Opati v Republic (Criminal Appeal E005 of 2022)
[2023] KEHC 27087 (KLR) (19 December 2023) (Judgment)

Neutral citation: [2023] KEHC 27087 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E005 OF 2022

JN KAMAU, J

DECEMBER 19, 2023

BETWEEN

GAMMALIEL OPATI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon R. M. Ndombi (SRM) delivered at Vihiga in Principal Magistrate's Court in SO Case No 64 of 2019 on 23rd March 2022)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of rape contrary to Section 3(1)(a)(c) (3) (sic) of the *Sexual Offences Act* No 3 of 2006. He had also been charged with an alternative offence of committing an indecent act with a child contrary to Section 11(A) (sic) of the *Sexual Offences Act*. He was tried and convicted on the main charge by the Learned Trial Magistrate, Hon R. M. Ndombi, Senior Resident Magistrate who sentenced him to fifteen (15) years imprisonment.

2. Being dissatisfied with the said Judgement, on 11th April 2022, the Appellant lodged the Appeal herein. His Petition of Appeal was of even date. He set out eleven (11) grounds of appeal.

3. On 20th September 2023, he informed this court and his advocate that he would be representing himself.

4. He filed Supplementary Grounds of Appeal and Written Submissions both dated 29th July 2023 on 2nd November 2023. The Respondent's Written Submissions were dated 2nd November 2023 and filed on 2nd October 2023 (sic). The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.

7. Having looked at the Appellant's Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issue that had been placed before it for determination were as follows:-

    1. Whether or not the Charge Sheet was defective;

    2. Whether or not the Appellant's right to fair trial was infringed upon;

    3. Whether or not the Prosecution proved its case beyond reasonable doubt; and

    4. Whether or not the sentence that was meted to him was excessive warranting interference by this court.

8. The court therefore dealt with all the said issues under the following distinct and separate heads.

I. Right to Fair Trial

9. Ground of Appeal No (9) of the Petition of Appeal was dealt with under this head but under the different sub-heads.

A. Right to Legal Representation

10. The Appellant submitted that he informed the Trial Court that he required an advocate but that the same escaped its attention. He asserted that this was not recorded anywhere in the proceedings.

11. He added that he was not given a right of representation by counsel of his own choice, he was not cautioned of anything which violated his right thus rendering his trial a nullity. He relied on the case of Orisa High Court – Justice Sangam Kumar Shoo; Khudia Kudivan Tudnu vs State of Odisha 2023 livelw (ori) 45. However, he did not set out the holding that he was relying upon.

12. On its part, the Respondent pointed out that the Appellant confirmed that he understood the language of the court. It argued that at no time did he mention to the court that he wished to be represented by counsel. It further averred that he did not demonstrate how his right to fair trial was violated. It asserted that from the proceedings, his rights were carefully observed.

13. A perusal of the proceedings showed that the Appellant indicated that he understood Kiswahili. There was no indication that he requested the court to give him time to instruct a counsel who would represent him during trial. It was therefore difficult to ascertain whether or not he asked that he be given time to get counsel of his own choice as he had submitted.

14. Be that as it may, this court found and held that the Trial Court was under an obligation to have informed him of his right to be represented by counsel as was mandated by Article 50(2)(g) of *the Constitution* of Kenya, 2010.

15. Notably, Article 50(2)(g) of *the Constitution* of Kenya provides as follows:-

> " Every accused person has the right to a fair trial, which includes the right to choose, and be represented by, an advocate, and to be informed of this right promptly."

16. Failure by the Trial Court to inform the Appellant of this right was a great omission. Having said so, it not always that such omission must cause an accused person injustice as it can be remedied by way of a retrial if such accused person has completely prejudiced.

17. In this particular case, the Appellant proceeded with the trial without ever having asked that the Trial Court give him time to instruct counsel who would represent him. This court thus came to the firm conclusion that his constitutional and fundamental right to fair trial had not been breached merely because the Trial Court did not inform of his right of legal representation under Article 50(2)(g) of *the Constitution* of Kenya.

18. In view of the delays that would be occasioned by recalling witnesses due to failure by trial courts to promptly inform accused persons of their right to choose and be represented by an advocate and to be informed of this right promptly under Article 50(2)(g) and the right to have an advocate assigned to the accused person by the State and at State expense and bearing in mind substantial injustice that would otherwise result as provided in Article 50(2)(h) of *the Constitution* of Kenya, trial courts are called upon to comply with these provisions of the law when an accused person is first presented to court and before taking the plea as this is indeed the beast practise.

19. The Appellant's submissions that he was not furnished with the Charge Sheet and Witness Statements was also not supported by the proceedings. When the matter came up for hearing on 12th August 2020, he informed the Trial Court that he was ready to proceed. Throughout the trial, he did not inform the Trial Court that he was not given the Charge Sheet and Witness Statements.

20. In the absence of proof of the Appellant's assertions regarding his right to fair trial, this court was therefore not persuaded that the same was infringed rendering the trial a nullity and necessitating a retrial.

