Kebo v Republic (Criminal Appeal E023 of 2022)
[2024] KEHC 5868 (KLR) (22 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5868 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL APPEAL E023 OF 2022

RN NYAKUNDI, J

MAY 22, 2024

BETWEEN

ALEX KEBO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. D. Orimba in Lodwar Law courts Cr. S.O No. 52 of 2021)

JUDGMENT

Representation:

Mr. Kakoi for the State

1. The appellant was charged with three counts. He was charged with the offence of rape contrary to section 3(1) (4) of the *Sexual Offence Act* No. 3 of 2006. The particulars of the charge were that on 17th October, 2021 in Turkana South Sub County of Turkana County intentionally and unlawfully caused his penis to penetrate the vagina of SL by use of force.

2. On the second count, the appellant was charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars were that on 17th October, 2021 in Turkana South Sub-County within Turkana County, the appellant assaulted SL thereby occasioning actual bodily harm.

3. The appellant was also charged with the offence of stealing stock contrary to section 278 of the *Penal code*. The particulars of the charge were that the appellant on 17th October, 2021 in Turkana South within Turkana County, stole on she goat valued at Kshs. 8,000/= the property of SE

4. The appellant was convicted on all the three counts and was sentenced to serve 15 years imprisonment on the 1st count, 6 months on the 2nd count and 6 months on the 3rd count.

5. Being dissatisfied with the said judgment the appellant lodged the present appeal relying on the following grounds:

    i. That the learned trial magistrate erred in Law and in fact by failing to note that penetration was not proved.

    ii. That the learned trial magistrate erred in law and fact by failing to ensure that the appellant was supplied with witness statements and prosecution exhibits throughout the trial.

    iii. That the learned trial magistrate erred in law and in fact by failing to consider the inconsistencies and discrepancies in the evidence of the prosecution witnesses.

    iv. That the learned magistrate erred in law and fact by relying on hearsay evidence by allowing the medical report of a clinical officer who did not testify to be adduced.

    v. That the learned trial magistrate erred in law and in fact by misapprehending the evidence on record.

6. The parties filed submissions in support of their case.

Appellant's submissions

7. The appellant in advancing his submissions, couched three issues for determination namely:

    i. Whether penetration was proved?

    ii. Whether the evidence presented was sufficient to convict the appellant

    iii. Whether the trial court violated the rights of the appellant of a fair hearing.

8. It was submitted that the allegation of penetration was never corroborated with the medical evidence adduced. That the medical officer testified that the Labia, Majora and Minora were intact. The appellant argued that there was no medical evidence presented to prove the alleged penetration. It was submitted for the appellant that the question of penetration is still in doubt and such could warrant an interference of the trial court's finding. That the prosecution did not provide a clear and convincing evidence under this head. He urged the court to find so.

9. On the second issue, it was the appellant's submission that all the elements of the offence must be proven. The appellant argued that because penetration was not proven, the prosecution did not call the crucial witnesses who would have proven whether or not the appellant raped the complainant. That the result then is that the prosecution evidence to this extent was not adequate.

10. The appellant took issue with the fact that the medical report was produced by someone else who was not the maker of the said document. He argued that PW2 did not give reasons why the author of the medical report could not come to this court. For these reasons, the appellant urged the court to find that the evidence adduced was not sufficient to convict the appellant.

11. As to whether the trial court violated the rights of the appellant of a fair hearing, the appellant argued that the courts speak through the record. He submitted that he was not supplied with witness statements and prosecution exhibits throughout the trial despite making several requests.

12. The appellant further submitted that his right for a fair hearing under article 50 was violated since he did not have the witness statements to enable him cross examine the witnesses. Based on the foregoing the appellant urged the court to allow the present appeal as prayed.

Respondent's submissions

13. The Respondent submitted on the three separate counts. On the first count, the respondent submitted that the ingredients of the offence of rape were established. As to lack of consent, the respondent maintained that the complainant testimony was that she was passing near the house of the appellant when she was called in and assaulted and raped. The complainant as a result sustained injuries on the cheek and knee joints.

