REPUBLIC OF KENYA

High Court at Embu

Criminal Appeal 222 of 2009

PATRICK NJIRU NJUE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Sentence and Conviction of E.K. NYUTU Resident Magistrate Embu in Criminal Case No. 285 of 2005 on 11th September 2009)

J U D G M E N T

PATRICK NJIRU NJUE the appellant was charged with the offence of rape contrary to Section 140 of the Penal Code. The particulars as stated in the charge sheet were as follows:-

On the 23rd day of January 2005 at Kavutiri village, Kavutiri sub-location in Embu District within the Eastern Province you unlawfully had carnal knowledge of J.N.I without her consent.

The appellant pleaded not guilty and the matter proceeded to full hearing and he was convicted and sentenced to 7 years imprisonment. And being aggrieved has appealed against the whole judgment raising the following grounds:-

1. ***The learned Resident Magistrate erred both in fact and in law by conducting the trial, convicting and sentencing him to serve 7 years imprisonment while totally disregarding the fact that his constitution rights as enshrined under Section 72(3) and 77(1) of the Constitution of Kenya had been violated when he was unlawfully held and detained in police custody for 3 days from 24th January 2005 when he was arrested (which was on Monday) to 27th January 2005 when he was arraigned before court instead of the lawful 24 hours as provided for under the Constitution of Kenya.***
2. ***The learned Resident Magistrate erred both in fact and in law when she tried and convicted him on repealed law under Section 140 of the Penal Code which section of the law was repealed on 21st July 2006 by operationalization of the Sexual Offences Act 2006.***
3. ***The learned Resident Magistrate erred and misdirected herself on the interpretation and application of Section 140 of the Penal Code (repealed) vis–a-vis the Sexual Offences Act No. 3 of 2006 and the transitional provisions of 1st schedule paragraph 3 of the Sexual Offences Act to the effect that any proceedings commended under any written law repealed by the Act shall continue to their logical conclusion under those written laws.***
4. ***The learned Resident Magistrate erred both in fact and in law by relying on and convicting the appellant on uncorroborated evidence of the complainant (PW1).***
5. ***The learned Resident Magistrate erred in law by imposing on him a sentence of 7 years imprisonment under repealed law which was excessive in the circumstances and failing to***

consider the fact that he was a first offender.

Mr. Ithiga for appellant and the State through Ms. Inga'hizu filed written submissions in disposal of the appeal. Mr. Ithiga has broadly submitted that the learned trial Magistrate erred in convicting the appellant under Section 140 of the Penal Code when the said provision had been repealed. He referred the Court to the provisions of the Sexual Offenses Act. And on the evidence he submitted that PW1's evidence was not corroborated and that she was not a truthful witness. Finally he state that the sentence of 7 years was too harsh. Apparently he did not submit on the 1st ground.

Ms. Inga'hizu for the state also referred to the same provisions of the law as referred to by the appellant and submitted that the learned trial Magistrate had acted in accordance with the law. She further cited the evidence of PW2 and PW3 saying it supported that of PW1. She urged the court to dismiss the appeal.

As a first appeal court, I am enjoined to re-evaluate and re-consider the evidence adduced in the court below and arrive at my own conclusion. I am alive to the fact that I did not see nor hear the witnesses. I am guided by the cases of:-

1. ***OKENO VS REPUBLIC [1972] EA 32***
2. ***NGUI VS REPUBLIC [1984] KLR 729***
3. ***BORU & ANOTHER VS REPUBLIC [2005] 1 KLR 649***
4. ***KIILU & ANOTHER VS REPUBLIC [2005] 1 KLR 174***
5. ***SIMIYU & ANOTHER VS REPUBLIC [2005] 1 KLR 192***

The case presenting itself before me is PW1 left home on 23/1/2005 and proceeded to the shop using a road in a bushy area. He met the appellant (a watchman at Kavutiri Secondary School). The appellant was running carrying 3 arrows. He told her he would kill her. As he struggled with her, PW2 passed by and asked the appellant what the problem was and the latter ordered her to go away or she would be killed.

When PW2 ran away the appellant pushed her to the bush and onto the ground. Apparently PW1 was pregnant. He held her throat when she tried to scream. He removed her pant and his clothes and had sex with her three (3) times. The ordeal ended at 7.30 p.m. and he was escorting her to a certain house to lock her when the primary school watchman saw her and called her.

The appellant left and she jumped over the fence and ran away and reached home. Meanwhile PW2 had reported to PW1's mother in law (PW3) what she had witnessed. PW3 then went to Kavutiri Primary School to find out what was happening. She found one watchman who told her they were two watchmen but one was not there. She went back home and reported the matter to the Chief's camp. PW1 arrived home crying and reported to them what had happened. They again went to report to the AP's at the Chief's camp who advised them to go to the police. PW1 was taken to hospital by the police.

The medical evidence by PW5 confirmed the presence of spermatozoa and sexual contact with penetration (EXB1). The appellant had in his unsworn defence denied the charges saying PW1 and her husband were framing him up. And that he was not tested. That it was not possible for him to rape her while he was armed with bows and arrows. In ground 1 of the appeal the appellant says he was taken to Court 3 days after his arrest hence violation of his constitutional rights. The record shows that he was arrested on 24/1/2005 and was arraigned in court on 27/1/2005 for pleas. There was no explanation given by the prosecution as to the cause of the delay.

