Njoroge v Republic (Criminal Appeal E025 of 2021)
[2023] KEHC 1599 (KLR) (10 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1599 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E025 OF 2021

MM KASANGO, J

MARCH 10, 2023

BETWEEN

MICHAEL CHEGE NJOROGE ..... ACCUSED

AND

REPUBLIC ..... RESPONDENT

(Appeal from the original conviction and sentence in the Chief Magistrate's Court at Gatundu (L.M. Wachira, CM) dated 2nd March,2021 in Criminal Case No. SO. 1072 OF 2012)

JUDGMENT

1. Michael Chege Njoroge, the appellant was convicted before Gatundu Magistrate's court of the offence of rape contrary to Section 3(1)(a)(b)(3) of the *Sexual Offences Act*. On being convicted, the appellant was sentenced to serve 35 years imprisonment. He was aggrieved by that conviction and sentence and has accordingly, filed this present appeal.

2. This is the first appellate court and therefore, this Court is required to subject the trial court's evidence to fresh examination. The Court of appeal while considering the duty of the first trial court in the case *Gabriel Kamau Njoroge v Republic* (1987) EKLR stated:-

> " As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect. (See Pandya V R [1957] EA 336, Ruwalla V R [1957] EA 570).'

3. I will therefore, as required review the evidence in this appeal.

4. The prosecution called a total of 5 witnesses. The complainant CNM. was in November, 2021 19 years old school going girl. She was in Form 3. On November 2, 2012 she stated she had gone to Gatundu District Commissioner's office to pick up her national identity card. After collecting that card and as she began to return to her home she met the appellant. Complainant told him she was on her way home to (withheld). On the appellant informing her, he also resided at that place and at his invitation the complainant agreed to accept a lift from the appellant. The appellant according to the complainant did not follow the route leading to where she resided. When she asked him why, appellant informed her that he was taking through a shorter route. The appellant however stopped at Ruiru town and stated he was going to buy a soda. He left complainant in the car.

5. On his return to the car, appellant requested complainant to get out of the car and to follow him to what appellant described was a shop. The complainant complied and as she entered the place she realized it was Bar and Lodging. Appellant led her to room No. 20 and on entering complainant realized there was a bed in that room. Complainant narrated what happened thereafter as follows:-

> " He (appellant) closed the door behind me and started removing my clothes. I screamt (sic) but he threatened to kill me. He forceably(sic) removed my clothes, the pant, the skirt, the peticoat(sic). He then removed his clothes and wore a condom. He had sexual intercourse with me on the bed. We had never at all discussed that we would have sex. I did not really have a choice as he was strong."

6. Complainant stated she bled after that ordeal and that the bed and the floor had blood. Appellant thereafter told her to dress up and once he too dressed up he informed her that he would take her home, which he did. While dropping her, appellant gave complainant his telephone number and requested her to contact him if here was "any issue". Complainant who by then had blood running down her legs informed her mother on reaching home of what the appellant had done and as they went to the hospital complainant lost consciousness. She was admitted at the hospital.

7. The doctor who admitted the complainant at Gatundu Level 4 Hospital confirmed that he attended complainant who went to the hospital with blood stained clothes and who complained of sexual assault. This is what the doctor stated in evidence:-

> " It was Sexual offence on 19 year old. The hymen was broken. There was 2 lacerations on vagina 6 cm bleeding and hymen ring. She was stitched. A HVS was done and no spermatozoa or pus cells done...
>
> Bleeding on the vagina was caused by laceration of the vaginal wall 6 cm and hymen ring 0.5 cm ...
>
> The conclusion was that there was sexual assault based on the findings and history given."

8. complainant's mother confirmed complainant arrived home with blood dripping down her legs. She also confirmed that on taking complainant to hospital on her admission at that hospital, that she reported the matter at the police station.

9. The Investigating Officer (I.O) narrated how she went to hospital and got information from the complainant of her assault by the appellant. The I.O. stated further:-

> " Yes, I got the clothing of the victim (the complainant). They were blood stained and the petticoat was torn."

10. The I.O. did go to investigate at the lodging where the offence occurred but she found the room washed and made up.

11. Appellant gave an unsworn statement in his defence. Appellant described himself as a journalist with the Royal Media, a businessman, a community leader and nyumbakumi member. In his defence, he began by stating that the complainant had not lodged a complaint with the police over the offence but rather, it was her mother who lodged the complaint with the police. He further stated that on the day in question, he was in Gatundu town doing journalistic reporting. He denied having met the complainant, having gone to Ruiru with her and he specifically denied having intercourse with her. Appellant further alleged that he had previously been threatened by police because he exposed their corruption by receiving money form "Mungiki". That it was the officer in charge of station (OCS) who coerced the complainant to make the complaint with the police. That this case was instituted to blemish his good character.

Analysis

12. The petition of appeal raises the following issues:-Whether prosecution proved its case on required criminal standard of proof.Whether the trial court erred to sentence appellant to 35 years imprisonment.

