Kaunda & another v Republic (Criminal Appeal E1151 of 2021)
[2022] KEHC 16799 (KLR) (Crim) (22 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16799 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E1151 OF 2021

CW GITHUA, J

DECEMBER 22, 2022

BETWEEN

DENNIS AREMBA KAUNDA ..... 1ST APPELLANT

JOSEPH OKARI KAUNDA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original conviction and sentence in Sexual Offences Case No.118 of 2018 in the chief Magistrate' Court at Makadara dated 10th December 2021 (Hon. L.K. Gatheru SRM)

JUDGMENT

1. The 1st and 2nd appellants were charged separately in Count I and Count 3 and convicted of the offence of gang rape contrary to section 10 of the *Sexual Offences Act, 2006* (SOA).

   The particulars were that on the June 16, 2018 at [Particulars Withheld] in Nairobi County, with a common intention, they caused their male organs to penetrate the vagina of SW, a female aged 19 years without her consent.

2. The 1st appellant, Dennis Aremba Kaunda faced an additional charge of stealing contrary to section 268(1) as read with section 275 of the *Penal Code* for which he was also convicted. The particulars alleged that on the June 16, 2018 at [Partuculars Withheld] in Nairobi County, he stole cash Kshs 1,200, a mobile phone make Tecno K7 valued at Kshs 9,000, earphones valued at Ksh.100 and a T-shirt valued at Kshs 500 all valued at Kshs 10,800 the property of SW.

3. The two appellants had been charged alongside their cousin, Princess Nyabuto who had been charged with the offence of detention of a female for immoral purposes contrary to section 151 as read with section 4 of the *Penal Code*.

4. After a full trial, Princess Nyabuto was acquitted under section 215 of the *Criminal Procedure Code* (CPC) for lack of sufficient evidence.

   Upon their conviction for the offence of gang rape, each appellant was sentenced to serve 15 years imprisonment.

   For the offence of theft charged in count two, the 1st appellant was sentenced to serve 12 months imprisonment. The sentence was ordered to run concurrently with the sentence imposed on him for the offence of gang rape.

5. Both appellants were aggrieved by their convictions and sentence. Through their advocate, Ms Ann Nyasuguta Ondande & Company Advocates, the appellants proffered the instant appeal.

   In their petition of appeal dated December 21, 2021 and supplementary petition of appeal dated June 13, 2022, the appellants advanced a total of 17 grounds of appeal in which they principally complained that the learned trial magistrate erred in law and fact by:

   > convicting them on defective charges; failing to observe the provisions of Section 200 of the *CPC* upon taking over the case from the previous magistrate; failing to comply with section 211 of the *CPC*.; relying on hearsay evidence, innuendos and conjecture in convicting the appellants; failing to accord the appellants legal representation contrary to article 50(2) (g) & (h) of the *Constitution* and failing to observe their right to a fair trial contrary to article 50(2) (c) & (j) and article 50 (4) of the *Constitution*; allowing the production of secondary evidence without any legal basis; failing to take into account the appellants statements in defence and convicting them on evidence that did not establish their guilt as charged beyond any reasonable doubt.

   The learned trial magistrate was also faulted for imposing on them a severe and harsh sentence.

6. The appeal was prosecuted by way of written submissions. The appellants' counsel opened her submissions by faulting the trial court for relying on the medical report, P3 form and post rape care form which had been produced as exhibits by PW3 who was not their maker. She averred that no legal basis was laid by the prosecution for the production of the said documents by a person other than their maker.

   Counsel also submitted that the conviction of the appellants was unsafe as the appellants right to a fair trial was violated in the course of the trial as they were not furnished with copies of the prosecution's statements or documentary evidence before the trial commenced to enable them prepare for the trial. Another instance cited by counsel demonstrating violation of the appellants' right to a fair trial was the alleged noncompliance of section 211 of the *CPC* by the trial court.

