Maroro v Republic (Criminal Appeal E002 of 2023)
[2024] KEHC 5037 (KLR) (13 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5037 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E002 OF 2023

GL NZIOKA, J

MAY 13, 2024

BETWEEN

ERIC SIRO MARORO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the decision of Hon. E. Kimilu, Principal Magistrate (PM) delivered on 19th June 2019, in Chief Magistrate's Court criminal sexual offence case No. 35 of 2017)

JUDGMENT

1. The appellant was arraigned before the Chief Magistrate's court at Naivasha charged vide criminal case S/O No. 35 of 2017 with the offence of rape contrary to section 3(1)(a), (b)(3) of the *Sexual Offences Act* No 3 of 2006 (herein "the Act") and an alternative charge of indecent act with an adult contrary to section 11A of the *Act*. The particulars of the charges are as per the charge sheet.

2. The prosecution case is that on 4th May 2017, PW1 CNM , (herein "the complainant") travelled from Nairobi to Naivasha where she arrived at 1.00am. That she went to the bus stage to get a motor bike to take her to her residence at (Particulars Withheld).

3. That she boarded a motorbike driven by the appellant who offered to take her home and they took off to her residence. That the appellant departed from the main road to another depot way. The complainant questioned the appellant as to why he had departed from the main road and he told her that it was the shortest road to her house.

4. That as they proceeded on, the complainant could see several cactus trees and doubted the appellant's information that the route was shorter to her house. At that time the appellant stopped the motor bike, alighted and as the complainant alighted, he turned on her grabbed her by the neck and told her that he was "after her". That even if she shouted nobody was near to rescue her. She pleaded to with him

not to harm her and offered him money and her mobile phone, but he tore her clothes, overwhelmed her plucked off her piece from the braids on her head, and fell her down.

5. That, the appellant removed his clothes, raised up her dress, removed her pant and raped her without any protection. The complainant testified that by that time all her personal effects were scattered all over. She picked them up and the appellant forced her to board the motor bike again. That, he told her he was not satisfied with one shot and as she declined to board the motor bike, he threatened to stab her with a knife, slapped her, and strangled her on the neck.

6. That, the appellant ordered her to board the motor bike again which she did as he was violent. He took her to Banda area where he alleged, that he was going to throw her into Lake Naivasha. As they proceeded on the appellant accused her of trying to call someone took her phone and threw it into the cactus trees, and returned to the scene where he had raped her. He raped her again and then told her to pay transport and she gave him Kshs. 100, and a further Kshs. 200. The appellant took the Kshs. 300 and left her at the scene. She traced her way home.

7. That, the following day the complainant took a bath, changed her clothes and went to work. She sought for permission went to hospital and reported the matter to the Police Station at Naivasha. The police officers visited the scene and collected pieces of hair braids believed to have been plucked off the complainant head, and the complainant's pant. In the meantime, the complainant was examined by the medical personnel and the PRC and P3 forms were filled. The appellant was then charged after his arrest over another report of rape and identification in the identification parade by the complainant.

8. At the close of the prosecution case, the appellant was placed on his defence. He denied the offence and testified that, on 30th May 2017, he woke up in the morning and dropped his child to school. He proceeded to Polyclinic motor bike stage. At around 10.00am he was approached by his cousin Annaline Mosoti in the company of three police officers; Corporal Albert Otuke, PC Idewa. That, Corporal Otuke had a relationship with Annaline which he advised her against, as the Corporal had a family. However, she was not happy and moved to Kihoto estate. Further, she told the appellant's wife that Corporal Oture was paying for her upkeep at Kihoto estate.

9. The appellant further testified that, he was arrested and taken to Naivasha Police Station on an allegation of raping Annaline which he had not done. That, while at the station he was subjected to an identification parade where all members were police officers, except him and that they all had shoes apart from him. That, the complainant herein identified him and picked him out of the parade. On 31st May 2017, he was arraigned in court charged with the offence herein which he denied and still denies.

10. At the conclusion of the entire case the trial Magistrate vide a judgment delivered on 19th June 2019, found the appellant guilty on the main count convicted him and sentenced him to serve 10 years imprisonment.

11. However, the appellant is aggrieved with the decision of the trial court and appeals against it on following grounds:

    a. That, the learned trial Magistrate erred in law and in fact by awarding a conviction on a prosecution case that was marred with uncorroborated evidence.

    b. That, the learned trial Magistrate erred in law and fact by not finding that the ingredients of the offence were not conclusively proved beyond reasonable doubt.

    c. That, the learned trial Magistrate erred in law and fact by awarding a sentence that is not only excessive but also harsh in the circumstances of the offence.

d. That, the learned trial Magistrate erred in law and fact by failing to find that the appellant's defence was cogent and believable.

e. That, I pray to be supplied with a copy of the appellate court proceedings and its judgment

f. That, further grounds shall be adduced at the hearing of the appeal.

