Issa v Republic (Criminal Appeal E051 of 2022) [2023] KEHC 2460 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2460 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E051 OF 2022

FG MUGAMBI, J

MARCH 17, 2023

BETWEEN

MOHAMMED ISSA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the conviction and sentence of Hon. D. Odhiambo, RM dated 30th December 2021 in Sexual Offence No. 118 of 2020 in the Senior Principal Magistrates Court at Shanzu)

JUDGMENT

1. The appellant was charged with the offence of rape contrary to Section 3(1)(a)(c) as read with section 3(3) of the *Sexual Offences Act* No 3 of 2006. The particulars were that on the July 23, 2020 at [particulars withheld] area in Nyali sub county within Mombasa county, he intentionally and unlawfully caused his penis to penetrate the vagina of MES by use of force and threats. He was equally charged with the alternative charge of committing an indecent act with an adult contrary to Section 11(a) of the *Sexual Offences Act* No 3 of 2006.

2. The brief facts as presented during trial were that PW1, the complainant testified that she was born on June 28, 2002. She was familiar with the appellant and had seen him in the neighbourhood. It was her testimony that on the material evening of July 23, 2020 she was helping her mother to carry utensils from her kiosk at about 7pm.

3. On her way home she met the appellant who tricked her into going to his parent's place to tell them that he had been arrested. She did not find anyone at the home but as she was leaving, the appellant appeared. He pushed PW1 into the house and forced himself on her. When he was done he pushed her out of the house and threw her panty at her. She took it and went home but she did not tell her mother for fear of reprimand. Almost two months later she was taken to hospital with stomach pains

and bleeding. An ultra sound done showed that she was pregnant. The bleeding had been as a result of a miscarriage.

4. PW2 was the mother to PW1. It was her testimony that she took her daughter to hospital on two occasions when PW1 started bleeding. The doctor confirmed that PW1 was pregnant and that is when she got to know that her daughter had been raped by the appellant. PW3 was a medical officer at the Coast General Hospital. She had worked with the doctor who examined PW1. She produced the P3 and PCR forms on behalf of the doctor. The report showed that the complainant's hymen was broken with an old scar which was estimated to be about 3 months old. The tests also indicated that she had had an incomplete abortion. The bleeding was as a result of the incomplete abortion. The next witness, PW4, a police officer attached to Nyali Police Station was the investigating officer. She arrested the appellant who confessed that he had sex with PW1 and stated that she was his girlfriend.

5. When put to his defence, the appellant admitted that what PW1 had said was true and added that he did not know how she got pregnant. It was his testimony that he and PW1 were in a sexual relationship but broke up because her parents did not like him. He even insinuated that her father had paid off the police for him to be arrested for raping PW1. The appellant brought in 3 witnesses who were friends of the two to confirm that PW1 and the appellant were in a relationship.

6. The trial court found the appellant guilty of the offence and sentenced him to 10 years' imprisonment. The appellant raised the following four (4) amended grounds of appeal:

    i. That the learned trial magistrate erred in law and fact by not considering that the defence under section 8(5) of the *Sexual Offences Act* was available to the appellant;

    ii. That the sentence was harsh and excessive

    iii. That the learned trial magistrate erred in law and fact by failing to consider the appellant's mitigation

    iv. That the learned trial magistrate erred in law and fact by failing to take into account the pre-trial custody period in the appellant's sentence.

Analysis and Determination.

7. Being a first appeal, this court is enjoined to re-evaluate the evidence afresh and come up with a new finding or conclusion altogether if need be. I have perused the submissions by the appellant and the rival submissions by the respondents.

8. In his grounds of appeal, the appellant has argued inter alia that the complainant was his girlfriend and he therefore seeks to rely on the defence provided for under section 8(5) of the Act.

   Section 8(5) of the *Sexual Offences Act* provides as follows:

   > It is a defence to a charge under this section if - (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and (b) the accused reasonably believed that the child was over the age of eighteen years.

9. From the records, the complainant was already 18 years at the time the offence was committed. Secondly, this section requires that an accused person raises this defence at his trial so as to allow the prosecution an opportunity to respond.

10. Where the defence is raised, the court will have to consider the defence, the circumstances including the steps which the accused took to ascertain the age of the complainant. When an accused opts to rely on the defence the evidential burden shifts on him to satisfy the above conditions attached to the defence. He has to demonstrate that, it is the child who deceived him to believe that she was eighteen or over, that he believed that the child was over eighteen years and that when all the circumstances are considered it will lead to the conclusion that the belief on the part of the accused was reasonable.

11. The appellant did not raise this point during the hearing and even as he cross examined the complainant, he did not make any reference to them being in a relationship. The testimony therefore coming at the end of the trial was at most an afterthought and the evidence of his friends did not therefore add much value. This ground of appeal fails.

12. I also note that the evidence of the complainant is on the whole uncontroverted by the appellant. The appellant states in defence that it is true what the girl said. He therefore admits to having pushed the complainant into his house, had sex with her under duress and against her wish (otherwise he would not have had to force her into his house) and then pushed her out.

13. The whole defence by the appellant in my view was a decoy. There was clearly no consent on the part of the complainant. The appellant did obtain sex by force which is described as rape. The charge was clearly proved.

14. Turning to the issue of sentencing, the minimum sentence provided for the offence of rape is 10 years. While courts have the sole discretion to determine appropriate sentences on a case to case basis, nothing stops the court from also meting out a minimum sentence if it deems it fit. I see nothing from the judgment of the trial court to insinuate that the learned trial magistrate misdirected himself on this discretion.

15. I note from the trial record that in mitigation the appellant simply stated that I don't know what to say. I didn't commit the offence. The trial court extensively considered the defence raised by the appellant and that too fell to the wayside. While I find no reason whatsoever to vary the sentence of the learned trial magistrate, I notice that the trial court did not specifically state that it had taken into account the period that the appellant had spent in pre-trial custody. I have perused the trial court records and see that the appellant was arrested on September 20, 2020 and remained in custody.

16. Consequently, I dismiss this appeal. The conviction and sentence of 10 years are upheld. The sentence shall begin to run from September 20, 2020 when the appellant was arrested.

SIGNED, DATED AND DELIVERED AT NAIROBI IN OPEN COURT (VIRTUALLY)

THIS 17th DAY OF March 2023

F. MUGAMBI

JUDGE