Ngoresia v Republic (Criminal Appeal E008 of 2023)
[2024] KEHC 13585 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13585 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPENGURIA

CRIMINAL APPEAL E008 OF 2023

RPV WENDOH, J

OCTOBER 25, 2024

BETWEEN

FESTUS NGORESIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant, Festus Ngoresia is aggrieved by the conviction and sentence meted on him by SPM Kapenguria in CRC.E001/2023. He was charged with the offence of Rape contrary to section 3(1) (a) (c) (3) of the *Sexual Offences Act*. The appellant also faced a second charge of Assault causing actual bodily harm contrary to section 251 of the Penal Code contrary to section 251 of the Penal Code. In the alternative, he faced a charge of committing an Indecent Act with an adult contrary to section 11(A) of the SOA.

2. The particulars of the charges are that on 21/12/2022 in Pokot Central, intentionally and unlawfully caused his penis to penetrate the vagina of PC without her consent and that as the day and place assaulted the complainant and caused her actual bodily harm. The prosecution called a total of five witnesses in support of their case, namely; PW1 PC (Complainant), PW2 MC, the complainant's daughter; PW3 PC Mutenywa, the Investigating Officer and lastly, PW4 Dr. Kibande Sylvester of Kapenguria Hospital. The appellant gave unsworn evidence in his defence and did not call any other witnesses.

3. The court found the appellant guilty on both counts and sentenced him as hereunder,

   Count I; twenty-five (25) years imprisonment;

   Count II; five (5) years imprisonment;

4. The sentences were ordered to run concurrently.

5. Aggrieved by the trial court's decision, the appellant filed this appeal together with amended grounds of appeal and submissions dated 8/7/2024. The Grounds of Appeal can be summarised as follows;

    1. That the trial magistrate erred by not considering her /his Constitutional Rights under Article 49(1) (b) (1) and 50 (2) (y) and (h);

    2. That the trial court failed to consider the fact that the evidence was full of contradictions;

    3. That the trial court erred by finding that penetration was proved;

    4. That there was not sufficient evidence to prove the charge of rape.

6. The appellant therefore, prays that the conviction be quashed, and the sentence be set aside.

7. The court directed that the appeal be canvassed by way of written submissions.

8. The appellant filed his submissions with the amended grounds of appeal. I have, however, not seen the Respondent's submissions. It was the appellant's submission that he was denied witness statements and any other evidence so that he could prepare for the hearing.

9. On the second ground, he urged that whereas one witness said that the appellant was arrested near the home, yet another says he was arrested in the forest; That the appellant prays that the contradictions be resolved in his favour;

10. On the third ground, the appellant submitted that penetration was not proved; that the Clinical Officer told the court that upon examining the complainant, he found grass in her private parts and there was no Forensic examination of the complainant; that there was no Medical evidence adduced connecting the appellant to the offence.

11. The Respondent has so far not filed their submissions.

12. This being a first appeal, the court is required to re-examine all the evidence tendered in the trial court, analyse it and arrive at its own conclusions. The court should, however, make allowance for the fact that this court neither saw nor heard the witnesses testify. However, the trial court had that privilege – See Okeno v. Republic (1971) EA 32.

13. PW1 testified that on 21/12/2022 at about 7.00 p.m., she was going back to her home when she was suddenly attacked by somebody who bit off her lower lip, tore her clothes, strangled her and raped her after overpowering her; that she screamed and her children went to her rescue; that her children went to get other clothes for her and even recovered her piece of flesh (lip) that had been bitten off. PW1 said that it was 7.00 p.m. but there was still enough light to see the assailant clearly.

14. PW2, the complainant's daughter recalled that on 21/02/2021, she was at home and her mother left their home to go to their other home. After a short while, they heard screams, she ran towards the screams. They found that the mother had been assaulted and her lower lip bitten off. They joined in screaming and members of public came. They found the mother naked with her clothes torn. They had the mother escorted to hospital.

