Nyakundi v Republic (Criminal Appeal E103 of 2023) [2024] KEHC 10587 (KLR) (18 July 2024) (Judgment)

Neutral citation: [2024] KEHC 10587 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL E103 OF 2023

CJ KENDAGOR, J

JULY 18, 2024

BETWEEN

DENNIS ONGERA NYAKUNDI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of rape contrary to Section 3(1) (a) (c) as read with Section 3(3) of the *Sexual Offences Act*. The particulars of the offence were that on 31st October 2022, at [particulars withheld], within Murang'a County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of SN without her consent. In the alternative, the Appellant was charged with committing an indecent act with an adult contrary to Section 11(a) of the *Sexual Offences Act*. The particulars of the offence were that on 31st October 2022, at [particulars withheld], within Murang'a County, the Appellant intentionally touched the vagina of SN with his penis against her will.
2. After conviction, the appellant was sentenced to 10 years imprisonment. He was aggrieved by his conviction and sentence, hence this appeal.
3. He filed his grounds of appeal on 20th September 2023 and subsequently filed amended grounds of appeal on 13th March 2024, together with written submissions.
4. This being a first appeal to the High Court, I am reminded of my duty to revisit the evidence presented before the trial court and to subject it to a thorough and exhaustive analysis to draw my own independent conclusions bearing in mind that unlike the trial court, I did not have the benefit of seeing and hearing the witnesses. This duty has been crystalized in a long line of authorities, including *Okeno v Republic*, [1972] EA 32; *Njoroge v Republic*, [1987] KLR 99; *Patrick v Republic*, [2005] 2 KLR 162, among others.

5. I have carefully considered the grounds of appeal, the entire evidence presented before the trial court and the written submissions filed by both the appellant and the respondent.

6. I have also read the judgment of the learned trial magistrate. Having done so, I find that the issue for determination is whether the prosecution established the offence of rape contrary to Section 3(1) as read with Section 3(3) of the *Sexual Offences Act* to the required standard of proof beyond any reasonable doubt.

7. 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;

> "(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."

8. The main 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, coupled with the absence of consent. The prosecution was, therefore, required to establish penetration, lack of consent, and that the appellant was the perpetrator of the act.

9. In her testimony, the complainant stated that the appellant, whom she had met and been in touch with for a few weeks, had invited her over to his cousin's house, where he locked the house and raped her twice. PW3, the Clinical officer, stated that the complainant was treated at 10 pm on the same date she complained of having been raped while the P3 form was filled 2 days later.

10. The investigating officer also testified and told the court that the incident was reported on the same night and that the complainant was escorted to the hospital for examination. The investigating officer visited the scene and confirmed that the occupier, who is known to the appellant, recorded a statement. According to the investigating officer, the appellant had a spare key for the house and had not been at work for two days, including the date complained of.

11. The complainant was recalled twice in this case; the cross-examination did not shake her testimony. The appellant confirmed that he and the complainant were known to each other and had been in contact. He was a person well-known to the complainant.

12. On the element of penetration, the general rule is that even without considering the presence or otherwise of medical evidence, an offence of this nature can be proved by oral evidence of a victim of rape or circumstantial evidence. This position is fortified by the holding of the Court of Appeal in *Martin Nyongesa Wanyonyi v Republic* Criminal Appeal No. 661 of 2010 (Eldoret), citing *Kassim Ali v Republic Criminal* Appeal No. 84 of 2005 (Mombasa), where the court stated that:

> "The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence."

In the present appeal, penetration was proved by the complainant's evidence which was corroborated by that of PW6. The Appellant did not challenge this evidence and this court finds that penetration was proved to the required standard of proof beyond reasonable doubt.

13. The complainant testified that she told the appellant that she had a boyfriend, and thus, she did not want to have sexual intercourse with the appellant. He then pulled her back on the bed, strangled her, and raped her twice. He then took videos of her naked and threatened to expose them on social media and send them to her boyfriend.

14. 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."

15. It's the complainant's case that she did not consent to the sexual acts. According to the Proviso to Section 42 of the *Sexual Offences Act*, "a person is said to consent if he or she agrees by choice, and has the freedom and capacity to make that choice." In *Republic v. Oyier* [1985] eKLR, the Court of Appeal held as follows: -

> " 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.

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."

16. This court has carefully considered the evidence tendered by the prosecution and the defence raised by the appellant. No gap was left by the fact that the witness referred to by the appellant did not testify. The evidence on record disapproved the alibi defence, and the prosecution fully discharged the burden of proof that the appellant was the perpetrator of the sexual assault.

17. This court, therefore, holds that the prosecution established to the required standard of proof that it was the Appellant who sexually assaulted the complainant. The conviction was proper and was supported by the law and evidence.

18. I will now briefly turn to the sentence. Section 3 (3) of the *Sexual Offenses Act* provides that a person guilty of the offence of rape 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. The appellant was sentenced to 10 years imprisonment. The accused was treated as a first offender, and his mitigation was recorded and considered as captured in the proceedings.

19. The Supreme Court has now given fresh guidance on minimum sentences under the Act in *Republic V Joshua Gichuki Mwangi* Petition No. E018 of 2023. The court held that where a sentence is set in statute, the legislature has already determined the course unless it's declared unconstitutional.

20. The learned magistrate exercised discretion in sentencing and, in doing so, meted an appropriate sentence, which was lawful. It was neither harsh nor excessive.

21. In his submissions, the appellant requested that this court consider the time he had spent in custody before his sentence. The court record shows that the appellant was arrested on November 18, 2022, and was in custody during his trial. It is evident from the trial court's record that in passing the sentence, the learned trial magistrate did not order the time the appellant had spent in custody to be taken into account when computing his sentence.

22. In compliance with the proviso to Section 333 (2) of the *Criminal Procedure Code*, order that the period of about ten months the appellant had spent in custody before the date of his sentence shall be deducted from his sentence.

23. The upshot is that the appeal on conviction is hereby dismissed. The sentence is set aside and substituted thereof with the sentence outlined in paragraph 22 of this judgment.

24. It is so ordered.

DELIVERED, DATED, AND SIGNED AT NAIROBI ON THIS 18TH DAY OF JULY 2024.

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C. KENDAGOR

JUDGE

Judgment delivered through the Microsoft Online Platform.

In the presence of:

Court Assistant: Hellen

ODPP: Ms. Oduor

Appellant: Dennis Ongera Nyakundi