Wanjoka v Republic (Criminal Appeal E015 of 2022)
[2023] KEHC 2548 (KLR) (22 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2548 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E015 OF 2022

LM NJUGUNA, J

MARCH 22, 2023

BETWEEN

ERICK FUNDI WANJOKA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the judgment of E. Wasike P.M. in MCSO No. 44 of 2020 delivered on 01.07.2021)

JUDGMENT

1. The appellant, Erick Fundi Wanjoka was charged with the offence of rape contrary to Section 3(1) (a) (b) as read with Section 3(3) of the *Sexual Offences Act*.
2. The particulars of the offence were that on May 1, 2020 in Kiamuringa Sub-Location, Mbeere South District within Embu County intentionally and unlawfully caused his penis to penetrate the vagina of CK by use of force.
3. When the appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted and sentenced to serve fifteen (15) years imprisonment. The appellant was aggrieved by the conviction and sentence and has appealed to this court.
4. The court directed that the appeal be canvassed by way of written submissions and the parties complied with the directions.
5. The appellant submitted that the trial court erred in law by not considering that the prosecution witnesses adduced contradictory and insufficient evidence in that, the charge sheet read as OB No 16/xx/xx/2020 contrary to the Medical Examination report which read as REF: xx/xx/5/2020. That the medical report indicated that the complainant visited the hospital on August 3, 2020 and as such, the delay of three months and two days was not reasonably explained. Further, it was argued that

the complainant did not describe the identity of the alleged perpetrator to the police and therefore, identification was not proper.

6. On sentence, it was submitted that the same was harsh and severe despite the fact that he was a first offender and therefore deserved the least severe punishment in the circumstances of this case. He therefore urged this court to quash his conviction and set aside the sentence.

7. The respondent submitted that the trial court upon evaluation of the evidence of the four witnesses together with the unsworn evidence of the appellant, convicted the appellant and thereafter sentenced him to serve fifteen years imprisonment. At the outset, the respondent submitted that the appeal herein is devoid of merit and the same ought to be dismissed. It was argued that the prosecution proved the ingredients of the offence in that the complainant gave a thorough account of what happened to her on the material day. Additionally, that PW5 also testified and produced the P3 and PRC forms, Lab reports all capturing the presence of spermatozoa and tran's section on the hymen at 3 o'clock and 8 o'clock. That it was PW4's conclusion that there was penetration; PW1's evidence was also corroborated by the evidence of PW5 together with exhibits 5, 6 and 7 which showed that penetration was proved.

8. On whether there was consent, it was submitted that PW1 described how she struggled with the appellant and how she screamed to no avail. That after the ordeal, she immediately went home and informed PW2 and PW3 and further reported the same to the Police. The complainant's torn clothes were produced as exhibits 2, 3 and 4 and they suggested the use of force. Reliance was placed on sections 42 and 43 of *SOA* and further on the cases of *Republic v Oyier [1985] eKLR* and *Charles Ndirangu Kibue v Republic [2016] eKLR*. On the mode of identification, it was submitted that the incident allegedly occurred at 6.40 a.m. in the morning and therefore the appellant was positively identified.

9. On sentence, reliance was placed on section 3(3) of the *SOA* and further, the case of *Shadrack Kipchoge Kogo v Republic eKLR* to underscore the point that the trial court used its discretion properly in sentencing the appellant. In the end, this court was urged to dismiss the appeal herein.

10. This being a first appeal, this court is mandated to re-evaluate the evidence adduced before the trial court afresh. The Court of Appeal in *Gabriel Kamau Njoroge v Republic [1982 – 88] 1 KAR 1134* stated this on the duty of the 1st Appellate court;

> "It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this."

11. In the present appeal, the issue for determination is whether the prosecution established the offence of rape contrary to Section 3(1) as read with Section 3(3) of the *Sexual Offences Act* to the required standard of proof beyond any reasonable doubt.

12. This court has re-evaluated the evidence that was adduced before the trial court in light of the submissions made in this appeal. Section 3(1) of the *Sexual Offences Act* states that a person commits the offence of rape if;

> "He or she intentionally and unlawfully commits an act which causes penetration with his genital organs;

a. The other person does not consent to the penetration; or

b. The consent is obtained by force or by means of threats or intimidation of any kind."

13. The prosecution was therefore required to establish penetration, absence of consent, and that the appellant was the perpetrator of the act. On the element of penetration, the complainant testified how on the fateful day as she was heading to school with her mother, she remembered that she had forgotten a face mask and her mother told her to go back home and pick their face masks. That on her way back home, the appellant grabbed and wrestled her to the ground and further started chocking her. She stated that she tried to scream to no avail as the appellant dragged her to some bushes where he violently forced her down. That he proceeded to insert his penis into her vagina and thereafter raped her severally. PW5 produced the results of the Laboratory examination where spermatozoa were seen on high vaginal swab and further, the tran's sections on the hymen at 3 o'clock and 8 o'clock; further the P3 and PRC Forms were also produced showing that the complainant was penetrated.