15. PW2 said that they found the appellant hiding at their fence without his shorts and was bare-chested and his trouser was folded up; that they ran away from the appellant after spotting him and her mother confirmed that he is the one who raped and assaulted her.

16. PW3 the Investigating Officer, recalled that on 22/12/2022, the appellant who had been arrested by Members of Public and accused of raping a lady and biting off her lip was taken to police station; that

the people of the area went to look for the culprit in the forest where he had escaped to. PW3 issued the complainant with P3 form which was filled.

17. PW4 Dr. Kibande testified that when the complainant went for examination, her clothes were torn and dirty and blouse had lots of blood. He said that apart from raping her, the person inserted grass in complainant's private parts. He confirmed that the lower lip had a human bite 12cm's wide and 6cm's deep; There was tenderness to the thighs, the genitalia was inflamed (minora), and so were the vaginal walls, that there were foreign bodies i.e grass in the upper vagina, vaginal walls; were swollen and red; that there were red blood cells and epithelial cells. PW4 formed the opinion that PW1 was sexually assaulted and the presence of grass was evidence of forceful penetration.

18. When called upon to defend himself, the appellant in his unsworn statement denied committing the offence; that he was arrested at Semaku in a Chang'aa den when he was drunk and does not know anything about the charge.

19. The appellant was charged with the offence of rape. The definition of rape in Section 3(2) of the *Sexual Offences Act* is;

    1. A person commits the offence of 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.

        d. Lastly, positive identification of the perpetrator.

20. Whether penetration was proved; The complainant was alone at the time of the incident. From the record, she told the court that she was raped. Unfortunately, the prosecution did not endeavor to find out exactly what the complainant meant by rape; The term rape is a technical term which needs to be unpacked by evidence to determine whether there was penetration as defined under Section 2 of the Sexual Offence Act.

21. Be that as it may, we have the testimony of PW4 who examined the complainant on 22/12/2022 and found that she had an inflamed minora, vagina walls were swollen and red, epithelial cells and grass in the upper vagina. PW4 was of the view that there was forceful penetration of the complainant. Because of the doctors (PW4) findings this court is satisfied that there was proof of penetration.

22. Whether there was consent; PW1 vividly narrated how she was suddenly attacked. The injuries she sustained and especially the human bite of the complainant's mouth is telling. It was a beastly heinous and barbaric act. In the case of Rep V. Oyier (1985) KLR 353, the Court of Appeal addressed itself on the issue of consent when it said

    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 has 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.

22. See page 32 in the case of CRA 013/2021 Nicholas Kiprotich Rono v. Rep. The violence meted on PW1 is clear evidence that there was lack of consent by PW1.

23. Who was the perpetrator? Like most sexual offences, PW1 was the only witness to this incident which took place at night at 7.00p.m. The trial court therefore based the conviction on evidence of a single identifying witness under unfavourable conditions. When receiving such evidence, the court has the duty of warning itself of the danger of relying on the evidence of a single identifying witness under unfavourable conditions. The Court of Appeal. Rep V. Turnbull (1973) all EA 549 considered some of the factors that the court should take into account if the case turns identification by a single witness. The court said

> "...the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? .... Finally, he should remind the jury of any specific weakness which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made" see CR.A 182 of 2011

24. Under Section 143 of *Evidence Act*, a fact can be proved by the testimony of one witness unless a particular requires that there be more than one witness.

25. In Abdalla Bin Wendo and another V. Rep. (1953) 20 EACA 166, the court stated

> ..... "Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free from the probability of error."

26. See also Killu V. Rep (1986) KLR 198

27. In the case of Maitanyi V. Rep (1956) KLR 198, the court said that when considering the evidence of a single witness under unfavourable conditions, the court has to warn itself of the danger of relying on it. In Eria Sebwatu V. Rep. CRA 37/1960), the Court of Appeal held that if the court actually relies on evidence of a single identifying witness, under unfavourable conditions, that evidence must be watertight. See also Roria V. Rep.