7. Further, it was submitted that the evidence of PW1 and PW3 had material inconsistencies which made it unreliable and that the medical evidence adduced by PW3 did not corroborate the evidence of PW1 and therefore, the charge of gang rape was not proved to the required standard.

8. Lastly, counsel submitted that the appellants were wrongly convicted on the basis of a defective charge sheet; that they were charged separately in different counts with the offence of gang rape in contravention of the provisions of section 134 of the *CPC* She argued that the appeal was merited and should be allowed.

9. The appeal is contested by the State. Learned prosecuting counsel Mr Kiragu submitted that the appellants were properly convicted on evidence which proved the essential ingredients of the offence of gang rape and stealing beyond any reasonable doubt. He submitted that the 2nd appellant aided the

commission of the offence of gang rape and though he did not directly participate in its commission, he was equally guilty of it as the 1st appellant. He invited the court to dismiss the appeal for want of merit.

10. As the first appellate court, I am enjoined to carefully and exhaustively scrutinize the evidence adduced before the trial court to arrive at my own independent conclusions regarding the validity or otherwise of the conviction entered against each appellant and the resultant sentence. In doing so, I should remember that unlike the trial court, I did not have the benefit of hearing and seeing the witnesses and give due allowance for that disadvantage. See: *OKeno v Republic* [1972] EA 32; *Mwangi v Republic* [2004] 2 KLR 28.

11. Briefly, the prosecution case was that the two appellants are brothers and Princess N (accused 3) was their cousin. The complainant who testified as PW1 recalled that on June 16, 2018 at about 10.00a.m., she went to visit Princess Nyabuto in her house at[Partuculars withheld]. At about 1.00p.m., Princess went to the appellant's house to see if they had cooked lunch. She went back ten minutes later and had a short conversation with PW1 before she left again leaving PW 1 in the house alone.

    After a short while, the 1st appellant went to the house. He was hostile and started questioning her presence in Princess's house. He closed the door from the inside and instructed the 2nd appellant who was outside to lock the door from the outside which he did.

12. Thereafter, the 1st appellant demanded to have sex with her and when she refused, he physically assaulted and threatened to kill her. PW1 testified that she started screaming and shaking the door till it opened but the 1st appellant pushed and smashed her head against the wall. He then closed the door from inside and had sexual intercourse with her without her consent. PW1 recalled that all this time, the 2nd appellant was standing outside the door and did nothing.

13. As the 1st appellant was sexually assaulting her, there was a knock on the door. He instructed her to dress up and open the door. When she opened the door, Princess came in followed by the 2nd appellant. The 2nd appellant ordered PW1 to leave the house and even slapped her when she insisted that she could not leave without her phone which she could not immediately trace.

14. PW1 recalled that as people started gathering outside the house, she was forced to leave without her T-shirt, mobile phone a Techno 7 and white ear phones. She claimed that at the back of the phone, she had stacked Kshs. 1,500 which was all the money she had. She therefore requested the 1st appellant for bus fare which he promised to get from a friend. He took her to another house which he broke into and then raped her again.

15. After he was done, they left the house. He ordered her to wait near a barber shop as he went to Princess's house to pick her items and take to her. She found an opportunity to escape. She went to her aunt's house at Ruiru and narrated what had happened to her. The auntie called her father (PW2) who went and took PW1 to Kasarani Police Station where he reported the matter. PW1 was then taken to MSF hospital where she was examined by Ms. Maureen Akenga, a clinical officer at the facility.

    According to the medical report and Post Rape Care Form (PRC) produced on Ms Akenga's behalf by PW3 her colleague, on examination, PW1 was found to have a swelling on the middle part of her head and on her right forehead. Her eyes were also red. Her vagina was reddish with scratches and her hymen had old tears.

16. PW5, PC Daniel Oriang, testified that he arrested the appellants on the following day upon identification by PW1 as her assailants. He recovered PW1's phone in a house in which he found the 2nd appellant. The 2nd appellant claimed that the phone had been taken there by the 1st appellant. The 1st appellant upon his arrest took them to his house where PW5 recovered PW1's two sim cards. The

phone and sim cards were identified in court by PW1 in the course of her testimony and were produced as exhibits 2 and 5 (a) & (b) respectively by the investigating officer CPL Grace Chege who testified as PW6.

