Alukhaba v Director of Public Prosecutions (Criminal Appeal E007 of 2021) [2022] KEHC 16913 (KLR) (23 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16913 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E007 OF 2021

WM MUSYOKA, J

DECEMBER 23, 2022

BETWEEN

JOHN ALUKHABA ..... APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

(Being an appeal from the judgment of Hon M Shimenga, Resident Magistrate, in Butere SRMSOC No 39 of 2018, delivered on November 18, 2019)

JUDGMENT

1. The appellant had been charged before the trial court of the offence of rape, contrary to section 3(a)(c), as read with section 3(3) of the *Sexual Offences Act*, No 3 of 2006, Laws of Kenya. The particulars were that on November 18, 2012, at Lunza sub-location, Butere sub-County of Kakamega County, he intentionally and unlawfully caused his penis to penetrate the vagina of FM, without her consent. There was an alternative charge of committing an indecent act with ab adult. Contrary to section 11(a) of the *Sexual Offences Act*. He also faced a second count of assault causing bodily harm, contrary to section 251 of the *Penal Code*, cap 63, Laws of Kenya, by unlawfully assaulting the said FM, at the same place and at the same time of the commission of the offence charged in the first count.

2. He pleaded not guilty, and a trial was conducted. 4 witnesses testified. PW1, FM, the complainant, testified that on November 17, 2018 she was out partying at a club. She went out to get a motorcycle to take her home. The appellant accosted her, and stopped the motorcycle rider from ferrying her home, claiming that she had spent most of his money that night. He beat her up, and raped her. She passed out, at the scene, which was along the road. She regained consciousness at sunrise, and at 9.00 am she was taken to Butere sub-county hospital. She was admitted for 4 days. She reported the incident at the Butere police station. She conceded that she was drunk. She stated that her clothes were soiled and torn. She stated that she knew the appellant well.

3. PW2, was Cedric Wanyama, a clinician at the Butere sub-county hospital. He stated that PW1 was presented at the facility on November 18, 2019, escorted by a police officer. She reported a rape and assault, by a person well-known to her, in the midnight of November 17, 2019. She said that she had been kicked, slapped and hit with blows, after which she was raped. She had a swollen face and mouth, and her clothes were muddy. Her private parts were bleeding, and her hymen was missing. Laboratory tests did not reveal any infection, but she had blood and epithelial cells. She did not have any sperm. She was admitted, put on painkiller and tetanus drugs. She was also put on medication to prevent HIV and pregnancy. He confirmed that she had been assaulted and raped. He did a high vaginal swab, which showed lots of red blood cells, which was evidence of penetration. He stated that the appellant was also brought in on the same date, by police officers. He had no injuries. HIV and STI tests were negative. He had numerous epithelial cells, which confirmed that there was friction and penetration. He presented various medical documents and treatment notes for both PW1 and the appellant.

4. PW3, No 207453 police sergeant Ezekiel Namai, testified that he was in charge of the Lunza patrol base. On November 18, 2018, PW1 was brought to the base by Aswani. She had been beaten, and had a swollen face. She had defecated on herself, and had been raped just next to the road. It was claimed that it was a John Alukhara who had raped her. PW3 took her to Butere police station, and later to Butere hospital, where she was treated. She was admitted for 2 days. He stated that the appellant was taken to his office, and he re-arrested him, and took him to Butere police station.

5. PW4, No 113913 Police Constable Maureen Akwara, was the investigating officer. She said that she was in her office on November 18, 2018, when PW1 was brought in by officers from Lunza. She had been beaten on the face. She reported that she was headed home, at midnight, when the appellant started to beat her with slaps and fists, near the home of Joseph Aswani. The appellant then undressed her and raped her. She regained consciousness in the morning, and had soiled her clothes with faeces. She found a crowd surrounding her, when she regained consciousness. Her grandfather and a village elder then reported the matter to the police at Lunza, who took her to Butere police station, where a report was made, and she was taken to hospital. The appellant was arrested the same day , and taken to Butere hospital for treatment. .

6. After reviewing the prosecution evidence, the trial court put the appellant on his defence. The appellant opted to give an unsworn statement, where he said he had been supplied with an investigation diary which indicated that he had been charged with assault. He said that he did not know why he was in court.

7. The appellant was aggrieved of his conviction and sentence, and filed the instant appeal. He raises issues around the essential elements of the offence not being proved, the sentencing did not consider leniency or a noncustodial sentence, the evidence was uncorroborated contradictory and was fabricated, the medical evidence was flimsy, and burden of proof was shifted and the defence rejected, there was no evidence that PW3 entered the premises with a motorcycle, the electronic evidence was not properly produced, the appellant had a disability and could not ride a motorcycle and had no licence allowing him to, the conviction was against the weight of the evidence, the trial court was biased and the sentence imposed was manifestly excessive. He filed supplementary grounds, where he largely repeated the same grounds, save that a crucial witness was not called, his arrest was illegal, an inventory or list of the recovered items was not produced, and the case was not proved beyond reasonable doubt.

8. The appellant put in written submissions, on May 9, 2022. The respondent did not submit, Ms. Challa invited the court to allocate a date for judgment.