28. In Wamunga V. Rep. 1980 (KLR) 424 the court said

> 'It is trite law that where the only evidence against a defendant is evidence of identification of recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.'

29. Again, in Maitanyi V. Rep. (1986) KLR 198 the court said

> "The strange fact is that many witnesses do not properly identify another person even in daylight... It is at least essential to ascertain the nature of light available. What sort of light, its size and it position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are unknown because they were not inquired into....'See CRA.16/2019 V. Rep.Nicholas Kipngetich Mutai V. Republic.

30. In Roria V. Rep. Supra the court said

> "A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner, LC said recently in the House of Lords in the course of a debate on S. 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts;
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> > 'There may be a case in which identify is in question, and if any innocent people are convicted today I should think that in nine cases out of ten – if they are as many as ten – it is in a question of identify.'
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> > That danger is of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safer to act on such identification." See CRA.156/2010.
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> > Again in Maitanyi V. Rep (Supra) CRA 156/2010.
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> > In this case there is no other evidence circumstantial or direct. The decision must turn on the need for testing with greatest care the evidence of this single witness. Is that what the courts below really did? It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Otherwise, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improves. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and it (sic) position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by there would have been a careful inquiry into these matters by the committing magistrate, state counsel and defence counsel.....

> There is a sound line of inquiry which ought to be made and that is whether the complainant was able to give such description or identification of his or her assailants to those who came to the complainant's aid, or to the police." Moses Odongo V. Rep Court of Appeal 156/2010.

31. The decisions I have referred to above, all stress the fact identification under unfavourable conditions should be watertight to avoid the danger of basing a conviction on unchangeable evidence.

32. In the instant case, the complainant at first said "He came out of nowhere in darkness...." However, later in the same sentence, she said "it was about 7.00 p.m. though there was still enough light to see him". In cross-examination, PW1 claimed to have seen the appellant clearly. However, the complainant did not reconcile the 1st statement of "He came out of darkness" PW1 did not describe the assailant nor did she elaborate on how she was able to see him, what he wore etc. There is no evidence that when she made the report to the police, she described the assailant or gave his name.

33. PW2 who arrived in response to PW1's screams claimed to have seen the appellant at their fence but he did not allude to how she was able to see or recognize him in the circumstances i.e. at 7.00 p.m.

34. Further to the above, the appellant was allegedly arrested by members of the public but none was called as a witness to establish they had a name or a description of the perpetrators. Besides this court has no idea whether the complainant gave them a name or a description of the assailant. PW3, the investigating officer did not tell the court whether the complainant gave a name or description. Since the appellant was not arrested soon after the act, the police should have mounted an identification parade. What PW1 did was dock identification which cannot carry much weight.

35. After considering all their evidence in its totality, and although there is evidence of the beastly act committed on PW1, the appellant is a key suspect, I find that the identification of the appellant as the perpetrator is not full proof. There is the possibility of error. I therefore find that the conviction to be unsafe. I quash the conviction and set aside the sentence.

36. As to the Assault charge, it was committed in the course of committing the offence of rape and the two charges cannot be separated. The appellant was irregularly charged with the offence of assault. In any event, the identification was not watertight.

37. After considering all the evidence in its totality, and although there is evidence of the beastly act committed on PW1 and the appellant is a key suspect, I find that the identification of the appellant as the perpetrator is not water tight. There is the possibility of error. I therefore find that the conviction is unsafe. The appeal has merit, I quash the conviction and set aside the sentence. The appellant is set at liberty forthwith unless otherwise lawfully held.

DELIVERED, DATED, AND SIGNED AT KAPENGURIA THIS 25TH DAY OF OCTOBER, 2024.

R. WENDOH

JUDGE

Judgment delivered in the presence of

Appellant –

Respondent -

Juma/ Hellen – Court Assistants