Korir v Republic (Criminal Appeal E032 of 2021)
[2023] KEHC 903 (KLR) (10 February 2023) (Judgment)

Neutral citation: [2023] KEHC 903 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

CRIMINAL APPEAL E032 OF 2021

AN ONGERI, J

FEBRUARY 10, 2023

BETWEEN

VINCENT KIPKIRUI KORIR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of Hon. S. M. Mokua (CM) in Kericho S.O No.72 of 2020 delivered on 13/1/2021)

JUDGMENT

1. The appellant was convicted with the offence of rape and sentenced to 10 years imprisonment on 13/1/2021. He was acquitted on the 2nd count of stealing from the person under section 279 of the *Penal Code* cap 63, Laws of Kenya.

2. The particulars of the charge were that on 29/7/2020 at [Particulars Withheld] Estate Chagaik location in Kericho County, the appellant intentionally and unlawfully had carnal knowledge of VC using threats and without her consent.

3. The prosecution evidence in summary was that on 29/7/2020, the appellant called the complainant and promised to help her get a job at [Particulars Withheld] Tea Factory.

4. The complainant agreed to go with the appellant to[Particulars Withheld] Tea Factory. They passed through a forested area and while there, the appellant threatened to kill the complainant unless she gave into his sexual advances.

5. The appellant undressed her, raped her and snatched her mobile phone and Kshs 1,700 and he disappeared into the bush. The complainant was assisted by the employees of a nearby flower farm and she reported the incident at Jamji patrol base and later went to Kericho District Hospital.

6. PW5 Nancy Wendo examined the complainant on 30/7/2020 and confirmed recent sexual activity.

7. The appellant in his defence denied that he committed the offence. He said on the material day he was plucking tea and looking after animals.

8. The trial court found the appellant guilty and convicted him with offence of rape and sentenced him to 10 years imprisonment. The appellant was acquitted of the charge of stealing from the person under section 279 (a) of the *Penal Code c*ap 63, Laws of Kenya.

9. The appellant has appealed to this court on the following grounds;

    i. That , the trial magistrate violated the appellant's fundamental rights and further denied the appellant a fair trial.

    ii. That , the trial magistrate failed to consider that the prosecution did not demonstrate penetration on the part of the complainant.

    iii. That , the trial magistrate failed to detect that there was an acrimonious relationship between security officers from KK and the appellant, who arrested the appellant and framed the appellant with the alleged offences.

    iv. That , the trial magistrate erred in law and fact by awarding the appellant with the maximum sentence contrary to section 216 and 329 of the *Criminal Procedure Code*.

    v. That , the trial court failed to take cognizance of the fact that there was no recovery, despite the fact that the arrest was immediately after the alleged incident.

    vi. That , the trial magistrate erred in awarding the prosecution the benefit of doubt, yet the prosecution did not discharge its evidentiary burden.

    vii. That , the trial magistrate erred in law and fact by dismissing the appellant's sworn defense without proper explanation.

10. The parties filed written submissions in this appeal which I have considered.

11. The appellant contended the evidence in the medical report, the clinical officer made the following observations that the 'hymen was missing but old' and further that there was no spermatozoa. The appellant was therefore adamant about the lack of scientific evidence that sexual intercourse occurred as required by the *Sexual Offences Act* No 3 of 2006.

12. The appellant contended that he was unknown to the complainant and that the incident took place when there was nobody else apart from the complainant and the suspect herein and such the court ought to proceed with abundant caution.

13. The appellant reiterated that the instant case was not a case of recognition but that of identification and as such an identification parade should have conducted upon the arrest of the appellant.

14. The appellant reiterated the prosecution case was not water tight.

15. The appellant contended the fact that he was awarded the maximum prescribed sentence, which was harsh and excessive in the circumstances of the case and in light of the directions from the High Court in Machakos *vide* Petition No E017 of 2021 by Odunga J (as he then was) directing that those convicted and sentenced under the *Sexual Offences Act* ought to petition the High Court for resentencing.

16. The appellant reiterated that the trial court failed to consider his sworn defense, he had a reasonable and/or plausible explanation on his whereabouts on the material day, however, the magistrate disregarded it without providing sufficient reason.

17. The respondent in its submissions reiterated that the appellant's fundamental rights as an accused person and the right to a fair trial as espoused in article 50 (2) of the *Constitution* of Kenya, 2010 were upheld at all times.

18. The respondent reiterated that with regards to penetration the *Sexual Offences Act* No 3 of 2006 defines penetration as "the partial or complete insertion of the genital organs of a person into the genital organs of another."

19. The respondent reiterated whereas the medical report "PExihibit 1(a)" was unclear as to whether or not penetration took place, the treatment notes "PExihibit 1(b)" by PW6 the clinical officer who examined PW1 confirmed the presence of epithelial cells which was an indication of recent sexual activity which further collaborated PW1's testimony that she was penetrated by the appellant without her consent.