14. On penetration the respondent was of the position that the same was proved. That the complainant testified as to how she was penetrated and at the examination by the clinical officer, nothing abnormal was detected. Vaginal swab was done which revealed red blood cells and noble sterol cells.

15. Finally on this count, the respondent submitted that the appellant was well known to the complainant.

16. The second count was that of assault. According to the respondent, the charge was clearly proved. The complainant stated how she was assaulted by the appellant using a belt. The clinical officer confirmed that she has been assaulted, she had bruises on the knee joint and the face has bruises.

17. Count III was stealing stock. On this, the respondent stated that the appellant pleaded guilty to the said charge. The Respondent submitted that the prosecution indicated that it would read the facts but it did not. At the close of the prosecution's case, the facts had not been read out or the complainant (SE) had not been called to testify.

18. According to the Respondent, it was improper to sentence the appellant on this count without the facts being read out to the appellant or the complainant testifying. The Respondent urged the court to acquit the Appellant on this count.

19. On the sentence imposed, the Respondent urged the court to maintain the sentence in count I and II. It urged the court to acquit the appellant on the 3rd count.

Analysis And Determination

20. 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 demeanor of the witnesses. See *Okeno v. Republic* [1972] E.A 32.

21. 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 appellant was lawful.

Count I

22. 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."

23. The prosecution was therefore required to establish penetration, absence of consent, and that the Appellant was the perpetrator of the act. On the element of penetration, the complainant testified and gave a narration of how the Appellant had raped her. She testified that she was on her way home from the grandmother's house home. On reaching a certain house she saw the accused who called her. She moved closer to find out why she was being called. On close look she saw a goat having been slaughtered inside the house. she was grabbed and dragged in the house and raped without her consent.

24. 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 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."

25. Evidence was adduced by PW2 that the complainant's clothes were soiled but no blood stain. The face had bruises and were still fresh. The external genitalia were normal together with the external labia and Majora. The vaginal wall was also normal. No discharge was seen. HIV and pregnancy test was negative. A vaginal swap was done and it revealed red blood cells and noble sterol cells and the conclusion was that there was penetration.

26. It is therefore evident that the complainant did not consent to the sexual act. The evidence she gave was corroborated by evidence of the medical doctor who examined her and confirmed penetration.

27. The next issue is whether the appellant penetrated the complainant. From the evidence of the complainant, the accused person was positively identified to her. The evidence is that the two knew each other well prior to the case. It was the evidence of the complainant was always fond of making sexual advance whenever they met. In such circumstances, the accused person was positively identified.

In the cases of *R v Turbull and Others* (1976) 3 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 or more identification of the accused which the defence alleges to be 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 identifications. In addition, he should instruct them 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 convincing one and that a number of such witness 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 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 observation and the reason for remembering the accused" How long elapsed between original observation 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."

28. The evidence by the prosecution leaves no doubt that the appellant caused penetration of the complainant. Accordingly, I find that the elements of rape were proved beyond doubt. The conviction was therefore proper.

Count II

29. The Appellant was charged with the offence of assault causing bodily harm. In this court's opinion, the medical evidence by the clinical officer (PW 2) did corroborate the complaints evidence that she was assaulted. The result of the assault as per the medical evidence was the bodily harm occasioned to the complainant. The appellant's conviction on the second count of assault was thus proper and safe.

30. In the third count, the appellant pleaded guilty but the facts were never read to him even at the close of the prosecution's case. I agree with the Respondent's submission that it was improper to sentence the appellant on this count without the facts being read out to the appellant or the complainant testifying. I am therefore inclined to acquit the appellant on this count.

On sentence

31. In the "*Muruatetu Case*", the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to sentencing;

> "(a) age of the offender;
>
> (b) being a first offender;
>
> (c) whether the offender pleaded guilty;
>
> (d) character and record of the offender;
>
> (e) commission of the offence in response to gender-based violence;
>
> (f) remorsefulness of the offender;
>
> (g) the possibility of reform and social re-adaption of the offender;
>
> (h) any other factor that the Court considers relevant."

