DMK v Republic (Criminal Appeal E009 of 2023)
[2023] KEHC 25597 (KLR) (22 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25597 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E009 OF 2023

LM NJUGUNA, J

NOVEMBER 22, 2023

BETWEEN

DMK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. D. Endoo RM in Chief Magistrate's Court at Embu Sexual Offence No. E009 of 2021 delivered on 28th April 2023)

JUDGMENT

1. The appellant herein was charged with two counts: the first one being the offence of rape of a person with mental disability contrary to Section 7 of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on 31st January 2021 between 9.00a.m and 4.00p.m., within Embu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of PMG an adult aged 28 years by use of force and/or threats.

2. The second count was the offence of committing an indecent act with a person with mental disability contrary to Section 7 of the *Sexual Offences Act* No. 3 of 2006. The particulars of the second count are that on 31st January 2021 between 9.00 a.m. and 4.00p.m, a within Embu County, the appellant intentionally and unlawfully touched the vagina of PMG an adult aged 28 years with his penis.

3. The case proceeded for full hearing and the trial court, in its judgment delivered on 28th April 2023, convicted and sentenced the appellant to serve 10 years imprisonment in the 2nd count but acquitted him in the first one.

4. The appellant, being dissatisfied with the decision of the trial court, filed a petition of appeal dated 29th May 2023, seeking orders that the appeal be allowed, conviction quashed, sentence be set aside and the appellant be set free. The appeal is premised on the grounds that:

a. The learned trial magistrate erred in both law and fact by convicting the appellant on an offence and charge whose particulars were not proved, were inconsistent and not supported by any evidence;

b. The learned trial magistrate erred in both law and fact by disregarding the appellant's defense;

c. The learned trial magistrate erred in both law and fact by convicting the appellant yet the prosecution's case was full of inconsistencies;

d. The learned trial magistrate erred in fact by convicting the appellant when the prosecution did not prove their case beyond reasonable doubt;

e. The learned trial magistrate erred in both law and fact by convicting the appellant based on insufficient evidence; and

f. The learned trial magistrate erred in both law and fact by sentencing the appellant to serve 10 years imprisonment which sentence was harsh and excessive in the circumstances considering the appellant was a first offender.

5. On both counts, the appellant pleaded not guilty and plea of not guilty was duly entered. The prosecution called 5 witnesses in support of their case.

6. PW1 who was the victim, testified through an intermediary because of her mental incapacity. She stated that on the date of the incident, she went to the house of the appellant where they watched television and then went to sleep. That the appellant threatened to stab her with a knife if she screamt then he removed her clothes, tied her up with a rope and defiled her twice. That she screamt but nobody came to help her. She stated that she did not give him permission to do "bad manners" to her. That when she went back home, she did not tell her mother anything as the appellant had told her not to tell anyone. That before that day, she did not know the appellant and she did not ask for his name but she knows his face. She identified the appellant as her assailant. On cross-examination, she stated that it was not the first time that she had sex with the appellant and that she used to go to his house every day using the back route to the house. That after the incident, she left the appellant's house at night. That at the time of the incident, people had gone to church and the appellant would threaten her with a knife if she did not do as he asked her to do. That she was hurt in her private parts and she couldn't walk well.

7. PW2, mother of the victim stated that on the day of the incident, she had gone to church, leaving PW1 with her younger siblings. That when she returned she did not find PW1 at home and upon asking around, someone told her that PW1 was seen at Makengi shopping center. That she followed up and found PW1 looking frail and unable to walk. That PW2 asked her where she had been and PW1 showed PW2 the back route to the appellant's house and told her what had happened. It was her testimony that she took PW1 to hospital for examination and treatment. She stated that PW1 was born on 11th May 1992. On cross-examination, she stated that the appellant's house was about 30 minutes' walk from her house and that when they went there, the house was locked with a padlock. That a teacher saw the victim at around 4PM, looking dirty and unkempt. She stated that the victim has been living with her parents even before the incident and that she had no capacity to consent to marriage, much less to sexual intercourse. That the appellant threatened the victim with a knife, meaning that the victim did not consent to the sexual intercourse.

