VOJ v Republic (Criminal Appeal E001 of 2021)
[2023] KEHC 2048 (KLR) (15 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2048 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL E001 OF 2021

KW KIARIE, J

MARCH 15, 2023

BETWEEN

VOJ ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in S.O.A case No.23 of 2019 of the Senior Principal Magistrate's Court at Oyugis by Hon. Celesa A. Okore–Senior Resident Magistrate)

JUDGMENT

1. VOJ, the appellant herein, was convicted of the offence of rape contrary to section 3(1) as read with section 3 (3) of the *Sexual Offences Act* No.3 of 2006.

2. The particulars of the offence were that on diverse dates between December 2018 and September 2019 at Rachuonyo North Sub-County within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of JAO, without her consent.

3. The appellant was sentenced to serve ten years imprisonment. He was aggrieved and has appealed against both conviction and sentence.

4. He was in person. He raised grounds of appeal that the learned trial magistrate erred:

    a. In failing to warn herself against the danger of convicting the appellant on uncorroborated evidence of prosecution witnesses.

    b. By failing to give a benefit of doubt to the appellant after the prosecution failed to produce exhibit like alleged used condoms mentioned by PW1 which were never escorted to the government

c. By convicting the appellant when there was no government analysts report that the contents (if there was) of the alleged used condoms neither belonged to the appellant nor to the victim.

d. By demonstrating the fact she was biased and prejudicial against the appellant. As a result the appellant was not accorded a fair trial as enshrined inarticle 50(2) of the *Constitution*.

e. By shifting the burden of proof to the appellant which is against the law.

f. Concluding that the prosecution case was proved beyond reasonable doubt.

g. Convicting the appellant without considering that PW1's, PW2's and PW3's evidence was incredible when put to the test and full of inconsistencies, contradictions, discrepancies and glaring gaps.

h. In believing in the medical evidence of PW1 when exonerated the appellant to P3 form, PRC form treatment not form did not indicate any rape.

i. Failing to bring the complainant and other vital witnesses to testify in Court whose evidence could have secured my acquittal.

j. By failing to examine the appellant to ascertain the truth of the complainant's allegations.

k. By failing to realize that the complainant's allegations and contention was not supported by medical evidence produced by PW1.

l. By failing to realize that the complainant was not brought to court for the hon. court to access her and conclude that she was vulnerable at 42 years with grown up children

m. Failing to realize that the mental status assessment which was done to the complainant and was brought to court as exhibit to prove the prosecution's allegations that complainant was mentally retarded proved that complainant was more epileptic than mentally disable.

n. By failing to realize that a mentally retarded person cannot remember nor recall any past occurrence but present.

o. By not believing that there was no penetration hence no rape.

p. By not realizing that suspicion however strong cannot form a basis for conviction.

q. By failing to realize that the complainant was HIV positive while the appellant herein is HIV negative hence section 26(1) (a) (b) (c) *Sexual Offence Ac*t No.3 should be applied against the complainant and charged if consented.

r. By failing to realize that section 42 of S.O.A No.3 of 2006 applies to this case since exhibit was produced in Court to prove the complainant's mental regardless but showed a greater percentage of being epileptic and the degree of mental disability to indicate.

s. By failing to realize that section 31(1)(a)(c)(2)(1) gives only the court mandate and jurisdiction to declare a witness vulnerable by either seeing the witness in court or by seeing the exhibit (evidence) produced in court of mental disability but not anybody else not even prosecution.

t. By failing to realize that my arrest was improper, unlawful and not in the scene.

u. By failing to realize that I was not identified by the complainant.

v. By failing to realize that the complainant was a female adult of 42 years with grown up children of my age, proof that she engaged in sexual intercourse even before I the appellant was born the issue of broken hymen, old is not proof or rage in the instant case.

w. By not realizing that this was a framed up case against the appellant.

x. By not realizing that the complainant mentioned PW2 as the rapist who raped her.

y. By failing to realize that the medical evidence b PW1 did not prove any rape and did not single out the appellant as the rapist or perpetrator of the offence.

z. By failing to realize that PW1 (Clinical officer) did not tell the Hon. Trial court his qualifications. Area of study and any experience he had in medical examination field hence untrustworthy.

aa. By failing to consider discretion in the instant case.

bb. By not realizing that the investigation in the instant case was shoddy and conducted by unqualified personnel.

cc. By failing to realize that no exhibit were recovered from me even the alleged used condoms which were never brought to court as exhibits.

dd. By not realizing that the sentence was executed against the law in violation of article 15(a) of the *Constitution*.

ee. By failing to realize that the mental status assessment report was not produced in court by PW1 who is alleged by PW5 was not its maker.

By failing to realize that the appellant adduced alibi as PW1 which was trustful and cogent to warrant acquittal but was simply dismissed as untruthful.

5. The appeal was opposed by the state through Justus Ochengo, learned counsel on grounds that:

a. The circumstances for identification were favourable; and

b. The defence of the appellant was mere denial.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.

7. The ingredients of the offence of rape are set out in section 3 of the *Sexual Offences Act* which states as follows:

> 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.

8. The complainant is mentally sick and according to the evidence of Fredrick Odhiambo Oya (PW1) she was not coherent in her speech. The most ideal situation could have been to produce her to court

in order for the court to observe her and make the necessary finding. I however do not find the failure to produce her in court prejudicial to the appellant, given the evidence on her mental condition and her inability to communicate coherently.

9. Prior to the arrest of the appellant, the complainant had raised a concern that somebody was raping her after identifying himself as O. Evidence was adduced that O was another name for DO (PW2), her brother. The complainant was advised that next time the rapist pounced her she should raise an alarm.

10. On 20th September 2019 the complainant raised an alarm and was crying to be left alone. DO Were (PW2) was the first to arrive. He ordered the man he found in the house to approach him and with the help of a spotlight was able to identify him as the appellant. The appellant is their neighbour whose home is about 200 meters away. He was joined by his brother George.

11. In his evidence, TWO (PW4), testified that when he rushed to his mother's house in answer to the complainant's screams, he found the appellant in the sitting room. His other brother JOO (PW3) testified that he recognized the appellant while he was running away.

12. Whereas it was not possible for JOO (PW3) to recognize the person who was fleeing, I find that the evidence of PW2 and that of PW4 put to rest the person who was found in the house where the complainant was on September 20, 2019 at about 1a.m., was the appellant.

13. It would appear from the evidence on record that on September 20, 2019the complainant raised an alarm before she was raped. The evidence against the appellant was therefore circumstantial. In the case of *Mohamed & 3 others v Republic* [2005]1KLR 722 Osiemo Judge explained what circumstantial evidence is as follows:

> Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.

14. The pattern that was unfolding prior to the alarm by the complainant supported the claim she had made. Although we do not have evidence whether he had introduced himself as O before the alarm, the only logical and irresistible inference to make is that he had gone there to rape the complainant.

15. The appellant contended that the sentence was excessive. An appellate court would interfere with the sentence of the trial court only where there exists, to a sufficient extent, circumstances entitling it to vary the order of the trial court. These circumstances were well illustrated in the case of *Nillson v Republic* [1970] EA 599, as follows:

> The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v Rex*(1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R v Shershewsity* (1912) C CA 28 TLR 364.

16. Section 3 (3) of the *Sexual Offences Act* Provides:

> 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.

17. The appellant was sentenced to serve the minimum prescribed sentence. This sentence is legal and there is nothing unconstitutional about it.

18. The appellant had raised other grounds that have not been proved and therefore I find that the appeal lacks merit. I accordingly dismiss it.

DELIVERED AND SIGNED AT HOMA BAY THIS 15TH DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE