XYZ v Republic (Criminal Appeal 117 of 2015)
[2016] KEHC 2505 (KLR) (20 September 2016) (Judgment)

Lawrence Kirinya Kiragu v Republic [2016] eKLR

Neutral citation: [2016] KEHC 2505 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 117 OF 2015

P NYAMWEYA, J

SEPTEMBER 20, 2016

BETWEEN

XYZ ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal arising out of the judgment and sentence of Hon. L.A Mumassabba RM in Sexual Offence No. 1 of 2012 delivered on 22nd July 2015 at the Principal Magistrate's Court at Mavoko)

JUDGMENT

1. The Appellant was charged with the offence of rape contrary to section 3(1)(a)(b)(3) of the *Sexual Offences Act*. The particulars of the offence were that on the 11th October 2013, at [particulars withheld] Hospital in Athi River District, within Machakos County, the Appellant intentionally and unlawfully caused his male genital organ to penetrate the female genital organ (vagina) of L K without her consent.

2. In the alternative the Appellant was charged with the offence of committing an indecent Act with an adult contrary to section 11(b) of the *Sexual Offences Act*. The particulars of the offence were that on the 11th October 2013, at [particulars withheld] Hospital in Athi River District, within Machakos County, the Appellant unlawfully and indecently caused his male genital organ to come into contact with the female genital organ (vagina) of L K without her consent.

3. The Appellant was first arraigned in court on 12th October 2012 and he pleaded not guilty to the charges. He was tried, convicted of the offence and sentenced to ten (10) years imprisonment for the main charge.

4. The Appellant is aggrieved by the judgment of the trial magistrate and has preferred this appeal against the conviction and sentence. The main grounds in his Petition of Appeal dated 3rd August 2015 and filed in Court on 31st March 2015. The grounds are as follows:

    1. The Learned Magistrate Court erred in law and facts when she convicted the accused person on basis of contradictory evidence which the trial Magistrate admitted and wondered why the prosecution tendered contradictory evidence in court in her judgment

    2. The learned Magistrate erred in law and facts when she convicted the accused person on basis of uncorroborated evidence.

    3. The Learned Magistrate erred in law and facts when she held that the accused person had been properly identified by the complainant.

    4. The learned Magistrate erred in law and facts when she held that the charge against the accused person had been proven beyond reasonable doubt.

    5. The learned Magistrate erred in law and facts when she dismissed the accused person's defence and failed to consider the circumstances under which the offence is alleged to have been committed.

    6. The learned Magistrate erred in law and facts when she dismissed the fact that the material witnesses had not been called and proceeded to convict the accused person on basis of unsubstantiated evidence.

    7. The learned Magistrate erred in law and facts when she totally relied on the circumstantial evidence to convict the accused person without warning herself of the danger of convicting an accused person purely on the basis of circumstantial evidence.

    8. The learned Magistrate erred in law and facts when she convicted the accused person against the weight of evidence placed before her.

    9. The learned Magistrate erred in law and facts when she held that the duly sentence that could be imposed upon the accused person was that of custodial sentence of 10 years when no sufficient proof had been tendered in court to warrant a conviction.

5. The Appellant's learned counsel, Kitindio Musembi & Company Advocates filed written submissions dated 2nd March 2016 upon directions given by this Court. It was argued therein that the testimonies of PW1 and PW4 were contradictory, particularly on the presence of spermatozoa in the vaginal swab taken from the complainant after the alleged rape. Further, that the evidence by PW2 who was the complainant was contradictory, circumstantial and did not prove any penetration, and that the trial Court should not have relied on the said evidence without corroboration.

6. It was also argued that material witnesses were not called to testify, and the threshold for proof of beyond reasonable doubt, particularly of penetration was not met. Lastly, it was submitted that the Appellant's defence was not taken into account, and reliance was placed on various judicial authorities in support of these arguments.

7. Cliff Machogu, the learned prosecution counsel, filed submissions dated 6th July 2016 in opposition to the appeal. While acknowledging the contradictory evidence of PW1 and PW4, the counsel submitted that the evidence of PW1 should prevail as she examined PW2 within two hours of the occurrence of the rape, while PW4 examined the samples almost one year after the incident. It was submitted therein that the charge against the Appellant was proved beyond reasonable doubt by the testimony of PW2

who identified the Appellant. Lastly, it was urged that section 143 of the *Evidence Act* provides that no particular number of witnesses shall be required to prove a fact, and that section 124 of the Act does not require corroboration of the victim's evidence if the Court believes the victim's testimony.

8. As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see Okeno v Republic [1973] EA 32).

9. The prosecution called four witnesses. The first witness (PW1) was Maureen Maitha, a clinical officer at Athi River Health Centre, who testified that the complainant came to the clinic on 11th October 2012 and made a complaint that she was sexually assaulted. Further, that PW1 then examined the complainant and took samples which were taken to the laboratory for examination, and tests showed that there was spermatozoa in the swab taken from the complainant. She also testified that she put the complainant on medication.

10. The complainant, L K (PW1), testified that on 11th October 2012, she had gone to [particulars withheld] Hospital for an ante-natal clinic and was 8 months pregnant at the time. Further, that she was examined by the Appellant, and in the course of the examination, she felt the Appellant breathing heavily on top of her, and upon pushing him away she found his trousers halfway down and his penis was wet. She then screamed where upon the Appellant left the room. The evidence by PW2 will be examined in greater detail later in this judgment.

11. PW3 was P N, a businessman who was the complainant's employer, and he testified as to getting a call from the complainant who informed him that she had been raped, whereupon he went to the [particulars withheld] Clinic and thereafter the Appellant's house where the Appellant was arrested.

12. PW4 was Ann Wangechi Nderitu a government analyst at the Government Chemist who testified that she received the complainant's vaginal swab and the complainant's and Appellant's blood samples on 30th October 2013, and did not find any spermatozoa in the vaginal swab.

13. The last witness (PW5) was PC Pauline Katunge, attached to the Athi River Crime Branch. She testified that on 11th October 2012 she received a report of rape from a relative of the complainant, and went to Shalom Hospital where she got information from the complainant and took her to Athi River Health Centre. She also testified that samples taken from the complainant and Appellant were escorted to the Government Chemist.

14. The trial court found that the prosecution had established a prima facie case to warrant the Appellant to be put on his defence. The Appellant gave sworn testimony and did not call any witnesses. He gave a detailed account of the examination he undertook of PW2 on 11th October 2012, and insisted that he was professional in his examination, and that PW2 was uncomfortable and unco-operative during the examination, and started to scream when he informed her that she may have a sexual infection and should be tested. He denied running away from the clinic, and stated that he went to his house for fear of his safety as a crowd had gathered at the clinic.

15. I have considered the grounds of appeal, submissions and evidence given in the trial court, and find that the grounds of appeal raise one main issue of whether the Appellant's conviction for the offence of rape was based on consistent and sufficient evidence.

16. Section 3(1) of the *Sexual Offences Act* in this regard provides for the elements of the offence of rape 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 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."

17. It was held in Mwangi vs R (1984) KLR 595 that an essential fact to the proof of the offence of rape is the proof of penetration which establishes that sexual intercourse has taken place. Penetration is defined in the *Sexual Offences Act* to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person.

18. In the present appeal, PW2's testimony in this regard was direct evidence and was not circumstantial, as she was present during the alleged rape, and testified as to what transpired during her ordeal as follows:

> " On 11/10/2012 at around 8.15 a.m. I had gone for a clinic at [particulars withheld] Hospital. It was not my 1st time. I was 8 months pregnant and went for a clinic. I was told by the nurses that I had to be examined to determine whether I would go for ceaserian or deliver normally. I was told by a lady nurse and I was examined by accused. I went to the opposite room and he told me to remove my lower clothes and pants. Accused told me to lie on the bed that was there facing up. Accused wore gloves on his hand and took some gel and applied in my private parts. I was conscious. He inserted his fingers. I do not know which fingers he inserted. I felt pain when I tried moving. He told me if I had "maringo" I could just go away. I did not reply. Accused kept on telling me to wait while touching my private parts. I then felt him breathing heavingly on me. I pushed him. There was a place accused was standing. I only heard him breathing heavingly and he was on me and his head was on my stomach. The moment I pushed him his pants were half way and wet. I did not see him lie on me. I was pregnant and I felt pain that is when I pushed him. Accused was in a dust coat and his trousers were half way. I did not see him remove his pants. I heard pressure and pain and he was breathing heaving on me that is why I pushed him. He told me to lie so that he could finish. It never came to my mind that he could do such a thing. When I pushed him that is when I found out that his pants were half down and his penis was wet. He had applied some gel on me. I started screaming for the 2nd time. The door was closed with a hook. I went and opened it. Accused left me in the room immediately I opened the door. I was confused. Another man who was a nurse came. He did not want to listen to me. Female nurses came and they also did not want to listen to me. Only one lady and I called my boss and explained to him what had happened. He came and I told him what had transpired. "

19. What is notable to the Court is that PW2's testimony was not specific as to the act of penetration, which is an essential ingredient of rape. Doubt is also raised by the fact that the complainant testified that she was at the time going through medical examination which involved examination of her genital organs and particularly insertion by the Appellant of his fingers into her vagina, and it is evident that there was penetration by the Appellant's fingers and which was also corroborated and admitted by the Appellant in his defence, but there was no evidence of any penetration by the Appellant's penis. In

addition, PW2 in her testimony stated that she did not see or feel the Appellant insert his penis into her vagina, and only saw that his trousers halfway down and the trousers and penis were wet when she got up, which is what led her to believe she had been raped.

20. While the proviso to section 124 of the *Evidence Act* provides that no corroboration is required in cases involving sexual offences, this only applies in instances where the Court believes that the complainant is telling the truth. The testimony by PW2 as to what transpired during her ordeal is however inconsistent and there are gaps that are unexplained. On cross-examination PW2 stated as follows:

> " I did not know the procedure that was to be done to me. Accused did not explain to me the procedure. I did not ask the nurse what the examination would entail. I did not ask accused what examination would entail. Accused ushered me into the room and told me to remove my clothes. He did not shout at me. I did not fell harassed before examination. There was just one step to the coach. I climbed on it after removing my clothes. He ordered me to lie down and check size of my cervix. I understand it to mean that he would use his two fingers to insert his fingers in the vagina. He was in gloves and had gel. He told me he wanted to check the size of my vagina. Cervix cannot be measured by tape measure. It was very painful and I felt discomfort. It was my 1st pregnancy. I trusted him as a Clinical Practitioner. I knew he was doing a medical procedure. Accused said kama niko na maringo niache. It was painful and that is what prompted me to move. I did not exchange with accused. I cannot remember how long procedure lasted. I was not sedated. I was conscious. I did not feel his private parts enter mine. I did not see him remove his gloves. The moment I tried to wake up he told me to lie down. The moment I woke up I saw his pants down. Accused told me I had an infection."

21. There are questions and gaps raised by the testimony as regards the hostility by the Appellant; the physical position of the Appellant during the examination; whether he was standing or lying on the complainant; and as to whether the trousers were half way down or the Appellant was half naked. As the credibility of PW1's testimony is in doubt, the Prosecution's case would have benefited from additional evidence as regards the state of the Appellant after the said incident, as witnessed by those who were present at the time of the alleged offence.

22. As regards the contradictory medical evidence by PW1 and PW4, it is notable that PW1 testified that she did not carry out the laboratory tests on the vaginal swabs taken from the complainant, and the person alleged to have done so, one Victoria Mambua, was not called as a witness to confirm that the said tests were carried out and the results thereof. The evidence by PW1 as regard the said test and results is therefore hearsay and inadmissible.

23. This finding notwithstanding, medical evidence is only relevant to corroborate primary evidence that shows that all the elements of rape were met, and in the present case the said evidence was contradictory and insufficient to provide such corroboration.

24. Arising from the foregoing reasons, I find that as there was no proof of penetration there was insufficient evidence upon which to convict the Appellant for the offence of rape, and the said conviction by the trial Court was in error. I accordingly quash the conviction of the Appellant for the charge of rape contrary to section 3(1) (a)(b)(3). I also set aside the sentence imposed upon the Appellant for this conviction and order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held. The Appellant's sureties are also hereby discharged.

It is so ordered.

DATED AND SIGNED AT MACHAKOS THIS 20TH DAY OF SEPTEMBER 2016.

P. NYAMWEYA

JUDGE