Lotiani & another v Republic (Criminal Appeal E029 of 2019)
[2024] KEHC 3397 (KLR) (9 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3397 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL APPEAL E029 OF 2019

RN NYAKUNDI, J

APRIL 9, 2024

BETWEEN

ESEKON LOTIANI ..... 1ST APPELLANT

EKALALE NACHORORIAM ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the judgment of Hon. Mwangi in Lodwar law Court cr. SO. No. 26 of 2021)

JUDGMENT

Representation:

Mr. edward Kakoi for the State

1. The appellants were charged with the offence of gang rape contrary to section 10 of the *sexual offences Act* No. 3 of 2006. The particulars of the offence were that on 2nd June, 2018 in Kibish Sub- County of Turkana County in association with Ekalale Nachorim intentionally and unlawfully caused his penis to penetrate the vagina of ATE without her consent. In the alternative, they were charged with the offence of committing an indecent act with an adult contrary to section 11(A) of the *Sexual Offences Act*. The particulars were more or less similar to those in the first charge.

2. The appellants were convicted on the main charge and sentenced to serve nine (9) years' imprisonment. Being dissatisfied with the said judgment the appellants lodged the present appeal relying on the following grounds:

    i. That the learned trial magistrate erred in law and facts without considering that his case was closed up without the testimony of an investigating officer.

ii. That the learned magistrate erred in law and facts by not observing that the medical officer who was brought to testify before the court had not actually filed part C of the P3 form in respect of the nature of the offence.

iii. That the trial magistrate erred in both law and facts in convicting the appellant without considering that there was contradictory evidence in the prosecution case.

iv. That the trial magistrate erred in both law and facts by not considering that the case was full of fabricated facts and testimonies.

v. That the trial magistrate erred in both law and facts when he over-looked the appellant's defence in establishing his judgment.

The prosecution in support of its case called three witnesses.

3. PW1 was the complainant. She testified and gave events leading to the ordeal. It was her testimony that she was wearing a skirt with an underwear. It was her testimony that she was woken up by the 1st appellant who was on top of her and thrusting inside her vagina with his penis. It was her testimony that evening, she had taken some alcohol provided by a neighbor to cure a bout of diarrhea and then she covered herself inside a mosquito net and woke up to find the 1st appellant having sex with her. It was her testimony that while the 1st appellant was thrusting inside her, the 2nd accused was resting besides her, apparently resting having already has his turn.

4. It was her testimony that she struggled with the 2 men and with the help of her daughter, she managed to lock the door and one N a neighbor who is a PR came and helped her apprehend the 2 accused person and put them in cells. It was her testimony that upon apprehending the 2, she saw that she had some shine slimy substance oozing from her Vagina.

5. PW2 (NL) said that he is a KPR officer and that the complainant is his neighbor for the last 2 years. It was his testimony that on 02-06-2018, about 2AM, he was in his house when he was woken by screams from the complainant's house saying she was being raped. He said that he rushed to the scene and on arrival he found PW1 on the door way struggling with the 1st accused while the 2nd accused was inside and the scene was illuminated by the daughter of PW1 who was carrying a torch. He said that he aviated by the accused persons and looked foe enforcement of fellow KPR who came and assisted him to keep the accused persons in custody. It was his further testimony that they guarded the accused persons up to when a police vehicle came and carried the accused persons.

6. PW3 (Ngasike John) testified that he is the clinical officer who worked and who knew the writing and signature of the clinical officer who worked and who knew the writing and signature of the clinical officer who examined and completed the P3 in respect of PW1. It was his testimony that there were no notable bruises in the genitalia but there was not necessary for a raped adult. It was also his testimony that PW1 suffered injury to the right eye. He produced the P3 as an exhibit.

7. At the close of the prosecution case, the trial court found that the accused persons had a case to answer and placed them on their defence. They elected to give unsworn testimony and did not avail any witnesses.

8. In defence, the 1st appellant stated that on 28th he was at home having been sent home the previous day to go and fetch school fees. He testified that he was given a cow to go and sale in Katungula area where he arrived in the evening with the cow and he met a man who introduced him to a dealer and they agreed a price of Kshs. 27,800/=. He stated that he slept in the house of the dealer and in the morning, as was a ground of men, came and arrested him and when the man who had taken him to the home

arrived and asked why he was being arrested, no answers were given and instead he was taken to the police station and later charged for something he did not do.

