Muhu v Republic (Criminal Appeal 39 of 2019)
[2022] KEHC 11375 (KLR) (25 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11375 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL 39 OF 2019

J WAKIAGA, J

MAY 25, 2022

BETWEEN

SAMUEL CHEGE MUHU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against both conviction and sentence in SPM Court at Kigumo S.O 38 of 2017 by Hon. A. MWANGI SPM)

JUDGMENT

1. The appellant was charged with two counts of rape contrary to section 3(1) (a)(b)(3) of the *Sexual Offences Act* No 3 of 2006 the particulars of which were that on May 26, 2017 at unknown time in Kigumo sub County of Muranga county intentionally and unlawfully caused his penis to penetrate the anus of GWW without his consent and that on the June 28, 2017 he intentionally and unlawfully caused his penis to penetrate the anus of JNG.

2. He faced an alternative charge of committing indecent act on the said date.

3. He was further charged on count 3, with obtaining by false pretence contrary to section 313 of the *Penal Code*, the particulars of which were that between 17th and 21st day with the intent to defraud obtained from GW a sum of Ksh. 10,000/= by false pretence that he would offer him a job. In count 4 he was charged with resisting arrest contrary to section 253(b) of the *Penal code* and four counts of threatening to kill contrary to section 223(1) of the *Panel Code*.

4. He was tried, convicted on the two counts of rape, obtaining by false pretence, resisting arrest and threatening to kill and sentenced to ten years each for the offence of rape to run consecutively, a fine of Ksh.10,000/= on the count of obtaining and similar amount for each of the counts of threatening to kill.

5. Being aggrieved by the said conviction and sentence, he filed this appeal and raised the following grounds of Appeal; -

   A. That the case was not proved beyond reasonable doubt

   B. The same was charged with more than one offence contrary to section 135(3) of the *Penal Code*

   C. The court failed to consider his defence that there was a mutual arrangement for the laptop rather than obtaining by false pretence

   D. The court failed to consider the fact that there was consent by the victims through their conduct.

6. Directions were given on the hearing of the appeal by way of submissions and the appellant who was not represented filed and relied upon written submissions, while the State opposed the appeal by way of oral submissions.

Submissions

7. It was submitted by the appellant that the case was not proved beyond reasonable doubt as there was no evidence of penetration of the victim's anal region. It was contended that he was arrested on false allegations and that there was no eye witness called by the prosecution.

   It was contended that the charge of threatening to kill was not proved and that his defence was not considered. On sentence he submitted that since his incarceration, he had undergone the rehabilitation program which the court should take into account.

8. On behalf of the State, it was submitted that penetration was proved through the evidence of the complainants as corroborated by the Doctor (PW6) and that consent was obtained through threats and intimidation and that the appellant gave the complainants drinks that made them dizzy, so in that state they could not give consent. It was contended that any contradiction in the prosecution case, was not fatal.

9. This being a first appeal, the court is under a duty to re-evaluate and assess the evidence tendered before the trial court, so as to come to its own determination, while giving allowance to the fact that unlike the trial court, it did not have the privilege of seeing and hearing witnesses.

10. PW1 JG, then a student accepted a friendship request on face book from one Samuel, who later informed him that he was working with [Particulars Withheld]. He requested for the complainant's documents and phone number which he sent on promise of employment. The said Samuel called him and said he will call later as he was in a meeting with his bosses but he did not, causing him to block him.

11. He later asked GW (PW2) to access his account and check on the appellant, who later called him and asked him to send to him Ksh. 4,800 being the cost of the certificates, which he did not. On the 25th the appellant invited him to Thika but later on changed the venue to [Particulars Withheld] and to [Particulars Withheld] where at 10.30 pm, he gave him beer, which made him feel dizzy and fell asleep only to wake up feeling pain in his anus and on the same bed with the appellant who was naked, who told him that he had used some lubricant recommended by the doctor.