32. In my considered view, the accused mitigation ought to count in sentencing. The objectives of sentencing should be considered in totality. In this regard, section 3(1) (a) (b) (3) of the *Sexual Offences Act* gives room for the exercise of judicial discretion.

33. Further, the sentencing objectives in Kenya have been captured in the Sentencing guidelines 2023 to be the following: -

    i. Retribution: to punish the offender for his/her criminal conduct in a just manner.

    ii. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

    iii. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.

    iv. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.

    v. Community protection: to protect the community by incapacitating the offender.

    vi. Denunciation: to communicate the community's condemnation of the criminal conduct.

    vii. Reconciliation: To mend the relationship between the offender, the victim and the community.

    viii. Reintegration: To facilitate the re-entry of the offender into the society.

34. Therefore, mandatory minimum sentences place a bar on the trial court's ability to set a sentence lower than the one prescribed by the statute. It kind of stripes the Judge or magistrate's power to exercise judicial discretion on a case-to-case specifics. Sometimes I consider it as an intrusion by the legislature with regards to the sentencing discretion of Judges and Magistrates. The courts merely become rubber stamps. The offence of rape is punishable with an imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

35. In contrast to the above given the guidelines in the Benard Kimani V Republic "It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

36. The trial court while sentencing the accused persons noted that the accused person was a first offender and the court took note of the position in the Muruatetu case that mandatory sentences are now outlawed. The trial court imposed a 15 years sentence. In my view, the objectives of sentencing were not considered in totality.

37. Turning to the issue of sentence, I am reminded of the principles outlined in a persuasive case in Madalits Keke v The Republic Confirmation Case No. 404 of 2010 (HC) (PR) (Unrep). " Hitherto the basis on which appellate courts have had to overturn the sentence has basically been that the sentence was manifestly excessive or inadequate as to comport an improper exercise of the discretion. In either case the sentence was inadequate or excessive if there would be a sense of shock after due regard

of the offence, offender victim and the public, for which criminal justice serves an interest in relation to the latter, it must not be ignored that it is also in the public interest that criminals are treated jsutfly, humanely and according to the fundamental principles and provisions of our new constitutional order. Section 19(3) of the *constitution* now creates a fundamental right to citizens not to be subjected to "cruel, inhuman or degrading treatment or punishment. Sentences courts pass are therefore, violation of the section if they are cruel, inhuman or degrading. " it is not that the sentences be all or are two of these. The sentences will be unconstitutional on any one ground. Sentences must now be wary and ensure that in sentencing offenders the sentences comport with these constitutional rights. No sentence is per se constitutional, courts must therefore have to ensure that there sentences do not offend section of the *constitution* (*Solemn v He*l- 463 U.S 277 (1983). United Supreme Court.

> In sum we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted, reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crime, as well as to the discretion that trial courts possess in sentencing convicted criminals. (Footnote 16) But no penalty is per se constitutional. As the court noted in *Robinso v Califonia*, 370 U.S at 370 U.S 667 a single day in prison may be unconstitutional in some circumstance.

38. In the upshot, the 15 years custodial sentence be and is hereby interfered with a lesser sentence of ten (10) years' imprisonment. The court in arriving at this decision, has taken into account the aggravating factors, mitigation, that the appellant is a 1st offender and the objectives of sentencing.

39. The sentence imposed on the 2nd count is proper and safe and I shall not interfere with the same. The two sentences shall run concurrently and the period shall include the period from the time or arrest i.e. 30th October, 2021.

40. The appeal therefore partially succeeds on sentence whereas the order on conviction is affirmed.

DATED AND SIGNED AT LODWAR THIS 22ND DAY OF MAY 2024

In the Presence of

Mr. Otieno for the State

The Appellant.

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R. NYAKUNDI

JUDGE