Kiprotich v Republic (Criminal Appeal 51 of 2020) [2024] KEHC 8905 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8905 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL 51 OF 2020

AC MRIMA, J

JULY 25, 2024

BETWEEN

KELVIN KIPROTICH .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. M.I.G Moranga (Senior Principal Magistrate) in Kitale Chief Magistrate's Court Criminal Case (S.O.) No. 119 of 2019 delivered on 9th December 2020)

JUDGMENT

Background:

1. K. K., the Appellant herein, was charged and convicted of the offence of Rape contrary to Section 3(1)(a)(c)(3) of the *Sexual Offences Act*.
2. The particulars of the offence are that, on the 8th day of May 2019 at [particulars withheld], within Trans-Nzoia County, intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of A.C.T., by force and threat and without her consent.
3. The Appellant faced an alternative charge of Committing an indecent act with an adult contrary to section 11(A) of the *Sexual Offences Act*.
4. The particulars thereof were that on the 8th day of May 2019 at [particulars withheld] within Trans Nzoia County intentionally caused the contact between his genital organ namely penis and the genital organ namely vagina of A.C.T. without her consent.
5. Before the trial Court, the Appellant was found guilty and accordingly convicted for the offence of rape.

6. He was sentenced to 10 years imprisonment.

The Appeal

7. The Appellant was dissatisfied with the conviction and sentence and lodged an appeal. He preferred the following Grounds of Appeal: -

    1. That I pleaded not guilty at the trial court.

    2. That the learned trial magistrate erred in both law and fact in convicting the Appellant by shifting the burden of proof to the Appellant.

    3. That the learned trial magistrate erred in both fact and in law by not considering that the Appellant was not examined by the clinical officer so as to prove the alleged offence.

    4. That the trial magistrate erred in law and in fact by not considering that there were fabrications in the evidence adduced by the prosecution team.

    5. That the trial magistrate erred in law and in fact in convicting yet the case was not proved beyond reasonable doubt.

    6. That the trial magistrate erred in both law and in fact by convicting without adequate evidence by the prosecution.

8. The Appellant did not file any written submissions. However, in his Petition of Appeal, the Appellant prayed that the appeal be allowed, the conviction be quashed and the sentence set aside with the consequence of him being set at liberty.

9. The appeal was opposed.

The Respondent's case:

10. The State challenged the appeal through written submissions dated 20th June 2023.

11. It was its case that the Prosecution established all the ingredients for the offence of Rape.

12. It urged that the appeal be dismissed and the conviction and sentence affirmed.

Analysis:

13. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono vs. Republic [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in Ajode v. Republic [2004] KLR 81.

14. This Court is, therefore, supposed to determine whether the offence of rape or committing and indecent act with an adult was proved beyond reasonable doubt and, if so, whether it was committed by the Appellant.

15. The starting point is how the offence of rape is described in law. Section 3 of the *Sexual Offences Act* No. 3 of 2006 (hereinafter referred to as 'the Act') defines 'rape' as follows: -

    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.

(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.

(3) 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.

16. From the above definition, the ingredients of the offence of rape, therefore, include proof that the victim was not a minor, proof of penetration, proof of the perpetrator and proof that the consent was not freely given.

17. On looking at those aspects in this judgment, this Court shall consider each of them singly. I must however confirm that the evidence was well captured in the judgment under appeal and I hereby adopt the same as part of this decision by reference.

18. In a snapshot, five witnesses testified before the trial Court. The Complainant testified as PW1, Jackson Chesilon, who was PW1's neighbour testified as PW2, Anthony Rotich Naibei, a National Police Reservist working under Endebes Police Station testified as PW3, Emma Kemunto, a Clinical officer attached at the Endebes Sub- County Hospital testified as PW4 and PC Wilmina Tioko, the Investigating Officer testified as PW5.

19. Upon close of the prosecution's case, the Appellant was found to have a case to answer. He was placed on his defence.

20. The Appellant was the sole Defence witness. He gave sworn evidence.

21. A consideration of the ingredients of the offence of rape now follows.

(a) Age of the complainant:

22. The age of the complainant was not contested in this appeal. The complainant testified that she was aged 62 years old. That was confirmed by the P3 Form which was produced as an exhibit.

23. The complainant was, hence, not a minor in law.

(b) Penetration:

24. The complainant's testimony was compelling as to the occurrence of penetration. Being an elderly woman, she narrated how an assailant found his way into her house, pinned her on the floor, undressed her, placed a knife on his neck and engaged her in a sexual intercourse. She definitely knew what engaging in sex is all about.

