Nkondi v Republic (Criminal Appeal E010 of 2023)
[2024] KEHC 8496 (KLR) (15 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8496 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CRIMINAL APPEAL E010 OF 2023

LW GITARI, J

JULY 15, 2024

BETWEEN

MOSES KINYUA NKONDI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

The appellant was charged with robbery with violence in Chief Magistrate's Court at Chuka Criminal Case No. E009/2020. The particulars are that on 4/10/2020 at (Particulars withheld) Sub-Location (Particulars withheld) Location Maara Sub-County while armed with a dangerous weapon namely a panga did rob LK 10 kilogrames of sorghum and Kshs.8000/- and immediately before the time of such robbery did use actual violence by cutting the said LK on her left ear. The appellant was also charged with rape contrary to Section 3(1)(a)(b) (3) of the *Sexual Offences Act* No. 3 of 2006 in that at the same time and place he intentionally and unlawfully cause his penis to penetrate the genital organ of LK without her consent. The appellant was also charged with indecent act with an adult contrary to Section 11(1) of the *Sexual Offences Act* in that at the same time and place he intentionally and unlawfully touched the female genital organ namely vagina and breasts without her consent using his penis and hand.

1. The appellant denied all the charges and after a full trial he was convicted of the offence of rape and sentenced to serve ten years imprisonment. He was acquitted on the offence of robbery with violence. The appellant was dissatisfied with both the conviction and sentence and filed this appeal based on six (6) grounds which are as follows:-

    1. That the learned trial magistrate still erred in both matters of laws and facts by failing to note that the prosecutions witnesses gave inconsistent, contradictory and conflicting evidence.

2. That the learned trial magistrate still erred in both matters of laws and facts by failing to note that the medical report adduced by the doctor was only single side based.

3. That the learned trial magistrate still erred in both matters of laws and facts when disregarded the appellant's defence without giving cogent reasons.

4. That the learned trial magistrate still erred in both matters of laws and facts by filing to note that the case was frame up against the appellant.

5. That the learned trial magistrate still erred in both matters of laws and facts convicting the appellant on evidence that lacked requisite standard of beyond reasonable doubts.

6. That the learned trial magistrate still erred in both matters of laws and facts by convicting the appellant based on evidence of a single witness without warning herself of the dangers of relying on such evidence.

The appellant prayed that the appeal be allowed, the conviction be quashed, the sentence be set aside and he be set free.

The appeal was opposed by the respondent who urged the court to up-hold the conviction and sentence.

The Prosecution's Case

2. The complainant LK was on her way home on the material day when at Maara bridge she noticed the appellant walking behind her. After crossing the bridge, the appellant got hold of her and led her to a nearby bush. The appellant who was armed with a panga cut the complainant on the left ear when she resisted his evil advances. Once in the bush he forced the complainant to lie down on her back, removed her pant and then tried to penetrate her. He was unable to penetrate her and he forced her to move further inside the bush and raped her by inserting his penis in her genital organ, namely vigina. The appellant lay on top of her and raped her. Though she resisted the appellant threatened her with a panga. After the appellant raped her she managed to escape but appellant caught up with her and led her to an abandoned house. The complainant managed to run away and ended up in the home of one Kirimi (PW3) where she asked for help. PW3 called her husband and they went and reported the matter at Magutuni Police Station. She was issued with a P3 form. She was examined at Chuka Hospital where a P3 form was filled showing that the complainant was bleeding from the cervical wall and inflamed viginal wall. The doctor also found that the complainant had a deep cut on the left pinna and scalp and the degree of injury was harm. The appellant was arrested by members of the public and escorted to Magutuni Police Station where he was charged with these offences. The complainant was carrying ten kilogrammes of sorghum and Kshs.8000/- which went missing after the incident.

Defence Case:

3. The appellant testified on Oath and said that he was arrested on 5/10/2020 at 6.00 pm and taken to the police station. He told the court that he did not rape the complainant and that he did not even know her. That on 4/10/2020 when the offence was committed he was at home. He also called DW2 Fridah Gacheri who testified that on 5/10/2020 the appellant was at home at 5.30 p.m. She said PW1 was their neighbor for the last five years and she had no reason to implicate the appellant. He told the court that on 4/10/2020 the appellant was at home and he never left.

4. The appeal was disposed off by way of written submissions. The appellants submitted on all the grounds together. He submits that the charge was not proved beyond any reasonable doubts. That he was not subjected to medical examination to prove that whether he was the one who committed the

offence. He submits that the evidence of PW3 was hearsay which is inadmissible. He terms the charge against him as a frame up.

5. The respondent submits that the appellant did not demonstrate the inconsistencies and contradictions. He submits that there were no contradictions and inconsistencies in the prosecution case to the extent that a reasonable person would be left in doubt. The respondent relies on *Twehangane Alfred –v- Uganda* Criminal Appeal No. 139/2001 (2003) UGCA where it was stated that not every contradiction warrants rejection of evidence. He also relies on the Nigerian Case of David Ojeabuo –v- Federal Republic of Nigeria which defined what constitutes contradictions and stated that "Two Pieces of evidence contradict one another when they are inconsistent on material facts while discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

   The respondent submits that contradictions in the evidence of a witness that would be fatal must relate to material facts and must be substantial and must deal with substance of the case. That minor or trivial contradictions do not affect credibility of a witness and cannot vitiate a trial. That it is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. That the evidence of the complainant was corroborated by medical evidence and was sufficient to base a conviction.

Analysis and Determination:-

I have considered the evidence tendered before the trial court. The issue which arises for determination is whether the conviction of the appellant was safe.

This is a 1st appeal. It is the duty of the first appellate court to carefully examine and evaluate the evidence which was presented before the trial court and come up with its own independent decision. It is now well settled that an appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination and consideration, and to the appellate's court own decision on the evidence. The leading authority on this subject is *Okeno-v- Republic* (1972) E.A 32 where this duty was discussed. This was buttressed in the case of *Kiilu & Another-v- Republic* (2005) 1 KLR 174 where the Court of Appeal stated:-

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weight conflicting evidence and draw its own conclusions.
>
> It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion. It must itself make its own finding. 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 advantage of hearing and seeing the witnesses."
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> The appellant was charged under Section 3(1) (a) (b) (3) of the *Sexual offences Act* which provides as follows:-
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> "
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> " 3(1) A person commits the offence termed rape if-
>
> (b) the other person does not consent to the penetration; or

(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."

The ingredients of the offence of rape are:-

i. Penetration .

ii. The other person does not consent to the penetration.

iii. The consent was obtained by force or by means of threat or intimidation of any kind.

iv. Positive identification of the perpetrator.

6. On the issue of penetration, I find that the evidence adduce by the complainant proved that there was penetration. She was an adult and gave details on how the appellant held her and when she resisted she was cut with a panga. She gave details that the appellant led her to the bush and tried to rape her but he was unable to penetrate her. He led her further inside the bush and managed to penetrate her. The trial magistrate who saw the complainant was satisfied with her testimony and stated that she found the complainant's testimony was consistent and did not leave any doubts in the court's mind that she was indeed raped by the appellant. Based on the fact that the offence was committed at 6.30 pm when it was not dark and the appellant was well known to her as they had lived as neighbours for five years, she could not have failed to recognize him. It is trite law that penetration is proved by the evidence of the complainant and corroborated by medical evidence. In this case, PW3 the clinical officer testified that he examined the complainant and found that she had an inflamed viginal wall. She also had a deep cut wound on the left ear. The presence of inflamed viginal wall is sufficient prove that she was engaged in sexual activity. I find that even the evidence of a victim of rape alone it is sufficient to prove penetration provided that the court is satisfied that she is truthful. In this case medical evidence corroborated the fact of rape putting credence to the complainant's testimony that there was penetration.

7. On the issue of consent the evidence of the complainant was sufficient she had not consented. She proved that the complainant cut her with a panga and threatened to harm if she did not consent to the Sexual Act. Medical Evidence corroborated her testimony that she had been injured with a sharp object which injury was bodily harm. The consent if any was obtained by use of force and threats of harm. The trial magistrate found that the testimony of the complainant was credible and left no doubt in the mind of the court. In *Republic-v- Oyier* (1995) KLR 353 the Court of Appeal held that:-

"(i) (i) The lack of consent is an essential element of the crime of rape. The 'mensrea' in rape is primarily an intention and not a state of mind. The mental element to have intercourse without consent or not caring whether the woman consented or not.

ii) To prove the mental element of required in rape, the prosecution had to prove that the complainant physically resisted, or if she did not, that her understating and knowledge were such that she was not in a position whether to consent or resist.

(iii) Where a woman yields 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."

The complainant did not consent and for that she had to endure a deep cut injury on her ear and threat to more harm. It has been well demonstrated that there was no consent and therefore the offence of rape was committed.

8. The appellant denied that he raped the complainant and his defence was that he did not even know her. This was sharply contradicted by his wife (DW2) who told the court that PW1 is a neighbor and they live near where she lives for the last five years. It was mere denial for the appellant to say that she did not know the complainant. It shows that the defence of the appellant was false. DW1 &2 admitted that PW1 had not reason to implicated the appellant. I find that the defence was a mere denial and laced with lies. The learned trial magistrate properly rejected that defence and stated that –"Analysis of defence case shows that the accused's defence is an afterthought crafted by his witnesses in order to shake the strong prosecution case against him..... I find that defence a sham and untenable."

   The PW1 had no reason to frame the appellant with whom he had no grudges. The appellant was identified as the perpetrator. PW3 testified that the complainant went to her home at 11.00 pm and was bleeding from her left ear and the clothes were blood stained. She told him that the appellant Moses Kinyua had raped her assaulted her and stole Ksh.8000/- from her. PW3 was the first person to meet the complainant after the ordeal and she did not mint words on who the assailant was. It shows that PW1 had recognized the assailant.

9. The appellant has submitted that he was not examined to confirm whether he is the one who committed the offence. I find that sufficient evidence was adduced to proof that he was the perpetrator. The offence of rape is proved by evident of the victim. In this case failure to have him examined is not material as there was sufficient evidence to prove that he was the perpetrator.

10. The complainant was examined by the doctor five hours after the incident. There was only one incident which started about 6.30 pm and it was not until 11.00pm when the complainant escaped and was assisted by PW3. There were no inconsistencies or contradictions which are substantial and fundamental to the main issues in question before this court. The court ignores minor inconsistences which are not substantial and are not on material particulars.

11. In the final analysis, I come to the conclusion that the appellant was properly convicted. The appeal is without merits and is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 15TH DAY OF JULY, 2024.

L.W. GITARI

JUDGE

15/7/2024

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

15/7/2024