8. PW3, the appellant's landlord, stated that on the material day, she had gone to church and upon return, she found PW1 and PW2 waiting for her at her clinic. That PW2 told her that one of her tenants had raped PW1 and they showed her the house of the appellant. That PW3 advised them not to change

any of PW1's clothing but to report the matter to the police immediately. That PW1 appeared to have been in pain.

9. PW4, a clinical officer at Embu Level 5 Hospital, produced P3 and PRC forms authored by his colleague who had since left the department. He also produced the initial medical reports for the first examination done at Embu Children Hospital Tenri. That upon examination, the victim had ligature marks on the legs caused by tying. That the vagina did not have injuries but had a foul smell and relevant medication was prescribed to her and the examining doctor categorized the injuries as harm. On cross-examination, he stated that the ligature marks on the legs were caused by tying with a rope and not henna or paint. That the victim was not able to explain if she had been hurt because of her mental incapacity.

10. PW5 is a police officer at Manyatta Police Station and the investigating officer in this case. She stated that the incident was reported at the station and she booked it in the OB then escorted the victim and her parents to Tenri Hospital for examination and treatment. That the appellant was not known to the parents of the victim and that he was escorted to the police station by his employer on 19th February 2021 and thereafter, he was arraigned in court. That the appellant told PW5 that he was friends with the victim. That the victim told her that they used to meet with the appellant but on that day, she was forced. On cross-examination, she stated that the victim was mentally incapacitated and did not say that she wanted to marry the appellant, even though it is not forbidden in law to have a relationship with a mentally incapacitated person.

11. At the end of the prosecution's case, the court found that a prima facie case had been established and the accused person was put to his defence.

12. DW1, the appellant herein testified that the victim was his girlfriend and that they had plans of getting married. That she used to go to his house many times and on the day of the incident, there was nothing different. That he does not know what happened after the victim left his house that day. That he was informed that he was being looked for and so he surrendered himself to Manyatta Police Station where he was arrested and arraigned. He asked for forgiveness and stated that he would not have voluntarily gone to the police station if he was lying. On cross-examination, he stated that he had known the victim since 2019 and he did not know that she was mentally incapacitated. That he did not know that she had been registered as a person living with disability and was unable to consent to sexual intercourse. He stated that he voluntarily presented himself to the police station being accompanied by his former employer.

13. The trial court acquitted the appellant on the 1st charge but found him guilty of the 2nd count and sentenced him to 10 years imprisonment. It was the court's finding that the elements of rape were not proved to the required standard but the elements of the 2nd count were proved. That the offence as crafted does not exist in the *Sexual Offences Act* but rather in the *Penal Code*. She was guided by the decision in the case of *John Mutetei v Republic* (2020) eKLR in finding the appellant guilty of the 2nd count only.

14. The appeal was disposed of by way of written submissions and both parties complied.

15. It was the appellant's submission that the charge sheet was fatally defective owing to the fact that the charges as framed are defective and are non-existent in the *Sexual Offences Act* No. 3 of 2006. The trial magistrate noted the defect to the 1st count and acquitted the appellant, although the 2nd count, for which the appellant was convicted, was also defective. That the prosecution misconstrued the meaning of section 7 of the *Sexual Offences Act* No. 3 of 2006 which renders an accused person liable if an indecent act is done in the presence of the people mentioned. He relied on the cases of *Njoroge*

Mungai v Republic (2017) eKLR and *Edwin Odongo Aol v Republic* (2021) eKLR where the courts distinguished the offences under Section 146 of the *Penal Code* and Section 7 of the *Sexual Offences Act* No. 3 of 2006.

16. That the trial magistrate erred in convicting the appellant for a charge that does not exist, which is prejudicial to his rights under Article 49(2) of the *Constitution*. It was his argument that for an offence under Section 146 of the *Penal Code* to be proved, there has to be proof that the victim was indeed mentally incapacitated at the time of the offence and that the accused person knew this before he raped the victim. For this argument, reliance was placed on the case of *Samwel Godfrey Otili v Republic* (1992) eKLR. That the victim habitually and voluntarily visited the appellant for 2 years and had accepted to be married and so the appellant cannot be criminally liable.

