Peter v Republic (Criminal Appeal E039 of 2023)
[2024] KEHC 10861 (KLR) (18 September 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E039 OF 2023

LM NJUGUNA, J

SEPTEMBER 18, 2024

BETWEEN

MARTIN NDWIGA PETER ALIAS GITONGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of Hon. S. Ouko, SRM in Runyenjes MCSO No. E010 of 2022 Delivered on 15th November 2023)

JUDGMENT

1. The appellant has filed a petition of appeal dated 13th December 2023 seeking that the appeal be allowed, conviction be quashed, sentence of 15 years be set aside and he be set at liberty. The grounds for appeal are that the learned trial magistrate erred in law and facts:

    a. By convicting the appellant without considering that the prosecution's evidence was inadequate to sustain a conviction since the incident happened at night;

    b. By convicting the appellant without considering that the prosecution's evidence was uncorroborated and full of inconsistencies thus offending section 163(1) of the *Evidence Act*; and

    c. By disregarding the appellant's defense without giving cogent reasons;

    d. By relying on the evidence of the prosecution witnesses, which was insufficient and unsatisfactory in law.

2. The appellant was charged with 2 counts. The first count was the offence of gang rape contrary to section 10 of the *Sexual Offences Act*, whose particulars are that on 18th April 2022 at about 0100hrs at in Embu County, the appellant, in association with others not before the court, intentionally caused

his penis to penetrate the vagina of A.M., a female adult. The alternative charge to the first count was committing an indecent act with an adult contrary to section 11A of the *Sexual Offences Act*, and whose particulars are that on 18th April 2022 at about 0100hrs at Nduuri sublocation in Embu County, the appellant intentionally touched the vagina of A.M. with his penis against her will. The second count was grievous harm contrary to section 234 of the Penal Code, whose particulars are that on 18th April 2022 at about 0100hrs at in Embu County, the appellant, in association with others not before the court, unlawfully did grievous harm to A.M. The appellant pleaded not guilty to all the charges and the plea was duly entered and the matter proceeded to trial.

3. PW1 was A.M, the victim, who stated that at around 7PM she had gone to untie the goats and the appellant entered her house and hid under the bed. That she went to sleep at around 8PM and at about midnight, the appellant got out from under her bed and went to open the door to let in another person. That together, they raped her on the floor while beating her. That the appellant hit her on the face causing her to lose 4 teeth, he bit 2 of her fingers off and tried to break her neck. That at some point during the ordeal, she managed to escape while screaming although no one came to her rescue. She said that she ran to Mary's home while she was bleeding and together, they reported the matter to the subarea chief then to Runyenjes Police Station where she collected a P3 form and went to Embu hospital. That she was examined and taken to theatre and she lost 2 fingers.

4. That she was also examined vaginally and she stated that the appellant and his companion both inserted their penises in her vagina. She stated that she saw the faces of the assailants using the light from her phone torch. She knows the appellant because his mother and herself are married in the same family and she has known him from birth. On cross-examination, she stated that the appellant has never told her to warn her son against stealing his macadamia nuts. That any shortfalls by her son are his own and that it was not her business. That the appellant opened the door when she was sleeping on her bed and he let his friends into her house. It was her testimony that when the appellant opened her house door, she had lit her phone torch, thus she saw him for sure.

5. PW2 was Cpl. Mary Mbogo of Runyenjes Police Station, she stated that the victim reported the incident at the police station and she was escorted to Runyenjes hospital by another officer. That the victim was bleeding from her mouth although no teeth were recovered at the scene. That she recovered a blood stained pink top and a muddy skirt at the scene. That the victim identified the appellant through an identification parade and he was arrested by the subarea chief. She stated that the neighbor who helped the victim that night refused to record a statement because she was afraid of the appellant. That she visited the scene about 1 month after the incident and by then, the victim had relocated to Nairobi to live with her daughter. On cross-examination, she stated that the appellant had threatened the victim and he was arrested after the complainant obtained a P3 form. That the identification parade was necessary since the incident occurred at night.

6. PW3 was Inspector Stephen Mbithi of Runyenjes Police Station who performed the identification parade where the appellant was identified as the assailant of a gang rape. That he arranged 12 people based on height, clothes and lack of deformities and the appellant chose to stand between positions 9 and 11. That the victim identified him by touching him on his shoulder. He produced the Identification parade form as an exhibit. On cross-examination, he stated that the complainant was in his office before the identification parade began and it was conducted without any coercion.

7. PW4 was Joseph Kinyua, the assistant Chief of Nduuri sublocation who stated that both the victim and the appellant are known to him. He stated that on the night of the incident, he got reports from the village elders that the victim had been attacked at her home and she had been raped and was bleeding. That he advised them to take her to hospital and later, he worked with the police to have the appellant arrested in connection with the incident. On cross-examination, he stated that the appellant had gone

to the victim's house before but she had feared to report. That the appellant is a suspected serial thief in the village and the police investigated the incident this time round before arresting him.

8. PW5 was Mary Gitiri, the victim's friend and neighbour, who stated that the victim went to her house at around midnight and she was bleeding from all over her face and mouth. She said that she had been attacked by someone whom she feared to disclose. That she called the village elder and informed him that the victim was at her house and she was in very bad shape. That she had also been strangled and her voice was very low. She stated that the victim had bit marks on her forehead, cheeks, nose and mouth and 2 of her fingers had been bitten off. That she was not able to take the victim to hospital or to the police station that night since it was raining heavily but they went the next morning. On cross-examination, she stated that the victim did not tell her who had attacked her but she told the chief.

9. PW6 was Martin Mureithi formerly of Runyenjes Hospital who stated that upon examining the victim, the right and left fore fingers had been bitten off and were hanging thus they had to be surgically amputated. He observed that she had multiple bruises and he categorized the injuries as grievous harm. He stated that the vaginal examination showed that there were no injuries on the labia and the hymen was perforated. He filled the PRC and P3 forms which he produced as evidence

10. At the close of the prosecution's case, the accused person was placed on his defense.

11. DW1, the appellant, stated that on the night in question, he was at home with his parents and his brother, although he lived separately with his child who was in school at the time. That he did not leave his house that night. That his parents and the victim do not relate well because of a land boundary dispute which has got the attention of the authorities. That the victim had threatened him and 5 years later, he was arrested for this offence. on cross-examination, he stated that the victim framed him and that if he had left his house that night, people would have heard the door opening.

12. DW2 was Peter Ndwiga, the appellant's father who stated that the accused had gone to work that day and when he returned, he went to his house. That the following day, he heard that the victim had been attacked and after 1 month, his son was arrested in connection with the incident. He stated that the case was fabricated since his family has a small disagreement with the victim. That the victim never named her assailant until 1 month later when she named the appellant. On cross-examination, he stated that on the material night, it was raining heavily and that it was not possible for someone to leave their house.

13. The trial court found the appellant guilty of both counts and convicted him accordingly. The appellant was sentenced to 15 years imprisonment for the 1st count but did not sentence him on the second count.

14. This appeal was canvassed by way of written submission.

15. The appellant stated that the prosecution failed to prove the elements of the offence of gang rape against him since medical evidence did not corroborate the testimony of PW1. That the medical evidence did not prove the presence of spermatozoa cells and forceful penetration and he relied on the case of F.O.D. v Republic [2014] eKLR. He submitted that the charge sheet was defective and did not comply with section 34 of the Criminal Procedure Code since it did not clearly communicate the charge leveled against him. He also cited the case of Sibo Makavo v Republic [1997] eKLR and stated that it is suspect that only the appellant was charged with the offence yet the offence seemingly involved other people.

16. He challenged the identification parade and stated that he was not properly identified as the assailant. That the identification was speculative as was discussed in the cases of Paul Etole v Republic [2001] eKLR and Simiyu & Another v Republic [2005] KLR 192. He argued that DNA evidence was not adduced to link him to the offence. He relied on the cases of AML v Republic [2013] eKLR, Kassim Ali v Republic [2006] eKLR, John Mutua Munyoki v Republic [2017] eKLR, Joan Chebichii Sawe

v Republic [2003] eKLR and Republic v Kipkering Arap Koske & Another [1949] EACA 135. He urged the court to re-examine the evidence and find him not guilty.

17. The respondent, in its submissions, relied on the provisions of section 10 of the *Sexual Offences Act* and the cases of Joseph Muriu Mungai v Republic [2021] eKLR, E.E. v Republic [2015] eKLR, Bassita Hussein v Uganda, Supreme Court Criminal Appeal No. 35 of 1995 and Aloyo Ewoi v Republic [2017] eKLR and stated that the 2 counts were proved beyond reasonable doubt. He relied on section 21 of the Penal Code and submitted that the gang rape was committed in association with others.

18. That the appellant was properly identified by the victim on the night of the incident and the evidence is admissible under section 124 of the *Evidence Act*. That with regards to the offence of grievous harm, the appellant was identified through an identification parade. That the evidence was sufficient to identify the appellant as the assailant. The court disregarded the evidence of the appellant because it does not displace the prosecution evidence. Reliance was placed on the case of MTG v. Republic [2022] eKLR. It urged the court to uphold the findings of the trial court on both conviction and sentence.

19. From a thorough perusal of the evidence and written submissions herein, I isolate the following issues for determination:

    a. Whether or not the prosecution proved the 2 counts beyond reasonable doubt;

    b. Whether or not the charge sheet was defective; and

    c. Whether or not the court based its conviction on contradictory evidence.

20. There were 2 counts brought against the appellant. The first count was gang rape contrary to section 10 of the *Sexual Offences Act* which states:

> " Any person who commits the offence of rape or Defilement under this Act in association with another or others, or any other 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 than fifteen years but which may be enhanced to imprisonment for life."

21. On the first count of gang rape, the prosecution was tasked with proving the elements of rape as provided under section 3 of the Act as follows and in association with others with whom they share a common intention:

> " (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."