21. In the premises foregoing, Ground of Appeal (9) was not merited and the same be and is hereby dismissed.

B. Mode of Defence

22. The Respondent did not submit on this issue. On the other hand, the Appellant submitted that Section 211 of the Criminal Procedure Code Cap 75 (Laws of Kenya) was not complied with rendering the trial a nullity and necessitating a retrial.

23. Section 211(1) of the Criminal Procedure Code states as follows:-

> " At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable

to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any)."

24. On 3rd August 2021, the Trial Court found the Appellant had a case to answer and placed him on his defence. He informed the Trial Court that he needed time to prepare and that he had no witnesses. The defence hearing was set for 15th September 2021. On 7th February 2022, he reiterated that he had no witnesses and confirmed that he was ready to defend himself. He adduced unsworn evidence.

25. This court found the proceedings of the Trial Court on Section 211 (1) of the Criminal Procedure Code to have been very sketchy opening them to being challenged. Indeed, there was no indication if the Appellant was to adduce sworn or unsworn evidence. This was a great omission by the Trial Court. To avoid such challenges, it was incumbent upon trial courts to set out the exact manner an accused person has chosen to defend himself or herself.

26. Having said so, it was evident from the facts of this case that the Appellant was aware of the three (3) different ways of defending himself despite the same not having been set out in the proceedings. This is because he adduced unsworn evidence and did not call any witnesses.

27. Notably, a re-trial should only be ordered where no prejudice would be occasioned to an appellant or where it will not give a party seeking a re-trial a second bite at the cherry by panel beating its case to fill gaps in a fresh trial. Indeed, an appellate court will not order that a re-trial be conducted where it finds that a conviction cannot be sustained based on the evidence that is currently before it at the time of hearing and determination of an appeal.

28. In this regard, this court fully associated itself with the holdings in the cases of Ahmedi Ali Dharamsi Sumar vs Republic [1964] E.A. 481 and re-stated in Fatehaji Manji vs Republic [1966] E.A. 343 that Mutende and Thuranira Jaden JJ cited in the case of Jackson Mutunga Matheka vs Republic [2015] eKLR where it was stated as follows:-

> "... a retrial will only be ordered when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence of for the purpose of enabling the prosecution fill up gaps in its evidence at the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on particular facts and circumstances and an order for retrial should only be made where the interest of justice required it and not ordered where it is likely to cause an injustice to the accused."

29. This court thus came to the firm conclusion that although the proceedings were not detailed, the Appellant nonetheless understood what how he was to conduct his defence under the provisions of Section 211(1) of the Criminal Procedure Code and did not therefore suffer any prejudice that would have rendered the trial a nullity and require a retrial.

II. Proof of Prosecution's Case

30. Grounds of Appeal Nos (1), (2), (3), (4), (5), (6), (7), (8), (10), (11) and (12) of the Petition of Appeal were dealt with together under this head as they were all related.

31. The Appellant relied on several cases but did not set out the holdings that he was relying upon.

32. He submitted that the Prosecution did not call crucial witnesses yet they would have explained his relationship with PW 1. He singled out Kelvin Mwangu as an important witness who was not called to testify.

33. He further argued that the Complainant, LC (hereinafter referred to as "PW 1") gave her consent for the sexual act and because it was one person's against the other and that in this regard, the benefit of doubt should go to him. He pointed out that the Complainant complained when he did not pay her money. He asserted that she had previously done the same to another person. He faulted No 86662 Cpl Rael Ambasa (hereinafter referred to as "the Investigating Officer") for not having investigated that angle.

34. It was his argument that the Trial Court completely ignored his defence that he was sheltering in his employer's house with PW 1 who was a house help. He pointed out that she contradicted herself when she testified that she reported the incident to her employer on the same date at 11.00 am and again stated that she reported the incident the following day. He also asserted that she contradicted herself when she told the Trial Court that she screamed and again said that she did not scream. He urged this court to take the said omissions seriously and find that the Prosecution did not prove its case beyond reasonable doubt.

35. On its part, the Respondent was emphatic that the Prosecution proved its case beyond reasonable doubt. It asserted that the contradictions were not material to have affected the substance of the case. It also contended that the Appellant did not demonstrate how the Trial Court was biased.

36. It was categorical that PW 1 did not consent to the sexual act and that a Clinical Officer, Paul Muturi (hereinafter referred to as "PW 2") tendered in evidence a P3 Form, Post Rape Care (PRC) Form, treatment notes and adduced evidence showing that PW 1 had lacerations at 6 and 3 o'clock and inflamed minora and majora. It this urged this court to dismiss the Appeal herein as the same lacked merit.

37. PW 1 testified that she was a house help and that the Appellant had come to work at her employer's house for a day. At about 5.00 pm, it started raining and the Appellant took shelter in the kitchen. He bit her on the lips as he carried her to a bed where he raped her. He did not remove her clothes but pulled her panty sideways before unzipping and inserting his penis into her vagina. She informed her employer's wife of the incident when she came home at about 11.00 am night and she in turn informed her husband, Kelvin Mwango who was in Nairobi. PW 1 went to Coptic Hospital the following day.

