Malemo v Republic (Criminal Appeal 92 of 2021)
[2023] KEHC 3686 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3686 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL 92 OF 2021

REA OUGO, J

APRIL 20, 2023

BETWEEN

CHRISPUS MALEMO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence at Bungoma Law Courts before Hon A. Adawo (SRM) on 26th August 2021)

JUDGMENT

1. The appellant, Chrispus Malemo, was charged with the offence of rape contrary to section 3 (3) of the *Sexual Offences Act* No 3 of 2006. The particulars of the charge were that on August 30, 2020 at around 23:30 hours in Bungoma South sub-county within Bungoma county intentionally and unlawfully caused his penis to penetrate the vagina of IN against her will. The appellant was convicted and sentenced to 15 years imprisonment by the trial court and now challenges the finding of the court.

2. This being first appeal, it is the duty of this court to re-evaluate the evidence before the trial court and to arrive at its own conclusion whether or not to support the conviction while bearing in mind that the trial court had the advantage of seeing the witnesses (see *Okeno v Republic* [1972] EA 32).

3. The offence is alleged to have taken place at 23:30 hours on August 30, 2020. YW (Pw1) testified that she was asleep when she heard a knock at her door. The appellant, who was her neighbour and well known to her, asked her to open the door as there were people chasing him from his house. Pw1 testified that she could hear the appellant breathing heavily. She opened the door for him and allowed him to stay for 30 minutes. After the 30 minutes lapsed, Pw1 asked the appellant to leave but he refused to do so. Instead, he started strangling Pw1 and despite raising an alarm the appellant continued strangling her. The appellant removed her clothes and raped her. Pw1 tried fighting and bit the appellant's hand but he strangled her even harder. Pw1 soon realized that she was out of breath and could become

unconscious and therefore stopped fighting the appellant and cooperated. The appellant stopped strangling her. Once she gained strength she pushed the appellant and he fell of her, he then slapped her but she managed to run. She opened the door, locked it from outside and asked her neighbours for help. She testified that there was sufficient light. The appellant kicked the door therefore breaking it and ran away. Pw1 stayed outside by her door after the incident. After 20 minutes, the appellant came back and Pw1 raised an alarm and the neighbours chased him away. She reported the incident to the police the following day. On cross examination she testified that the appellant had seduced her before but she was not interested and the appellant told her that he would do something she would never forget. Pw1 told the subordinate court that at the time, she did not treat the threat as serious.

4. The complainant's neighbour Adbulzamin Wechuli (Pw2) testified that on the material day at around midnight they heard Pw1 calling for help. He stood by the door and saw someone ran off very fast. He later saw the appellant but did not tell him anything. The following morning at around 8:00 a.m. the appellant came and apologised to Pw1.

5. On September 1, 2020 Pw1 went to Bungoma county Referral Hospital. Dr Elias Adoka (Pw3) testified that Pw1 gave a history that she had been attacked, assaulted and defiled by person known to her. She had bruises on her exterior neck, the back of her hand and complained of pain on her chest. Vaginal exam revealed that she had suffered a small tear in the lower vaginal floor. He filled her P3 form.

6. The investigating officer, No 81647 Corporal Irene Chepkonga (Pw4) testified that the complainant reported that she had been raped and treated. Pw4 gave her a P3 form and recorded witness statements. The appellant had gone to the complainant's house breathing heaving and tricked her that he was being followed. The complainant opened the door, and the appellant stayed in her house for 30 minutes and refused to leave. The appellant then strangled her while raping her.

7. The appellant when placed on his defence, testified as Dw1 and told the trial court that on the material day he was in his home. He testified that he did not commit the offence. He also testified that unknown people visited his house and would not allow him to question them and that they took him to the police station where he was processed.

8. The trial magistrate in her judgment found that the appellant was positively identified as the perpetrator and that he did not obtain Pw1 consent. The appellant dissatisfied with the finding of the court has preferred this instant appeal on the following grounds:

    1. That the appellant pleaded not guilty of rape.
    2. That, learned trial magistrate erred in law and fact in conducting proceedings that violated the rights of the appellant per the provisions of laws of Kenya.
    3. That, the learned trial magistrate erred in law and fact in rejecting the alibi defence adduced by the appellant.
    4. That, the trial magistrate erred in law and fact in riving at a decision basing on evidences that were full of contradiction and without analyzing the same.
    5. That, the trial learned trial magistrate erred in law and fact in considering extraneous factors in the decision making.
    6. That, the trial court was biased by flavouring (sic) the prosecution side in the aspects of the judgment delivered.

7. That, the sentence imposed upon the appellant was harsh and excess in the circumstances.

9. When the appeal came up for hearing, I directed that the same be canvassed by way of written submissions.

10. The appellant in his submissions filed on August 23, 2022 argued that the prosecution failed to prove its case beyond reasonable doubt. The P3 form, PRC form and treatment notes do not indicate rape. He also faulted the finding of the trial magistrate on consent, yet there was evidence that Pw1 opened the door to the appellant. He pointed out that Pw1 had testified on cross examination that the appellant desired her and that he had told him that she had no intention of ruining his marriage. He submitted that the suspicion of rape did not warrant a conviction. There were also glaring contradiction in Pw1 and Pw2's evidence on how the appellant was arrested. He also faulted the trial magistrate for failing to take into account the time that he had spent in remand in her sentence.

11. The respondent submitted that the appellant was well identified by Pw1. Identification of the appellant was based on recognition and was free from error. They further submitted that there was sufficient evidence of penetration from the testimony of Pw1 and Pw3. It relied on the case of *COO v Republic* (2018) eKLR where the court noted that victims need not to suffer vaginal or anal injury as a condition precedent to prove penetration. There was evidence of lack of consent based on the force applied by the appellant. The appellant on his defence gave testimony on his arrest without countering the overwhelming evidence put forward by the prosecution. The respondent urged the court to treat the appellant's defence as a mere denial. They submitted that the sentence meted by the trial magistrate was commensurate to the crime.

Analysis and Determination

12. I have carefully considered the petition of appeal, the evidence on record and the appellant's submissions in support of the appeal as well as the respondent's rival submissions. The main issue for the court's determination was whether the prosecution proved its case to the required standards, if so whether the sentence meted by the trial magistrate was appropriate.

13. In cases of sexual offence such as rape and defilement, the key evidence considered by courts in order to prove penetration is the complainant own testimony which is usually corroborated by the medical report presented by the medical officer (see*Onyango v Republic* (criminal appeal 97 of 2019) [2022] KEHC 16486 (KLR) (16 December 2022) (Judgment)).

14. The appellant was placed at the *locus in quo* by Pw1 and Pw2 who were his neighbours. Pw1 testified that the appellant was her neighbour and on the material day, the appellant came to her house she recognized his voice. She testified that before she opened the door, the appellant said it is 'Chris your neighbour'. She therefore recognized his voice and opened the door. Despite the incident taking place at night, there was sufficient evidence of proper lighting. Pw2 testified that the area was well lit because of security lights. Pw1 also testified that there was so much light. She also sat with the appellant in her house for 30 minutes after she let him in. Having considered the weight of the prosecution evidence, the trial magistrate cannot be faulted for arriving at the conclusion that the appellant had been positively identified.

15. The appellant tricked Pw1 to believe that he was in danger as he told her that he was being chased from his house by some people. Pw1 testified that the appellant was breathing heavily and at the time, she must have believed that he was in danger when she opened her door to let him in. The appellant has submitted that the fact that Pw1 opened her door in itself meant that she had consented to having sex

with him. However, an invitation into a person's house cannot be equated to consent. Pw1 testified that the appellant had tried to seduce her but she rejected his advances. The appellant must have known that he could only gain access to Pw1's house if he made her to believe that he was in danger and in need of her help. There was no point at which Pw1 gave her consent to have sex with the appellant.

16. Eventually when Pw1 asked the appellant to leave, he became violent. Pw1 testified that the appellant strangled her, removed her clothes and raped her. This was corroborated by the clinical officer, Pw3, who testified that Pw1 had a tear on the lower vaginal floor. The evidence of Pw1 is clear. The evidence of Pw1 and Pw3 points to unlawful penetration.

17. The prosecution presented further evidence that the appellant did not have Pw1's consent. Pw1 testified that when she asked the appellant to leave he became violent and strangled her to the point that she almost became unconscious. She was also screaming for help which could only mean that she had not given her consent. In fact, when she was able to regain her strength she pushed the appellant, ran out and locked him in while calling out for help her. The appellant, in an attempt to subdue the complainant strangled and scratched her. Pw3 confirmed that Pw1 had bruises on her exterior neck and hands. Pw4, following the report made by Pw1, took witness statements and arrested the appellant. The evidence of Pw1, Pw2 and Pw3 can only lead to the conclusion that the appellant had sexual intercourse with Pw1 without her consent.

18. The appellant's defence was that he did not commit the offence. He only testified as to how he was arrested and I agree with the submissions of the respondent, that the appellant's defence was mere denial. He did not have any explanation that could displace the evidence mounted against him. His appeal against the conviction is declined.

19. Was the sentence meted by the trial magistrate excessive? I think not.section 3 (3) of the *Sexual Offences Act* provides that the penalty for the offence shall not be less than ten years but which may be enhanced to imprisonment for life. The appellant was sentenced to 15 years imprisonment. I cannot fault the 15 years sentence as the appellant in committing the offence assaulted the complaint causing her other bodily injuries However, the appellant's main contention is that the trial magistrate failed to comply with section 333 (2) of the *Criminal Procedure Code* which provides as follows:

> "
>
> " 333.
>
> (2) Subject to the provisions of section 38 of the *Penal Code* (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

20. The court in*Maroro v Republic* (criminal revision E036of2022) [2022]KEHC11249(KLR) stated as follows in regards to provisions 333 (2) of the *Criminal Procedure Code*:

> "
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> " 10. The Judiciary Sentencing Policy Guidelines paragraph 7 further buttresses this legal position by stipulating as follows: "The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody

during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

11. The Court of Appeal in *Ahamad Abolfathi Mohammed & another v Republic*, [2018] eKLR when considering the appellant's complaint that the time they had been in custody was not taken into account by the High Court stated as follows:

"By dint of section 333 (2) of the *Criminal Procedure Code*, the court was obliged to take into account the period that they had spent in custody before they were sentenced... ..Taking into account the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction."

21. At the pre-sentence hearing, the appellant asked the court to take into account the time spent in custody. The trial magistrate in her ruling noted that she took into account the time spent in custody but did not direct that the sentence should run from the date of conviction. Pursuant to section 333 (2) of the *Criminal Procedure Code*, the sentence imposed by the trial court shall commence from September 4, 2020.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF APRIL 2023

R.E. OUGO

JUDGE

In the presence of:

Appellant in person

Miss Omondi For the Respondent

Wilkister C/A