12. The appellant later called for a rider which took him away and thereafter the appellant kept on promising to offer him employment and later sent him a massage warning him against talking to PW2 as he was a bad guy, he later sent him a massage threatening to expose him to his brother.

13. It was his further evidence that h reported the appellant to the police leading to his arrest. He later saw a Doctor who issued him with P3 form. He denied consenting to sexual act with the appellant.

14. In cross examination, he stated that every time the appellant called him, he would be talking about some millions of shillings he was expecting from a Mheshimiwa. He stated that after he left the appellants house, he sent him money to buy fruits.

15. PW2 GW stated that he was a student at Thika and that on 8/4/2017, the appellant sent him a message on face book and thereafter they started communicating. He then told him that he was working with the [Particulars Withheld] and that he was in a position to secure for him employment. He then requested for his certificates, he later went to his home to give him the documents and he offered him drinks only for him to wake up in the morning with pains in his anus, when he asked the appellant what had happened, he told him not to worry as he would take care of the treatments.

16. He denied consenting to sexual activities with the appellant. the appellant thereafter started to threaten him and started to go to his grandmother threatening her that he owed him a lap top and that he would bring him down. he thereafter reported to the police. In cross-examination, he confirmed that he had visited the appellants home five times and denied having fixed the appellant.

17. PW3 Corp Kennedy Kwatenge arrested the appellant on July 29, 2017in the company of the two complainants where they took his three mobile phones and that in the process of arrest the appellant attempted to run away and that he was identified by one of the complainants.

18. PW4 Corp Maina Kabugi corroborated pw4's evidence on the arrest having laid an ambush for the same.

19. PW 5 PC Peter Makau the investigating office stated that they received the report form PW1 and Pw2 on July 24, 2017. he issued the m with P3 forms and recorded their statements. He revived the Mpesa statement from the complainants confirming that they had sent money to the appellant who had promised to secure for them employment. He then took their phones to the cyber-crime unit where the information was not extracted since the phones had been off. He further established that the appellant two mobile phones were registered in his name and the Mpesa Transactions from the complainants were recorded therein.

20. In cross examination he stated that he collected the alcohol from the appellant's house on the allegations he was using them to stupefy the victims, he denied any conspiracy between the complainants to frame the appellant up. Ha stated that at the time of the arrest, visibility was clear as there was security light and that the appellant was using drinks to stupefy his victims before raping them. He stated that the Mpesa statements were wevidence of what the appellant had obtained and that he lured the victims to his home to drop their documents with a promise for a job.

21. PW6 James Mwangi a Clinical Officer examined the complainants and filed their respective P3Forms. He stated that examination was done eleven weeks after and that they were sodomized by a person known to them.

    He confirmed that there was presence of loose anal splinter muscles on digital rectal examination, which confirmed that they had been sodomised.

22. When put on his defence, the appellant gave sworn statement and stated that on July 27, 2017while on his way home at 11.00 pm he was arrested and taken to the police station. it was his evidence that he was framed by the complainants to avoid paying him Ksh. 60,000/= which PW1 owed him and not to return his lap top and that is why it took them two months to report and that the Mpesa transactions

were legal payments of his debt and that it took the complaints one and two months respectively to make a report showing that he was framed up.

23. It was his evidence that no voice records were supplied to court to confirmed that he had threated to kill and that he was tortured by the police who arrested him. In cross examination he stated that he did not have any document to prove that he was owed money by the complainants and that he had two witnesses whom he intended to call in support of his defence.

Anylisis and Determination

24. From the proceedings herein I have identified the following issues for determination in this appeal:

    A. Whether the prosecution case against the appellant was proved

    B. Whether his rights were violated

    C. Whether the sentence was excessive.

25. On proof of the prosecution case, I shall start with the two counts of rape; from the evidence on record the identification of the appellant was proved beyond reasonable doubt. He met with the complainants on face book and a relationship developed between them.

