Kariuki v Republic (Criminal Appeal E008 of 2021)
[2024] KEHC 12559 (KLR) (Crim) (7 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12559 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E008 OF 2021

LN MUTENDE, J

OCTOBER 7, 2024

BETWEEN

ELIJAH NGAYUNI KARIUKI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. Elijah Ngayuni Kariuki, the Appellant, was charged with the offence of of Rape Contrary to Section 3(1) (a) (3) of the *Sexual Offences Act* (SOA). The particulars of the offence were that on the 7/5/2015 in Athi River Sub-County Machakos County, the appellant intentionally and unlawfully caused his male genital organ (penis) to penetrate the female genital organ (anus) of NKW without her consent.

2. In the alternative the appellant faced a charge of committing an Indecent Act with an adult contrary to Section 11(A) of the SOA. Particulars being that he intentionally and unlawfully caused his male organ to come into contact with the complainant's anus.

3. The complaint was made within the jurisdiction of Mavoko, hence the matter commenced in Mavoko Senior Principal Magistrate's Court where prosecution witnesses testified. Subsequently the case was transferred to Makadara Chief Magistrate's Court, where the appellant was taken through full trial, convicted for the offence of rape and sentenced to serve six (6) years imprisonment from 10/2/2016 after his bond was cancelled.

4. Aggrieved, the appellant proffered this appeal on grounds that:

    1. The magistrate erred in law and fact in failing to consider the defence.

    2. The court erred in taking the complainant's evidence as gospel truth.

3. The court erred in failing to find that no other evidence linked the appellant to the offence.

4. That DNA results were not produced to prove spermatozoa found on the anus of the complainant belonged to the appellant.

5. That the court gave unequal weight to the contradicting medical reports and had open bias to the report from Nairobi Women's Hospital.

6. The court failed to note the glaring contradictions and inconsistencies in witness testimony.

7. The court failed to note that the bruises on the anus were inflicted a few hours before examination yet the incident took place 19 hours before the examination.

8. The court failed to notice the witch hunt by the complainant and the bad blood between the parties.

9. The court failed to take into account the fact that the alleged weapon was never produced as evidence.

10. The court erred in finding that the prosecution proved its case beyond reasonable doubt.

5. Briefly, facts of the case were that in November,2013, PW1 NWK met the appellant herein. They had a relationship that blossomed into an intimate one. Later on, they disagreed and separated, due to the accused manner of endeavoring to have anal sex with her which was a sexual assault on her person. He would become violent and physically assault the complainant. She reported the matter to Kitengela Police Station but following an apology tendered by the appellant she withdrew the complaint.

6. Subsequently, they reconciled and he continued visiting her at the Sabaki residence but again disagreed. Despite that the appellant continued visiting her house at Sabaki. On 7/5/2015, the appellant went to her house, became violent and forced her to have anal sex with him. When she resisted he threatened to cut her with a surgical blade. In the result he ended up violating her sexually through the anus. After the act he ordered her to shower to which she complied and she stayed in the sitting room as the appellant slept in the bedroom.

7. As soon as he left in the morning the complainant reported the matter to Sabaki Police Station. She was taken to Athi River Heaith Centre for examination and subsequently to Nairobi Women Hospital, Kitengela. The matter was reported to the police who investigated and charged the appellant.

8. Upon being placed on his defence, the appellant denied having committed the offence and referred to the complainant as his wife. He stated that he was a biomedical technician and that the complainant was a nurse and they met at a medical conference organized by Philips Pharmaceuticals in Kisumu. That they later had an intimate relationship, and when it became apparent that he was married with 3 children, the complainant did not mind. He later introduced her to his family and she did likewise.

9. That the complainant had a 23 roomed house made of iron sheets. In 2013, she wanted to sell part of her plot so as to put up a permanent house, and upon seeking his advice he wanted to loan her the money to build, and, also proposed that she could take a loan but she said her payslip was overcommitted. That they eventually agreed that he would chip in to help her build the house and one half of the plot would be in their joint names.

10. That the complainant's sister supervised the construction and he accused him of sleeping with her. That they quarreled on a certain day when he turned to the house at 5:30pm with her sister and the compliant was abusive, that the workers were aware of this and police from Sabaki Police Post were called but upon explaining they left.

11. That in 2014 they argued over his lifestyle and she accused him of not being able to bear children. That she would go through his phone and was suspicious but they talked over the issue and got back together, that he received texts from her sister asking him for money and this angered the complainant.

12. That he asked her to either allocate the plot as agreed or sell it and pay him; and, the complainant said she would get a buyer and give him the money later, that he was with the complainant at Sabaki on 4/5/2015, they had supper in the evening and he left the place after he received a text. He also went to pick his laptop from his Car Registration No. KCB xxx P Toyota Landcruiser.

13. That after arguing he left to his house in Athi river where they lived, he had switched off his phone, he later saw abusive messages at 6:45 pm, the complainant also pestered him to go back. Later he received a call from a strange number which later turned out to be a police officer in charge of Sabaki Police Post.

14. That he went to the police post and was told that Nancy accused him of sexual assault. They later went to Athi River Police Station and Athi River Sub-County Hospital where they were examined. They tested his urine samples and checked his genitals and the doctor's view was that she was not assaulted and there was no evidence to charge him. This caused a standoff and the complainant was aggressive. They went for a second examination following her dissatisfaction and directions from the OCS.

15. That they went to Nairobi Women Hospital and the Investigating Officer went to see the doctor, who later said that she found a bruise on the victim's anus. That the PRC form was crossed and was overwritten to prove the sexual assault. The doctor alleged that she relied on medical history. He denied the allegations. That the alleged date of the offence was the night of 6th to 7th May 2015 between 9:00pm to 8:00oam. That they were in hospital on 7th May 2015, she was examined within 24 hours and the results were different.

16. The appeal was canvassed through written submissions that I have taken into consideration as well as authorities cited. The duty of the first appellate court was set out in the case of Okeno v R [1972] EA 32, which delivered itself thus:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic [1957] 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. Rulwala v Republic [1957] E.A. 570). It is not the function 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."

17. Section 3 of the *[Sexual Offences Act](#)* defines Rape to mean, the intentional and unlawful penetration of a person's genital organ into another's genital organ without their consent.

18. In Simon Kimiti David v Republic [2017] eKLR ,the court stated that the elements of rape as follows ;

> "(1) The act of intentional and unlawful penetration.
>
> (2) The act of sexual intercourse was done and against the complainant's will.
>
> (3) The consent is obtained by force or by means of threats or intimidation."

19. The fact that the appellant and the complainant had an intimate relationship over a long period was not disputed. The prosecution's case and which informed the charges and the conviction is that the victim did not consent to anal sex. That on the date of the offence, stated as the night of 6th and the morning of 7th the appellant used force, threats and intimidation to coerce her to anal sex.

20. The appellant's case was that the two had problems and often separated and reconciled. That they had separated on 4th after a disagreement upon a claim that he was having sexual relationship with her sister. That he was later called on 8th and he later went to Athi River Police Post where he was informed of the complainant's allegation. They went for medical examination and at the outset anal penetration was not proved. But the second medical examination established the fact.

21. Medical evidence is important in such cases but it is not the only way of proving sexual offences, especially so when the mode of examination and specialty is not established. This therefore leaves the victim's account that has been elevated and is more superior where it is found to be truthful.

22. The burden of proof is beyond reasonable doubt at all stages of the case and does not leave the door step of the prosecution. The evidence must also be considered as a whole.

23. In Upar v Uganda [1971] EA 98, the Court of Appeal held that lack of consent always remains an essential element of the crime of rape and so it should be specifically dealt with.

24. Section 44 of the *Sexual Offences Act* sets out instances where the court can make evidential presumptions about consent to reach a finding that the complainant did not consent to a sexual act. Section 44 (2) (a)-(f) lists the circumstances as interlia :

    (a) any person was, at the time of the offence or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;

    (b) any person was, at the time of the offence or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;

25. In this case, there is evidence that the appellant used force, threats and violence to have anal sex with the complainant.

26. The appellant did not tell court where he was on the specified dates. PW1's oral testimony proved that they were together that night and the morning hours before the victim went to the police station on the 7th . The appellant also stated in his defence that they were examined together. The medical evidence was that the examination was done on 7th May 2015.. He also stated that he was arrested, and the arrest having been on 8th May,2015, this corroborated the prosecution's case.

27. The court must reconcile the contradictions and inconsistencies and, make relevant conclusions, [See the case of Vincent Kasyla Kingo *v Republic Nairobi Criminal Appeal No. 98 of 2014*] where the Court ruled that a trial court has a duty to reconcile discrepancies where any is alleged to exist and where there is failure to do so an appellate court has an obligation to reconcile them and determine whether these go to the root of the prosecution case or not.

28. Medical evidence adduced was contradictory, PW2 Winfred Musembi, a clinical officer from Athi River Health Centre did not find evidence of physical injury, while PW3 Irene Ndegu, a Clinical officer from Nairobi Women Hospital, Kitengela found bruises on the victim's anal opening.

29. It was expected that the first or immediate medical examination would establish injuries if any and further medical examination and reports would corroborate the first report, but, that was not the case herein. The appellant's contention is that the first medical report should have indicated evidence of anal penetration and there is a doubt whether it really happened.

30. The complainant testified that the Sub-County Hospital did not carry out the anal examination. She sought a second medical opinion which was within her right according to the trial court.

31. It is trite that expert opinions are not binding on the court but form guidance on matters that are outside judicial notice and general knowledge. In this case, the 2nd medical report was righty obtained so as to controvert an existing report. The appellant has not alleged that the report was obtained fraudulently by collusion or for such purpose. There is no evidence of collusion with medical practitioners at the Nairobi Women Hospital to nail him.

32. The trial court reconciled the evidence from the two medical facilities which handled this matter, it was found that the appellant's wife worked at the Athi River Health Centre where the initial examination was conducted, and that PW2 knew the appellant and his wife. If that is the case, there are high chances that the findings would be biased and this casts doubt on the report . Moreover, the ethical thing to do was to refer the issue to an independent Medical Officer.

33. For that reason, both reports should be disregarded considering the secondary place of medical evidence in sexual offences. As to the allegation that DNA should have been done to establish the presence of spermatozoa in the victim's anus; In AML v Republic [2012] eKLR, it was held that the fact of rape or defilement is not proved by DNA test but by way of evidence. This therefore leaves the court to consider direct evidence adduced.

34. In Mukungu v Republic [200] AHRLR 175 [KeCA 2003] the Court of Appeal stated that:

> " ... there is neither scientific proof nor research finding that we know of to show that women and girls will, as a general rule, give false testimony or fabricate cases against men in sexual offences."

35. There is no requirement of corroboration as long as the victim is believed by the court. PW1 gave convincing evidence that the appellant had anal intercourse with her against her will and that he used force, threats and violence before and in the process.

36. Further, the trial court had the advantage of interrogating the primary evidence. The trial magistrate reconciliation and finding were based on evidence on record. By principle, the appellate court cannot interfere with such findings unless it is proved that they were perverse and not backed with evidence.

37. Further contradiction was that PW 1 testified that the appellant used a surgical blade to threaten her. She also stated that blows and fists were used. The appellant contends that physical examination did not reveal the injuries caused by fists and blows.

38. The weapon or objects used to mete out the violence or during the offence do not form part of the ingredients of rape.

39. The element of consent is what proves a rape case. In Charles Ndirangu Kibue v Republic [2016] eKLR, Mativo J (as he then was) held that:

> " The essence of rape is the absence of consent. Consent means an intelligent, positive concurrence of the 'will' of the woman. The policy behind the exemption from liability in the case of consent is based on the principle that a man or a woman is the best judge of his

or her own interest, and if he or she decides to suffer a harm voluntarily, he or she cannot complain of it when it comes about."

40. Section 42 of the *Sexual Offences Act* provides that, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice. In Oyier v Republic [1985] eKLR, the Court of Appeal described this ingredient holding that:

> " ..the mens rea in rape. It is primarily an intention and not state of mind. Thus the mental element is to have intercourse without consent, or not caring whether the woman consented or not: DPP v Morgan [1975] 61 Cr Appl. R 136 HL The prosecution must prove either 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; Archbold Criminal Pleading Evidence and Practice 40th Edn pp 1411 – 1412 paragraph 2881 and R v Harwood K [1966] 50 CR App R 56. So if 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."

41. The evidence proved firstly that the victim was against the idea of having anal sex with her partner, secondly, on the date of the offence she did not give her consent and thirdly, force threats, violence listed in Section 44 (2) and (a) and (b) were used during coitus. She also went to the Police Station immediately after the act. In the Oyier case [Supra], the court held that in a rape case the fact that a complaint is made by the victim shortly after the alleged offence is merely evidence of the consistency of the conduct of the victim with her evidence given at the trial and it can be regarded as corroboration of the story of the complainant.

42. The appellant's defence was that the complainant intended to get back at him, he also indicated that the complainant was reluctant to transfer to him his share of the plot after he invested in and/or helped her put up her permanent house. I find that the defence was not coherent and must have been an afterthought. The fact that the complainant wanted to hit back at him, the reasons for doing this and particularly using the serious charges before court had to be proved through the trial. The appellant's defence has to cast doubt on the credibility of the prosecution's evidence. PW1's evidence was coherent and found to be truthful.

43. On sentence meted out, Section 3 (3) of the *Sexual offences Act* sets the sentence as not less than ten (10) years imprisonment. A 6 year custodial sentence was given, the court having taken into account time spent in custody, hence it was lenient, and not excessive considering the circumstances of the offence.

44. The upshot of the above is that the appeal lacks merit, accordingly, it is dismissed in its entirety.

DATED, SIGNED AND DELIVERED VIRTUALLY

THROUGH MICROSOFT TEAMS AT NAIROBI,

THIS 7TH DAY OF OCTOBER, 2024.

L. N. MUTENDE

JUDGE