Asuga v Republic (Criminal Appeal E011 of 2022)
[2024] KEHC 5650 (KLR) (2 February 2024) (Judgment)

Neutral citation: [2024] KEHC 5650 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E011 OF 2022

A MSHILA, J

FEBRUARY 2, 2024

BETWEEN

BENARD SINDE ASUGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal originating from the conviction and sentence by Hon. G. Omodho (PM) in Kiambu Criminal Case No.152 of 2016 on the 28{{^th}} day of October, 2021)

JUDGMENT

1. The Appellant, Benard Sinde Asuga, was charged before the Principal Magistrate's Court at Kiambu in Criminal Case No. 152 of 2016 with the offence of Rape contrary to Section 3(1)(a) as read with Sub Section 3 (3) of the *Sexual Offences Act*, No. 3 of 2006. The particulars were that the Appellant on the 22nd day of August, 2015 at [Particulars Withheld] in Kahawa West, Kasarani Sub-County within Nairobi County intentionally and unlawfully did an act which caused his genital organ (penis) to penetrate into the genital organ (vagina) of HC without her consent.

2. In the alternative charge, the Appellant was charged with the offence of committing an Indecent act to a woman contrary to Section 11 A of the *Sexual Offences Act* No. 3 of 2006. The particulars were that the Appellant on the 22nd day of August, 2015 at [Particulars Withheld] in Kahawa West, Kasarani Sub-County within Nairobi County intentionally touched the vagina of HC against her will.

3. Upon being found guilty, the trial court convicted the Appellant and sentenced him to serve ten (10) years imprisonment. Being dissatisfied with the conviction and sentence the Appellant lodged the instant appeal based on the following grounds of appeal:-

a. That the Learned Magistrate who convicted the Appellant erred in law and in fact by not complying with Section 200 of the *Criminal Procedure Code* of according the Appellant the opportunity to recall witnesses when taking over the case.

b. That the Learned Magistrate erred in fact and in law in not according the Appellant fair trial as enshrined under article 50(2)(h) of the *Constitution* of Kenya 2010.

c. That the Learned Trial Magistrate erred in law and in fact by convicting and sentencing the appellant pursuant to Section 3(1) as read with Section 3(3) of the *Sexual Offences Act*, without having had an opportunity of personally assessing the personal credibility and demeanor of all witnesses as she was not the trial magistrate.

d. That the Learned Magistrate erred in law and in fact by not according the accused person the right to recall all the witnesses when the trial court was changed.

e. That the Learned Magistrate erred in law and in fact by failing to find that there was no tangible evidence to sustain a conviction against the appellant as the essential ingredients of the offence of rape were not proved beyond reasonable doubt.

f. That the Learned Trial Magistrate erred in fact and in law by failing to consider that the prosecution's evidence contained inconsistencies.

g. That the Learned Magistrate erred in fact and in law by ignoring and/or failing to consider the evidence adduced by the appellant during his defense in her Judgment.

h. That the Learned Magistrate erred in law and in fact by not evaluating the entire evidence but took the prosecution evidence in isolation.

i. That the Learned Trial Magistrate erred in fact and in law by failing to consider the relationship that existed between the complainant and the appellant as they were boy/girlfriend.

j. That the Learned Trial Magistrate meted out a sentence that was extremely harsh in the circumstances even when the complainant openly stated that she was no longer interested in the matter and had already moved on.

Background

4. The prosecution called six (6) witnesses in support of their case. HCT (PW1) testified that on 22/8/2015 she was residing at [Particulars Withheld], next to [Particulars Withheld] University together with Millicent Akoth who was said to be the accused's girlfriend. She stated that Millicent was going for a kesha and Benard would come to help with fetching water. Benard arrived at 4.30 pm and together they went to fetch water she then went back to her room. At around 8 pm Benard knocked on her door and stated that he wanted to pick his laptop which was under the bed. The complainant narrated that she opened the door for the accused who picked his laptop and proceeded to sit on the bed where he started listening to music. At around 9pm the complainant asked the accused to leave but the accused stated that his hostel had been locked as such he would sleep on the floor. The complainant testified that she told the accused to go spend the night at his friend's room which was next door, but instead he locked the door with a padlock and attacked her; she tried to struggle and bit the accused on the hand but the accused overpowered her and that at this point she asked the accused to use protection which he did. She claimed that the accused inserted his penis into her vagina and that she felt so much pain. After finishing the accused is said to have called his friends next door boasting. The accused raped the complainant a second time and later left and joined his friends where they were heard celebrating. That the accused came back the following morning at 6 am and asked her to forgive him. She testified

that she later reported to the university security and the health centre. She was taken to a health facility at Eastleigh where she was examined and given medicines and a PRC form was filled. She also reported at Kiamumbi Police Station where she was referred to Kiambu Hospital with a P3 form. She testified that after finishing her exams she went home when she was called and informed that the accused had been arrested.