17. Upon being placed on their defence, the 1st appellant chose to give a sworn statement and did not call witnesses. In his statement, he admitted having spent time in Princess's house with PW1 on the material date but denied having committed any of the offences preferred against him. He claimed that PW1 was his friend whom he had known since the year 2018. He denied having had sex with her as alleged or at all. He claimed that it is PW1 who left her phone in his house where the police recovered it.

18. The 2nd appellant also made a sworn statement in his defence. He did not also call an additional witness. In his statement, he confirmed having seen PW1 in Princess's house at the material time when he went there to borrow a basin but claimed that after he left, he never went back until much later that evening. He narrated how he was arrested and later charged with an offence he knew nothing about.

19. After carefully considering the grounds of appeal, the rival written submissions filed on behalf of the parties and the evidence on record as summarized above, I find that four issues emerge for my determination in this appeal. These are:

    i. Whether the appellants were convicted on a defective charge sheet.

    ii. Whether the appellants' right to fair trial was violated.

    iii. Whether the evidence adduced by the prosecution was sufficient to prove the charges preferred against the appellants beyond any reasonable doubt.

    iv. Whether the sentence imposed on the appellants was harsh and excessive in the circumstances of the case.

20. Turning to the first issue, the appellants in their submissions averred that the charge sheet was totally defective as they were charged in separate counts with the same offence of gang rape instead of being charged jointly in the same court.

21. Section 136 of the *CPC* stipulates categories of persons who may be joined in one charge or information. They include persons accused of having committed the same offence in the course of the same transaction and persons accused having aided or abetted the crime.

22. Section 10 of the *Sexual Offences Act* which creates the offence of gang rape provides that;

> " Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment to life."

23. Given the essential ingredients of the offence of gang rape as can be seen from the above provision and in view of the evidence adduced in support of the prosecution case, it is evident that ideally, the two appellants ought to have been charged jointly in one count instead of being charged separately in different counts. I however disagree with the appellants' counsel's submission that failure to charge the appellants jointly in one count rendered the charge sheet fatally defective.

    The use of the word "may" as opposed to "shall" in section 136 of the *CPC* shows that it is not a mandatory requirement to have the persons specified therein charged jointly in one count and that failure to comply with the provision does not make a charge incurably defective.

24. Besides, the irregularity in drafting the charges against the appellants did not occasion them any prejudice as they knew the charges they were facing from the very beginning and they ably defended themselves against them throughout the trial.

Consequently, it is my view that the irregularity was curable under section 382 of the *CPC*. It cannot thus be a basis for vitiating the appellant's convictions.

25. Regarding the claim that the appellants' convictions were unsafe as the trial court violated their rights to a fair trial, the proceedings before the trial court proves quite the opposite.

The trial court's record shows that on July 19, 2018, the court ordered that the appellants be furnished with witness statements. By the time the first prosecution witness testified about 9 months later on April 23, 2019 and subsequently during the trial, the appellants did not complain that they had not been supplied with witness statements or documentary evidence to be relied on by the prosecution during the trial. The only inference to be drawn from this fact is that they had actually been supplied with the evidence the prosecution was relying on during the trial.

26. Similarly, the submission that the trial court failed to comply with section 200 of the *CPC* when taking over the case from the previous magistrate thereby violating the appellants right to a fair trial is clearly unmerited.

The record shows that when Hon L Gatheru (SRM) took over the case from Hon W Oketch (SRM) on November 21, 2018, no prosecution witness had testified. The case was not therefore partly heard by the previous magistrate to justify compliance with section 200 (3) of the CPC.

27. The appellants further complained that the trial court failed to comply with section 211 of the CPC when placing them on their defence.

Section 211 sets out the procedure to be followed upon close of the prosecution case. It provides that where a court finds that a case had been sufficiently made out against an accused person to require him to be put on his 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 witness and other evidence (if any)"

28. The trial court's record shows that after delivery of the ruling on case to answer placing the appellants on their defence, the learned trial magistrate specifically stated that she had complied with section 211 of the *CPC* and recorded the election made by each of the appellants and their co-accused regarding how they desired to prosecute their respective defences.

29. Given the foregoing, I have come to the firm conclusion that the appellants were accorded a fair trial as none of their fair trial rights enshrined in article 50 (2) of the *Constitution* were violated by the trial court.

30. Turning to the complaint that the evidence adduced by the prosecution was contradictory and insufficient to prove the charges preferred against the appellants beyond any reasonable doubt, my perusal of the evidence on record did not reveal any material contradictions in the prosecution's case.

31. For the prosecution to sustain a conviction for the offence of gang rape, it must prove beyond doubt that the accused committed the offence of rape or defilement in association with one or more persons

or with a common intention, the accused was in the company of one or more persons who committed the offence of rape or defilement.

32. Section 3(1) of the *Sexual Offences Act* defines rape as follows;

    1. " A person commits the offence termed rape if:

        a. he or she intentionally and unlawfully commits an act which cause penetration with his or her genital organs;

        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."

33. The above demonstrates that for the offence of rape to be established, the prosecution must prove beyond doubt that the accused person caused penetration with his or her genital organ without the victim's consent. Positive identification of the accused person as the culprit must also be proved.

34. In her judgment, the learned trial magistrate addressed in detail the above ingredients of the offence of gang rape and tested them against the evidence on record to ascertain whether or not they had been established. After critically analysing the evidence and making reference to relevant case law, for instance, *Mark Kiruri Mose v Republic* [2013] eKLR; *Republic v Oyier* [1985] eKLR and *Francis Matonda Ogeto v Republic* [2019] eKLR,the learned trial magistrate found as a fact that the 1st appellant physically assaulted and threatened PW1 with death to force her to have sexual intercourse with him and that out of fear, PW1 yielded to his demands. The trial court found that this happened with the participation of the 2nd appellant as although he did not penetrate the complainant, he facilitated the commission of the offence by locking the house from outside to restrain the complainant from escaping. He remained outside the house and would later go in accompanied by Princess and ordered PW1 out of the house.

    Relying on section 20 of the *Penal Code*, the learned trial magistrate concluded that the 2nd appellant had abetted the rape perpetrated on PW1 by the 1st appellant and was equally guilty of the offence.

35. After my own appraisal of the evidence, I am unable to fault the learned trial magistrate on this finding because as she correctly noted, though the 1st appellant denied having had any sexual activity with PW1, when PW1 was medically examined in the evening of the same day, she was found to have swellings on her head and forehead and her vagina was reddish with scratches. This materially corroborated PW1's evidence that the 1st appellant had assaulted her to subdue and force her to have sexual intercourse with her on the date in question. The medical evidence supported PW1's assertions regarding penetration and lack of consent.

36. The appellant's claim that the medical report and PRC form were inadmissible in evidence for having been produced as exhibits by a person other than their maker is totally without merit. The medical reports were clearly admissible under section 77 of the *Evidence Act*.

37. From the evidence, I concur with the learned trial magistrate's finding that the 2nd appellant shared a common intention with the 1st appellant to commit the offence because besides locking the house from outside, he remained outside as the 1st appellant assaulted and raped PW1 and he made no attempt to stop him. Besides, after the act was done, he is the one who threw PW1 out of the house after slapping her. The whole sequence of events left no doubt that the two appellants were acting in concert.

38. Turning to the issue of identification, I am satisfied that the identities of the two appellants were not in question since they did not deny having interacted with the complainant on the material date and

time. The 1st appellant in fact conceded that they had known each other with PW1 since the year 2018; that they were good friends.

Flowing from the foregoing, I have no doubt that the two appellants were properly convicted of the offence of gang rape. Their conviction is thus upheld.

