Tarus v Republic (Criminal Appeal E075 of 2021)
[2023] KEHC 1315 (KLR) (15 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1315 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E075 OF 2021

FG MUGAMBI, J

FEBRUARY 15, 2023

BETWEEN

SOSTEM KIPKEMOI TARUS ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of Hon. C.A Ogweno, RM dated 5th August 2021 in Sexual Offence Case No. 64 of 2020 at the Chief Magistrates Court at Mombasa)

Threats and intimidation are sufficient to establish lack of consent for the offence of rape.
The court addressed the appellant's conviction for rape, focusing on the definition of penetration and the essential element of consent. It held that threats and intimidation indicated a lack of consent, even without physical injuries. The court also upheld the trial court's finding that despite the victim's mental disability, she was capable of understanding and resisting the act; and that she was also a credible and reliable witness. Further, the court held that the offence under section 7 of the Sexual Offences Act did not pertain to the rape of a person with mental disabilities, which was addressed separately under section 146 of the Penal Code. The appellate court ultimately upheld the appellant's conviction and the 10-year sentence, concluding that all elements of the crime were proven and the sentence was appropriate.

Reported by Moses Rotich

Criminal Law *- sexual offences - offence of rape - elements necessary to prove the offence of rape - definition of penetration and the requirement of consent - whether threats and intimidation, even in the absence of physical injury, were sufficient to establish a lack of consent in the offence of rape - Sexual Offences Act, cap 63A, section 7.*

Statutes *- interpretation of statutes - interpretation of section 7 of the Sexual Offences Act vis-à-vis section 146 of the Penal Code, regarding offences involving persons with mental disabilities - distinction between the roles of a spectator and a victim in relation to mental disabilities - Sexual Offences Act, cap 63A, sections 2 and 7; Penal Code, cap 63, section 146.*

Evidence *- credibility of testimony - consideration of threats and intimidation in establishing lack of consent in the offence of rape - whether a complainant with mental disabilities could provide credible and reliable evidence.*

Brief facts

The appellant was convicted and sentenced to 10 years' imprisonment for the rape of a person with mental disabilities, contrary to section 3(1)(a) and (c) of the Sexual Offences Act, with an alternative charge of committing an indecent act.

In the instant appeal, the appellant was challenging the conviction and sentence. He argued that the trial court erred by holding that the complainant was mentally challenged without relying on a psychiatric report. He further contended that the court failed to recognize that the clinician's report and the P3 form did not sufficiently prove the offence of rape. Additionally, the appellant claimed that the sentence imposed was excessively harsh given the circumstances of the case. Finally, he asserted that the trial court did not adequately consider his defence.

Issues

i. What were the ingredients of the offence of rape?
ii. Whether threats and intimidation, even in the absence of physical injury, were sufficient to establish a lack of consent in the offence of rape.
iii. Whether evidence from a victim with mental disabilities was reliable in proving the offence of rape.
iv. Whether the offence under section 7 of the Sexual Offences Act pertained to the rape of a person with mental disabilities.

Relevant provisions of the Law

Sexual Offences Act, cap 63A

Section 2 - Interpretation

*"**person with mental disabilities**" means a person affected by any mental disability irrespective of its cause, whether temporary or permanent, and for purposes of this Act includes a person affected by such mental disability to the extent that he or she, at the time of the alleged commission of the offence in question, was—(a)unable to appreciate the nature and reasonably foreseeable consequences of any act described under this Act;(b)able to appreciate the nature and reasonably foreseeable consequences of such an act but unable to act in accordance with that appreciation;(c)unable to resist the commission of any such act; or(d)unable to communicate his or her unwillingness to participate in any such act.*

Section 7 - Acts which cause penetration or indecent acts committed within the view of a family member, child or person with mental disabilities

A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years.

Penal Code, cap 63

Section 146. Defilement of person suffering from mental illness

Any person who, knowing a person to be a person suffering from mental illness, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was a person suffering from mental illness, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years.

Held

1. Penetration was the partial or complete insertion of a person's genital organs into genital organs of another person. The lack of consent was essential element of the crime of rape. The *mens rea* in rape was primarily an intention and not a state of mind. The mental element was 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 had to show 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. Where a woman yielded through fear of death or

through distress it was rape and it was not excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor was it any excuse that she consented after the fact.

3. The fact that there was no physical injury should not negate the assumption that there was no consent. The threats and intimidation did not have to arise from physical abuse; they could also be mentally instigated. The complainant's testimony, which was corroborated, demonstrated a lack of consent due to threats and intimidation.
4. The offence under section 7 of the Sexual Offences Act did not apply to cases involving the rape of a person with mental disabilities. Section 7 of the Act addressed the commission of rape or indecent acts within the view of a family member, child, or person with mental disabilities, making the latter a spectator rather than the victim. Section 146 of the Penal Code dealt with the rape of a person with mental disabilities, referred to in that provision as an "idiot or imbecile."
5. The evidence provided by the complainant, despite her mental disabilities, was credible and reliable. She was lucid at the time of her testimony, and her evidence was corroborated by witnesses. The appellant's claim that he should have been charged under section 7 of the Sexual Offences Act rather than section 146 the Penal Code was dismissed.
6. The appellant's sentence of 10 years' imprisonment was upheld as there were no grounds to interfere with the trial court's decision.

Appeal dismissed.

Orders

Conviction and sentence of the trial court were affirmed.

Citations

Cases

Kenya

1. *Gacheru, Bernard Kimani v Republic* Criminal Appeal 188 of 2000; [2002] KECA 94 (KLR) - (Explained)
2. *Kogo, Shadrack Kipkoech v Republic* Criminal Appeal No 253 of 2003 - (Mentioned)
3. *Mungai, Njorogev Republic* Criminal Appeal 103 of 2017; [2017] KEHC 2075 (KLR) - (Explained)
4. *Njoroge v Republic* Criminal Appeal 149 of 2017; [2024] KECA 1076 (KLR) - (Mentioned)
5. *Republic v Oyier* Criminal Appeal 158 of 1984; [1985] KECA 55 (KLR) - (Explained)
6. *Wairimu, David Njuguna v Republic* Criminal Appeal 28 of 2009; [2010] KECA 495 (KLR) - (Explained)

Regional Court

Okeno v Republic [1972] EA 32 - (Mentioned)

Statutes

Kenya

1. Penal Code (cap 63) section 146 - (Interpreted)
2. Sexual Offences Act (cap 63A) sections 3, 3(1)(a)(c); 7; 11(a) - (Interpreted)

Advocates

None mentioned

JUDGMENT

1. The appellant was charged, convicted and sentenced to 10 years' imprisonment for the offence of rape contrary to section 3(1)(a) and (c) read with section 3 of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on 4th of July 2020 at [Particulars Withheld] area in Likoni sub

county within Mombasa county he unlawfully and intentionally caused his penis to penetrate the vagina of *SOA* without her consent. He was also charged with an alternative charge of committing an indecent act contrary to section 11(a) of the *Sexual Offences Act*.

2. The appellant now appeals against the conviction and sentence as set out in the amended petition of appeal filed on September 5, 2022. The appellant also relies on his written submissions. The prosecution opposed the appeal through the written submissions of its counsel filed on January 23, 2023.

3. During trial the prosecution called five witnesses. PW1, the complainant gave a detailed account of the offence. It was her testimony that she had gone to a barber shop for a haircut. The appellant grabbed her and locked her in a room and then raped her. PW 2 was her employer who asked her to go for a haircut and who received her after the offence and accompanied her to hospital and the police station. PW3 and PW4 testified as the medical officers who attended to the complainant and PW5 was the investigating officer. The trial court found that the appellant had a case to answer and put him on his defence. The appellant gave sworn testimony and did not call any witnesses.

4. In summary, the appellant has singled out the following grounds of appeal.

    i. That the trial court erred in making a finding that the complainant was mentally challenged without the support of a psychiatric report

    ii. That the trial court erred by failing to note that the report of the clinician and the P3 form did not prove the offence of rape.

    iii. That the sentence was manifestly harsh and excessive in the circumstances of the case.

    iv. The trial court erred in failing to consider his defence.

5. In his submissions, the appellant contends that the prosecution did not prove its case to the required standard. He faults the trial court for heavily relying on inconsistent evidence of the complainant, PW2, and the clinical officer as the basis for convicting him. He states that the mental state of the complainant ought to have been enquired into as it was raised during the trial and because of this fact, he ought to have been charged under section 7 of the *Sexual Offences Act*. It is his submission that the medical evidence produced to prove the element of penetration was inconclusive although interestingly the appellant alleges that he had intercourse with the complainant and that the same was consensual. Finally, it is his case that the sentence was manifestly excessive considering the circumstances of the offence and the appellant's disability.

6. The prosecution submitted that it had proved beyond reasonable doubt all the ingredients of rape and the evidence adduced was solid. It was also the submission by the prosecution that the sentence was justified and that there were no reasons to interfere with the same going by the decision in *Shadrack Kipkoech Kogo v R*, Criminal Appeal No 253 of 2003.

7. As the first appellate court it is the duty of this court to analyze and re-evaluate the evidence which was before the trial court and come to its independent conclusions on that evidence without overlooking the conclusions of the trial court. (See *Okeno v Republic* [1972] EA 32). I am cautious and give due regard to the fact that I neither saw nor heard the witnesses as cautioned in *Njoroge v Republic* [1987] KLR, 19 & *Okeno v Republic* [1972] EA, 32. Depending on the facts and circumstances of the case, the first appellate court may come to the same conclusions as those of the lower court or it may rehash those conclusions. There is nothing objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of

the decision [See *David Njuguna Wairimu v Republic* [2010] eKLR]. Against this background, I have considered the evidence before the trial court both for the prosecution and defence and reassessed that evidence and taken into account the written submissions and authorities cited by both the appellant and the prosecution counsel.

Analysis and Determination

8. I will combine all the grounds and consider them together in trying to determine if the evidence led before the trial court support a finding that the offence charged had been proved beyond reasonable doubt.

9. Section 3 of the *Sexual Offences Act* provides for the offence of rape in the following terms

    a. A person commits the offence termed rape if--

        i. he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;

        ii. the other person does not consent to the penetration; or

        iii. the consent is obtained by force or by means of threats or intimidation of any kind.

    b. In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this *Act*.

    c. 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."

10. It follows that for the offence of rape to stand there must be proof of

    i. Penetration

    ii. Lack of consent or proof of consent obtained by force, or threats or by intimidation.

    iii. Identification of the perpetrator

Penetration:

11. Penetration is defined under the *Sexual Offences Act* as the partial or complete insertion of the genital organs of a person into the genital organs of another person. I do not think that the issue of penetration is denied by the appellant although the same was collaborated by the medical report. At p 7 of his submission, the appellant states that:

12. 'The truth is that there was consent by the complainant to have sex with the alleged perpetrator and the allegations of rape only came after the alleged perpetrator refused to give the complainants employer, PW 2, bus fare as requested, to go to Western'.

13. For this reason, I will not belabour the issue further.

Lack of Consent or Consent Obtained by Force, Threats or Intimidation

14. The court in *Republic v Oyier*; Criminal Appeal No 158 of 1984 – Kisumu Court of Appeal stated that;

> The lack of consent is 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.

15. To prove the mental element required in rape, the prosecution had 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. Where a woman yields through fear of death or through distress it is rape and it is not 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."

16. PW1 recounted what transpired on the material date. It is important to point out that the trial court found the evidence by the complainant to be credible and found her to be believable despite the fact that she was mentally challenged. The trial court's proceedings show that the learned trial magistrate found that she was in a lucid moment and understood proceedings. There was no need to therefore subject her to psychiatric examination as alleged by the appellant. It was her testimony that she had gone to the barber shop for a haircut. She was the last customer and after the hair cut the appellant suddenly pulled her and locked her in a room. She stated that she did not consent to the sexual activity and that the appellant threatened to harm her if she dared scream.

17. Her state of shock and fright after the act was corroborated by PW2 who stated that the complainant returned home crying and shaking and asked never to be sent back to the barbershop again. There is also the testimony from the investigating officer, PW 5 that upon visiting the scene of crime the complainant 'appeared confused and wanted to go home'. The state of the complainant after the incident in my view would point out to a person who was still scared and afraid of what had happened to her. This apprehension can only point out to the force, threats and intimidation under the appellant. The fact that there was no physical injury should not negate the assumption that there was no consent. The threats and intimidation do not have to arise from physical abuse and can also be mentally instigated as was held in the *Republic v Oyier* case (*supra*). The evidence of the complainant in this regard was corroborated by the testimonies of PW2 and PW5 who gave evidence that was entirely consistent with the complainant's.

18. It is the appellants case that had the mental state of the complainant been taken into account, the court would have found the charge sheet defective. He argues that he ought to have been charged under section 7 of the *Sexual Offences Act* which provides that

> A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years.

19. On this, I would reiterate the finding of the court in the case of *Njoroge Mungai v Republic* [2017] eKLR to the extent that the section 7 offence is not an offence for the rape of a person with mental disabilities, which is the subject of an offence under section 146 of the *Penal Code*. Section 7 of the *Sexual Offences Act* proscribes the rape of or indecent act with another within the view of a family member, a child or a person with mental disability. In section 7 offence, the person with mental

disability is the spectator while in section 146 offence the person with mental disability, therein called an idiot or imbecile, is the victim. Section 146 of the *Penal Code* provides as follows:

> "Any person who, knowing a person to be an idiot or imbecile, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was an idiot or imbecile, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years."

20. Having said that, the definition of person with mental disabilities under the *Sexual Offences Act* means

> A person affected by any mental disability irrespective of its cause, whether temporary or permanent, and for purposes of this Act includes a person affected by such mental disability to the extent that he or she, at the time of the alleged commission of the offence in question, was –
>
> i. unable to appreciate the nature and reasonably foreseeable consequences of any act described under this Act;
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> ii. able to appreciate the nature and reasonably foreseeable consequences of such an act but unable to act in accordance with that appreciation;
>
> iii. unable to resist the commission of any such act; or
>
> iv. unable to communicate his or her unwillingness to participate in any such act;

21. I have already stated that the court had on its own assessment found the accused to be a credible witness with a clear grasp of what had happened to her and there was no evidence that she was being delusional. This evidence of her lucidity is corroborated by PW2, her employer of 7 years who stated that she was able to take care of the children. Under the circumstances, it is my finding that PW1 would not fall under the definition of an imbecile or person with mental disability as anticipated for purposes of section 7 of the *Sexual Offences Act* or section 146 of the *Penal Code* and that the charge was proper.

Identification of the Perpetrator

22. PW 1 was able to identify the perpetrator by recognition because it was the second time that she had gone to the barber shop and even if she did not know him well, she was able to recognize him also because she had been attended to by him. PW2 also corroborated the evidence of PW1. She knew the appellant well. The appellant in any case also confirmed having had sex with the complainant.

23. Hence, the conclusion that I come to is that there was cogent evidence before the lower court to demonstrate beyond reasonable doubt that PW1 was raped on July 4, 2020 and that there was intentional and unlawful penetration of her vagina without her consent; and that she was subdued by means of force, threats and intimidation. I will now turn to the final issue, on the sentence.

Sentence

24. The appellant submits that the sentence of 10 years was harsh and excessive under the circumstances. The respondents deny this fact and have pointed to the case of *Shadrack Kipkoech Kogo v Republic*; Criminal Appeal No 253 of 2003. It is the respondent's submission that this court ought to interfere with the sentence only if it can be proved that the trial court applied wrong principles of sentencing. I

also take note of the decision of the Court of Appeal in the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR where it was stated as follows:

> " "It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist." (emphasis mine).

25. With this in mind, I note that the trial court addressed itself to the circumstances of the case and took into account the mitigation by the appellant, his physical disability and the vulnerability of the complainant and considering this, sentenced the appellant to 10 years. The decision of the court does not seem to have been hinged on the prescribed minimum sentence which provisions have since evolved through emerging jurisprudence. I therefore see nothing to warrant a review of the sentence.

26. In sum, I am in agreement with the trial court that all the ingredients necessary to satisfy a charge of rape were proved by the prosecution against the appellant. I affirm the conviction and sentence. The appeal is dismissed.

SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI (VIRTUALLY) THIS 15TH DAY OF FEBRUARY, 2023

F. MUGAMBI

JUDGE