9. I will consider the grounds of appeal sequentially.

10. The first ground is that essential elements of the offence were not proved beyond doubt. The appellant faced 2 counts, one of rape and the other of assault. The trial court recited the provisions creating both offences. With respect to rape, the court identified 2 key ingredients, penetration and the fact that the penetration was by the accused person. The court found that the medical evidence proved penetration, and that the same was by the appellant. I have closely perused the record, and I agree totally with the trial court, that the testimony of PW2, was clearly that he found epithelial cells in the genital organs of both PW1 and the appellant, both of which suggested penetration. PW1 identified the appellant as her assailant, and the fact that his penis, upon being examined by PW2, was found to have had evidence of recent penetration, that was consistent with her testimony. The trial court did not address the other key element, that fact that the penetration happens without consent. I have considered the circumstances of the penetration, and it would appear that there was no consent by PW1 to have her vagina penetrated by the appellant. She left the club, then the appellant followed her outside onto the road, angry, complaining that she had consumed much of his money in the club. He began to assault her, after which he raped her, so badly that she defecated on herself. There could not have been any consent under those circumstances. PW1 was taken to the police hours later, and onwards to hospital, where she was admitted for some time. The appellant was also arrested within 24 hours, and presented in hospital, where he was also medically examined. All the relevant medical documents were tabled. All the elements of the offence of rape were established beyond reasonable doubt

11. On the elements or ingredients of assault causing actual bodily harm, the court cited *Ndaa vs Republic* [1984] eKLR (Hancox JA, Chesoni & Nyarangi Ag JJA), where elements were stated to be assaulting the complainant or the victim , and occasioning on them actual bodily harm. Assault causing bodily harm amounts to battery, where physical force is applied on the person of the victim, either directly or via a missile. There must be some form of physical striking, which occasions some injury or harm. PW1 testified that the appellant beat her up, and she was admitted in hospital for some time. It was not clear whether the admission was on account of the battery or the rape. The clinician said that she had a swollen face and mouth. The medical records indicate a swollen face with blood stains, and a swollen upper lip. The P3 form opined that the probable weapon was blunt, possibly blows and kicks, or an erect male penile shaft. From the material placed before the trial court, there was sufficient evidence of battery, which resulted in physical injury, and therefore the offence charged was proved beyond reasonable doubt.

12. The second ground is on sentence. It is argued that leniency was not exercised, and a non-custodial sentence was not considered. Under the *Sexual Offences Act*, the minimum penalty for the offence of rape is 10 years imprisonment . the trial court imposed that minimum sentence, 10 years. Rape is considered to be a grave felony in most jurisdictions. So serious that the maximum penalty for it is life imprisonment. See *Rex vs Lachman Singh s/o Jowala Singh & another* [1947] 14 EACA 56 (Sir Joseph Sheridan CJ, Sir G Graham Paul CJ & Thacker J). The explanation for so treating it as such a serious offence is that it constitutes a grievous invasion of the physical integrity and privacy of a person, and it can expose the victim to serious consequences, like sexually transmitted deceases, including HIV which causes AIDS. It is not an offence for which, upon conviction, a court should consider a non-custodial sentence, for doing so would be to make a very bad precedent, and to send a bad signal. It is in the same league with robbery with violence and related offences.

13. Of course, minimum sentences have fallen into disfavour in Kenya, going by the current jurisprudence emanating from the High Court and the Supreme Court. Even then, were the trial court to consider sentence in the absence of the minimums, which option was not available to the trial court then, the appellant would not a deserved a sentence of anything less than 10 years, considering the circumstances of the commission of the offence. The sexual assault was preceded by physical assault or battery, where

PW1 was savagely beaten by the appellant. The assault, whether the physical or the sexual, was so bad, that PW1 defecated on herself. The appellant not only forced himself on PW1, and had sexual contact with her without her consent, he did so with such brutality that she ended up admitted in hospital for some days. PW1 was a young woman of 18 or 19, just emerging from childhood. Such young women deserve protection from such predators as the appellant. He got what he deserved, indeed, a 10-year sentence was on the lower side. For the physical assault charge, he was sentenced to 4 years. The law provides for a maximum of 5. 4 years was deserved given the circumstances of the offence.

14. On the evidence being uncorroborated, fabricated and contradictory, the record speaks for itself. On corroboration, the factual background that PW1 gave was corroborated by PW2, PW3 and PW4. PW2 was the clinician, who medically treated her. He noted the physical injuries, which were consistent with physical assault. He testified of what he noted from the genitals of PW1, which was consistent to the sexual assault alleged by PW1. The testimony by PW3 confirmed that of PW1 and PW2, about her physical injuries, she had torn clothes and had defecated on herself. PW4 also testified that PW1 had a swollen face, and narrated the history that was given to her by PW1 of the events, which was on all fours with the testimonies of PW1, PW2 and PW3. The testimonies were flowing and consistent, and if there were any contradictions, then the same were minor, and did not go to the core of the matter. The appellant alleges fabrication of the evidence. That is his case. He did not lead any evidence which would have demonstrated the alleged fabrication.

15. The appellant alleges that the medical evidence was flimsy, yet he has not demonstrated how that was so. Both PW1 and himself were examined by PW2, within hours of the occurrence of the events. From both examinations, he found evidence of penetration, that is that the vagina of PW1 and been penetrated, and that his penis had penetrated someone.

16. Finally, he submits that burden of proof was shifted to him, yet he has not sought to demonstrate how. The respondent led straightforward evidence from the victim, and medical evidence from the clinician, which established *prima facie*, the 2 offences charged. I have not seen, from the record, any incidence of shifting of burden of proof from the respondent to him. Regarding his defence not being considered. He made a brief unsworn statement. In the first place an unsworn statement amounts to no evidence, given that such evidence cannot be tested by way of cross-examination. Secondly, his unsworn statement was to effect that he did not know why he was in court. There was nothing to be considered with respect to such a statement in alleged defence.

17. Overall, I find no merit in the appeal herein, and I accordingly dismiss it. The conviction is affirmed, and the sentence confirmed.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 23RD DAY OF DECEMBER 2022

WM MUSYOKA

JUDGE

Mr Erick Zalo, Court assistant.

John Alukhaba, the appellant, in person.

Ms Kagai, instructed by the Director of Public Prosecutions, for the respondent.