38. In his unsworn evidence, the Appellant concurred with PW 1 that when it started raining, he went to seek shelter in the homestead of Kelvin Mwango. As they were eating food in the sitting room, PW 1 put her hands in his underpant and touched his private parts whereupon sexual intercourse followed.

39. He contended that Kelvin Mwango had told him that PW 1 would pay him his dues for that day. When he asked PW 1 to pay her the money, she demanded that he gives her the money otherwise he would report her to her boss. He asked her for her number so that she could send her money by mpesa but she refused. He assured her that he came from that area and that if she looked for him, she would get him. He was thereafter arrested and charged with the offence.

40. He contended that if he had raped her, then her clothes would have been torn. He asserted that it was not the first encounter with her.

41. PW 1 was the only single identifying witness in the case. Under Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya), a trial court can convict a person on the basis of uncorroborated evidence of the victim if it is satisfied that the victim is telling the truth.

42. Notably, the proviso of Section 124 of the *Evidence Act* states that:-

> "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 (emphasis)."

43. However, a trial court must exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person's word against the other. Other corroborating evidence could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful.

44. In this particular case, PW 2 testified he found lacerations as was set out by the Respondent herein. A high vaginal swab showed that there was presence of purse cell bacteria. The probable type of weapon that caused the injuries was the penis.

45. The Appellant did not deny that he and PW 1 had sexual engagement on the material date. He only asserted that PW 1 consented to the act. While this court could not dispute that he had been in a relationship with PW 1 as he had alleged, there was no consent the moment she withdrew the same. The fact that there were injuries to her minora and majora was evidence that there was force during the sexual engagement on the material date. The Trial Court therefore correctly observed that the indication of injuries was evidence of force.

46. The Appellant's version that the said Kelvin Mwango had given her money to pay him for the work that he did did not sound plausible since his mpesa was active. He in fact stated that his phone had Kshs 500/= on that night. It was not clear from his evidence why the said Kelvin Mwango opted to send his dues to PW 1 when he could have sent him the money directly to his phone.

47. The said Kelvin Mwango was not a necessary witness to the Prosecution as he did not witness the incident. He would not have been relevant or a crucial witness as he would not have been able to tell the Trial Court whether or not PW 1 consent to the sexual intercourse. Indeed, the Appellant had admitted having been in his house on that material date and having sexual intercourse with PW 1.

48. The said Kelvin Mwango may have assisted the Appellant's case because he could have confirmed to the Trial Court if he had asked PW 1 to pay the Appellant. This could have created a possibility of PW 1 having framed him.

49. The fact that PW 1 did not consent to the act was proof that the offence of rape was established. Indeed, in the case of Republic vs Oyier (1985) KLR pg 353, it was held that lack of consent was an essential element of rape

50. Without belabouring this point, this court came to the firm conclusion that the Prosecution had proven the case herein beyond reasonable doubt.

51. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3), (4), (5), (6), (7), (8), (10), (11) and (12) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

III. Sentence

52. Neither the Appellant not the Respondent submitted on this issue. Be that as it may, this court found it necessary to comment on the sentence.

53. Section 3(1) (a) and Section 3(3) of the *Sexual Offences Act* provide that:-

> 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;
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> 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 (emphasis court).

54. The Trial Court sentenced the Appellant to fifteen (15) years imprisonment and termed the same as a minimum mandatory sentence. This was incorrect. The minimum mandatory sentence was ten (10) years. Be that as it may, it was within the law when it sentenced him to fifteen (15) years as it could exercise its discretion and sentence him up to life imprisonment.

55. Despite there being emerging jurisprudence to reduce sentences under the *Sexual Offences Act* as can be seen in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where the Court of Appeal held that Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing offences, the African Charter on Human and Peoples' Rights on the Rights of Women in Africa provides that any practice that hinders or endangers the normal growth and affects the physical and psychological development of women and girls should be condemned and eliminated. Rape is one of those practices and actions. It must therefore be condemned in the harshest terms.

56. Rape is a crime that robs the victim his or her and carries lifelong trauma. It is an unforgivable crime because the perpetrator takes something valuable from the victim by force and unexpectedly. It is similar to the offence robbery with violence that leaves a victim shocked and traumatised. It must therefore be condemned in the harshest terms.

57. Considering that PW 1 was aged fifty (50) years while the Appellant herein was aged about thirty seven (37) years as per the Probation Report dated 22nd February 2022, this court restrained itself from disturbing the sentence of fifteen (15) years that was meted upon the Appellant herein as the same was fair.

Disposition

58. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 10th February 2021 was not merited and the same be and is hereby dismissed. The Appellant's conviction and sentence be and is hereby upheld as they were both safe.

59. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 19TH OF DECEMBER 2023

J. KAMAU

JUDGE