22. PW1 stated that she went to untie her livestock earlier that evening and that she went to sleep around 8.00 p.m. That at around midnight, the appellant came from underneath her bed and went to open the door and that is when she shone her phone torch and saw him. That he opened the door and let in another person and together, they raped her in turns. That in addition to raping her, they beat her up until she lost 4 teeth and they bit off her 2 fingers.

23. The elements of the offence of gang rape are; proof of penetration, identity of the assailants (being more than one person), lack of consent to sex and the assailant's association to commit rape. PW1 in her testimony stated that the 2 men inserted their penises into her vagina in turns. She said that she did not see the second person but she saw the appellant whom she recognized as she had known him since he was a child. She expressly stated that the assailants forcefully had sex with her against her wishes and the appellant told her to shut up and not make any noise.

24. According to section 124 of the *Evidence Act*, the testimony of the victim of a sexual offence need not be corroborated and it is sufficient to identify the assailant. In this case, the appellant decried the fact that the testimony of PW6 did not provide any evidence of penetration since there was no spermatozoa found. The Court notes that the evidence of PW6 concentrated more on count 2, on the injuries that the complainant sustained to the other parts of her body. The record shows that he examined the complainant after a whole month after the incident. In her evidence, the complainant explained the delay as due to the threats that she had received from the appellant. As a result, nothing which would have been expected from that examination due to the long lapse of time. However, this being an offence under the *Sexual Offences Act*, a conviction can be sustained with evidence of the complainant alone under section 124, of the *Evidence Act*. The complainant clearly identified the appellant as one of the people who were in her house that night and who raped her. The learned magistrate did not err in convicting the appellant of the offence of gang rape.

25. The investigating officer, PW2, stated that the appellant was identified from an identification parade which was necessary because the incident occurred at night. PW3 stated that he conducted the identification parade in which the victim identified the appellant. As regards the second count of grievous harm, in addition to the testimony of the victim which is sufficient in the eyes of section 124 of the *Evidence Act*, the identification parade served to also identify the appellant, thus placing him at the scene. The offence of grievous harm is provided for under section 234 of the Penal Code as follows:

> " Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life."

26. PW1 testified that it is the appellant who bit off her fingers and beat her up. According to PW6, the victim had human bite marks and 2 of her fingers were bitten off to an extent that they were hanging off the hand. He stated that they had to subject the victim to surgical amputation of those 2 fingers that had been maimed and he categorized the injuries as grievous harm. According to section 4 of the Penal Code, "grievous harm" means

> " any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense."

27. From the evidence, both counts were proved beyond reasonable doubt and the trial court was right in finding as much.

28. On the issue of whether the charge sheet was defective, section 134 of the Criminal Procedure Code provides:

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

29. In my view, the charge sheet contained all the necessary information to enable the appellant participate in his trial and the court to enter its judgment. In the case of MG v Republic (Criminal Appeal E051 of 2021) [2022] KEHC 14454 (KLR) the court was guided by the decision of the Court of Appeal in the case of Benard Ombuna v. Republic [2019] eKLR where it was held:

> " In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

30. On the related issue of whether or not the conviction was based on contradictory evidence, the appellant argued that the evidence produced showed discrepancies. From the evidence adduced, I find no discrepancies and the prosecution's evidence flows systematically proving both counts against the appellant. However, even if there were inconsistencies in the evidence, the same are negligible as they do not prejudice the appellant's case in any way (see the case of Joseph Maina Mwangi v Republic [2000] eKLR). In the same breadth, I note that the appellant stated that the trial court disregarded his evidence. I have considered this argument and the trial magistrate's analysis of the issues and it is my view that the defense case did not punch holes in the prosecution's evidence in a bid to create reasonable doubt.

31. On the issue of sentencing, the trial court convicted the appellant of both counts but only sentenced him to 15 years imprisonment on the first count, noting that it is the minimum sentence prescribed under section 10 of the *Sexual offences Act*. In this regard, the trial court erred for failing to sentence the appellant on the second count after convicting the appellant.

32. This court has unlimited jurisdiction in criminal and civil cases as bestowed unto it by Article 165(3)(a) of *the Constitution*. The trial court considered the mitigating factors and the probation officer's report, which I, too, consider alongside aggravating factors. The victim in this case was 58 years old at the time of the offence and she lived alone at her home following the death of her husband just a few months before the incident. The incident has driven her out of her home because of the trauma arising from the incident. On the other hand, the appellant was 33 years at the time of the incident and he prayed for leniency since he is the sole breadwinner in his family. Section 234 of the Penal Code prescribes a sentence of life imprisonment where is convicted for the offence of grievous harm. I find that this sentence is sufficient in the circumstances of this case.

33. In conclusion I find that the appeal lacks merit and the same is hereby dismissed with orders thus:

    a. The findings of the trial court on conviction on both counts is hereby upheld;

    b. The sentence of 15 years imprisonment for the first count is hereby upheld;

    c. For the second count, the appellant is hereby sentenced to 5 years imprisonment; and

    d. The sentences meted out to the appellant for the 2 counts shall run concurrently.

34. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF SEPTEMBER, 2024.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent