Lupe v Republic (Criminal Appeal E192 of 2023)
[2024] KEHC 8131 (KLR) (Crim) (2 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8131 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E192 OF 2023

LN MUTENDE, J

JULY 2, 2024

BETWEEN

JAMES MACHARIA LUPE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal arising from the original conviction and sentence in S.O Case. No. 68 of 2020 at the Chief Magistrates' Court Makadara, by Hon. L. K. Gatheru (SRM))

JUDGMENT

1. James Macharia Lupe, the appellant, was charged with Rape contrary to Section 3(1)(a) of the *Sexual Offences Act*. The particulars of the offence were that on 18/1/2020 at 2130Hrs at Kariobangi South in Njiru Sub-County within Nairobi County, he intentionally and unlawfully caused his penis to penetrate the vagina of RWH without her consent.

2. In the alternative, the appellant faced the charge of committing an Indecent Act with an adult, contrary to Section 11A of the *Sexual Offences Act*. Particulars being that on the afore-stated date and time he unlawfully and intentionally touched the vagina of RW with his penis against her will.

3. Having been taken through full trial he was convicted and sentenced to serve 12 years imprisonment for the main charge of rape.

4. Aggrieved, the appellant proffered an appeal against both conviction and sentence on grounds that: The magistrate erred in law and fact by convicting him on a trial that was full of discrepancies and contradictions; the conviction and sentence was against the weight of evidence; and, that the court erred in convicting on hearsay evidence.

5. Briefly, the case presented by the prosecution was that on 18/1/2020, at 2130 Hrs PW1, the victim, was coming from PCEA Kariobangi South church and was walking alone along a dark lonely path though there was some light from a church nearby. She saw a man close by but she did not talk to him. On passing him the man followed and referred to her as: "Wee Madam!" As she continued walking she heard steps come closer, all over a sudden she was held by the neck and strangled from behind. The person removed a sword from the waist and threatened her if she tried to resist. He pulled her to two (2) deserted houses and lay her down. He removed his trouser and pulled down her trouser then inserted his penis into her vagina and violated her sexually, an incident that occurred 20 to 30 meters from the church.

6. After the act, the man instructed her to look at him which she did. He asked her if she had ever seen his face before and she denied hence he let her go. She rushed to a friend's house where she found her friend and mother and the two escorted her to the chief's camp, Kariobangi South to report the incident. Her father came to the camp and later took her to Metropolitan hospital where she was examined.

7. Subsequently, on 3/3/2020 while coming from Bible study, she saw the appellant at PCEA Kariobangi church at 9:00pm and with the help of her friends who were in her company, PW2 Meshack Njuki Muriuki and PW4 James Mark Ngugi arrested and took him to the chief's camp. He was later taken to Dandora Police Station where PW5 No. 10xxxx PC Merti Mwakesi investigated the matter and caused him to be charged.

8. Upon being placed on his defence, the appellant stated that he worked as a mechanic and also sold motor vehicle spare parts and he lived at Civil servants' quarters Kariobangi. That on 3/3/2020 while walking home he passed through the backside and on reaching PCEA area he found 2 people on a narrow path, one of them stopped him and asked where he lived and he told him where he lived. The other one said that they usually saw him pass by and they let him go. He took a few steps and heard them say "oya! oya !" meaning hey! Hey! signaling him to go back.

9. That one assaulted him on the head and they later took him to the residential area claiming that "they had found one of them". He did not know what they meant and what he had been accused of. It turned to mob justice and a lady later stopped them claiming that they should be sure that he was part of the group first. Others agreed with her, the beatings however continued and he lost consciousness which he regained to find himself in the police cells at Kariobangi police station. He was later taken to Dandora police station where he found the complainant at the report office. It was alleged that he had raped her and he was told to try settle the matter by giving Ksh 100,000/= but, he denied knowing the charges.

10. The appeal was canvassed through oral submissions whereby the appellant urged that the prosecution failed to prove the case against him, his defence was disregarded and the sentence meted was excessive. The appeal is opposed by the State. It is submitted that the case was proved beyond doubt, the appellant was properly identified and the sentence was merited.

11. This being a firstappeal, the primary duty of the court is to reevaluate and reassess the evidence adduced at the trial and come up with independent conclusions, the court must however note that it did not see or hear the witnesses and thus must give due allowance for this. This was stated in Okeno -Vs- Republic (1972) EA 32 by the Court of Appeal for Eastern Africa 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 junction 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, see (Peters V Sunday Post 1978) E.A. 424."

12. The appellant contends that the elements of the offence of rape were not proved beyond doubt. Section 3 (1) of the Sexual Offences Act enacts that: A person commits the offence termed rape if -

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

13. In Republic -Vs- Oyier (1985) KLR 353, the Court of Appeal held that the prove of mens rea is to have intercourse without consent or determining whether the victim has consented. It delivered itself thus:

> " 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."