17. He cited inconsistencies in the testimony of PW5 which testimony was meant to corroborate that of PW1. That PW5 stated that the ligature marks were faint and he could not tell how old the injuries were, meaning that the marks could have been caused by another person or by the victim herself. He argued that if the appellant had been charged and convicted with an offence under Section 11A of the *Sexual Offences Act* No. 3 of 2006, the maximum sentence would have been five years imprisonment. He urged the court to set aside the conviction, being guided by the cases of *Njoroge Mungai v Republic* (2017) eKLR, *John Maundu Mutetei v Republic* (2017) eKLR and *Opiche v Republic* (2009) KLR 369, 375.

18. On its part, the respondent submitted that the elements of an indecent act were proved as provided in the Act and that under Section 382 of the *Criminal Procedure Code*, the conviction should be upheld. It relied on the case of *John Irungu v Republic* (2016) eKLR and added that the court must consider whether the error on the charge sheet has occasioned miscarriage of justice. It stated that the appellant fully understood the charges and participated in the trial by cross-examining the witnesses and even testified in his own defence.

19. Upon perusal of the petition of appeal, the trial court's record and the submissions herein, the issues for determination are:

    a. Whether the charge sheet was fatally defective;

    b. Whether the charges were proved beyond reasonable doubt; and

    c. Whether the sentence was harsh and excessive.

20. I am aware of the role of an appellate court as stated in the case of *Okeno v Republic* (1972) EA 32 where the court held:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding 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."

21. According to the amended charge sheet, the charges were stated as 'rape of a person with mental disability contrary to Section 7 of the *Sexual Offences Act* No. 3 of 2006'. For the 2nd count the charge

was 'committing an indecent act of a person with mental disability contrary to Section 7 of the *Sexual Offences Act* No. 3 of 2006'. Section 7 of the *Sexual Offences Act* provides:

> " A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years."

22. The test of whether or not a charge sheet is fatally defective, lies in the determining whether the appellant understood the charges preferred against him and how he reacted to the evidence adduced. From the proceedings of the trial court, the appellant heard the charges levelled against him and took a plea of not guilty. He also participated in the trial by cross-examining witnesses and testifying as a defense witness. He clearly understood that he was being charged with having non-consensual sex with the victim, who was proved to be mentally incapacitated. He even stated that the victim is his girlfriend and that they had plans of getting married. This is not the behavior of someone who did not understand the charges.

23. A defective charge sheet will many times be corrected during the prosecution's case and sometimes, the courts overlook small defects which do not alter the substance of the charge. In this case, the trial was carried to the end but at no point did the appellant intimate that the charge sheet was defective. Furthermore, the issue of a defective charge sheet is not a ground of appeal herein but is only raised by the appellant in his submissions. It is settled law that submission do not have evidentiary value, as stated by the Court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR as follows:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

24. If I am to determine the defectiveness of the charge sheet, if any, I would be forced to look at whether the alleged defect ought to have been raised much earlier in the trial, mostly at the plea taking or before close of the prosecution's case. In this case, this is only coming up on appeal and in the appellant's submissions. In my view, it is too late in the day for the appellant to raise this argument and the court will not entertain it. I am guided by the provisions of Section 382 of the *Criminal Procedure Code* which states:

> " 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. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

25. In my view, the charge sheet may be defective but not fatally defective as the appellant fully participated in the trial, having understood the charges. In the case of *MG v Republic* (Criminal Appeal E051 of 2021) [2022] KEHC 14454 (KLR) the court stated thus:

> " The Court of Appeal in Benard Ombuna v Republic (2019) eKLR addressed the issue of a defective charge sheet in the following terms:-
>
> > " 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.""

26. On the second issue of whether the offences were proved beyond reasonable doubt, Section 7 of the *Sexual Offences Act* provides:

> " A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years."

