Mwikali v Republic (Criminal Appeal E057 of 2022)
[2024] KEHC 17224 (KLR) (18 September 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E057 OF 2022

TM MATHEKA, J

SEPTEMBER 18, 2024

BETWEEN

JOSEPH MUEMA MWIKALI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from Makindu MCCRC no. SO 125 of 2019 judgment of Hon B Ireri SPM of 14/4/2022)

JUDGMENT

1. On 15/11/2019 RMM's mother was in hospital with a sick child at Matiliku. She gave instructions to RMM to go to her kibanda (grocery stall) at Makutano to collect vegetables. RMM's mother called JMM, PW2, her father and told her the same.
2. The kibanda was about 25 minutes' walk from RMM's home. At about 7:00 pm she was walking back home with the vegetables.
3. Somewhere along the road she met two men. According to her It was a bit dark but she testified that she identified the appellant who she said had been their neighbour before. These two men appeared suddenly – they got hold of her and dragged her to a path that had bushes and trees on both sides.
4. In this bush they removed her clothes, lay her down and raped her in turns. They then dressed her up – put her on the motor cycle which was driven by the accused – and dumped her at the dam at Manooni. At that time, she was not aware of her surroundings. She found herself there – weak and unable to move. It was at night and she slept under a mango tree.
5. In the meantime, her father waited for her till 7:15pm. When she did not show up he decided to go to his wife's stall. On the way he found by the wayside, the vegetables, cabbages and tomatoes and a cap belonging to his daughter and noted signs of a struggle there. On reaching Makutano he was told that she had picked the vegetables and left for home. He went back home; she was not there. He reported at

Mbenu police post at 11:00 pm. He was told to wait till the next day – but searched for her till 3:00am in vain.

6. The next day there was information that the accused's motor cycle had been seen parked at the scene where JMM had found the scattered groceries. A search for the accused began, even as he searched for RMM continued.

7. On her part, her testimony was that in the morning she began to go home – she had back pains, pains in her vagina. As she passed the home of one Florence Musyimi, Florence called her into the home and told her that her father was looking for her. JMM also got information his daughter had been found in the home of Muinde.

8. RMM waited there and police officers picked her. They were with her parents – she was taken to hospital and treated. She recorded her statement. The accused was later arrested but his accomplice was not. She told the court that she recognized the accused person on the night she was raped.

9. PW3 Anastacia Nthenya Mwau's testimony was about the fact that on 15/11/2019 around 8:00 – 8:30pm, the accused passed by her home and told her that he had parked his motor cycle near the home of one Kilonzo – and needed assistance watching over it – she waited till 11:30pm and when he did not return she went to sleep. She was aware that there were prayers in the home of Kilonzo the following morning. She went for the prayers and found police officers and the Assistant Chief – she told them what she knew about the motor cycle.

10. PW4 Anastacia Kambua Kivindu's testimony was that the motor cycle the accused rode belonged to her – and she had employed the accused person to ride it. She told the court that on 16/11/2019 she received a call from her sister that her motor cycle was at her brother's place and no one knew how it had reached there. The accused was looked for – she did not know where he was arrested from. She confirmed that on 15/11/2019 the accused did not bring the motor cycle home to her as was the norm.

11. PW7 Tabitha Mulau Muoki was a Clinical Officer at Matiliku sub-county hospital she said she treated RMM aged 17 years' old who went to the family on 17/11/2019 – with complaint of rape on 15/11/2019 by two unknown men. Her clothes were torn - sweater, inner clothes stained with dry blood – lacerations on her vagina, blood discharge. The genitalia had lacerations, blood stains on external genitalia, no hymen.

12. PW6 No. 93xxx Cpl Josephine Makilia Incharge Mbenu Police Post at the material time. She told the court that RMM came to the station with her father JMM and reported the rape. Her inner clothes were torn. She recorded statements and visited the scene. She said the complainant told her that she was attacked by two men one of who was her boyfriend before and she knew him. She learnt later that this man had been arrested. She added that the complainant told her that her attackers had covered themselves. On cross examination she told the court that the complainant told her that she did not identify the two men but she later met the accused who warned him not to tell anyone who had raped her.

13. In his defence the accused told the court in a sworn statement that the cause of all this was his failure to park the motor cycle where he was to do so – at the home of PW5. It was his evidence that Stacie Wambua Kivindu was his wife. The motor cycle was registered in her names – that on the night of 14/11/2019 he left the motor cycle with one Esther Kasusu and walked home. He said his failure to arrive with the motor cycle caused him to collide with his wife – seriously. It was his evidence that there was something wrong with the motor cycle and he was looking for a mechanic the following day – when police confiscated his motor cycle. He said Esther was the mother to his wife - and he had left the motor cycle with her because the motor cycle was spoilt – He said his wife lied to the court.

14. In a judgment delivered on 14/4/2022 the learned trial magistrate found the accused person guilty, the accused person had no mitigation. He was sentenced to 15 years' imprisonment.

15. It is from this background that the appellant brings this appeal the ground that, there was an error in fact and law on the part of the trial magistrate in the following aspects: -

16. His rights to fair and impartial trial were impugned because the trial court did not inform him of his rights to an advocate as provided for under Article 50 of *the Constitution*.

17. That the key ingredients of the offence were not proved.

18. The learned magistrate did not analyze the evidence exhaustively and did not give regard to the material contradictions and inconsistencies in the evidence – going to the root of the charges against the accused person.

19. That the sentence was harsh.

20. The appellant relying on Articles 50(2) (g) and (h) of *the Constitution* and section 43 of the *Legal Aid Act* and various authorities – including HO v R [2020] e KLR, David Njoroge Macharia v Republic [2011] e KLR Karisa Chengo and 2 Others v R [2015] e KLR, BMM v R[2020] e KLR the appellant urges this court to find that the failure by the learned trial court to inform him of the right to an advocate prejudiced him to the extent that the conviction cannot stand.

21. The appellant concedes that from the evidence given by the complainant there was rape – however he submits that he was not the culprit, and he was not identified as such. He submits that the PW1 testified it was a bit dark – that she said she knew the accused before as a neighbor, that she knew his voice well – that neither of the assailants was her boyfriend and she had no boyfriend before- yet she told the Clinical Officer that she was raped by two unknown men, and the Investigating Officer that she was attacked by two men one of who was her former boyfriend.

22. He submits that this evidence that he was not identified emerges from the complainant's evidence and makes it "doubtful on the cogency, truthfulness and accuracy of her testimony" see Ngida Kiloriti Meiseiki –v- R [2019] e KLR, and similar holding in Elkana Macharia Njoroge v- R [2018] e KLR. He urged the court to find the evidence of the complainant was not believable with respect to the identity of the assailants. He submits further that his arrest was related to the place where he had parked his motor cycle on the material night and on suspicion.

23. He submits, while relying on John Mutua Musyoki v – R [2016] that this court is bound to evaluate the veracity of the contradictions and discrepancies in the evidence before it. See also Kavoo Kimonyi v – R [2018] e KLR.

24. He submits further that the trial court failed to consider his defence where he told the court that the suspicion arose from the fact that he had left the motor bike parked somewhere near the vicinity of what happened to the young lady – the home of one Esther Kasusu.

25. He submits that in the event the appeal fails that his sentence be reduced because he has reformed.

26. The ODPP through the prosecuting counsel summarized the evidence and framed issues for determination thus:

> Whether there was penetration, whether there was consent, whether there was positive identification of the appellant,
>
> whether there were notable inconsistencies on the testimonies of witnesses, whether the sentence was safe.

27. Relying on section 124 of the *Evidence Act*, GOA v R [2018] e KLR it was submitted that the trial court was right to act on the evidence of the victim. Relying on Peter Wanjala Wanyonyi – R [2021] e KLR it was submitted that the intercourse was not consensual – and on Peter Mwiti Gichuru – R [20200 e KLR – that the essential elements of the offence were proved.