12. The appeal was opposed by the respondent vide grounds of opposition dated 16th February 2023, which states:

a. That the witnesses who testified from PW1 the evidence was corroborated, consistent and credible.

b. That all the ingredients of the offence of rape were met and proved beyond reasonable doubt.

c. That the trial Magistrate awarded a minimum sentence for the offence and we implore the court to enhance the sentence to 20 years in prison regarding the circumstances of the case.

d. That the trial court evaluated the defense of the accused person against the prosecution evidence and correctly found the defense of the appellant as mere denials and full of lies.

13. The appeal was disposed of vide filing of submissions. The appellant in submissions filed on 31st March 2023 argued that, trial magistrate convicted him based on the prosecution case that was marred by contradictions and inconsistencies. That, the complainant stated that she gave the appellant an additional Kshs. 200 over the fare amount of Kshs. 100 however, PW3 the investigating officer claimed that, the appellant robbed the complainant of Kshs. 300. Further, the complainant stated that, she washed her clothes when she arrived home however, the clothes produced in court were stained with mud. Furthermore, there was a contradiction on between the complainant and the investigating officer on the number of people in the identification parade.

14. The appellant submitted that, the ingredients of the offence of rape as per the Act are; identification of the perpetrator, the use of force or threats against the victim, and penetration. That, the evidence of penetration by the complainant was not corroborated by any other evidence. That, the P3 form and PRC form produced as medical evidence indicated that, the appellant had blood stained discharged as she was on her menses. Further, there were no lacerations noted in the vagina nor were spermatozoa detected in the high vaginal swab.

15. That, the trial court erred in failing to warn itself of the dangers of relying on uncorroborated evidence of the complainant and relied on the case of *Bernard Kebiba v Republic* [2000] eKLR where the Court of Appeal stated that, a court can convict without corroboration where it is satisfied that the complainant is speaking nothing but the truth, however, it should warn itself of the dangers of basing a conviction such uncorroborated evidence.

16. Furthermore, the trial court erred in admitting the PRC form which lacked rubberstamp of the hospital and therefore its authenticity could not be verified.

17. The appellant submitted that, the evidence of identification was doubtful as the complainant did not state that she was able to identify the perpetrator in her first report to the police. That, the circumstances of identification were not favourable the offence was committed at night, in the bush while it was raining. Further, the complainant did not state the amount of time she spent with her assailant.

18. He relied on the case of, *Republic v Turnbukk* (1971) QR 227 where the court gave guidelines to consider while examining the circumstances of identification including how long the witness observed

the accused, at what distance, at what light, if the witness had seen the witness before and how often, if there was a special reason to remember the accused.

19. Furthermore, the identification parade did not meet the conditions envisaged in the Police Standing Orders as he was the only person in the identification parade who did not have shoes or a belt. He argued that, he was not supplied with the identification parade form to enable him prepare his defence in contravention of article 50 (2) (b) of the *Constitution* of Kenya, 2010.

20. Finally, the appellant submitted that, the sentence was manifestly harsh and excessive as the trial court failed to take into consideration his mitigation. Further, the trial court did not consider the time he spent in remand contrary to section 333 (2) of the *Criminal Procedure Code* (Cap 75) Laws of Kenya as she did not order the sentence to run from the time of his arrest and cited the case of *Ahamad Abolfatgi Mohammed & another v Republic* [2018] eKLR.

21. However, the respondent in submissions dated 16th February 2023 argued that, the complainant identified the appellant and further she was able to pick him out in an identification parade as the person who raped her.

22. Further, the medical reports produced as prosecution exhibit 1 corroborated the complainant's evidence that she was raped. Furthermore, PW3 the investigating officer recovered the complainant's torn clothes, pant and hair which were scattered at the crime scene.

23. The respondent submitted that, the appellant's defense that he was framed was mere denial and lies and was too weak to dislodge the evidence of the complainant. The respondent urged the court to uphold the conviction and enhance the sentence to twenty (20) years in view of the fact that the appellant violently sexually abused the complainant against her will.

24. I have considered the appeal in the light of the evidence adduced in the trial court and arguments advanced in this court. The role of the first appellate court isas held by the Court of Appeal in the case of; *Okeno v. Republic* (1972) EA 32, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.

25. In that matter, the court stated as follows: -

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that, the trial court has had the advantage of hearing and seeing the witnesses"

26. The appellant has been convicted and sentences of the offence of rape which is provided for under section 3(1) of the *Penal Code* which states: -

(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.

27. Pursuant thereto, the ingredients of rape are settled by case law as penetration, that the penetration was unlawful and without consent, and the accused committed the offence.

28. Further, the Court of Appeal in the case of; *Republic v Francis Otieno Oyier* [1985] eKLR in dealing with the issue of; "mens rea" in rape charge which the prosecution is required to prove stated that:

> " The learned magistrate had the correct appreciation of the mens rea in rape. It is primarily an intention and not state of mind. Thus the mental element is to have intercourse without consent, or not caring whether the woman consented or not: DPP v Morgan (1975) 61 Cr Appl. R 136 HL The prosecution must prove either 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; Archbold Criminal Pleading Evidence and Practice 40th Edn pp 1411 – 1412 paragraph 2881 and R v Harwood K (1966) 50 CR App R 56."

29. In considering the subject ingredients in relation to the matter herein I note that the complainant testified that, the appellant raped her twice. To corroborate her evidence on penetration, the P3 and PRC forms produced by PW2 Jane Wambui Njoroge, a clinical officer who examined the complainant, revealed that she had suffered bruises on anterior face and neck with pain in her left cheek. That, her hymen was broken and she had blood stained discharge due to menses. The conclusion of the examination was that, the afore finding were consistent with the history given of rape. Therefore the element of penetration was proved in the light of definition of penetration under section 2 of the Act as follows: -

> " means the partial or complete insertion of the genital organs of a person into the genital organs of another person;"

30. Furthermore, section 43 of the *Act* deals with circumstances where penetration is intention and unlawful and states as follows: -

> " (1) An act is intentional and unlawful if it is committed—
>
> (a) in any coercive circumstance;
>
> (b) under false pretences or by fraudulent means; or
>
> (c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence.
>
> (2) The coercive circumstances, referred to in subsection (1)(a) include any circumstances where there is—
>
> (a) use of force against the complainant or another person or against the property of the complainant or that of any other person;
>
> (b) threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or
>
> (c) abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating

his or her resistance to such an act, or his or her unwillingness to participate in such an act."

31. The complainant was categorical that, she was subjected to violent sex under threats and intimidation. That, she was even physically assaulted. The evidence of the physical assault has been confirmed by PW2 who established she had bruises on her body. The pieces of braids recovered at the scene confirmed the violence meted upon her. The use of force negates consent.

32. The very question is the person who raped her and in particular whether it was the appellant. The complainant testified that she was picked from a bus stage where there was light. The court takes judicial notice of the fact that, all public service vehicles or motor bike stage would generally be lit with adequate light and in modern days, electricity. She told the court that she was picked by the appellant at a stage outside Sera centre, where there are security lights. That ,when the appellant approached her, he did not have a helmet on. She thus states: -

> " I had seen my assailant face and his lips very well. At Sera centre where he picked me there was light. He had not worn a (sic) helmet and I saw his face very well."

In cross-examination she stated as follows: -

> " You came before I boarded another motor cycle. You stopped at Sera centre and because your motorcycle had an umbrella, I preferred to be dropped by you. I even heard other boda boda operators calling you "Malaya" prostitute. To me I treated it as hate speech. It turned out you were a rapist.

She went on to say: -

> " There were lights at the scene'

33. In addition PW3 No. 72266 PC Boniface Aboki while being cross-examined by the appellant states that: -

> " The stage has electricity lights i.e. Sera centre"

34. In further evidence, it is undisputed that an identification parade was conducted and the appellant was positively identified. The parade form was produced in evidence. It does not indicate that, he was dissatisfied with the manner in which it was conducted.

35. It is against the afore evidence that, the appellant testified that, he was being fixed by his cousin Annaline for disapproving of her relationship with Corporal Otuke. However, several issues and/or questions arise from the appellant's defence. First and foremost, he does not address the events of 4th May 2017, when the offence is alleged to have taken place, he does not testify as to where he was, what he was doing and more so in the night of 3rd to 4th March 2017. He elected to give it a black out and only spoke to the events of the day of his arrest.

36. Further, the appellant in his defence testified that he is a boda boda rider at Polyclinic motor bike stage and stays at Site estate in Naivasha. Therefore creating an opportunity to have come in contact with the complainant as a motor bike rider.

37. Furthermore, the defence in relation to bad blood between the appellant and a cousin Annaline was never put to the prosecution witnesses; and even if it was true, there is no reason advanced by the appellant why the complainant who was unknown to him had any reason to plant the charges on him.

The appellant does not state that, the complainant was known to him before the incident happen or had bad blood between him and the complainant.

38. Having considered all the evidence adduced I find that, there is adequate evidence that, the appellant was involved in the commission of the offence herein. I uphold the conviction.

39. As regards sentence meted out, I find that, it is the minimum sentence provided under the law. In fact had the prosecution sought for enhancement, I would have done so, taking into account the heinous manner in which the offence was committed. Taking into account the period the case has taken since 2017, and the sentence in 2019, I shall leave the appellant to serve the sentence meted out.

40. The upshot is that, the appeal lacks merit and it is dismissed in its entirety.

41. It is so ordered

DATE, DELIVERED AND SIGNED THIS 13TH DAY OF MAY, 2024

GRACE L. NZIOKA

JUDGE

In the presence of:

The appellant present virtually

Mr. Abwajo for the respondent

Ms. Ogutu: Court Assistant