5. Babra Salano Kerre (PW2) a clinical officer working with MSF Organization at the gender violence recovery centre. She produced the medical certificate and PRC form on behalf of Purity Kajuju. She testified that on physical examination of the complainant, there were no visible injuries but she complained of pain and neck. Examination on the genitals showed that the external was normal. There was reddening of inner labia walls and there were fresh bruises on the inner vaginal walls and external cells. The hymen had multiple old tears. The results for the HIV and urinalysis test were negative and there was no presence of spermatozoa in the vaginal swab.

6. No. 234387 APC Jared Agola (PW3) attached at [Particulars Withheld] University testified that on 19/1/2016 he received a report from students that the accused had been sighted. The complainant had earlier made a report that the accused had raped him. They proceeded to a kinyozi where the accused was identified by Meshack one of his colleagues. The accused was arrested and taken to Kiamumbi Police Station.

7. Dr. Warda Hassan (PW4) from Kiambu Hospital produced the P3 Form for the complainant who had a history of rape. Upon examination, she had pain on her neck, she also had bruises and reddening of genital walls. That there was thick creamy discharge from the vagina.

8. No. 2011316774 APC Meshack Odero Oburu (PW5) currently attached at Kisumu East Sub-County testified that on 23/8/2015 he was working at [Particulars Withheld] University when the complainant visited the security office and reported that the accused had raped her. That they referred her to the hospital for treatment and later to Kiamumbi Police Station. He stated that they started searching for the accused who had gone missing. They were later informed that the accused had been spotted at a Kinyozi and together with Jared they proceeded to arrest him and took him to Kiamumbi Police Station. He indicated that he knew the accused before as a barber working near the university.

9. No. 69136 Corporal Daniel Mwangi (PW5) the investigating officer herein testified that the accused was arrested on 19/1/2016 a report of rape having been made on 25/8/2015 by the complainant who alleged to have been raped on 22/8/2015. The complainant had been treated at MSF and had documents from the said hospital. He issued the complainant with a P3 Form which was filled at the hospital. The accused was later charged with the offence of rape.

10. The prosecution closed its case and the Appellant was put on his defence where he opted to give a sworn statement and called one witness. In his defence, Benard Sinde Asuga (DW1) the Appellant herein denied raping the complainant. He testified that the complainant was his girlfriend since January, 2014 while he was working at [Particulars Withheld] University. That on 22/8/2015 the complainant called him and informing him that she had an emergency. The complainant arrived at 6pm and around 8pm they proceeded to his house where she was accommodated from Tuesday to Saturday. His girlfriend asked him what the complainant had been doing in his house as such he asked the complainant to leave. The complainant did not want to leave as such she told the accused that he would know him. He was later called by the security office at [Particulars Withheld] University. He testified that the complainant refused to leave as such he left her in the house as he was getting late for work.

11. Millicent Akoth Sore (DW2) testified that the accused was her boyfriend from 2012 to 2019 and that in August she had travelled to Alliance Girls. She was friends with the complainant but did not know that the complainant were friends with the accused. She was informed about the rape by the university

security. When she went to the office she found the complainant who asked her to say that they were living together.

12. The trial court found that the issue of penetration was well proved as the complainant's evidence was straight forward and well corroborated. On the issue of consent, the court found that the victim's consent was neither obtained nor was there room to make a choice as she was forced into submission through aggression. The accused's identity was not contested as the two had interacted earlier. In conclusion, the prosecution was found to have proved its case beyond reasonable doubt and the accused was found guilty of the offence of rape as charged and he was sentenced to serve ten (10) years imprisonment less the thirty (30) days spent in custody.

13. The parties were directed to canvas the appeal by way of written submissions.

Appellants Submissions

14. The Appellant in his written submissions submitted that the prosecution failed to prove its case against him beyond reasonable doubt. Reliance was placed in the case of *JMN vs Republic* (Criminal Appeal No. E017 of 2021) (2022) KEHC 279 (KLR). He raised the issue of whether the complainant had taken a shower before visiting the hospital and whether the complainant bit the accused's finger. He submitted that without the presence of the Appellant's DNA in the complainant's vagina, there was need for the complainant's evidence to be corroborated by strong and credible evidence. Further, he submitted that his defence was not given its probative value. Reliance was placed in the case of *Erick Onyango Odeng vs R* (2014) eKLR. The Appellant submits that the complainant only pressed charges as he had asked her to leave his house as another of his girlfriends was coming over. The court was urged to find that the Appellant and the complainant were intimate friends. It was also submitted that the court is not a place of settling scores. Lastly, the Appellant submitted that his right under Section 200 of the *Criminal Procedure Code* was violated and that failure to recall the complainant was prejudicial to him causing a miscarriage of justice. Reliance was placed in the case of *Ndegwa vs R* (1985) KLR 535. The court was urged to quash the conviction and set aside the sentence.

Respondents Submission

15. The Respondent submits that the prosecution ably discharged its duty of proving all the ingredients of rape. That penetration was proved through the complainant's evidence, the medical certificate and PRC forms which were produced. With regard to consent, the complainant was said to have failed to consent to the Appellants advances as such he resorted to the use of force. The Appellant was said to be well known to the complainant as such identification was not an issue. The failure of starting the matter de novo in compliance with Section 200 of the *Criminal Procedure Code,* the same was stated not to be prejudicial as the Appellant had been accorded a chance to cross examine the complainant further, in any case the available remedy was said to be an order of retrial and not an acquittal.

Issues for Determination

16. After reading the respective written submissions this court has framed the following issues for determination;

    i. Whether the prosecution proved its case beyond reasonable doubt.

    ii. Whether Section 200 of the *CPC* was adhered to.

    iii. Whether the accused's defence was considered by the court.

Analysis

17. It is the duty of the first Appellate court to carefully examine and analyze afresh the evidence presented from the trial court and draw its own conclusion. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. See the case of *Pandya vs. Republi*c (1957) EA 336.

18. The appellant was charged with the offence of rape; The main ingredients of the offence of rape are identification, intentional and unlawful penetration with his/her genital organs, lack of consent or the same being obtained by force. The offence is provided for under Section 3 (1) of the *Sexual Offences Act*

> "(1) 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."

19. The Appellant alleges that the prosecution did not prove these key ingredients beyond reasonable doubt.

20. On the issue of penetration, the complainant testified that the Appellant forced her to have canal knowledge with him when he visited her room and pretended to be collecting his laptop. The complainant stated that the Appellant used protection when he penetrated her twice. The Appellant on the other hand denied the allegations and stated that the two were friends who had consensual sex.

21. The trial court dismissed the Appellant's defence as a mere denial. The complainant gave a candid account of what transpired on the fateful day. The same was corroborated by testimony of PW2 the clinical officer who produced the PRC form. On examination the complainant was said to experience pain on her neck. Also it was indicated that there was reddening of the inner labia walls and there were fresh bruises on the inner vaginal walls. This according to the trial court was sufficient evidence to prove that indeed the complainant was raped.

22. On consent, this court finds that the accused had carnal knowledge with the complainant without her consent. In the case of *Republic vs. Oyier (*1985) KLR 353 the Court of Appeal held that;

> "1. The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.
>
> 2. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.
>
> 3. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards

committed by force or against her will; nor is it any excuse that she consented after the fact."

23. The complainant testified that the Appellant forced her to have sex with him as he threatened her with a knife and at the same time covered her mouth with his hand causing the complainant to bite his finger. As a result of the struggle, the complainant experienced pain on her neck. The same is corroborated by PW2 who examined the complainant. In the circumstances, it is safe to conclude, the complainant having been overpowered by the accused had no choice but to concede.

24. On the issue of identification, the evidence at trial demonstrates that the Appellant was well known to the complainant as they had interacted prior to the incident;

25. In the case of *Anjononi & Others vs. Republic* (1980) KLR 59 the Court of Appeal held that;

> "...recognition of an assailant is more satisfactory, more reassuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another."

26. This court is satisfied that the Appellant was identified by way of recognition.

27. This court is satisfied that there was medical documentary evidence that corroborated the complainants evidence on penetration and is satisfied that the prosecution proved all the key ingredients to the desired threshold.

