WKC v Republic (Criminal Appeal E008 of 2021)
[2022] KEHC 10504 (KLR) (23 June 2022) (Judgment)

Neutral citation: [2022] KEHC 10504 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E008 OF 2021

RL KORIR, J

JUNE 23, 2022

BETWEEN

WKC ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From Conviction and Sentence by Hon. Jackson Omwange, SRM) in Sotik Magistrate's Court Sexual Offence Number 2 of 2020)

JUDGMENT

1. The appellant was convicted by Hon Jackson Omwange, Senior Resident Magistrate at Sotik Law Courts of the offence of Rape contrary to section 3(1)(a)(c)b as read with section 3(3) of the *Sexual Offences Act*. The particulars of the charge were that on January 2, 2020, at [Particulars Withheld] location in Konoin Sub County within Bomet County, he wilfully and unlawfully caused his penis to penetrate the vagina of EC without her consent.

2. The Appellant faced an alternative charge of committing an indecent act with an adult contrary to section 6(a) of the *Sexual Offences Act* No 3 of 2006. The particulars of the charge were that on 2nd January 2020, at [Particulars Withheld] location in Konoin Sub County within Bomet County, he intentionally touched the vagina of EC with his penis against her will.

3. The Appellant pleaded not guilty to both charges and the case went to full trial in which the prosecution called four (4) witnesses in support of its case.

4. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the appellant and he was accordingly put on his defence. He gave a sworn statement and did not call any witnesses in his defence.

5. At the conclusion of the trial, the appellant was convicted on the main charge and was sentenced to serve 9 years in prison.

6. Being dissatisfied with the conviction and sentence, the appellant appealed to this court and raised five grounds of appeal verbatim as follows: -

    1. That it was unlawful for the trial magistrate to violate the appellant's fundamental rights and further denied the appellant fair trial.

    2. That the learned trial magistrate failed to consider that the Prosecution did not demonstrate that the complainant was penetrated and the prosecution also did not prove the age of the child as required by law in the *Sexual Offences Act*.

    3. That the learned trial magistrate erred gravely by not detecting that there was a bad blood between the complainant's mother (PW1) and the Appellant that influenced frame on the alleged offence against the Appellant.

    4. That the learned trial magistrate erred in law and in fact by not considering that the light present at the scene of crime was not enough to identify the perpetrator and prosecution also failed to present medical examination on HIV result for the complainant since the Appellant is HIV positive tested from 2008 on the record of medication, annexed (sic).

    5. That the trial court erred in dismissing the appellant's defence and I pray to be present during the hearing and determination of this Appeal.

7. As a first appellate court, I am conscious of the duty to re-evaluate the evidence given at the trial court. This duty was succinctly stated by thecourt of Appeal for *Eastern Africa in Pandya vs. Republic* (1957) EA 336 where it stated:

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

The Prosecution's Case.

8. The evidence tendered by theprosecution was as follows. The complainant testified as PW2. That on the material day at around 7.30 pm., she was at a rider's place which was a shop. That while at the Centre, the accused told her that he will give her Kshs 50. It was PW2's testimony that the accused then pulled her for a long distance, removed her pants and he removed his trouser and did bad manners to her. That it was raining and they lay on the ground as the accused inserted his male genital organ into her female organ. It was PW2's further testimony that the accused was her neighbour.

9. SCC (PW1) who was the mother of PW2 testified that PW2 was 18 years old. That when she arrived home on the material day she found PW2 with a lot of mud. She also testified that PW2 told her that the accused had defiled her. It was her further testimony that the accused was their neighbour.

10. PW1 testified that she took PW2 to Mogogosiek where she was treated and later reported the matter to Mogogosiek Police Station. It was her further testimony that she did not have a grudge with the accused.

11. Daniel Too (PW3) testified that he was a clinical officer at Mogogosiek District Hospital and that he had a Diploma in Clinical Medicine and Surgery from MTTC Mombasa and that he had 7 years' experience. It was his testimony that he examined PW2 on January 6, 2019 and found that there were lacerations on the vaginal walls, the hymen was freshly broken and that red blood cells were seen. It was his conclusion that the penetration was consistent with rape. PW3 produced the P3 form, treatment notes and the PRC form that were marked as P. Exh 1, P.Exh 2 and P.Exh 3 respectively.

