



**Dacha v Republic (Criminal Appeal 36 of 2018)
[2024] KEHC 8469 (KLR) (9 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8469 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL 36 OF 2018**

JM NANG'EA, J

JULY 9, 2024

BETWEEN

HENRY DACHA APPELLANT

AND

THE REPUBLIC RESPONDENT

JUDGMENT

1. This appeal is preferred against the judgement of the Principal Magistrate's Court at Kikuyu (Hon.Onsarigo-RM) delivered on 31/5/2018 in which he convicted the appellant of the offence of rape contrary to Section 3 (1) (a), (b) and (3) of the *Sexual Offences Act* No. 3 of 2006 and sentenced him to 20 (twenty) years in prison. The appeal is both on conviction and sentence.
2. The appellant's Grounds of Appeal filed on 11/06/2018 and apparently amended on an unclear date may be summarized as hereunder:
 - i. That the learned trial magistrate erred in law and fact by convicting him on the basis of unreliable evidence of identification.
 - ii. That the learned trial magistrate erred in law and fact by failing to find that essential witnesses were not called.
And
 - iii. That the learned trail magistrate erred in matters of law and fact by failing to accord the appellant a fair trial as guaranteed by Article 50 (2) (b) and (e) of the Consitution of Kenya.



Guiding Principles

3. A first appellate court has the legal duty of re-evaluating the trial court's findings of fact and law and reaching its own conclusions while taking into account the fact that it did not have the advantage of watching the demeanour of witnesses{ (see the case of *Okeno V. Republic* (1972) E.A 32}

Summary of the Prosecution Evidence In The Lower Court.

4. The complainant then aged 86 years old testified that her house was broken into at about 1.00 am on 06/06/2015 and the burglar got into her bed . Upon shining her flash light on the invader's face, she recognized him as her neighbour she knew very well having hired him before to perform domestic chores for her.
5. The intruder is alleged to have proceeded to remove the complainant's clothes and raped her. During the act, the complainant said she inquired from the attacker why he was committing the act yet she had been circumscised with his mother (sic). The complainant didn't raise alarm during the act.
6. The complainant's daughter (PW2) testified that her mother reported the incident to her at around 6.00 am that night. According to PW2, the complainant related to her that her neighbour called Ndacha raped her. PW2 stated that she also knew the said Ndacha as the complainant's neighbour.
7. The case investigating officer (PW4) testified that the complaint was lodged at the Gender Desk of Kikuyu Police Station on 06/06/2015. According to information given to him the rapist was the complainant's neighbour at [Particulars Withheld] Village. Administration Police Officers later arrested the culprit at Karai area.
8. PW4 further testified that blood samples were taken from the complainant and the suspect for analysis by the Government Chemist. The Government Chemist report dated 06/04/2016 tendered in evidence found no spermatozoa or blood stains on clothes that the complainant wore at the material time.

The Appellant's Defence.

9. The appellant gave sworn evidence and confirmed that the complainant was his neighbour at the material time. He accused the complainant of malice saying that their families had a land boundary dispute which was resolved by the area chief.

Written Submissions.

10. The prosecution has not filed submissions. The appellant submits that the evidence of his recognition is not credible considering the undisputed fact that the alleged attack took place at night and the advanced age of the complainant. He also contends that no description of the attacker was given to the police and further that the arresting officers didn't testify to explain how they identified him as the suspect.
11. Citing the case of *Warunga v Republic* (1989) KLR 424 inter alia, the appellant submits that the trial court didn't satisfy itself that the circumstances of his identification as the offender were favourable and free from possibility of error. The intensity of light used for the identification and the position of the light relative to the suspect needed also to have been interrogated by the court according to the appellant (see case law in *Wandanyi v Republic* (1986)KLR 198 also cited in the appellant's submissions).
12. The appellant further laments that he wasn't accorded a fair hearing as the prosecution documents including witness statements were never supplied to him. He therefore contends that he was



encumbered in cross-examination of the prosecution witnesses and the presentation of his defence in violation of Article 50 (2) (g) of the *constitution* which requires that the accused be supplied with evidence in advance of trial to prepare his defence.

Analysis and Determination

13. The issues for determination are three-fold:
 - a. Whether the appellant was properly identified, nay, recognized as the rapist.
 - b. Whether the appellant's right to fair trial was abrogated.
 - c. The order (s) commending themselves to the court on this appeal.
14. It is common ground that the incident took place at night. On the basis of the case law cited, the court should carefully ensure that there is no possibility of error, more so in cases as here, where the prosecution relies on the evidence of a single identifying witness. In *James Okello v. Republic* (2022) eKLR it was observed that sometimes a witness may be mistaken even on identification or recognition of close relatives or friends if the conditions are unfavourable.
15. By dint of the proviso to section 124 of the *Evidence Act*, however, the court may convict the accused in sexual offences on the evidence of the victim alone implicating him if it is "satisfied that the victim is telling the truth".
16. In convicting the appellant the learned trial magistrate held that given the prosecution evidence, "the complainant had clearly interacted with the accused and was able to identify him". The court accordingly found that he was the rapist.
17. With respect to the learned trial magistrate, he failed to properly evaluate the evidence of identification or recognition as was indeed his duty as mandated by the law. He did not warn himself of the danger of relying on the uncorroborated identifying evidence of the complainant, especially considering that the attack took place at night. The intensity of the light used in the purported recognition; the position of the light relative to suspect and how long the attack lasted are not stated on the evidence. The evidence does not also show that the complainant gave any description of the assailant that enabled his arrest. Besides, the arresting officers didn't testify to explain how they identified and arrested the appellant as the culprit. It is also noteworthy that whereas the complainant only stated that she recognized the assailant as her neighbour, PW2 claimed that the complainant named her attacker as Ndacha.
18. Given the gaps and/or discrepancies in the prosecution evidence alluded to above, this court is unable to hold that the complainant spoke the truth regarding the appellant's complicity. The proviso to section 124 of the *Evidence Act* cited supra does not therefore aid the prosecution case.
19. For the foregoing reasons, I agree with the appellant and hold that the complainant didn't properly identify or recognize him as the attacker. It was unsafe to convict him in the circumstances.
20. The right to fair trial guaranteed by Article 50 (2) (j) of *the constitution* is one of four rights under the Bill of Rights that cannot be abrogated under any circumstances pursuant to Article 25 (c) of *the constitution*. The provisions require the accused to be given adequate time and facilities to prepare his defence and to be informed in advance of the evidence the prosecution will confront him/she with at trial, as well as to have reasonable access to the evidence. As observed by the appellant in his submissions, the evidence usually includes witness statements and any other documents that will be exhibited at trial.



21. A perusal of the lower court’s record does not show that the prosecution evidence was availed to the appellant before trial or at all. The omission infringed his constitutional right to fair trial and thus vitiated the trial. Issue (a) as framed above is thus determined in the affirmative.

Determination

22. It is unfortunate that the elderly victim was raped as corroborated by medical evidence yet the culprit was not fingered owing to wanting investigations and presentation of evidence. Courts, however, only decide cases before them solely on evidence and the law.

23. The upshot is that the appeal is allowed. The appellant be forthwith set free unless he is otherwise lawfully held over any other cases.

24. Judgement accordingly.

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J. M. NANG’EA

JUDGE

JUDGEMENT DELIVERED VIRTUALLY THIS 9TH DAY OF JULY 2024 IN THE PRESENCE OF :

The Prosecution Counsel,.....

The appellant.....

The Court Assistant,.....