28. On identification it was submitted on the strength of Peter Wanjala Wanyonyi v R [2021] e-KLR that the appellant was well known to the complainant, that the complainants was evidence of recognition, they were neighbors, she knew him before.

29. Regarding the inconsistencies, relying on Ali Mohamed Ibrahim v R [2017] e KLR it was submitted that just picking a few sentences out of the evidence could not demonstrate grave inconsistencies. The court was urged to establish that there were significant inconsistences before accepting this submission see Eric Onyanyo Ondeng v R [2014] e KLR, Twehangane Alfred v Uganda Criminal Appeal No. 139/2001 [2003] UGCA.

30. With regard to the sentence the State relies on Livingstone Asirika v R [2019] e KLR that the sentence for rape is minimum 15 years which can be enhanced to life – hence the sentence herein was legal. In addition, the court is urged to uphold the discrimination of the subordinate court to sentence – see SKM v R [2021] e KLR and to dismiss the appeal.

31. The appellant was charged with Gang Rape contrary to section 10 of the sexual offence act no. 3 of 2006. That on the 15th day of November 2019 at around 0700pm at in Nzaui sub county within Makueni Joseph Muema Mwikali in association with other not before court intentionally and unlawfully caused his penis to penetrate the vagina of RMM without her consent.

32. In the alternative, with committing an Indecent Act with an Adult contrary to section 11(A) of the Sexual Offence *Act No. 3 of 2006*. That on the 15th day of November 2019 at in Nzaui sub county within Makueni County intentionally with another not before court touched the vagina of RMM with his penis against her will.

    1. S. 10 of the SOA states Gang rape

    > Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.

33. He denied the offence and it was for the prosecution to prove the charge beyond a reasonable doubt.

34. Upon a careful consideration of the record, the submissions – it is evident that there is no doubt that the complainant was gang raped. Her testimony that two men confronted her and raped her in turns is credible. The evidence surrounding the circumstances of the case corroborate her testimony that she was gang raped the evidence by her father who passed by the scene and found the vegetables she had been carrying scattered in at a place with clear signs of struggle – leading him to the report to the police. There is also the evidence of where she was found on the morning after the rape, and the medical evidence that clearly established that the complainant was raped. The only issue in question is who did it.

35. The complainant's evidence is that it was 7:00pm, it was a bit dark when the two men suddenly appeared, each grabbed her wrist took her to the bush, undressed her and raped her she said appellant

was the 1st one – and he took 20 minutes. She states: “two men and accused was one of them… I had known the accused before he was our neighbour at one time. I knew his voice well” .

36. The question becomes whether the circumstances prevailing would enable a positive identification with no possibility of mistake. Nowhere in her evidence does the complainant state that the appellant uttered any words. It was a bit dark and the men appeared suddenly.

37. The Clinical Officer told the court complainant told her that she saw “two unknown men who held her and took her to a nearby bush and raped her”. He also produced a panty or inner wear that was soiled, yet the complainant told the court at her underwear got lost at the scene. Where did this one come from?

38. The investigating officer testified produced the underwear that was blood stained. She never told the court that she recovered it at the scene so it was not accounted for.

39. But of significance she also that the complainant told her that the men who attacked her had covered themselves and the complainant did not identify any of them. In the same breath that the complainant also told her that one of the men was her former boyfriend and she knew him. The complainant’s testimony was different. It is important to note that the complainant told the court that none of the two was boyfriend, and for emphasis that before the incident she had no boyfriend. Hence the alleged recognition has is not corroborated.

40. This officer alleged to have visited the scene. She never told the court what she found. Did she see any evidence of a motor bike going near the dam, the site of struggle? She ought to have carried out thorough investigations to establish the identity of the rapists and other relevant factors.

41. It is not in doubt that the appellant and the complainant could have known each other. The complainant’s father testified that the accused’s home was two hours walk or 15 minutes by motor cycle from his home and that he had known accused for 2 years before the incident. He however did not tell the court that he knew the appellant as his daughter’s boyfriend or that he used to come to his home.

42. He also described the circumstances raising the suspicion against the appellant: the fact that his motor cycle was parked in the vicinity of the incident. That it was upon this suspicion that the appellant was being looked for. Two witnesses were called to testify to the circumstances surrounding the finding of the m/cycle at the scene. One witness told the court that the appellant actually told her that he was leaving the m/bike where it was found. He did not just abandon it but left it under the watch of someone. Clearly the suspicion that it was the appellant was raised by the m/bike being at the place it was found. when the complainant was found she arrived to find a suspect being looked for. There is no evidence that she told the first person, Florence that she had been raped by the appellant. It is also noteworthy that though her father says she told them that one Joshua Muema had raped her, it is surprising that when she went to hospital and to the police she spoke about unknown men. If her testimony is to be believed then she ought to have mentioned the name of the appellant to all these people: the police and the doctor. It is now settled e that evidence of visual identification should always be approached with great care and caution (see Waithaka Chege v R (1979) KLR 271.

> Greater care should be exercised where the conditions for favourable identification are poor. And before a court convicts on evidence of identification of any accused person at night and in difficult circumstances, such evidence must be water tight. (See Wamunga v R, (1989) KLR 42; and Maitanyi v R, (1986) KLR 198).

43. Similarly evidence of visual recognition must be subjected to inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and

time taken by the witness to observe the accused so as to be able to identify him. see Court of Appeal in Joseph Muchangi Nyaga & another v Republic [2013] eKLR

44. The complainant's testimony and her varying statements on the identity of her attackers, presents the risk of mistaken identity, making the evidence of identification doubtful. That doubt must be resolved in favour of the appellant.

45. The record is clear that the complainant underwent a shocking and traumatizing experience. The record demonstrates the insensitivity of our systems and our mode of investigating these cases as a justice system. WE fail to take into consideration the state of mind of the victim, the psychological impact of the offence as this is overtake by is the urgency to record statements – without any counseling and to move the file forward. The fact of the State of mind of the victim must always be considered to enable her or him tell the story clearly and cogently. This is something the ODPP must of necessity give guidance to the I,Os.

46. The DPP must ensure that every police officer assigned the investigation of cases of this nature has sight of the Standing Operation Procedures on how to conduct victim interviews, how to ensure they are psychologically ready to do so It is necessary to avoid situations where the victim undergoes secondary trauma within the justice system, and her or his case is prejudiced the actions of those who are supposed to deal with it..

47. That said, The appellant also raised the key issue of the failure by the trial court to comply by the mandatory requirements of section 43 of the *Legal Aid Act*, to inform his of his right to an advocate This is mandatory requirement that goes to the root of a fair trial. It is unfortunate that despite several decisions from superior courts on this issue trial courts continue to infringe the rights of the accused person by failing to comply with the law.

48. In this case the record shows clearly that the trial magistrate who took the plea did not comply with the law. Section 43 breathes life to Article 50(2) (g) and (h) of *the Constitution*. While representation at State expense is not an inherent right, it is expected by *the Constitution* and State that the trial court will make the assessment and make the determination whether or not the accused will suffer substantial injustice if he is not represented at the trial. The accused person has the right as per Thomas Alugha Ndegwa v R [2016] e KLR to have the opportunity to apply for legal aid as well as per section 41 of the Act. This would only have happened if the appellant was made aware of his right. Having failed to do so – the court infringed on his right as a result the conviction cannot stand.

49. Regarding the sentence, trail court meted a legal sentence and I would not have interfered with it.

50. In conclusion, and from the foregoing, while the court acknowledges what happened to the complainant herein, the evidence of identity of the appellant was un reliable and cannot support the conviction of this appellant. Had the trial court addressed that issue the determination would have been different

51. In the circumstances the appeal succeeds. The conviction is quashed, the sentence set aside and the appellant is to be set at liberty unless otherwise legally held.

DATED, SIGNED AND DELIVERED IN OPEN COURT ON 18TH SEPTEMBER 2024

MUMBUA T MATHEKA

JUDGE

CA Ms Nelima/ Ms Elizabeth Court Prosecutor Ms Nyakibia Appellant Present

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2024-09-23 08:22:07