12. No. 113893, PC Jane Chepchirchir (PW4) testified that she was a police officer stationed at Konoin Police Station and she was the Investigating Officer. That onJanuary 6, 2020, PW2 and her parents reported the matter. It was her testimony that she recorded witness statements and issued PW2 with a P3 form which was returned together with the PRC form and treatment notes. It was her conclusion that there was evidence of penetration, and they charged the accused. That the accused was positively identified by the witnesses in court.

13. The appellant filed his amended Memorandum of Appeal along with his submissions on October 10, 2020.

The Respondent's (prosecution's) Submissions.

14. In this appeal, the prosecution, now respondent, filed written submissions dated March 23, 2022. The prosecution submitted that it was clear from the record that the evidence and documents tendered by their witnesses clearly demonstrated a prima facie case against the accused.

15. The respondent submitted that there was no evidence of bad blood between PW2 and the accused. It was the prosecution's submission that the evidence on record did not establish consent by PW2. That the accused did not raise the issue of consent in cross examination.

16. The respondent further submitted that the accused did not call any witness to support his evidence in court and neither was there any independent evidence that could support his averments.

17. It was the respondent's submission that they had established penetration and absence of consent. That the accused was the perpetrator of the act. It was their further submission that penetration was proved by PW2's evidence which was corroborated by PW3. The prosecution submitted that with respect to penetration, the general rule was that even without considering the presence of medical evidence, an offence of that nature could be proved by oral evidence of the victim of rape. They relied on section 42 of the *Sexual Offences Act* and the case of *Republic vs. Oyier* (1985) eKLR to support this submission.

18. In conclusion, they stated that this Appeal lacked merit and that the sentence meted against the accused was legal. It was their prayer that this Appeal be dismissed.

the defence case.

19. The accused testified as DW1. He testified that on the material day, he was at home as he felt unwell. That he slept and nothing happened. It was his further testimony that he was framed by Gladys whom

he had a grudge with and that it was not the first time she was framing him. He admitted that he knew PW2.

The Appellant's Submissions.

20. It was the Appellant's submission that his fundamental rights were grossly violated and that he was not accorded a fair trial. That the trial court denied his application for adjournment because he could not produce medical evidence that he was sick and needed to be taken to hospital. It was his further submission that the denial was in contravention to article 159 of the *Constitution*.

21. Theappellant submitted that the prosecution failed to prove penetration. That PW1 and PW2 were well known to him and from the medical records, he concluded that PW2 was a mature lady who was experiencing her menstrual periods. He also submitted that her genitalia was normal. He further submitted that she had gone to the shops at 7.30 p.m. and nothing on the record showed why she had gone to the shops at that time.

22. The Appellant submitted that although PW2 was raped, he was not the perpetrator. That from the medical evidence, he was able to conclude that PW2 was a fully grown woman who was already engaging in with men.

23. The accused submitted that the prosecution failed to prove the ingredients of the offence of rape. That the prosecution failed to prove the age of the victim as PW1 and PW2 did not testify in regard to the age of PW2. It was his further submission that the prosecution ought to have produced a certified copy of a birth certificate and failure to produce it would not justify the conviction.

24. It was the accused person's submission that the trial court failed to detect the bad blood between himself and PW1. That PW1 framed him due to a grudge and this influenced this fabrication against him.

25. The accused submitted that the trial court convicted him in the absence of proper identification as the light at the crime scene was not enough to positively identify him.

26. It was the accused person's submission that the medical evidence presented by the prosecution indicated that the victim PW2 was HIV Negative whereas he has been under ARV medication since 2008.

27. It was the accused person's submission that the trial court convicted him without considering his defence which was reasonable. That his sentence was based on an improper conviction.

28. From my perusal of the record and consideration of the Petition of Appeal filed on February 24, 2020, the Amended Memorandum of Appeal filed on October 10, 2020, the Appellant's submissions filed on October 10, 2020and the respondent's submissions dated March 23, 2022, I discern three issues for my determination as follows;

    i. Whether the prosecution proved its case.

    ii. Whether thedefence places doubt on the prosecution case.

    iii. Whether the sentence was lawful.

    i. Whether the prosecution proved its case.

1. Section 3 of the *Sexual Offences Act* which provides: -

> (1b) a person commits the offence termed rape if the other person does not consent to the penetration.

(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.

30. For the offence of rape to be established, the following elements must be demonstrated: -

i. The intentional and unlawful penetration of the genital organ of a person by another.

ii. The absence of consent.

iii. Where consent is obtained by force or by means of threat or by intimidation of any kind.

31. With respect to the evidence of penetration, the general rule is penetration can be proven first by the evidence of the victim and corroborated by medical evidence and even where there is no medical evidence, the case can still be proved. This position was fortified by the holding of the Court of Appeal in *Martin Nyongesa Wanyonyi vs Republic* Criminal Appeal No 661 of 2010, (Eldoret), citing *Kassim Ali vs. Republic* Criminal Appeal No 84 of 2005 (Mombasa) where the court stated that:

> " 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 or circumstantial evidence."

32. PW3 being a clinical officer at Mogogosiek District Hospital examined the complainant on January 6, 2019. His findings were that he found lacerations on the vaginal wall and a freshly broken hymen. It was his opinion that the penetration was consistent with rape. He produced a P3 Form, treatment notes and PRC form that were marked as P.Exh. 1, P.Exh 2 and P.Exh. 3 respectively and they all stated that PW2 was penetrated.

33. PW2 testified that the accused gave her Kshs 50 then dragged her for a long distance. That after the accused removed her pant, he "removed his trouser and did bad manners to her". It was her further testimony that the accused removed his male organ and inserted it into her female organ. This testimony was unshaken during cross examination.

34. Consent is defined in section 42 of the *Sexual Offences Act* as:

> " For the purposes of this Act, a person consents if he or she agrees by choice and has the freedom and capacity to make that choice".

35. In the case of *Republic v Oyier* [1985] eKLR, the Court of Appeal held as follows: -

> " 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.
>
> 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."

36. I am persuaded by the reasoning of Kimaru J in the case of *Peter Wanjala Wanyonyi v Republic* (2021) eKLR, Kimaru J where he held that: -

> " The burden of proof lies upon the prosecution to prove that the sexual intercourse was without the consent or against the will of the complainant. A woman is said to consent only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power, to act in a manner that she wants. Consent may be either expressed or implied depending upon the nature and circumstances of the case".

37. PW2 testified that she was unable to scream for help as the accused threatened her. This testimony clearly shows that PW2 did not consent to the sexual act. Her free will or capacity to accept was destroyed by the threats. I am satisfied that the prosecution has discharged this burden.

38. Based on the evidence of the complainant and the medical evidence that has been tendered by PW3, I find that there was penetration and such penetration was unlawful as it was not consensual. The penetration clearly falls within the definition under section 3 of the *Sexual Offences Act*.

39. In this case none of the other prosecution witnesses witnessed the alleged incident. It is trite law that evidence of identification must be carefully scrutinized before a person can be convicted of an offence. The court of Appeal sounded this caution in *Cleophas Otieno Wamunga v Republic*, (1989) KLR 424, in the following words: -

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".

40. It is also clear from the record that the alleged incident happened at night. The Court of Appeal in the case of *Nzaro v Republic* (1991) KAR 212 held that:

> " Identification/recognition at night must be absolutely watertight to justify conviction".

41. From the evidence on record, I am satisfied that the evidence adduced by the prosecution was enough to positively identify the accused as the perpetrator. The complainant testified that she knew the accused as a neighbour and on the material day, she saw the accused through the light in his mobile phone. PW1 who was PW2's mother also testified that the accused lived with them. I understood this to mean that he was a neighbour. It is also salient to note that PW1 and PW2 positively identified the accused in the dock during the hearing of the case.

42. As earlier mentioned, no one witnessed the alleged offence. Section 124 of the *Evidence Act* states that:

> " 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 of it, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth".

43. The court is empowered by the above section to convict an accused person solely on the evidence of the complainant. The above position was taken in *George Kioji vs. Republic* (Nyeri) Criminal Appeal No. 270 of 2012 (Ur) where the Court of Appeal expressed itself as:

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

44. I am inclined to believe the testimony of PW2 as she vividly recalled what the accused had done to her. She was cross-examined and re-examined and she was able to answer the questions satisfactorily. Moreover, her evidence regarding penetration stood unchallenged.

45. Regarding the age of PW2, her mother (PW1) testified that the complainant was 18 years old at the time of the offence. PW3 who was the clinical officer testified that PW2 was 21 years old and the same was reflected on the P3 Form. It was clear that there was a variance in the testimonies of both PW1 and PW3 regarding the age of PW2. The age of the complainant was however not material in this case. This is because the Appellant was not charged with the offence of defilement which makes age a critical ingredient of the offence.

46. It is my finding that though there was no production of evidence regarding the age of PW2, it was very clear at the very least that she was aged above 18 years. It appears to this court that the appellant laboured under the view that he was charged for defilement as he submitted that the complainant was a mature and grown-up lady.

47. From my perusal of the trial record, there were no observations made by the trial court on the physical state of the victim. However, from the PRC Form, it is indicated that the victim had a disability arising out of polio complications. Her testimony also suggested a lower IQ for an adult. She told the court that the appellant told her that he would give here 50, that she was following the bus that her mother had boarded, and that they rolled in the mud with the Appellant. Her mother also stated that the victim was muddy. I am persuaded that the victim suffered some disability.

48. It is my finding therefore based on the evidence on record and aided by section 124 of the *Evidence Act* that the Prosecution satisfied the ingredients of rape and proved its case beyond reasonable doubt.

ii.Whether the Defence places doubt on the Prosecution case.

49. The Appellant testified that he was unwell and at home on the material day. That he slept and nothing happened. It was his further testimony that he was framed by Gladys with whom they had a grudge with. He said that they had a problem since 2019 and that this was not the first time she was punishing him.

50. From the onset, it was unclear who Grace was as she was not PW1, PW2, PW3 or PW4. Further there was no evidence to support those averments by the accused. In the absence of such evidence, I can only treat the averments as mere allegations.

51. Though the issue of HIV was not raised at the trial court stage, I feel it is important to address it. In his Memorandum of Appeal, the Appellant stated that he had been HIV positive from 2008 and that

the prosecution failed to produce medical evidence pertaining to the HIV status of PW2, which then meant that she was HIV negative. It was his contention that he could not be linked to the offence. He displayed his medical treatment card to the court at the hearing of his appeal.

52. There was nothing on record to show that the accused was HIV positive. The burden of proof lay squarely at his feet and he failed to discharge that burden at his trial. This smirks of an afterthought defence. In the case of *Letto Machaki Mbiti vs. Republic* (2015) eKLR, the Court of Appeal held that: -

> " We take judicial notice that in certain circumstances the HIV virus is not transmitted from one person to another despite sexual intercourse. We find that the appellant's HIV status did not in any way displace the overwhelming evidence against him".

53. Following the above, I am satisfied that there was nothing in the defence case that could place doubt on the Prosecution' case which remained unshaken.

iii. Whether the Sentence was lawful

54. With respect to sentence, the appellantprayed that the conviction be quashed, the sentence set aside and that he be set at liberty.

55. In *Bernard Kimani Gacheru vs. Republic* (2002) eKLR, the Court of Appeal stated that: -

> " It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the 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 the wrong material, or acted on the 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 states is shown to exist".

56. The trial court upon conviction, sentenced the accused to 9 years in jail. In mitigation, the accused prayed that he be pardoned and that his family depended on him.

57. I see no reason to interfere with the sentence meted by the trial court. Section 3 (3) of the *Sexual Offences Act* states that:

> " A person guilty of an offence of rape 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".

58. The minimum sentence is 10 years and the trial court considered that the accused had already spent one year and one month in custody. It is my finding therefore that the sentence of 9 years' imprisonment was lawful and fair.

59. In the final analysis, it is my finding that theappeal lacks merit and is dismissed I uphold both the conviction and the sentence.

JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 23RD DAY OF JUNE, 2022.

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of Mr. Muriithi for the State, The Appellant in person and Kiprotich (Court Assistant).