From the evidence of PW4 the appellant was arrested on 24/1/2005 6.30 p.m. Under the old constitution one had to be arraigned in court as soon as was practically possible to do so and of course within the acceptable limit. It is correct to say that the latest the appellant ought to have been arraigned in court was 25/1/2005 6.30 p.m. or 26/1/2005 8 a.m. working within practical hours. If there was delay then it was a delay of 24 hours. Would it be just in the circumstances to dismiss the charge on that ground? Dismissal especially in the case where a complainant who equally has constitutional rights has suffered a

personal injury would not be just. I find the facts of this case not to warrant such an action by this court. The appellant has a right of channeling the alleged violation before the right forum.

Ground 2 and 3 are actually about interpretation of the law. It is not disputed that the appellant was charged under Section 140 of the Penal Code which was repealed when the Sexual Offences Act came into force on 21/7/2006. By 21/7/2006 the proceedings in this case were ¾ way done with one prosecution witness left. Under the Transitional Provisions of the first schedule of the Sexual Offences Act paragraph 3 it provides that

"ANY PROCEEDINGS COMMENCED UNDER ANY WRITTEN LAW OR PART THEREOF REPEALED BY THIS ACT SHALL CONTINUE TO THEIR LOGICAL CONCLUSION UNDER THOSE WRITTEN LAWS".

Further Section 23(3)(e) of the Interpretation and General Provisions Act Cap 2 Laws of Kenya provides

"WHERE A WRITTEN LAW REPEALS IN WHOLE OR IN PART ANOTHER WRITTEN LAW, THEN, UNLESS A CONTRARY INTENTION APPEARS, THE REPEAL SHALL NOT

(e) AFFECT AN INVESTIGATION, LEGAL PROCEEDING OR REMEDY IN RESPECT OF A RIGHT, PRIVILEGE OBLIGATION, LIABILITY, PENALTY, FORFEITURE, OR PUNISHMENT AS AFORESAID, AND ANY SUCH INVESTATION, LEGAL PROCEEDING OR REMEDY MAY BE IMPOSED, AS IF THE REPEALED WRITTEN LAW HAD NOT BEEN MADE".

It is clear that the appellant was charged for an offence that allegedly occurred on 23/1/2005 before commencement of the Sexual Offences Act on 21/7/2006. The new written law could not apply to the said incident as the appellant had already been charged and the case was on going when the new law commenced. The law operates retrospectively. The two provisions quoted above and in particular paragraph 3 of the transition provision of the Sexual Offences Act captures the appellant's scenario very well.

I therefore find that the learned trial Magistrate did not err in proceeding with the trial to its logical conclusion. Grounds 4 & 5 cover the evidence which I have reevaluated. The evidence of PW1 is clear. The incident took place when it was still day light. PW1 was going to the shop using a busy road passing near the school. PW2 had also used the same road while going to the shop. She did not go further after seeing what the appellant was doing to PW1 and after being threatened by the appellant. Both PW1 and PW2 knew the appellant as a watchman at Kavutiri Secondary School. PW4 confirms that is where the appellant was arrested from. The appellant in his defence also confirmed being a watchman in the said school. PW2 did not proceed to the shops and instead went and reported the incident to PW3 who is PW1's mother in law. And the report was that PW1 had been arrested by the watchman of Kavutiri Secondary School. Though PW2 did not witness the appellant raping PW1 she confirmed the situation she found PW1 in.

PW1 explained that it was after PW2 left that she was dragged to the bush and raped by the appellant. The appellant in his defence had stated that he could not have raped PW1 while holding the bows and arrows. There was no evidence that that is what happened. PW1 and PW2 said he was holding the arrows with the left hand while the right hand held PW1.

A report of the incident was made to the police the same day and PW1 was taken to the hospital. The medical report confirmed her complaints. The exam revealed the presence of spermatozoa which was just hours after the act complained of. Mr. Ithiga submitted that PW1 was an untruthful witness and her evidence required corroboration under Section 124 of the Evidence Act.

He cited 2 case viz:-

1. ***JULIUS LANGAT KIPROTICH VS REPUBLIC [2006] eKLR High Court of Kenya***

which dealt with the issue of corroboration. The position under Section 124 of the Evidence Act is that the court can convict on the uncorroborated evidence of an alleged victim of a sexual offence if for reasons to be recorded in the proceedings the court is satisfied the alleged victim is telling the truth. Mr. Ithiga has indicated that the complainant was not truthful witness. He who alleges a fact must prove it. Besides that statement he never went further to show how she was untruthful.

The learned trial Magistrate in her judgment has explicitly explained the evidence and the issues she was addressing. Contrary to Mr. Ithiga's submission the court finds corroboration in PW2's evidence. He was seen by PW2 holding PW1. She was not a free person. And he had arrows. After being asked by PW1 to rescue her she inquired from the appellant what it was and that is when he issued threats and she went away but reported to PW3. The learned trial Magistrate considered his defence which she did not find to challenge the prosecution case. She tackled the evidence on record very well.

I find no reason to make me interfere with her findings. The only issue I am now left with is the issue of sentence. Mr. Ithiga submitted that the sentence of 7 (seven) years was harsh and excessive since the appellant was a 1st offender. The sentence for such an offence was life imprisonment. He was given 7 years. The record shows he was a 1st offender and he also raised some issues about his children and wife.

This is also considered alongside the trauma caused to PW1. The appellant having been a first offender I do find that the experience of imprisonment itself rather than the duration of the imprisonment is a salutary lesson which is not likely to be forgotten.

The appeal against sentence will therefore be allowed in part. For the sentence of seven years imprisonment imposed in the court below there will be a substituted sentence of six (6) years imprisonment.

To that extent only does the appeal succeed.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF APRIL 2013.

H.I. ONG'UDI
JUDGE

In the presence of:-

Ms. Ing'ahizu for State

Ms. Muthoni for Ithiga for appellant

Appellant
Njue CC