



REPUBLIC OF KENYA



KENYA LAW
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**Kipchirchir v Republic (Criminal Appeal E050 of 2021)
[2023] KEHC 642 (KLR) (8 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 642 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E050 OF 2021
JWW MONG'ARE, J
FEBRUARY 8, 2023**

BETWEEN

HILLARY KIPCHIRCHIR APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the entire judgment of Hon. Caroline R.T. Ateya in Iten Senior Principal Magistrates Criminal Case No. 772 of 2018 delivered on 24th November, 2021)

JUDGMENT

1. The appellant was charged with three offences. He was charged with one count of causing grievous harm contrary to section 234 of the *Penal Code*. The particulars of the offence are that on the March 31, 2018 at around 1.00pm, at Kaptich location, he unlawfully did grievous harm to MC.
2. The appellant was also charged with one count of rape contrary to section 3(1) as read with section 3(3) of the *Sexual Offences Act*. The particulars of the offence are that on the March 31, 2018 at around 1.00pm, at Kaptich location, he unlawfully caused his genital organ, namely penis, to penetrate the genital organ, namely vagina of MC.
3. In the alternative, he was charged with the offence of committing an indecent act with an adult contrary to section 114 of the *Sexual Offences Act*. The particulars of the offence are that on the March 31, 2018 at around 1.00pm, at Kaptich location, he willfully and unlawfully caused his penis to come into contact with the vagina of MJK.
4. The appellant pleaded not guilty and the matter proceeded to full trial. The prosecution called five (5) witnesses and the accused was put on his defence. He gave an unsworn testimony and called no witnesses. Upon considering the evidence produced in court and the testimony of all the witnesses, the trial court found the appellant guilty on count 1. He was sentenced to serve fifteen years' imprisonment.



5. Being aggrieved with the entire decision of the trial court, the appellant instituted this appeal vide a petition of appeal filed on August 2, 2021 based on the following grounds;
 1. That (I) am aggrieved that the trial court erred in law and fact as it failed to hold that the charge sheet was fatally defective.
 2. That the trial court erred in law and facts as it failed to observe that the witness evidence was inconsistent and uncorroborated.
 3. That (I) am aggrieved the trial court erred in law and in facts as it failed to hold that the evidence of identification and recognition was not conclusive.
 4. That the learned trial magistrate erred in law and facts by shifting the burden of proof from the prosecution back to the appellant when the evidence failed to link him to the offence.
 5. That other grounds will be raised during hearing.

The parties filed written submissions on the appeal and adopted the same during the hearing.

Appellant's case

6. The appellant submitted that no evidence had been produced to prove that he had beaten the complainant. He further stated that the evidence of the witnesses called by the prosecution gave contradictory statements and were inconsistent in their testimonies as to what really happened. He alleged that the court relied on flimsy and weak evidence to convict him and urged this court to find that the conviction was weak, as the prosecution did not prove their case to the required standard of beyond reasonable doubt. Further, he submitted that there was no evidence to sustain the allegation that the complainant was seriously hurt or that she was treated at Moi Teaching and Referral Hospital, as alleged in her testimony. For those reasons he submitted that the conviction was premised on very shaky evidence and any doubt therein should be in his favour and that this court has power to vacate the conviction by the trial court.
7. On the sentence the appellant submitted that one of the objectives of criminal law is the imposition of appropriate sentences commensurate with the nature and the manner in which the crime is done. He stated that the sentence imposed upon him by the trial court was excessive and this court had power to interfere with it and impose a lesser sentence should it find that he was properly convicted. He urged the court to take into consideration the principle of proportionality in sentencing and determine the appeal in his favour.

Respondent's case

8. Learned counsel for the state submitted that the appellant did not elaborate or explain why or in what way he thought the charge sheet was defective, despite having stated so in his grounds of appeal and invited the court to find that the charge as drafted was proper and in accordance with the law as it allowed the appellant to understand and take appeal before the trial court. Counsel for the state further stated that the charge sheet as framed was proper and the assertion that it was defective was baseless.
9. On conviction and the evidence produced at trial, counsel argued that the appellant was properly identified as it the offence took place during the day at 1pm and both witnesses, who were his neighbours testified to having seen him and were able to positively identify him. Further, PW1 sustained injuries during the incident and the same were captured in the P3 form which was produced by the medical personnel who attended to her. It was her further submissions that the evidence of



the medical personnel confirmed that the injuries sustained by the complainant were as a result of the beatings inflicted by the appellant. She invited the court to find that the prosecution discharged its burden of proof in relation to placing the appellant at the scene of the crime and associating him with the offences for which he was convicted of.

10. Learned counsel denied that the burden of proof was shifted to the appellant and cited the case of *Pius Mutua Mbuvi vs R, HCCRA No 88 of 2019 (eKLR)(2021)* where the court affirmed that the ingredients of a charge of grievous harm must be laid out in the charge sheet for it to be proper. She urged that the appeal be dismissed for lack of merit.

Analysis & determination

11. As the first appellate court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. See *Okeno v Republic [1973] EA 32*; *Pandya vs R (1957) EA 336*, *Ruwala vs R (1957) EA 570*. I am however aware that this being an appellate court I did not have the opportunity like the trial court to observe the mien of the witnesses during trial and so I tread carefully.
12. Upon considering the petition of appeal and the submissions of the parties, the following issues emerge for determination;
 1. Whether the prosecution proved its case to the required standard
 2. Whether the sentence was harsh/excessive

Whether the prosecution proved its case to the required standard

13. Grievous harm is defined under section 4 of the Penal Code as follows;

'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.

'harm' means any bodily hurt, disease or disorder whether permanent or temporary.

14. The medical evidence adduced in court established that the complainant sustained several injuries and was treated for the same. Further, the evidence of PW2 who witnessed the appellant assault the complainant, coupled with the evidence of PW3, PW4 and PW5 confirms that the appellant was the perpetrator of the assault and that the complainant sustained said injuries. The identification was by recognition and all other evidence was consistent and well corroborated. Therefore, I am persuaded that the prosecution proved its case beyond reasonable doubt that the appellant committed the offence and I find no reason to interfere with the conviction.

Whether the sentence was harsh/excessive

15. Section 234 of the Penal Code prescribes a life sentence for the offence of causing grievous harm. I note that the trial court sentenced the appellant to fifteen years' imprisonment. I have considered the extent of the violence that was meted out on the victims and it is my strong view that the sentence was very lenient. From the evidence on record it appears to me that the appellant was intent on causing extreme harm to the complainant. This is very clear from the evidence adduced at trial. In fact, the complainant was only saved by the intervention of the people in the community that stopped the appellant from



finishing her off. Further, I note from the court record that the appellant is a repeat offender, and at one-point absconded bail in a separate criminal matter.

16. In arriving at a decision on whether the sentence given to the accused is commensurate with the offence as charged I am guided by section 364(1)(a) of the *Criminal Procedure Code* which provides;

(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may -

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;

17. As earlier stated, I find no reason to interfere with the conviction. On sentencing I find the trial magistrate properly applied herself in meting out the custodial sentence of fifteen years and I find no good reason to interfere with it. The appeal is hereby dismissed.

DATED, DELIVERED AND SIGNED AT ELDORET ON THIS 8TH DAY OF FEBRUARY 2023

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JWW MONGARE

JUDGE

Read in open Court in the presence of

1. Appellant in court
2. Ms Okok for the State
3. Loyanae- Court Assistant

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J.W.W.MONGARE

JUDGE