20. The respondent further cited section 124 of the *Evidence Act* which states as follows; "in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall proceed to convict the accused person if, for the reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth. The respondent reiterated that in the instant case the trial court had an opportunity to observe the demeanor and character of PW1 when she testified on November 18, 2020 and stated that the appellant penetrated her without consent, using force and threats and found her to be truthful and credible.

21. The respondent dismissed the appellant's contention of bad blood between himself and PW 3 as unfounded and an afterthought. PW 3's role was merely to arrest the appellant after a report had already been made by the complainant at Chagaik Police Post.

22. This being a first appeal, the duty of the 1st appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether or not to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses.

23. In *Okeno v Republic* [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court as follows: "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 vs Republic* (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M Ruwala Vs R* (1957) EA 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 finding and conclusion; 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, see *Peters vs Sunday Post* [1958] E.A 424."

24. Similarly, in *Kiilu & Another v Republic* [2005]1 KLR 174, the Court of Appeal stated thus;

> "(i) 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 weigh conflicting evidence and draw its own conclusions.

(ii) 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."

25. The issues for determination in this appeal are as follows;

i. Whether the offence of rape was proven

ii. Whether the defence of *alibi* was cogent

iii. Whether the sentence was excessive

26. In the present case, the appellant was charged with the offence of rape, the statutory definition of rape is in section 3 (1) of the *Sexual Offences Act*;

"(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."

27. The main ingredients of the offence of rape created in section 3 (1) of the *Sexual Offences Act* include intentional and unlawful penetration of the genital organ of one person by another, coupled with the absence of consent.

28. In the case of *Republic v Oyier* [1985] KLR 353 the Court of Appeal held that; "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."

29. I find that there is evidence of sexual intercourse and further, I find that lack of consent, was proved.

30. The complainant's evidence was corroborated by that of PW2 who said the appellant promised to escort the complainant to [particulars withheld] factory to get a job.

31. PW 4 saw the appellant with the complainant on the material day and they exchanged greetings. Although PW 4 did not witness the incident, there is evidence that he saw the appellant in the company of the complainant.

32. On the issue as to whether the trial court considered the defence, the appellant raised an *alibi* defence. The Court of Appeal in the case of *Charles Anjare Mwamusi v Republic* Criminal Appeal No 226 of 2002 stated as follows; "An *alibi* raises a specific defence and an accused person who puts forward an *alibi* as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an *alibi* introduces into the mind of a court a doubt that is not unreasonable..." In the present case I find that the *alibi* defence did not dislodge the prosecution's evidence.

33. The *alibi* defence should also be raised at the earliest opportune time as was held in the case of *R v Sukha Singh s/o Wazir Singh & Others* (1939) 6 EACA145 that: " if a person is accused of anything and his defence is an *alibi*, he should bring forward that *alibi* as soon as he can because, firstly, if he does not bring it forward until months afterwards, there's naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment, it will give prosecution an opportunity of inquiring into that *alibi* and if they are satisfied as to its genuineness proceedings will be stopped."

34. In the case of *Victor Mwendwa Mulinge v Republic* [2014] eKLR, the Court of Appeal rendered itself on the issue of *alibi* as follows; "It is trite law that the burden of proving the falsity, if at all, of an accused's defence of *alibi* lies on the prosecution; see *Karanja v Republic* [1983] KLR 501, this court held that in a proper case, a trial court may, in testing a defence of *alibi* and in weighing it with all the other evidence to see if the accused's guilty is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of *alibi* at an early stage in the case so that it can be tested by those responsible for investigating and thereby prevent any suggestion that the defence was an afterthought"

35. I find that the *alibi* defence raised by the appellant was an afterthought.

36. On the issue as to whether the sentence of 10 years meted out was harsh and excessive, section 3 (1) of the *Sexual Offences Act* creates the offence of rape, provides for the ingredients of the offence to wit penetration and lack of consent whereas section 3 (3) of the *Sexual Offence Act* prescribes the penalty for the offence, as follows; "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."

37. Furthermore, sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously.

38. In the case of *Shadrack Kipchoge Kogo v Republic* Criminal Appeal No 253 of 2003 (Eldoret), the Court of Appeal stated as follows; "Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"

39. Similarly, in the case of *Wanjema v Republic* (1971) EA 493 the court stated as follows; "An appellate court should not interfere with the discretion which a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into consideration some immaterial fact, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."

40. I accordingly find that the sentence meted is lawful.

41. I find that the conviction herein is secure and the sentence lawful.

42. I dismiss the appeal and uphold both the conviction and sentence.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 10TH DAY OF FEBRUARY 2023.

A. N. ONGERI

JUDGE