Section 3 of the same *Act* defines rape 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.

(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.

(3) 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.

Section 43 of the same *Act* defines intentional and unlawful acts as follows:

> " Section 43(1)(c) An act is intentional and unlawful if it is committed-
>
> (a) ...
>
> (b) ... or
>
> (c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence.
>
> Section 43(4)(e) The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (1) include circumstances where such a person is, at the time of the commission of such act-

(a) .....;

(b) .....;

(c) .....;

(d) .....;

(e) mentally impaired; or

(f) ....."

27. The offences as stated herein are found in Section 7 of the *Sexual offences Act* and they stem from Section 3 of the Act where rape is defined. In order to determine the issue herein, this court will satisfy itself on three things which together make up the elements to be proved for a conviction to be sustained. These are:

a. Penetration

b. Lack of consent

c. If there was consent it was obtained by force, or threats or by intimidation.

28. On penetration, PW1 testified that the appellant removed her clothes by force and tied her with ropes before raping her. PW4 noted that there were ligature marks on PW1's legs, consistent with tying with ropes. DW1 who is the appellant stated that PW1 always visited his house and that it was not the first time they had sex. Both PW1 and DW1 stated that they were friends and they had plans of getting married to each other. PW4 noted that there were no injuries to the vagina but the vaginal swab showed that there were spermatozoa cells present and a foul odour. The examining doctor formed the professional opinion that there was harm. Penetration was sufficiently proved.

29. On the question of consent, DW1 stated that they had been having sex before that day and that they were planning to get married. The trial court noted the demeanor of PW1 when she was testifying and she was acting shy when she said that she knew him before the incident. At some point PW1 stated that she consented and then later she said that she did not consent on that day. PW1 was mentally incapacitated and Section 43 of the *Sexual Offences Act* provides that she did not have capacity to consent to sex.

30. The victim's mental impairment expressly makes her incapable of communicating clearly or coherently, as categorically provided for under Section 44(1) and (2)(e) of the *Sexual Offences Act* as follows:

"

"(1) If in proceedings for an offence under this Act, it is proved-

(a) that any of the circumstances specified in subsection (2) existed; and

(b) that the accused person knew that those circumstances existed, the complainant is to be taken not to have consented to the act unless sufficient evidence is adduced to raise an issue as to whether he or she consented, and the accused is to be taken not to have reasonably believed that the complainant consented unless

sufficient evidence is adduced to raise an issue as to whether he or she reasonably believed it.

(2) The circumstances are that-

(e) because of the complainant's disability, the complainant would not have been able at the time of the commission of the act to communicate to the accused whether the complainant consented;"

Given the above discussion, I am convinced that the victim did not consent to the sexual intercourse. Additionally, PW1 testified that she was tied with ropes before the act, meaning that the appellant forcefully had sex with her. PW1 also stated that the appellant threatened to stab her with a knife, although the knife and rope were not brought to court as evidence.

31. The trial court found that the prosecution did not prove the offence of rape beyond reasonable doubt. In my view, and from a re-examination of the evidence, the offence was proved beyond reasonable doubt.

32. I do note that the trial magistrate found the appellant guilty of the 2nd count and sentenced him to 10 years imprisonment. The 2nd count as framed, does not exist in the *Sexual Offences Act* or in any other law for that matter. In my view, and if all, this 2nd count should have been framed as an alternative charge to the 1st count and more so, it should have been framed in a manner that is relevant in law. Having said that, I find that the appellant ought not to have been convicted on the 2nd count as it does not exist in law, therefore he is acquitted of this charge.

33. I find that the appeal partially succeeds with orders as follows:

a. The judgment of the trial court acquitting the appellant of the 1st count is hereby set aside and substituted with a finding that the appellant is guilty of the offence of rape and is hereby sentenced to 7 years imprisonment; and

b. The judgment of the trial court on conviction and sentence on the 2nd count is hereby set aside and substituted with an acquittal.

34. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF NOVEMBER, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent