Mutai v Republic (Criminal Appeal E077 of 2021)
[2023] KEHC 681 (KLR) (9 February 2023) (Judgment)

Neutral citation: [2023] KEHC 681 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E077 OF 2021

JWW MONG'ARE, J

FEBRUARY 9, 2023

BETWEEN

JONATHAN KIPLETING MUTAI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the conviction and sentence of Hon R Odenyo in Eldoret Chief Magistrates' Criminal Case No 143 of 2018 dated November 23, 2021)

JUDGMENT

1. The appellant was charged with the offence of rape contrary to section 3(1)(a)(b)(3) of the Sexual Offences Act. The particulars of the offence are that on July 10, 2018 within Uasin Gishu County, he intentionally and unlawfully caused his genital organ (penis) to penetrate the genital area (vagina) of VC, a girl aged 19 years without her consent. In the alternative, he was charged with the offence committing an indecent act with an adult contrary to section 11(A) of the Sexual Offences Act.

2. The appellant pleaded not guilty and the matter proceeded to full hearing. Upon considering the testimonies of the witnesses, the evidence produced in court and the defence of the appellant, the trial court found him guilty of the main charge and sentenced him to 20 years imprisonment.

3. Being aggrieved with the decision of the trial court, the appellant instituted this appeal vide a petition filed on November 30, 2011 premised on the following grounds;

    1. That the pundit trial magistrate erred in law and in fact by conviction the Appellant relying on shoddy, shambolic investigation.

    2. That the learned trial magistrate erred in law and fact by convicting and sentencing the Appellant without considering that the prosecution case was full of contradiction and hearsay testimonies.

3. That (I) am aggrieved the trial court erred in law and fact by delivering a harsh sentence without considering the time spent in remand during the entire trial period.

4. That the trial court erred in law and in facts as it failed to observe that the witness evidence was inconsistent and uncorroborated.

5. That (I) am aggrieved the trial court erred in law and facts as it failed to hold that the medical report were not reliable.

6. That the learned magistrate erred in law and fats as it failed to hold that the medical report was not reliable.

7. That the learned magistrate erred in law and facts by shifting the burden of proof from the prosecution backyard to the Appellant when the evidence failed to link him to the offence.

8. That other grounds will be raised at the hearing.

The parties filed submissions on the appeal.

Appellant's Case

4. The Appellant submitted that his rights to a fair trial were infringed by being detained for two days before being arraigned. Further, that the prosecution witness evidence was full of hearsay and contradictions. He stated that the medical evidence by PW5 revealed that the complainant's hymen was not torn and she was on her monthly period yet the bed she was raped on had no blood stains. He stated that the conflict in the evidence was proof of a frame up. He urged the court to allow the appeal.

Respondent's CASE

5. Learned counsel for the respondent submitted that the appellant's rights were never violated as he was arraigned in court 24 hours after he had been arrested. Further, that the delay in prosecuting his case was as a result of the Covid pandemic. Learned counsel stated that there were no contradictions or inconsistencies in the testimonies of the witness and even if there were, they did not go to the root of the prosecution case. She stated that the Appellant never denied knowing the complainant during the trial. Further, that the evidence of the complainant and the doctor were consistent with the offence of rape. From the evidence adduced, all the ingredients of the offence of rape were proved beyond reasonable doubt. Counsel urged the court to dismiss the appeal.

Analysis & determination

6. 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. In doing so, I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. See *Okeno v Republic* [1973] E A 32; *Pandya vs R* (1957) EA 336, *Ruwala vs R* (1957) EA 570.

Issues for determination

7. The following issues emerge for consideration from the grounds of appeal and submissions of the parties;

    1. Whether the prosecution proved its case to the required standard

    2. Whether the sentence was harsh and excessive

Whether the prosecution proved its case to the required standard

8. 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."

9. The ingredients for the offence of rape to be proved are;PenetrationLack of consentCoercion/Force to obtain consent.

10 The medical evidence of PW5 who prepared the P3 form and examined the complainant proved that there was penetration. The identification was by recognition and the complainant did not consent to the act. It was also clear that the consent was obtained by force. The complainant's evidence was corroborated by the medical evidence. I have considered the evidence in the trial court and it is my strong view that the ingredients of the offence of rape were satisfied and in the circumstances the conviction stands. The trial court did not err in finding the appellant guilty.

Whether the sentence was harsh/excessive

11. 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."

12. The law sets a minimum of 10 years for the offence of rape for an adult and that the court using its discretion may enhance the same and even convict the accused person to serve a life sentence, there is need to consider any factors that may be necessary for enhancement of the sentence. In this case the accused was sentenced to an enhanced sentence of 20 years custodial sentence. The law has set a minimum of 10 years custodial sentence for this type of offence. From the record, there is no clarity as the factors that influenced the trial court to enhance the sentence upward. Under article 50(2)(p)

> (2) Every accused person has the right to a fair trial, which includes the right
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> a) .....
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> .
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> (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

13. Under its supervisory jurisdiction the High Court is empowered by law to review any decision of the lower court and make appropriate orders as commanded by article 165(6)&(7) which provides as follows;

    6) subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

    (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice

14. Flowing from above, I find that the matter before me is one where this court can interfere and review the sentence of the lower court. In the case of *Ahmad Abolfathi Mohammed & Another* Criminal Appeal No 135 of 2016 (eKLR 2018) held thus at Page 28:

> " Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(s) of the *Criminal Procedure Code* was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person"

15. Accordingly, the sentence by the trial court in Eldoret CMCC no 143 of 2018 sentencing the appellant to a custodial sentence of 20 years is hereby vacated and set aside and in its place, this court sentences the accused (now the appellant) to serve a custodial sentence of 10 years. I however note that he was in remand from 10th July, 2018 and therefore, in accordance with the requirements of section 333(2) of the *Criminal Procedure code*, the sentence shall run from 10th July 2018. It is so ordered.

DATED, SIGNED AND DELIVERED ON THIS 9TH DAY OF FEBRUARY 2023

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J W W MONGARE

JUDGE

Judgment delivered virtually in the presence of;

1. Appellant is present

2. Ms okok- prosecution counsel

3. Loyanae- court assistant.

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J W W MONGARE

JUDGE