Ali v Republic (Criminal Appeal E022 of 2022)
[2023] KEHC 23234 (KLR) (Crim) (6 June 2023) (Judgment)

Neutral citation: [2023] KEHC 23234 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E022 OF 2022

DO OGEMBO, J

JUNE 6, 2023

BETWEEN

MOHAMED ALI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence arising from criminal case No. 69 of 2015 in the Chief Magistrate's court at Kibera, Hon. Mutua, SPM, and judgment delivered on 15/12/2021)

JUDGMENT

1. The appellant Mohamed Ali was tried before the lower court with the offence of Sexual Assault contrary to section 5(i) (a) (1) (2) of the *Sexual Offences Act*, No 3 of 2006. That on 12/11/2015 at (name withheld), (name withheld) within Nairobi County, he unlawfully used his finger to penetrate the vagina of NK , a girl child aged 15 years.

2. The appellant faced an alternative charge of indecent act with a girl contrary to section 11 (1) of the *Sexual Offences Act*, No. 3 of 2006. That on 12/11/2015 at (name withheld) in (name withheld) within Nairobi County, he intentionally and unlawfully caused his penis to come into contact with the female genital organ (vagina) of NK , a girl child aged 15 years old.

3. The case of the appellant went through fall hearing. In a judgment read out on 15/12/2021, the appellant was convicted on the main charge. He was sentenced to serve 10 years imprisonment. The appellant has appealed to this court against the conviction and sentence. In the petition of Appeal filed herein and dated 8/12/2022, the appellant has raised the following grounds of appeal;

1. That the trial magistrate erred in law and in facts by failing to appreciate the fact and applicable law by holding that the charges against the appellant were prove beyond reasonable doubt this making a wrong decision.

2. That the trial magistrate erred in law and in facts by demonstrating open bias towards the prosecution evidence and ignoring the defence thereby making a wrong decision.

3. That the learned trial magistrate erred in law and in fact by concluding that the appellant was positively identified against the evidence on record.

4. That the learned trial magistrate erred in law and infact by conducting the trial on an irregular, strange and an unusual manner thereby prejudicing the appellant's right to fair hearing.

5. That the learned trial magistrate erred in law and fact by convicting the appellant on scanty and doubtful medical evidence thereby making a wrong decision.

6. That the learned trial magistrate erred in law and fact by failing to capture the correct legal position of the defence of an alibi and dismissing the said defence when the prosecution did not call any evidence or make any attempt to dislodge or rebut it thereby making a wrong decision.

7. That the learned trial magistrate erred in law and fact by convicting the appellant against the light of the evidence thereby made a wrong decision.

4. The appellant has urged this court to set aside the conviction and judgment herein and to acquit the appellant of the charges. The state has opposed this appeal of the appellant.

5. By agreement of the parties, this appeal was canvassed by way of written submissions. Both sides duly complied and filed their set of submissions.

6. From the appellant's side, it was submitted that the charge sheet was fatally defective in the sense whereas the amended charge sheet showed the charge of sexual assault contrary to section 5(1) and (i) (2) of the *Sexual Offences Act*, the conviction was based on section 5 (i) (a) (2) as read with section 5(2). Further, that on the issue of age, the complainant acted as an adult who was befriending people in the facebook page.

7. It was further submitted that the evidence of the prosecution was full of contradictions and lack of corroboration. The case of *Philip Nzaku Watu v R* (2016) was relied on, together with *Joseph Maina Mwangi v R*, Criminal Appeal No. 73 of 1993, *Eric Onyango Odeng v R* (2014) eKLR.

8. That the evidence of the complainant was not corroborated as the witnesses gave different accounts, neither did the same show any interference with the vagina to warrant a conviction. That the Doctor noted that the genitalia was normal with no injuries, the hymen was intact and no discharges, and that no spermatozoa was noted contrary to the evidence of the complainant that spermatozoa was splashed in her body.

9. The appellant went to distinguish the evidence as given by the various prosecution witnesses, PW 1, PW2, PW3, PW4, PW5, PW6, PW7. He alleged a fishing expedition on the part of the prosecution to ensure the appellant was found guilty. He contrasted the evidence on the PCRC form that there was semen in the vulva and he evidence of the complainant.

10. On the forensic evidence, it was submitted that the dry semen that was taken to the laboratory did not match the sample of the appellant. The appellant also submitted that the defence of the appellant was no considered. And that the sentence meted out was unconstitutional in as far as the same was the minimum mandatory sentence.