14. On his part, the appellant has submitted that the medical examination report was filled on September 9, 2020 and stamped at Itabua Police Station on August 3, 2020 and therefore, a period of three months and two days delay was not explained. Of importance to note in respect to the evidence of penetration is that, an offence of this nature can be proved by oral evidence of a victim of rape or circumstantial evidence. This position is fortified by the holding of the Court of Appeal in *Martin Nyongesa Wanyonyi v Republic* Criminal Appeal No 661 of 2010, (Eldoret), citing *Kassim Ali v Republic* Criminal Appeal No 84 of 2005 (Mombasa) where the court stated that:

> "The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence."

In the present appeal, penetration was proved by the complainant's evidence which was corroborated by that of PW6. The Appellant did not challenge this evidence and this court finds that penetration was proved to the required standard of proof beyond reasonable doubt.

15. It's the complainant's case that she did not consent to the sexual acts. According to the Proviso to Section 42 of the *Sexual Offences Act*, "a person is said to consent if he or she agrees by choice, and has the freedom and capacity to make that choice." In *Republic v Oyier [1985] eKLR*, the Court of Appeal held as follows:-

> "The lack of consent is an 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.
>
> 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."

16. The burden of proof lies upon the prosecution to prove that the sexual intercourse was without the consent or against the will of the complainant. A woman is said to consent only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power, to act in a manner that she wants. Consent may be either express or implied depending on the nature and circumstances of the case. [See *Charles Ndirangu Kibue v Republic [2016] eKLR*].

17. In the instant case, the complainant testified how the appellant violently dragged and forcefully brought her down. That she tried to scream to no avail and further that, after the ordeal, the appellant threatened to kill her should she tell anyone; she stated that the appellant kicked and hurled insults

at her and then left. The witness stated that she reported the matter to the police and thereafter the appellant was apprehended.

18. From the above, it is my considered view that the evidence tendered by the prosecution and particularly the complainant was cogent and indeed the prosecution established that the sexual intercourse was not consensual.

19. As regards the identity of the perpetrator, the complainant stated that the incident occurred at 6.40 a.m. That there was sufficient light to enable her see the perpetrator and further, there was sufficient time to do so, in that, the complainant testified that the appellant raped her severally. This court, therefore, holds that the prosecution established to the required standard of proof that it was the appellant who sexually assaulted her. Further, the trial magistrate noted in his judgment that the prosecution witnesses appeared truthful and that they were consistent in their evidence and the same corroborated each other.

20. On the ground that the prosecution's evidence was marred with contradictions and inconsistencies, the appellant submitted that the date when the medical report was filled was different from the date captured on the charge sheet. That the medical report was filled on September 9, 2020 and stamped at Iatbua Police station on August 3, 2020 and further, the medical examination clearly indicated that the complainant visited the hospital after a period of about three months and two days. It is trite that contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. Further, it is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. The correct approach is to read the evidence tendered holistically. It is only when inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court that they can necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. In the case herein, PW5 stated that the complainant initially received treatment at Embu Level 5 Hospital and then went for further forensic examination on September 9, 2020.In my view therefore, the allegations by the appellant were not material to prejudice the appellant herein in whichever way. [See Section 382 of the *CPC* and Court of Appeal decision in *Benard Ombuna v Republic [2019] eKLR*].

21. On the ground that there existed a grudge between the complainant and the appellant, the court has noted that the appellant in his defence simply denied committing the offence herein and stated, that should the court sentence him to imprisonment, the period that he has been in custody be taken into consideration. In reference to the same, I do not find anything which shows that there was a grudge between the complainant and the appellant; in my view, the defence is mere afterthought.

22. On the ground that the appellant's defence was not considered, the court noted that the weight of evidence adduced by the prosecution weighed against the defence by the appellant; and it is outright that the appellant was responsible for the sexual abuse on the complainant. His defence was a mere denial. The trial court thus was satisfied, on the evidence given before it that the appellant was responsible for the sexual abuse and injuries the complainant suffered.

23. On the ground that the sentence meted out by the trial court was harsh and excessive and that the same failed to take cognizance that the appellant was a first offender and thus deserved to receive the least form of punishment, of importance to note is that sentence is a matter that rests in the discretion of

the trial court and it must depend on the facts of each case. On appeal, the appellate court will not easily interfere with the sentence unless, the 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. [See *Bernard Kimani Gacheru v Republic [2002] eKLR* and *Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR*].

24. In the case before the trial court, the appellant was charged with the offence of rape contrary to Section 3(1) (a) (b) as read with Section 3(3) of the *Sexual Offences Act*. The sentence is provided as stipulated hereunder:

> A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less that ten years but which may be enhanced to imprisonment for life.

25. In light of the foregoing, the appeal lodged by the appellant lacks merit and is hereby dismissed. The custodial sentence meted on the appellant is legal. Since there is no reason to disturb both the conviction and sentence, the decision of the trial court is hereby affirmed and the appeal is dismissed accordingly.

26. It is so ordered.

DELIVERED, DATED AND **SIGNED** AT **EMBU** THIS **22ND DAY** OF **MARCH, 2023.**

L NJUGUNA

JUDGE

……………………………………………for the Appellant

…………………………………………for the Respondent