13. It is important to start by stating the appellant did not testify in his defence under oath. He gave an unsworn statement as reproduced above. Such an unsworn statement is not evidence, it is a statement that merely can be considered for the court to determine whether the prosecution has met the standard of proof. The Court of Appeal in the case *Amber May v. Republic* [1979] eKLR had this to say of unsworn statement:-

> " Our researches have revealed two persuasive authorities from English cases, in which this point was considered. In R V Frost, R V Hale (1964) 48 Cr App Rep 284, referring to an unsworn statement, Lord Parker C J said (at pages 290, 291) :-
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> 'In the opinion of this Court, it is quite unnecessary to consider what is really an academic question, whether it is called evidence or not. It is clearly not evidence in the sense of sworn evidence that can be cross-examined to; on the other hand it is evidence in the sense that the jury can give to it such weight as they think fit ... and should take it into consideration in deciding whether the prosecution have made out their case so that they feel sure that the prisoner is guilty.'
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> In R V Coughlan (1977) 64 Cr App Rep the headnote reads:
>
> 'Held, that when a person charged with an offence chooses to make an unsworn statement from the dock, although such a statement might throw light on the sworn evidence and thus influence the jury's decision, its potential effect was persuasive rather than evidential, for such a person was not a witness, and thus his statement could not prove facts that were not otherwise proved by evidence ...'
>
> From all this we are satisfied that an unsworn statement is not evidence as that expression is generally understood. It has no probative value, but should be taken into consideration in relation to the whole of the evidence. ...

> We do not find it necessary to decide whether or not these words were hearsay, because an unsworn statement is not strictly speaking evidence, and the rules of evidence cannot strictly be applied to an unsworn statement."

14. The prosecution produced very compelling and consistent evidence which revealed that the appellant persuaded complainant, who was then a school girl of only 19 years of age to accept his lift. The complaint identified the accused as the person who lured her into a lodging and proceeded to forcefully rape her and the use of force was evident from the torn clothes, the bloody clothes and the two tears of the complainant's vaginal wall. The complainant was stitched at the hospital.

15. The complainant provided reasonable detailed account of the events of that day. The fact the complainant did not run away as she was left alone in the car and the fact she did not alert the workers at the lodge of her rape does not affect my assessment of her overall credibility. She was credible. She testified that appellant threatened to kill her when she attempted to scream. That may well explain why she did not run nor alert others that she had been raped.

16. Section 3(1) of the *Sexual Offences Act* (SOA) provides what constitutes offence of rape as follows:-

> "(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;"

17. Prosecution proved there was penetration as required under Section 3 of the *SOA*. Section 2 of the *SOA* defines penetration as:-

> "...the partial or complete insertion of the genital organs of a person into the genital organ of another person.

18. The complainant and the doctor proved there was penetration by appellant's genital organs of the complainant's genital organs.

19. Complainant testified she did not consent to have intercourse with appellant. Further, the doctor concluded that due to the injuries suffered by the complainant, he formed the view that she was raped forcefully.

20. In the case *Charle Ndirangu Kibue v Republic* [2016] eKLR had this to say on consent:-

> "One of the central elements of the offence of rape is the question of whether the complainant consented to the penetration by an accused. Additionally, it should also be noted that the complainant must also have the capability to consent as well. Chief Justice King said:-
>
> > 'The law on the topic of consent is not in doubt. Consent must be a free and voluntary consent. It is not necessary for the victim to struggle or scream. Mere submission in consequence of force or threats is not consent. The relevant time for consent is the time when sexual intercourse occurs. Consent, previously given, may be withdrawn, thereby rendering the act non-consensual. A previous refusal may be reversed thereby rendering the act consensual. That may occur as a consequence of persuasion, but, if it does, the consequent consent must, of course, be free and voluntary and not mere submission to improper persuasion by means of force or threats.'"

21. As stated before, the appellant's unsworn statement is not evidence and juxpositioning it against the prosecution's evidence it is my holding that the appellant was correctly convicted of the offence of rape.

22. Appellant was sentenced to 35 years imprisonment. He seeks to appeal his sentence. The trial court had the benefit of receiving victim impact report, which I have also sighted. There is no doubt that apart from the obvious physical effects, the rape had on the complainant, she also suffered psychologically. She had to attend various counselling sessions which affected her school attendances. She spoke of the shame she felt and continues to feels because the fact of the case were known by her neigbours. She is presently married living with her husband and children but because of the shame she feels, she stated she did not visit her parents frequently.

23. The court in the case *Charles Ndirangu* (supra) recognized that sentence is essentially exercise of the trial court as it had this to say:-

> " The general principles the Court adopts in an appeal relating to sentence as stated by Nicholas J in the South African case of R V Rabie are the following:-
>
> "1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal (a) should be guided the principle that punishment is "pre-eminently a matter for the discretion of the trial Court"; and
>
> (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised,
>
> 2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.'".

24. Bearing in mind that the appellant was convicted of a serious criminal offence and considering the effects it had on a young school going girl, I find that there was no error in the sentence of the trial court. I decline to interfere with the length of appellant's sentence.

DISPOSITION

25. In the end, I accept the evidence of the complainant and I am satisfied of the appellant's guilt. This appeal is consequently dismissed.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 10TH DAY OF MARCH, 2023.

MARY KASANGO

JUDGE

Coram:

Court Assistant : Mourice/Julia

Appellant:- Michael Chege Njoroge :- Present

For appellant : - No appearance

For DPP :- Mr. Gacharia

JUDGMENT delivered virtually.

MARY KASANGO

JUDGE