Whether the accused's defence was considered by the court

28. On whether the trial court considered the accused's person defence, the trial court found the same to be a casual denial. The Appellant contends that the complainant wanted to settle scores at the court as she was kicked out of the room to pave way for his other girlfriend. The Appellant referred to the complainant as an angry girlfriend.

29. The evidence of the complainant coupled with the medical evidence points to the offence of rape consent having not been sought. This court having carefully perused the lower court record, is satisfied that the complainant's evidence was consistent and the trial court was accused's defence is indeed a mere denial.

30. The accused alleges that his rights enshrined under Section 200 of the *Criminal Procedure Code* were violated as he was not accorded a chance to recall the complainant. The prosecution submitted that the accused was accorded an opportunity to cross examine the complainant when his advocate was present in court. The prosecution submitted that no prejudice was suffered by the accused.

31. A perusal of the lower court record shows that on 17/8/2016 when the matter came up for hearing, the accused sought for an adjournment on the ground that his advocate was absent. The court disallowed the prayer and ordered the case to proceed as scheduled and that the defence counsel will be at liberty to apply to have the witnesses who would have testified for further cross examination if he so wishes.

32. The complainant testified and was cross examined by the accused person. The next time the accused's advocate was present in court, he made an application to have the matter start de novo so as to cross examine the complainant. The same was objected by the prosecution. However, the court allowed the application and on 10/4/2017 the complainant was cross examined by the accused's advocate.

33. Subsequently, on 31/7/2019, the trial court being on transfer the prosecution sought directions under Section 200 of the *Criminal Procedure Code*. The prosecution sought for time to confirm whether

the complainant was available. The prosecution through the investigating officer expressed difficulties in finding the complainant as she had relocated. A further mention was given to accord prosecution time to trace the complainant. On 16/6/2020 the prosecution sought to proceed with the evidence on record. the accused person also opted to proceed with the evidence on record. At that point, the court ordered the matter to proceed with the evidence on record under Section 200 of the *CPC*.

34. Section 200(3) of the *Criminal Procedure Code* provides as follows:

> Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

35. It is clear that when the trial magistrate was transferred, the trial court invoked Section 200 of the *CPC* and both the prosecution and the accused person elected to proceed with the evidence on record. The investigating officer also expressed difficulties in tracing the complainant even after more time was accorded to the prosecution.

36. Section 200 of the *CPC* requires the trial magistrate to inform the accused of his right but it is not a must that a case must start afresh. In the case herein, the trial court complied with this requirement. Further, the complainant had already been subjected to a second cross examination.

37. See the Court of Appeal decision in the case of *Joseph Kamau Gichuki Vs. Republic* (2013) eKLR where it was held that;-

> This Court has previously held that section 200 of the *Criminal Procedure Code* should be invoked sparingly and only in cases where the ends of justice will be defeated if a succeeding magistrate does not continue a trial commenced by his predecessor. Some of the considerations to be borne in mind before invoking section 200 include whether it is convenient to commence the trial de novo, how far the trial had proceeded, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused.

38. In the instant matter, the prosecution indicated to the court that they had challenges procuring the complainant as she had relocated this was even after being accorded more time to trace her. This court finds that failure to start the matter afresh was not prejudicial to the accused on account that the defence had been accorded two opportunities to cross examine the complainant and they had not indicated to the court that they were not satisfied by the evidence given by the complainant.

39. In regard to the sentence, the accused was sentenced to 10 years imprisonment less 30 days spent in remand. Section 333 of the *Criminal Procedure Code* provides that:-

> (1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.

(2) Subject to the provisions of section 38 of the *Penal Code* every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in *this Code*.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

40. Bearing in mind that the trial court took into consideration the time spent in custody, the sentence imposed by the trial court is therefore, found to be proper.

Findings and Determination

41. In the light of the forgoing this court makes the following findings;

i. The prosecution is found to have proved its case to the desired threshold; the conviction is found to be safe;

ii. This court finds that there was no procedural flaw in the proceedings at the trial;

iii. The trial court is found to have carefully and seriously considered the appellants' defence.

iv. The appeal is found to be devoid of merit and it is hereby dismissed.

v. The conviction and sentence are hereby upheld.

Orders accordingly.

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 2ND FEBRUARY, 2024.

A. MSHILA

JUDGE

In the presence of:-

Mourice - Court Assistant

Wanjiru Njehia - for the appellant

Ndeda - for the Respondent/State

Appellant - present (Kiambu)