39. Regarding the theft charge against the 1st appellant, I find that though the evidence showed clearly that PW1 had left her phone, two sim cards, earphones and T-shirt in Princess's house after she was forced to leave without them, it is not clear who among the appellants and Princess moved the phone and sim cards to the house in which they were recovered. It is noteworthy that the house was shared by both appellants.

According to PW5, the 2nd appellant told him that it is the 1st appellant who had taken the phone to the house. But this was accomplice evidence which without corroboration lacked any probative value.

40. In my view, the evidence adduced by the prosecution did not prove the offence of theft as charged in Count 2 beyond any reasonable doubt. The learned trial magistrate failed to appreciate that the house in which the phone and sim cards were recovered was being shared by both appellants. She erred in her finding that they were recovered in the 1st appellant's house thus her finding that the 1st appellant had appropriated the two items to himself without the authority of the complainant. The evidence created a doubt regarding which of the three accused persons had removed the items from Princess's house with the intention of appropriating them and this doubt as required by the law should have been resolved in favour of the 1st appellant.

It is thus my finding that the 1st appellant's conviction in Count 2 was improper and unsafe. The conviction is consequently quashed and the resultant sentence of one year imprisonment set aside.

41. On the appellants appeal against sentence, as stated earlier, the appellants were each sentenced to 15 years' imprisonment which is the minimum mandatory sentence prescribed for the offence of gang rape under section 10 of the *SOA*. The court record shows that in her comprehensive ruling on sentencing, the learned trial magistrate considered both the aggravating and mitigating factors in respect of each of the appellants but her hands were tied since the law prevailing then left her with no option but to impose the minimum mandatory sentence.

42. The position has now changed given the new jurisprudence that has recently emerged from the High Court and the Court of Appeal. The High Court in *Philip Mueke Maingi & 5 others v Director of Public Prosecutions & another* (Odunga, J) and *Edwin Wachira & 9 others v Republic* consolidated with petition No 88 and 90 of 2021 (Mativo, J) following the reasoning of the Supreme Court in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Muruatetu) and guided by article 25, 27, 28 and article 50 of the *Constitution* has held that although the sentences prescribed under the *Sexual Offences Act* are not perse unconstitutional and courts are at liberty to impose them in appropriate cases, the imposition of the same as a mandatory minimum sentence was unconstitutional as it deprived the trial court its discretion to impose lesser sentences if the court was satisfied that it was the appropriate sentence taking into account the facts and circumstances of each case.

43. The position taken by Odunga and Mativo, JJ was recently upheld by the Court of Appeal in *Joshua Gichuki Mwangi v Republic* Criminal Appeal No 84 of 2015 where in reducing the 20 year minimum mandatory sentence imposed on the appellant under section 8(3) of the *SOA* to 15 years' imprisonment, the court stated as follows with regard to sentencing;

> This being a judicial function, it is impermissible for the legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes

against the independence of the Judiciary as enshrined in article 160 of the *Constitution*. Further, the Judiciary has a mandate under article 159 (2)(a) and (e) of the *Constitution* to exercise judicial authority in a manner that justice shall be done to all and to protect the purpose and principles of the *Constitution*. This includes the provision of article 25 which provides that the right to a fair trial is among the bill of rights that shall not be limited."

44. Applying the above holding to this appeal and having weighed the aggravating against the mitigating factors in this case including the fact that the appellants are young men who were in college when they committed the offence, I allow their appeal against sentence and set aside the fifteen year sentence imposed against each appellant by the trial court. I substitute it with a sentence of eight years imprisonment. The record shows that the appellants had spent eighteen (18) days in lawful custody before they were released on bond and in compliance with section 333(2) of the *CPC*, I direct that these period shall be taken into account when computing the appellants' substituted sentence.

It so ordered.

DATED, SIGNED AND DELIVERED AT KISII THIS 22ND DECEMBER 2022 .

CW GITHUA

JUDGE

In the presence of:

The appellant

Ms Ondande for the Appellant

Ms Oduor for the State

Ms Karwitha Court Assistant