Akiri v Republic (Criminal Appeal 10 of 2020)
[2022] KEHC 16604 (KLR) (20 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16604 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL 10 OF 2020

KW KIARIE, J

DECEMBER 20, 2022

BETWEEN

KILLION ADWOR AKIRI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in S.O.A case No.18 of 2018 of the Senior Principal Magistrate's Court at Oyugis by Hon. J.S Wesonga–Senior Resident Magistrate)

JUDGMENT

1. Killion Adwor Akiri, the appellant herein, was convicted of the offence of rape contrary to section 3(1) as read with section 3 (3) of the *Sexual Offences Act* No 3 of 2006.

2. The particulars of the offence were that on the August 1, 2018 at [Particulars Withheld] location, [Particulars Withheld] South Sub-County within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of LA, without her consent.

3. The appellant was sentenced to serve twenty years imprisonment. He was aggrieved and has appealed against both conviction and sentence.

4. He was in person. He raised grounds of appeal as follows:

    a. That the honourable learned trial magistrate gravely erred in points of law by failing to accord the appellant a fair trial when he failed to inform him of the right to be represented by an advocate at the state expense.

    b. That the case for the prosecution side was not affirmatively proved beyond reasonable doubt.

    c. That the evidence of recognition as adduced in court against the appellant did not meet the required legal standards.

d. That the mode of appellant's arrest did not at all irresistibly points to his guilt thus a prejudice.

e. That the learned trial magistrate erred in law and fact in making conclusive statements in respect of penetration which was not proved.

f. That the trial magistrate gravely faulted in law and fact in failing to appraise the evidence of the individual prosecution witnesses in the judgment to appreciate the contradictions therein.

g. That the learned trial magistrate gravely erred in points of law and facts in shifting the burden of proof to the defence thus a prejudice.

h. That, the learned trial magistrate gravely faulted in points of law and fact in misinterpreting the evidence of the both PW2 and PW3 respectively (the doctors), to make adverse comments against the appellant in the process of evaluating evidence.

i. That the learned trial magistrate finally erred in points of law and fact while relying on the evidence of intermediary herein, yet failed to consider that the enough conclusions as prescribed by the law thus a prejudice.

5. The appeal was opposed by the state, but no submissions were filed.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno v Republic [1972] EA 32*.

7. The ingredients of the offence of rape are set out in section 3 of the *Sexual Offences Act* which states as follows:

A person commits the offence termed rape if—

(a) he or she intentionally and unlawfully commits an act which causes 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.

8. Though the appellant has contended that the trial magistrate did not advise him that he was entitled to be represented by an advocate of own choice, this ground is baseless for on October 25, 2018 before the hearing commenced, Mr Bana advocate was placed on record for him.

9. The complainant did not testify. This is because she has a condition that makes her speech slurred. This was occasioned by stroke she suffered according to the evidence of doctor Peter Ogolla (PW3). He went on to testify that this did not mean she was mentally challenged. In my view, her failure to testify would not adversely affect the prosecution case. In cases of bestiality for example, the animal involved does not testify but a case may be proved through some other evidence.

10. The complainant's daughter, IA (PW4) a girl aged 9 years testified that she found the appellant on top of her mother outside near their makeshift kitchen. His buttocks were exposed and his pair of trousers were below the buttocks. She watched them for a while before it dawned on her that the appellant was raping her mother. She raised an alarm. The appellant dressed up and picked a stick with which he beat her mother on the face, hand and buttocks.

11. Kibet Serem examined the complainant on August 1, 2018. The report was produced in court on his behalf by Willis Omondi (PW2), a colleague clinical officer. The report indicated that other than

bruises on the labia majora, she sustained soft tissue injuries on both thighs, on the left hand and small fingers and soft tissue inflammation on the abdomen around umbilical region. The conclusion was that there was rape.

12. The medical evidence not only buttressed the evidence of the minor, PW4 but also proved that there was rape.

13. Killion Adwor Akiri, the accused pleaded an alibi. He contended that he left home at 8 am and went to his place of work. He returned home at 6 pm When an accused person pleads an alibi the onus is on the prosecution to disprove the same. This is even when this defence is raised for the first time while the accused is giving his evidence in defence. In the case of *Victor Mwendwa Mulinge v Republic [2014] eKLR* the Court of Appeal rendered itself thus on the issue of alibi:

    It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see *Karanja v R [1983] KLR 501* ... this court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.

    In the instant case I find that the alibi of the accused was displaced by the evidence on record. The prosecution therefore proved to the required standards that he was the one who raped the complainant.

14. The appellant contended that the sentence was excessive. An appellate court would interfere with the sentence of the trial court only where there exists, to a sufficient extent, circumstances entitling it to vary the order of the trial court. These circumstances were well illustrated in the case of *Nillson v Republic [1970] E.A. 599*, as follows:

    The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that 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 Rex (1950), 18 EACA 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 Shershewsity (1912) C CA 28 T LR 364*.

15. The proviso to section 20 (1) of the *Sexual Offences Act* states:

    > Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.

16. In the instant case, the appellant was 23 years old at the time of the sentence. This would put his age at about 22 years at the time he committed the offence. He was fairly a young man at the time of the offence. The prosecution indicated that he was a first offender. This ought to have been factored to mitigate the sentence. I therefore set aside the sentence by the learned trial magistrate and substitute it with a sentence of ten (10) years imprisonment. The sentence will run from when he was sentenced by the learned trial magistrate. To that extent the appeal succeeds.

DELIVERED AND SIGNED AT HOMA BAY THIS 20TH DAY OF DECEMBER, 2022

KIARIE WAWERU KIARIE

JUDGE