14. In the instant case, PW1, the victim testified that she was on her way home when she met a stranger, she was dragged to a deserted path in between houses and that the said man had sexual intercourse with her. Section 2 of the Act defines penetration as partial or complete insertion of genital organs of a person into the genital organs of another person. Having sexual intercourse with another involves the thrusting of a male penal shaft inside the vagina. The complainant underwent medical examination after the incident.PW3 Dr. Marvin Cherago, who examined and treated her on the material night some one-half hours later found normal labia without tears though semen was noted.

15. The appellant defence majored on the lack of DNA tests on the semen samples found on the victim's genitalia. From the evidence of PW3 and PW5 it is apparent that the samples taken had been disposed of by the time the appellant was arrested. DNA examination serves the purpose of proving the owner of the sample. This would also prove positive identification of the perpetrator, but,there are other ways of proving rape apart from DNA examination.

16. In Bassitta Hussein -Vs- Uganda, S C Criminal Appeal No. 35 of 1995 the Ugandan Supreme Court held that an act of sexual intercourse or penetration may be proved by direct or circumstantial evidence

and usually the sexual intercourse is proved by the victim's evidence and collaborated by medical or other evidence. The Court delivered itself thus:

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims 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."

17. Section 124 of the Evidence Act also provides that the evidence of a victim of sexual assault can inform conviction where the court finds it to be truthful. There is no requirement for corroboration in such case.

18. In the case of Kavuvu Muli -Vs- Republic (2002) e KLR the court held that:

> " A round of rape, or sexual intercourse, connotes perhaps climaxing in ejaculation leading to release of spermatozoa. If indeed there was a round of rape, it would be spermatozoa in the vagina of the complainant..."

19. Section 42 of the Sexual Offences Act provides that:

> a person is said to consent if he or she agrees by choice, and has the freedom and capacity to make that choice.

20. The complainant testified how she was strangled on the neck and that the perpetrator had a knife which he used to threaten her if she resisted. There is no doubt that she did not agree to what transpired, the sexual engagement was committed against her will since no consent could be obtained in such circumstances.

21. PW1's evidence was elaborate and consistent on the perpetrator's actions that night which eventually led to forceful penetration and the presence of semen was noted per the medical report which remained unchallenged. This was proof of rape beyond reasonable doubt.

22. The question lingering is hence whether the appellant was positively identified as the assailant. In the case of Wamunga -Vs- Republic (1989) KLR 424 the court held that:

> " ..... It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction".

23. The trial court noted that it tested the evidence of PW1, the only identifying witness and the fact of the appellant having not disputed the evidence and his defence also having not referred to the events of the night of 18/1/2020.

24. The appellant and the complainant are agreeable that they had not seen each other before the assault hence were strangers. PW1 testified that there was some light from the church, some 20 -30 meters away, and, that while at the abandoned houses after the rape, the assailant told her to look at him.

They also conversed, the person asked her if she had seen his face before and she denied. In thecase of Republic vs. Turnbull (1971) QR 227 court stated:

> "... 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 recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

25. In her evidence the complainant suggested that the identification in question was visual since she did not allude to voice identification. The complainant identified the appellant as the assailant, one and a half months later. The identification was from her memory. She stated that the incident took place behind abandoned houses, the place was dark. However, she qualified the statement by saying that there was some light from the church, some 20 to 30 metres away.

26. What came out in evidence was a contradiction as to whether the place where the act of rape took place was dark or well lit. I say so because the culprit was a stranger to the complainant, and the only time she looked at his face per her testimony was when he asked her to look at him. The prosecution did not address the question of the nature of lighting at the scene. How well the place was lit; the conditions of lighting considering that it was at 2130 Hours should have been exhaustively addressed.

27. The distance between the complainant and the assailant was close for it is stated he put a query to her that she answered. But when she looked at him, as stated, what peculiar thing did she see that made her identify him? A witness may be honest and may have had an opportunity of making a correct observation but there may be chances that she may be mistaken.

28. The onus of proving a criminal case lies with the prosecution. It had the responsibility of disapproving the defence put up. The appellant was spotted at the area where the complainant was violated sexually. Other than the complainant having pointed at him as the suspect and he was arrested, nothing was stated of peculiarity of any feature that made her believe he was the culprit. For that reason, it was unsafe for the court to return a verdict of guilty.

29. Accordingly, I find the appeal having merit, it was a misdirection on the part of the court to opine that the identification was apt. In the result the appeal is allowed, the conviction quashed and sentence meted set aside. The appellant shall be released forthwith unless otherwise lawfully held.

30. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 2ND DAY OF JULY, 2024.

L. N. MUTENDE

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR