released from remand. He had no relationship with the complainant.
27. DW2 was the accused's father. He told the court that on the material day the complainant's father (PW2) went to his house and inquired about the whereabouts of the Accused; that he led him to the accused's house. On reaching there PW2 assaulted the accused using his fists. On asking him why he was assaulting the accused PW2told him that the Accused had defiled his daughter. He did not report the assault to the police., neither did he take the accused for treatment.

Determination

28. This is a first Appeal and this court in under the duty to relook at the evidence presented during trial, re- evaluate it and arrive at its own conclusion, as was held in the case of *Okeno vs Republic*(1972) E.A 32



29. The following issues arise for determination:
- a). whether the Appellant was accorded a fair trial
 - b). whether crucial witnesses were not summoned.
 - c). Whether there were contradictions and inconsistencies on the prosecution's case.
 - d). Whether the prosecution proved its case beyond reasonable doubts.

Whether The Appellant Was Accorded A Fair Trial

29. The Appellant has submitted that he was not accorded a fair trial contrary to section 50 (2) g, h, i and j of *the constitution*. He however never submitted further on how his rights were violated, for this court to determine if indeed the Trial was fair or unfair. However a perusal of the record shows that the appellant the charges were read to him, he denied the charges , upon which the trial process commenced. There was no complaint of having not been given witness statements. He also cross examined all the prosecution witnesses. There was also no complaint regarding any other aspect of fair trial. I therefore do not find any violation of the right to fair trial. This complain is without any merit.

Whether a crucial witness was left out.

30. The Appellant has submitted that the prosecution failed to call a crucial witness that is one Maliki Onywere. Section 143 of *Evidence Act* provides as follows:

143. . Number of Witnesses

No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

31. Further, in the Court of Appeal case of *Keter v Republic* [2007] 1 EA 135, Bosire, Githinji and Onyango-Otieno JJA – the court of Appeal while addressing itself to the same issue sated: - “The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”

32. In the instant case, the complainant's evidence, though not requiring corroboration was well corroborated by the evidence of the clinical officer, who confirmed that the complainant was indeed a victim of rape. The medical tests carried out showed that there was penetration of the complainant's vagina. Thus, in my observation prosecution had tied up its case well without the need to call the Mr. Malik who is allegedly the one who came to the rescue of the complainant at the time of the attack.

Whether There Were Inconsistencies And Contradictions On The Prosecution's Case.

33. The Appellant argued that there were inconsistencies and discrepancies in the prosecution's Evidence. He cited the testimony of the complainant where she claimed that the incident occurred at 1 pm yet later stated that it occurred at 7-8 pm. The other contradiction is where she claimed that the accused was naked and later stated that he had worn red t-shirt with green slippers. To the Appellant the complainant was not a credible witness therefore.

34. The inconsistencies and contradictions raised by the appellant, in my view do not go to the heart of the matter to warrant the court to interfere with the judgment of the trial court. The issue of the wearing apparel is about identification. However, this was a case of identification by recognition. The two talked. They had known each other since they were young according to both their testimonies. On the issue of contradiction of time I will treat this as a case of accidental slip or recording error. In any case the



Accused never took to task the complainant on this apparent contradiction when he cross-examined her. Inconsistencies and contradictions were in my view very minor to upset the prosecution's case.

Whether The Prosecution Proved Its Case.

35. The appellant was charged with the offence of rape. Under the Act, rape is defined in section 3 (1) as follows:

- “(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.”

36. Thus, the main ingredients of the offence of rape is intentional and unlawful penetration of the genital organ of one person by another, coupled with the absence of consent.

37. On the element of consent the court of Appeal in the case of *Republic vs. Oyier*[1985] KLR 353 had this to say:

- “1. The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.
2. To prove the mental element required in rape, the prosecution had to prove 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.
3. Where 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.”

38. The evidence of the complainant detailed how the Appellant penetrated her. The Appellant threw her to the ground and tore off her pants. This was corroborated by the medical officer (PW2) who told the court that on performing a vaginal swab, there were presence of spermatozoa on the complainant's vagina.

39. Thus, the fact of penetration was proved.

40. On the lack of consent, the complainant was able to narrate the incident from the time she had met with the accused and how he had pushed her to the bush and defiled her; that she screamed. Someone whom she identified as her uncle came to her rescue and the Appellant ran away. If this was consensual sex, there would have been no need to tore off pants, the complainant would not have been screaming and there would have been no need for the Appellant to run away. Am satisfied that lack of consent has been proved.



41. On whether the complainant was able to identify the accused when it was late at night, the court has taken note of the testimonies of the complainant that they knew each other well. The Appellant told the court that he was in the same school with the complainant; that they have been neighbours since they were young. The complainant clearly identified the accused from what he had been wearing which was red t-shirt, a black trouser and green slipper. The complainant told the court that though it was about 7pm, it was not completely dark.
42. It was clear identification was more a case of recognition than identification. In this respect, I draw guidance from the case of *Peter Musau Mwanza v Republic* [2008] eKLR, where the Court of Appeal expressed itself as follows: -
- “We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.... “
38. Identification in this case fits well the parameters set out in the above stated case.
39. The appellant has argued that he was not subjected to a medical examination to prove that there was a nexus between him and the offence. He argues that this was a contravention of Section 36 of the Act. Section 36 of the Act sates as follows:
- “(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.
- (2) The sample or samples taken from an accused person in terms of subsection (1) shall be stored at an appropriate place until finalization of the trial.
45. However, as was held in the case of *Kassim Ali vs Republic* Cr. App. No 84 of 2005 (Mombasa) medical evidence is not mandatory to prove rape. It is my considered view that the medical evidence referred to in section 36 is only necessary when the identity of the perpetrator is in doubt. In the Kassam case(supra), the court held: “The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or circumstantial evidence.”
46. It is my finding that all the ingredients of the offence of rape was proved and consequently hold that the prosecution proved its case beyond reasonable doubt.
47. In conclusion I find that the conviction of the Appellant was proper.
48. Although the Appellant pleaded that the sentence be reviewed, he never submitted on it. This Appellant therefore has failed to move the court on the issue sentence and consequently I decline to address myself to it.



49. The entire Appeal fails. It is hereby dismissed.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF NOVEMBER, 2023.

S. CHIRCHIR

JUDGE.

In the presence of:

E. Zalo- Court Assistant.

Appellant- present

Ms. Osoro for the Respondent

