Kaunda v Republic (Criminal Appeal E083 of 2021) [2022] KEHC 15936 (KLR) (29 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15936 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E083 OF 2021

GMA DULU, J

NOVEMBER 29, 2022

BETWEEN

JOHN KIOKO KAUNDA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. C A Mayamba in Kilungu Principal Magistrate's Court (S.O) Case No.78 of 2019 pronounced on 19th December 2021)

JUDGMENT

1. The appellant was charged in the magistrate's court with rape contrary to section 3(1) as read with section 3(3) of the *Sexual Offences Act* No 3 of 2006. The particulars of offence were that on December 3, 2019 at around 9:00pm in [Particulars Withheld] village in Mukaa Location within Makueni County intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of PKD (name withheld) by use of force and threats.
2. In the alternative, he was charged with committing an indecent act with an adult contrary to section 11(A) of the *Sexual Offences Act*, the particulars of which being that on the same date and at the same place intentionally and unlawfully committed an indecent act with PKD by touching her genital organ (vagina) against her will.
3. He denied both charges. After a full trial, he was convicted on the main count of rape, and sentenced to 42 years imprisonment.
4. Dissatisfied with the conviction and sentence of the trial court, the appellant has come to this court on appeal on the following grounds –
    1. The magistrate erred by failing to find existence of bad blood between the appellant and the complainant which created fertile ground for fabrication of the charges.

2. The magistrate erred by not finding that the entire prosecution case was based on mere suspicion incapable of sustaining a conviction.

3. The learned magistrate erred by greatly and erroneously relying on the evidence of Pw3 whose evidence carried no probative value as there was no investigation done.

4. The magistrate erred in finding that the prosecution proved that the complainant was raped by the appellant on the December 3, 2019 whereas there were doubts in the medical evidence which was inconclusive.

5. The magistrate erred and completely misunderstood the medical evidence presented and hence arrived at an erroneously finding equating vaginal whitish discharge to penetration in absence of any other evidence to support it.

6. The magistrate erred in failing to consider whether the conduct of the complainant before, during and after the alleged rape impliedly revealed knowledge of identity of the assailant.

7. The magistrate erred in failing to consider whether the conduct of the appellant after the alleged offence was consistent with guilty mind.

8. The magistrate erred in failing to warn herself of the dangers of convicting the appellant solely on the uncorroborated evidence of the complainant who had had an altercation with the appellant.

9. The magistrate erred in finding that the appellant's alibi defence was an afterthought yet the appellant had raised his defence the moment he presented himself to the police.

10. The magistrate erred in failing to consider whether adverse findings could be drawn in the prosecution's case due to the prosecution failure to conduct forensic medical examination (vaginal swabs) on the complainant immediately after the alleged rape.

11. The magistrate erred in lowering the standard of proof in criminal cases in arriving at the conclusion that the prosecution proved their case against the appellant.

12. The magistrate erred in shifting the burden of proof upon the appellant whereas there was no legal basis for same in fact used the appellant's defence to create motive.

13. The magistrate erred in failing to note that material witnesses were not called to corroborate the complainant's evidence.

14. The magistrate erred in failing to find that no investigations were conducted whatsoever in the instant case and if at all it was done, it was shallow and unreliable.

15. The learned magistrate erred by failing to appreciate that the prosecution had failed to supply the appellant with witness statements.

16. The trial magistrate erred by disregarding the appellant's defence without cogent reasons.

5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the director of public prosecutions. I note that both sides relied on decided court cases.

6. This being a first appeal, I have to start by restating the long established legal principle that as a first appellate court, I am duty bound to evaluate all the evidence on record afresh and come to my

own independent conclusions and inferences. See *Okeno –vs- Republic [1972] EA 32*. I note that the appellant has raised many grounds of appeal, principally on conviction.

7. In proving their case the prosecution called three (3) witnesses. Pw1 was the alleged victim, who described what happened that night and stated that the culprit was the appellant who was a farm worker employed by one of his sons.

8. Pw2 Eric Kasiamani was a clinical officer at Matungu hospital (Kilungu) who filled and produced medical examination (P3) form for the victim in which it was stated that the victim was 79 years old, and attended medical treatment on December 4, 2019 and it was noted that she had bruises in the neck, thighs, vagina, and vaginal discharge.

9. The last witness was Pw3 PC CC whose evidence was that the rape report was made at Kilome police station on December 4, 2019 and that the victim mentioned the appellant as the culprit.

10. When put on his defence, the appellant tendered sworn defence testimony in which he admitted having worked for the victim, and said that on the material day December 3, 2019 he asked for Kshs 3,400/ = which he had loaned the victim at 4:00pm, who said that she did not have the money and gave him Kshs 400/= and he left and went home, only to receive a report later the same night that he had raped her. That when he went to the police station to clear his name, he was arrested. The prosecutor did not ask him any questions.

11. In my view, though the appellant has raised many grounds of appeal, the matter boils down to the sufficiency evidence of his of identification at night, and whether the victim was believable. In my view, the evidence on record proved beyond any reasonable doubt that the victim was forced into sexual activity, thus rape was proved. The victim's version was corroborated by the medical evidence.

12. With regard to proof of the identity of the appellant as the culprit, the incident occurred at night. It is trite that where the allegation against an accused person is based on evidence of identification or recognition in unfavorable circumstances, the court must warn itself and take sufficient care to find whether such identification is positive and without possibility of error.

13. In the present case, the victim stated that though it was at night and raining, she came out of her house with a lamp in order to assess the alleged injuries suffered by the appellant who had claimed to have been attacked. The two also talked. According to her evidence, on identification was not challenged by the appellant in cross examination. In my view, the evidence of the prosecution proved that the appellant was the culprit, as he was positively identified by the victim in the light of the lamp, and by voice.

14. Though the appellant claims on appeal, that the prosecution did not call crucial witnesses, in my view in the present case, no such crucial witnesses were not called. Thus the reasoning in *Bukenya –vs- Uganda [1973] EA 549* does not apply herein.

15. The only weakness I see in the prosecution case herein, is the fact that the prosecutor did not ask any question to challenge the appellant's sworn defence denying the offence and alleging an alibi. That weakness is however saved by the provisal to section 124 of the [*Evidence Act*] (Cap 80), which states that the evidence of a single sexual offence victim witness can sustain a conviction, if the said evidence is believable and is so believed by a trial court for reasons to be stated. In the circumstances of this case, the evidence of Pw1 is consistent and believable. The appellant's alibi defence and alleged grudge are an afterthought, as he did not raise any such issue in cross examination to any prosecution witnesses.

16. Thus, just like the trial magistrate, I hold that the prosecution proved beyond reasonable doubt that rape did occur on the victim as alleged, and that the appellant was the culprit. I will thus uphold the conviction.

17. With regard to sentence, I note that the appellant did not specifically argue the appeal against sentence. Being a layman, I will have to consider the element of sentence.

18. I am aware that sentencing is an exercise of discretionary power by a trial court. The offence is a serious offence committed on an old woman. However, the appellant having asked for leniency, and being a fairly youngman with a family, in my view imprisonment for 42 years was excessive sentence. I will thus reduce the sentence to 10 years imprisonment.

19. Consequently, I uphold the conviction of the trial court. As for sentence, I set aside the sentence imposed by the trial court, and order that instead the appellant will serve 10 years imprisonment from the date he was sentenced by the trial court.

    It is so ordered. Right of appeal explained.

DELIVERED, SIGNED & DATED THIS 29TH DAY OF NOVEMBER 2022, IN OPEN COURT AT MAKUENI.

....

George Dulu

Judge