    The appellant in his defence did not deny the fact that the complainants visited him. There was evidence tendered before the trial court of the communication between the appellants and the complainants which evidence the appellant did not controvert.

26. The evidence of PW6 confirmed that the complainants had been penetrated in their anus and the complainants evidence was that the appellant had given them drinks which made them dizzy only to wake up with pains in their anus and therefore did not consent, thereby proving all the elements of the offence of rape on the two counts and therefore find no fault with the conviction thereon, which I hereby affirm.

27. On the count of obtaining by false pretence, the evidence on record is that the appellant had promised to secure employments for the complainants and to facilitate the said employment he obtained several sums of money from them, which payment the appellant acknowledged in his defence and since the same did not secure employments to the complainants but only used the same as a bit to commit the charges on the first two counts, I find no fault with the conviction thereon which I hereby affirm.

28. On the remaining counts I have found no evidence tendered to support the claim that the appellant threatened to kill any of the complainants neither was there evidence to prove that the appellant resisted arrest based on the evidence on record, trying to escape from the police to my mind does not amount to resisting arrest as the evidence on record shows that the appellant was not aware that he would be arrested.

29. I would therefore allow the appeal on the two ground set aside the conviction and quash the sentence thereon.

30. On sentence, the same is solely at the discretion of the trial court and the appellant court will only interfere with it if it was issued on wrong principles and or was excessive as was stated in the case of *Bernard Kimani Gacheru v Republic* [2002] e KLR where the court stated thus “It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive

in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle.

Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.

The position was stated succinctly by the Court of Appeal for East Africa in the case of *Ogola s/o Owoura v Reginum* (1954) 21 270 as follows: -

> "The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The court does not alter a sentence on the mere ground that t if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in *James v R*., (1950) 18 E.A.C.A 147:
>
> "It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."
>
> To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: *R v Sher shewky*, (1912) CCA 28 TLR 364."
>
> Ogola s/o Owoura's case has been accepted and followed by this court and the High Court on matters of sentence for many years. What was stated there still remains good law to-date.
>
> For example, in the High Court case of *Wanjema v R* 1971 EA 493 , more particularly, on page 494 letters (D) to (E) this is what that court said:-
>
> > "A sentence must in the end, however, depend upon the facts of its own particular case. In the circumstances with which we are concerned, a custodial order was appropriately made. But that which was made cannot possibly be allowed to stand.
>
> An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case. The instant sentence merits this court's interference with it on each of these grounds. No account was taken as it should have been, of the fact that the appellant pleaded guilty: Skone (1967), 51 Cr App R 165 and Godfrey (1967), 51 Cr. App. R. 449 (This admits of no doubt because the magistrate awarded the maximum sentence to this first offender; which of itself is unusual.) Matter extraneous to the trial was acted upon for the magistrate bore in mind that he had "issued a warning only last week that dangerous drivers will be dealt with severely by the court."

31. The appellant was convicted of two counts of rape contrary to section 3(1) (a) (b) (3) of the *Sexual Offences Act* and upon conviction, the same is liable to imprisonment not less than ten years, the appellant was convicted on two counts and was sentenced to ten (10) years on each count which run consecutively noting that the offences were committed on different dates, I find no fault with the trial courts exercise of discretion and will therefore not interfere with the same.

32. On the count of obtaining with false pretence, the sentence provided for is imprisonment for three years, when read together with sections 26(3) and 28 (1) (b) of the *Penal Code*, I am satisfied that the court properly exercised its discretion in imposing fine in lieu thereof and shall therefore not interfere with the same which I affirm.

33. In the final analysis, I find no merit on the appeal on count 1, 2, and 3 which I dismiss and allow the appeal on both conviction and sentence on counts 4, 5, 6 7 and 8 which I allow, quash the convictions and set aside the sentences thereon.

34. The appellant is entitled to right of appeal.

SIGNED DATED SND DELIVERED AT MURANGA THIS 25TH DAY OF MAY 2022

J. WAKIAGA

JUDGE

In the presence of:-