Hillary v Republic (Criminal Appeal E085 of 2022)
[2024] KEHC 5315 (KLR) (17 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5315 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E085 OF 2022

DK KEMEI, J

MAY 17, 2024

BETWEEN

KENNEDY SIMIYU HILLARY ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence by Hon G. Adhiambo (PM) in Kimilili Principal Magistrate's Court S.O No. 6 of 2022 dated 11.12.2022.)

JUDGMENT

1. The Appellant was convicted of the offence of rape contrary to contrary to section 3 (1) (a) (c) (3) of the *Sexual Offences Act* No. 3 of 2006 and sentenced to 15 years' imprisonment on 11th December 2022.
2. The appellant was aggrieved by the conviction and sentence. He filed his petition of appeal wherein he raised the following grounds of appeal namely:
    i. That the sentence was harsh and excessive in the circumstances.
    ii. That the learned trial magistrate erred in law and fact by basing the conviction on speculation and contradictions from the prosecution's side.
    iii. That the case against the Appellant was not proved beyond reasonable doubt.
    iv. That the learned trial magistrate considered extraneous factor in her decision making.
    v. That the learned trial magistrate erred in law and fact by rejecting the Appellant's alibi.

    The Appellant therefore sought that the conviction be quashed and sentence set aside and that he set at liberty.

3. The particulars of the charge were that on 26th November 2021 at in Bungoma North Sub-County within Bungoma County, the Appellant intentionally and unlawfully caused his penis to forcefully penetrate the vagina of S.N.C a female adult without her consent.

4. He was also charged with an alternative offence of committing an indecent act with an adult contrary to section 11(a) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 26th November 2021 at Bungoma North Sub-County within Bungoma County, the Appellant intentionally and unlawfully caused his penis to forcefully penetrate the vagina of S.N.C a female adult by use of force.

5. The appellant denied the charges when he appeared before the court for plea. The case thus went to full trial during wherein the prosecution called four witnesses in support of its case.

6. PW1 was S. N.C. who testified that she recalled on 26th November 2021, at around 6.15 am while on her way to the stream to fetch water alone, the Appellant herein grabbed her by the clothes on her neck, squeezing her neck so hard that she could not scream. That the Appellant pushed her on the ground making her to fall, tore her clothes (dress, petticoat and inner pant), unzipped his trousers and proceeded to rape her. He lay on top of her and forcefully inserted his penis into her vagina. She was overpowered by confusion to comprehend what was happening until she later heard a lady called Agnes (PW2) screaming out for help whilst asking the Appellant what exactly he was doing. The Appellant lifted himself off the complainant while threatening her and Agnes that if he was to hear any talk by them concerning what happened, they would face the music. She testified that at the time of the incident she was five months pregnant and that as a result of the rape ordeal, she started bleeding. Agnes escorted her home where she rung her husband who later advised her to report the matter at the police station. She added that the incident occurred within a sugar plantation.

   On cross-examination, she stated that the Appellant is related to her since his mother is her aunt and that he raped her while she was heading to the stream.

7. PW2 was Agnes Barasa who testified that on 26th November 2021 at around 6.00 AM she was heading to collect milk from the home of PW1 when she heard someone crying in a low tone in the sugar plantation beside the road. She spotted a jerrican by the road and when she followed the directions of the screams, she found the Appellant herein raping PW1. She knew it was rape judging from the condition of the clothes of PW1. She raised alarm asking what exactly was the Appellant doing only for him to threaten her that if she was to repeat to anyone what she had seen, she would face the music. She testified that she knew the Appellant as he is a known boda boda rider and that she even uses his services. She testified that after the escape of the Appellant, she noted that the complainant was bleeding and that the upper part of her full dress and inner pant were torn.

   On cross-examination, she stated that PW1's home is close to hers as is the case with that of the Appellant and that she knew him very well. She insisted that she found the Appellant raping PW1 and that he even threatened them if they were to repeat what happened in that sugar plantation to anyone, they would face the music.

8. PW3 was Bonface Kaboi Tendet, who testified that he is a clinical officer working at Karima Health Centre. He examined PW1 herein on 26th November 2021 as she came into the health centre with a history of having been attacked and raped by a person well known to her on the same day. On examination, he observed that she had blood stains in her inner pants and semen fluids on her enteritis. She sustained injuries on her vagina. A detailed examination of her vagina indicated that she had minor bruises on the labia minora, her vaginal wall was intact and that there were no injuries to her cervix. There was obvious vaginal bleeding that he associated with forceful penetration to a pregnant woman. He produced PW1's treatment notes as P Exhibit 1 and the signed P3 form as P Exhibit 2.

On cross-examination, he stated that they did not conduct any DNA analysis of the Appellant and that he does not know who raped the complainant.

9. PW4 was No. 71272 Corporal Dickson Langat who testified that he is from Mbakalo Police Station and that he is the investigating officer in this matter. He recalled on 26th November 2021 he received a report from PW1 that on the same day at 6.01 am while on her way to the stream to fetch water, the Appellant accosted her at the footpath sandwiched by sugar plantation where he proceeded to forcefully insert his penis inside her vagina. She reported the Appellant herein and he proceeded to record the same in the OB and sent her to Karima Heath Centre where she was to be examined and treated. PW1 availed the clothes she was wearing during the incident and that he noted that they had bloodstains. He produced a black panty (torn) as Exhibit 2; a yellow petticoat with blood stains as Exhibit 3; a torn dress with mud stains on the back as Exhibit 4; photos of the scene as Exhibit 5 (a) to 5 (c) and certificates of photography as Exhibit 6. He testified that the photographs were processed and that he proceeded to record the evidence of the eye witness (PW2), and made his arrest thereafter.

   On cross-examination, he stated that he is not aware if the Appellant was related to PW1 and that he knew the home of the Appellant was about 25 metres from that of PW1. He testified that the complainant recognized the person who raped her.

10. At the close of the prosecution case, the court found that the prosecution had established a prima facie case against the Appellant and he was thus put on his defence. He gave sworn evidence and called six (6) witnesses.

11. DW1 was Kennedy Simiyu Hillary who testified that he works in the jua kali sector. He insisted that he did not commit any offence. He testified that his wife had some sort of discord with the complainant herein and that the case is before the chief and the sub-chief. He testified that PW1 was set to be arrested but she lodged a false claim of rape against him leading to his arrest. He insisted that PW1 wanted him to settle her claim but the OCS Mbakalo Police Station was able to listen to him as he insisted it was all a frame up. The OCS rung the chief informing him that there was no rape but just a frame up.

12. DW2 was Moses Makokha Indika, who testified that the Appellant has done work for him before and that he collects students and transports them to school for him. According to him, on the date of the alleged incident, he was with him and that he was late in preparing the student and so he arrived at his house late. He added that he had not heard of any adverse allegations against him as he is trusted person in their area.

    On cross-examination, he testified that he has not stated at what time he was he with the Appellant and that the Appellant is a boda boda rider not farmer.

13. DW3 was Shadrack Makweto, who testified that he was not aware of the charges the Appellant faced. He told testified that he only knew of the case involving the wife of the Appellant and the complainant herein. He added that the Appellant did not have any disagreement with the complainant's husband and that he has never dealt with any case against the Appellant in the area.

14. DW4 was Richard Wanyonyi Webi, who testified that he is only aware of the case of his wife quarrelling with the complainant herein and that efforts to sort out the same have been futile. He added that the Appellant has not committed any crime in the area.

15. DW5 was Edmond Makokha, who testified that he is the neighbour of the appellant herein. He stated that the complainant never informed him that she had been raped as she had bought land from them and that she knew the complainant used to quarrel with the wife of the Appellant. He stated that the police were arranging to arrest the complainant when the new allegations came up.

On cross-examination, he stated that there is a road separating the home of the complainant and that of the Appellant and that there is a sugar cane plantation behind the complainant's house.

16. DW6 was Peter Makede Wanjala testified that on 26th November 2021 at around 6.10 am the Appellant came to his hotel to take tea then he left at 6.25 am with his father. He stated that he had known the appellant that he knows the Appellant to be unproblematic. He also stated that he confronted the appellant as to how the allegations came up yet at 6.10 am he was at his hotel but he kept quiet.

    On cross-examination, he stated that at 6.00 am the Appellant was at his hotel and that he only learnt of the incident after three weeks. He noted that he did not record anywhere that the Appellant visited the hotel and that he had to prove because he departs his hotel at 6.30 and that his hotel has no name. He also testified that he had no receipts to show what the Appellant ate at his hotel.

17. At the conclusion of the hearing, the learned trial magistrate found the Appellant guilty as charged on the main charge, convicted him and sentenced him to 15 years' imprisonment.

18. The Petition of Appeal, filed in court raises the following several grounds with regards to the conviction and sentence meted out.

19. The appeal was canvassed by way of written submissions. Both parties filed and exchanged their respective written submissions.

20. I have duly considered the appeal, record of the lower court and the submissions tendered. This being a first appeal, this court is mandated to re-evaluate the evidence adduced before the trial court afresh and subject to an independent analysis so as to arrive at its own independent conclusion as to whether or not to uphold the decision of the trial court. The Court of Appeal in *Gabriel Kamau Njoroge – v- Republic* [1982 – 88] 1 KAR 1134 stated this on the duty of the 1st Appellate Court;

> " It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this."

21. In the case of *Bassita v Uganda* S. C. Criminal Appeal No. 35 of 1995 where the Supreme Court held:

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victims' evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt."
>
> "For evidence to be capable of being corroborated it must:
>
> (a). Be relevant and admissible- *Scafriot* {1978} QB 1016.
>
> (b). Be credible- *DPP v Kilbourne* {1973} AC 729
>
> (c). Be independent, that is emanating from a source other than the witness requiring to be corroborated- Whitehead J IKB 99
>
> (d). Implicate the accused"

22. In the present appeal, the issue for determination is whether the prosecution established the offence of rape contrary to section 3(1) as read with section 3(3) of the *Sexual Offences Act* to the required standard of proof.

23. This court has re-evaluated the evidence in this appeal in light of the submissions made on this appeal. Section 3(1) of the *Sexual Offences Act* states that a person commits the offence of rape if;

> " He or she intentionally and unlawfully commits an act which causes penetration with his or genital organs;
>
> a) The other person does not consent to the penetration; or
>
> b) The consent is obtained by force or by means of threats or intimidation of any kind."

24. The prosecution was therefore required to establish penetration, absence of consent, and that the Appellant was the perpetrator of the crime. On the element of penetration, the complainant testified that the Appellant had raped her. That the Appellant accosted her while she was on her way to the stream to fetch water. He grabbed her by the clothes on her neck, squeezing her neck so hard that she could not scream. The Appellant forced her on the ground making her to fall, tore her clothes (dress, petticoat and inner pant), unzipped his trousers and proceeded to rape her. He lay on top of her and forcefully inserted his penis into her vagina. She was overpowered by confusion to comprehend what was happening until she later heard a lady called Agnes (PW2) screaming out for help whilst asking the Appellant as to what exactly he was he doing while atop the complainant. PW3 further corroborated the evidence of PW1 and PW2 when he testified that on examination of PW1, he observed that she had blood stains in her inner pants and semen fluids on her enteritis. He confirmed that she sustained injuries on her vagina. He added that a detailed examination of her vagina indicated that she had minor bruises on the labia minora, her vaginal wall was intact and that there were no injuries to her cervix. There was obvious vaginal bleeding that he associated with forceful penetration to a pregnant woman.

25. On the issue of identification, i find that the Appellant was well known to the complainant as a relative, neighbour, and a rider. In the case of *Anjononi & Others v. 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."
>
> The Appellant was well known to the complainant as they were related and were neighbours. It was PW2 who found the Appellant atop the complainant in the act of rape and who raised alarm and managed to scare away the Appellant. The said Pw2 stated that she also knew the Appellant quite well as they hail from the same area. Hence, the identity of the Appellant was not in doubt.

26. On the issue of consent, the complainant stated that the Appellant had carnal knowledge of her without her consent as he pounced on her as she headed to the stream to fetch water and who overpowered her. Indeed, the complainant's dress and underpants plus petticoat were torn while she struggled with the Appellant. Proof of the age of the complainant is not required but lack of consent is mandatory. It was her evidence that the Appellant grabbed her by the clothes on her neck, squeezing her neck so hard that she could not scream. The Appellant forced her on the ground making her to fall, tore her clothes (dress, petticoat and inner pant), unzipped his trousers and proceeded to rape her. He

lay on top of her and forcefully inserted his penis into her vagina. The clinical officer (PW3) confirmed that there was penetration of the complainant's vagina.

27. It is not in doubt that the age of the victim is also an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim. See Court of Appeal case of *Alfayo Gombe Okello v. Republic* Cr. App. No. 203 of 2009 (Kisumu). However, prove of the age of the complainant is not required in rape cases.

28. The main 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, coupled with the absence of consent. In the case of *Republic v. 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."

29. The complainant did not consent to the sexual act as she testified that the Appellant had accosted her, grabbed her neck, tore open her dress, petite coat and panty and raped her. Her testimony was corroborated by evidence of PW2 who caught the Appellant in the act (flagrant delicto) and that of PW3, the clinical officer, who examined her and confirmed that she had had blood stains in her inner pant and semen fluids on her enteritis. She sustained injuries on her vagina. A detailed examination of her vagina indicated that she had minor bruises on the labia minora.

30. The Appellant's evidence was centred on a frame up scenario and the existing squabbles between the Appellant's wife and the complainant and that did not in any way cast any doubt in the evidence as presented by the prosecution. None of his witnesses was able to place this court's mind in that arena that he could be innocent rather it was a scenario of blame games and inconsequential statements of the witnesses like why the complainant did not tell them that she had been were raped. On the whole, the entire evidence presented by the prosecution did meet the threshold of proof which is beyond any reasonable doubt. The complainant had no reason to tear up her clothes and undergarments and smear herself with blood and then take herself to the hospital just to fix or frame the appellant over some differences as neighbours. No sane woman would subject herself to that unless of course she had been violated. Iam not persuaded by the Appellant's assertions that this was a frame up. Iam satisfied that indeed the complainant was raped by the Appellant on the material date. Nothing came out that the Appellant had any differences with the eye witness (PW2) who found her in the act. I find that the Appellant's defence and alibi was properly rejected by the trial court as it did not cast doubt upon the evidence of the prosecution. The conviction arrived at by the learned trial magistrate was therefore safe and i uphold the same.

31. On the issue as to whether the sentence of 15 years was harsh and excessive, section 3(1) of the *Sexual Offences Act* creates the offence of rape, provides for the ingredients of the offence to wit penetration

and lack of consent whereas section 3 (3) of the Sexual Offence Act prescribes the penalty for the offence as follows;

> " A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life."

32. Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The discretion is however limited to the statutory minimum and maximum penalty prescribed for a particular offence.

33. In the case of *Shadrack Kipchoge Kogo v. Republic* Criminal Appeal No. 253 of 2003 (Eldoret), the Court of Appeal stated as follows;

> " Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an 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"

34. Similarly, in the case of *Wanjema v. Republic* (1971) E.A. 493 the Court stated as follows;

> " An appellate court should not interfere with the discretion which a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into consideration some immaterial fact, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."

35. The circumstances of the offence herein are that the complainant was then five months pregnant and that there was a possibility that her unborn child would have been affected in some way. She was quite vulnerable and thus her inability to defend herself from the Appellant who finally managed to have his way with her. The learned trial magistrate exercised her discretion and I see no reason to interfere with the sentence. The sentences, if circumstances warrant, could still be enhanced to life imprisonment. It transpired from the evidence of the Appellant that he is a married man himself and hence his conduct in waylaying a pregnant woman at that hour and raping her was despicable to say the least. The incident has psychologically scarred the complainant and probably affected her marriage with her husband. I find the sentence neither harsh nor excessive in the circumstances. I see no reason to interfere with it.

36. The upshot of the foregoing observations is that the Appellant's appeal lacks merit. Appeal. The same is dismissed. The conviction and sentence are hereby upheld.

DATED AND DELIVERED AT BUNGOMA THIS 17TH DAY

Of May 2024.

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D. KEMEI

JUDGE

In the presence of:

Kennedy Simiyu Hillary Appellant

Miss Kibet for Respondent

Kizito Court Assistant