25. That was further corroborated by the evidence of the PW3, the Clinical Officer at Endebes Sub-County Hospital who stated that upon examining the complainant, she found blood stains, lacerations and inflammation of the labia majora, which was a sign of a penile forceful entry.

26. PW3 also testified that the complainant's vagina had a white discharge and a foul smell. A laboratory test of a high vaginal swab showed pus cells and spermatozoa.

27. Her conclusion was that there was evidence of sexual assault.

28. This Court has keenly perused the P3 Form and the medical notes produced as PExh. 2a and 2b respectively.

29. The totality of the foregoing is that there is no doubt that penetration was proved beyond reasonable doubt.

(c) Whether the appellant was the perpetrator and the issue of consent:

30. The complainant testified that on the fateful night, the Appellant forcefully entered her house. She stated that with the help of the security high mast lighting up Kolongei centre, she was able to identify the Appellant.

31. She gave evidence that when the Appellant raped her, the door was open and the light flooded in and she was able to recognize him.

32. The complainant further stated that she knew the Appellant quite well as her immediate neighbour. They had lived as such for about one and a half years. The complainant also gave the name of the Appellant as the assailant to PW2 and the village elder immediately after the heinous act.

33. At one point, the complainant stated as follows;

> ...When he raped me the door was open, the light was in the house. After he was through with raping me he knelt down next to me and took a lesso and tied my face. It is a piece of lesso not full. As he tied me he forgot to blind fold me on the right eye so I was able to identify him very clearly as he walked out of the house.
>
> I know him well, I saw his face clearly. Even as he was standing on the door I saw his jacket he wore.

34. The Appellant gave sworn testimony in his defence. He mainly testified on how he was arrested.

35. The evidence of identification was, therefore, by a single witness. Such evidence must be treated carefully and cautiously. In R –vs- Turnbull & Others (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

> .... 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 with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? 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 the 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 his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made....

36. The evidence by the single witness ordinarily calls for corroboration as so provided under Section 124 of the *Evidence Act*, Cap. 80 of the Laws of Kenya save for the evidence of a victim in sexual offences as long the Court believes the victim.

37. In Anjononi & Others vs. Republic [1980] KLR 59, the Court of Appeal stated as follows: -

> ...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.

38. In this case, there is no doubt that the Appellant was known to the complainant. The familiarity and the lighting coupled with the assailant's speaking to the complainant during the ordeal, created an enabling environment under which the assailant was readily recognized as the Appellant.

39. The trial Court believed the witnesses as truthful. There is nothing on record for this Court to review that finding. In sum, the prosecution's evidence affirms the position that the identification of the Appellant as the assailant was not in error.

40. Next is the issue of the consent. Lack of consent is a crucial component in the offence of rape. In Republic -vs- Oyier [1985] KLR 35 the Court of Appeal observed as follows: -

    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.

41. In her evidence, the complainant stated that the Appellant forced entry into her house, held her by the throat, hit her on the left side of the head and expressly said 'nataka rape wewe'. The Appellant then held a knife on her throat, cut her and caused her to bleed thereby overcoming her into the sexual act.

42. Therefore, the complainant's resistance is overwhelming evidence of the lack of will and or consent into engaging into sex with the assailant.

43. It, therefore, remains the case that the Appellant had carnal knowledge of the complainant without her consent.

44. Having comprehensively re-assessed the evidence, it is apparent that the ingredients for the offence of rape were satisfactorily proved. The Appellant intentionally and unlawfully caused his penis to penetrate the genital organ of the complainant without her consent. That is evidence of commission of the offence of rape.

45. The Appellant was, hence, properly found culpable and rightly convicted. As such, the appeal on conviction fails.

The sentence:

46. The Appellant was sentenced to 10 years imprisonment. The Appellant tendered mitigations and were duly considered by the sentencing Court.

47. The Court in Wanjema v. Republic (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only

interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

48. There is no doubt the offence is serious and indeed inhumane. It was also committed against an innocent elderly woman. There is nothing placed before this Court to the effect that sentencing Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive.

49. The sentence is lawful and fair in the circumstances. As a result, the appeal on sentence equally fails and is hereby dismissed.

Disposition:

50. Drawing from the above considerations, the appeal is wholly unsuccessful and is hereby dismissed.

51. It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS ...25TH ... DAY OF JULY, 2024.

A. C. MRIMA

....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Judgment delivered in open Court and in the presence of: -

Kelvin Kiprotich, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.