9. The 2nd appellant testified that on 3rd June, 2018, his mother sent him to the aunt's house to fetch food. He said that he travelled to his aunt's place in Kakorongorok where he stayed for 2 days. He stated that his aunt gave him Kshs. 1000/= and some food to take home. He said that it was on his way home at Nangole market when the police vehicle drove by, stopped, officers lavied him, forced him to the vehicle and took him to Kaikor police station where he was beaten up and held for 4 days without any reason and later he was charged with an offence he never committed.

Analysis and Determination

10. I have considered the appeal and the evidence adduced at the trial court. I have also read the record of the trial court and the judgment. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanour of the witnesses. See Okeno vs. Republic [1972] E.A 32.

11. The issues that arise for determination in this appeal are;

    i. Whether the prosecution proved its case to the desired threshold;

    ii. Whether the sentence meted upon the appellants was lawful.

Elements of the offence of gang rape

12. The appellant was charged with the offence gang rape contrary to section 10 of the *Sexual Offences Act* which provides as follows:

> " 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 the fifteen years but which may be enhanced to imprisonment to life."
>
> The provisions of section 10 of the *Sexual Offences Act* have capture the elements of gang rape as follows:
>
> i. Commission of rape; Penetration as defined by section 2 of the *Sexual offences act* without consent thereof;
>
> ii. In association with another or others, or any other with common intention, is in the company of another or others who commit the offence of rape
>
> iii. Positive identification of the perpetrator.

13. The key element then is rape or defilement that is committed in the association of others with a common intention notwithstanding the fact that the accused may not have defiled the victim. Therefore, it matters not whether the offence was rape or defilement as long as the conditions under section 10 are found to exist.

14. The key ingredients of the offence of rape created in section 3 (1) of the *Sexual Offences Act* include intentional and unlawful penetration of the genital organ of one person by another, without 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."

15. Evidence was adduced by PW 3, a clinical officer that there were no notable bruises in the genitalia but there was not necessary for a raped adult. It was his testimony that PW1 suffered injury to the right eye.

16. It then brings to question whether the element of penetration was clearly established. The Respondent in his submissions stated that even if there was no direct evidence that indeed the 2nd appellant penetrated at least he is guilty of furthering common intention under section 21 of the Penal Code.

17. One of the fundamental questions which must be answered is whether the Appellants can be placed at the scene of the crime. Before I delve into the trial court record I make reference to the principles in the case of R-vs- Turnbull and Others (1976) e ALL ER 549 Lord Widgery C.J had this to say. " First wherever the case against an accused depends wholly or substantially on the correctness of one more identification of the accused of the accused which the defence alleges to the mistaken the judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identification. In addition he should instruct then as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation. At what distance. In what light was the observation impended in any way, as for example by passing traffic or a press of people" Had the witness ever seen the accused before. "How often" if only occasionally, had he any special reason for remembering the accused. How long elapsed between original observations and the subsequent identification to the police. Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance.

    The evidence on identification is based on the testimony of PW1 and PW2 who had prior knowledge of the Appellants in this case. This was purely a case of recognition in circumstances which were not mistaken to render it unreliable. As a consequence the Appeal on conviction is dismissed.

18. Following the entry of conviction by the trial court each of the appellant was sentenced to (Nine) 9 years imprisonment. In evaluating whether this court can exercise jurisdiction over that punishment, I rely on the guidelines set out by the Court of Appeal in Thomas Mwambu Wenyi vs Republic (2017) eKLR cited the decision of the Supreme Court of India in Alister Antony Pereira Vs State

of Mahareshtra at Paragraph 70-71 where the court held the following on sentence "Sentence is an important task in the matter of crime. One of the prime objective of the criminal law is imposition of appropriate, adequate just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles. Twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing he crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence. In Shadrack Kipchoge Kogo vs the Republic Cr. App. 253/2003 the court of Appeal stated on the jurisdiction of an Appeals Court to review or interfere with the sentence of a trial court. " That sentence is essentially an exercise of the trial court and for this court to interfere, it must be show that in passing the sentence the court took into account and irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred.

19. From the memorandum of appeal and submission by the Appellants none of the arguments has passed the hurdle set out in the Kogo Case (Supra). Consequently, the Appeal on Sentence also fails. The upshot of it the entire appeal is dismissed for want of merit.

DELIVERED, DATED AND SIGNED AT LODWAR THIS 9TH DAY OF APRIL, 2024

In the presence of

Mr. Onkoba for the DPP

The Accused

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R. NYAKUNDI

JUDGE