11. On the side of the state, Respondent, it was submitted that the prosecution proved the case against the appellant beyond any reasonable doubt i.e prove of penetration and identification of the appellant as the assailant (*John Irungo v R*, Criminal Appeal No. 2 of 2016)

12. And that under section 124 of the *evidence Act*, in sexual offences there is not requirement of corroboration and that the evidence of PW 1 was clear on how the appellant lured her and also threatened with a knife by 2 people. And on the alleged inconsistencies, it was submitted that there were no material inconsistencies in the prosecution's case. And that there are no defects on the charge sheet because the particulars of the charge ere clear and the appellant suffered no prejudice during the trial. And that under Section 5 (i) (a) (2) as read with section 5(2) age is not a requirement for proof (The *Irungu case*).

13. And lastly on the forensic evidence, it was submitted that it is not disputed that the 2 were in communication, a fact proved by the fact of PW 1 leading the police to the house of the appellant where the offence took place. Otherwise, on sentence, the court was urged to exercise its discretion on the same. A plan was made that this appeal be dismissed.

14. I have considered the submissions made by the opposing sides. This court sits on this matter as a 1st appellate court. Guided by the authority in *Okeno v R* [1972] EA 32, this court is enjoined to reconsider and to re-evaluate the whole evidence tendered before the lower court and to itself come to its conclusion. It is therefore mandatory that this court sets out the said evidence and to determine the issues accordingly.

15. From the record of proceedings, the case of the prosecution commenced with the evidence of PW 1 NK , 16, that on 12/11/2015, while., as she was walking along Zanzibar Road, a white car KBD approached her. It had 2 men, one dark and the other light. That the light man pushed her inside the car as the dark one was driving. The light men had a knife with which he threatened her. That they proceeded to NHC, Langata, House number 54D where she was given a colourless bitter drink. The light man forced her to drink it, as the other man went to another room. She was taken to a room and locked in after her photos were taken. That once in the bedroom, the dark man ordered her to undress. He threatened to kill her with a knife if she refused. That after being forced to undress, the man also undressed and lay on top of her, asking her to suck his penis. That the man poured semen on her and also urinated on her. And to prove that she was a virgin, the man inserted his finger on her vagina. The man then told her to shower, but she refused. The man used a red shirt to wipe her. That when the man left her alone at the gate, she called and told her mother who advised her to run to the nearest security guard. She ran to a guard called Mercy who retained her at the guard room. That while at the guard room, she got a call which Mercy picked, with the man promising to pay her 5,000/= if she agreed to get out of the guard house. She could tell it was the same man. This witness went on that she had joined facebook and her cousin Ali had told her they were looking for models. That after communicating further, they had agreed to meet on 12/11/2015. That the voice she heard while at Mercy's place was the same that she had been talking to about modelling. Her mother got her and took her to Aga Khan Hospital and to Industrial Area police station, and later to Langata Police Station. She led the police to the house where they found the dark man, the appellant. That she later came to learn that he is Kevin the same man she had been chatting with on facebook. That his facebook showed he is cousin Ali.

16. Mr. Aswani for the appellant cross-examined this witness. She confirmed her evidence while denying telling the appellant that she was 19 years old at the time. That her mother destroyed her clothes which had semen and urine. That the appellant removed the condom he had put after she told him she was a virgin. That police took the blood stained bed cover, and also saw her photos on the lap top at the bedroom. Her testimony was that he used his fingers in her vagina and male organ in her mouth.

17. PW2 was Dr. Maundu of Nairobi Police surgery. He examined PW 1 on 16/11/2015 and noted that she had injury on right cheek about 3 days old. External genitalia was normal, hymen intact, no discharge noted. The produced the P3 form (Exhibit-4).

18. And PW3, [particulars withheld] testified that the daughter, PW 1 was born on 19/3/2000. That on 12/11/2015, at about 11.00 a.m. PW 1 called and told her she was in distress in Langata. She advised her to run to any guard. She went and found her the security office, crying. PW 1 told her what had happened. She took her to Aga Khan Hospital and to Industrial Area Police Station, and Langata Police Station. That PW 1 then led the police to the said House 54D where she printed out the appellant as the perpetrator. This witness confirmed on entering the house, she saw photos taken of PW1. She went on that she did not see any stain on her clothes, and that the clothes were not handed to the police.

19. Dr. Joseph Kagunda Kamau, Government Analyst was PW 4. He had received exhibits from PC Josephine Ajowi and examined the same. He confirmed that on examination, the vaginal swab (Exhibit 1) was neither stained nor with semen. And PW 5, John Njuguna, recalled that on 12/11/2015, was examined at Nairobi Women Hospital and post rape case form filled for her (Exhibit – 3). That on examination, her right cheek was inflamed. That there was evidence of physical and sexual assault, but that there was no evidence of penetration and no spermatozoa were noted.

20. PW6 PC Josephine Ajowi of Langat a Police Station, recalled that she took over this case on 13/11/2015. She escorted the complainant to the police Doctor and the appellant to the Dog Unit Dispensary where his samples were taken. The then presented the exhibits for examination. That complainant gave a statement of finger penetration. And that complainant's clothes were not surrendered to her.

21. And PW, Dr. Irene Njeri Njogu of Aga Khan University Hospital testified that she examined PW 1. She had a dry discharge like semen, hymen intact but inflamed and bacteria in urine. In her opinion, there was sexual activity proved by the discharge and the inflamed hymen. She produced the medical notes (Exhibit- 2 (a) (b). And that the last prosecution witness Cpl. Lilian Muraguri a cyber-forensic investigator confirmed that no single SMS was recovered from the exhibit presented to her.

22. When put to his own defence, the appellant gave a sworn testimony that on 12/11/2015 at about 11.00 p.m. the police told him he would be arrested for abduction and kidnapping. He was then living at Block 54, House No. 532, NHC Langata. The he had communicated with the complainant on social media over modelling. That he had never met her till the day she came to this house with the police. He generally denied the evidence of the prosecution. He called no witness.

23. I have considered both the evidence of the prosecution and that of the defence side by side the submissions made. The appellant was charged under section 5(1) (i) and 2 of the *sexual offences Act*, No. 3 of 2006. Section 5(1) of the *Act* states;

> " 1. Any person who unlawfully,
>
> a. Penetrates the genital organs of another person with;
>
> i. Any part of the body of another person or
>
> ii. An object manipulated by another or that person except where such penetration is carried out for proper and professional hygiene or medical purposes.

b. Manipulates any part of his or her body of another person so as to cause penetration of the genital organ into or by any part of other person's body, is guilty of an offence termed as sexual assault.

2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than 10 years but which may be enhanced to imprisonment for life."

24. The complainant herein, PW 1 gave evidence of how the 2 men drove her to the house at NHC, Langata, and that once in the house the appellant while threatening to kill her with a knife forced her to undress. That after undressing himself, he inserted his penis into the mouth of the complainant, before pouring semen on her body and also urinating on her. That at the same time, the appellant inserted his finger in her vagina.

25. It was further the evidence of PW 1 that the appellant used a red cloth to wipe out the semen on the body of the complainant and that on examination, the spermatozoa or semen was detected on her body. But that she had an inflamed hymen signifying penetration by a blunt object.

26. The evidence of the complainant was clear and direct on how she was sexually assaulted. The act of placing his penis into the mouth of the complainant and also his fingers in the vagina of the complainant clearly confirm that the prosecution proved the elements of sexual assault as seen above. i.e penetration of the genital organs of another person with any art of the body of another person. And the act of penetration was proved by both the oral testimony of the complainant and the medical findings as captured on the P3 form. Post rape form and the treatment notes produced as evidence.

27. The next issue is therefore whether the appellant is the one who sexually assaulted the complainant. It is worth noting that this issue took place in broad daylight. The complainant was with the 2 men for a considerable amount of time, at least from about 9.00 a.m. to about 11.00 a.m. Her testimony was well articulated from the moment she was placed in the car to the time of her rescue. This court is in the circumstances convinced that it was indeed possible for the complainant to positively identify the appellant as the one who sexually assaulted her. And the accuracy of her identification is proved by several factors. Her mother, rescued her from the security room at the gate of the residence the appellant occupied. And upon reporting to the police, complaint was able to lead the police to the house of the appellant form where he was arrested. In his defence, appellant has admitted that he indeed stayed in the said house. Appellant even admitted the fact that he had been on Facebook communication with the complainant over modelling, thereby confirming the evidence of the complainant. Then there is the evidence of the complainant and PW 3 that photos of the complainant were seen on the lap top found in the house of the appellant. I have no doubt in my mind therefore that it was the appellant who sexually assaulted PW 1.

28. On the defence of the appellant, with respect, the same was a mere denial that fell short of putting up any challenge to the watertight case of the prosecution. I do not find any merit in the defence of the appellant and I dismiss the same.

29. On the issues raised by the appellant in the submissions, I do not see any defect whatsoever on the charge sheet that the appellant answered to. And as already observed, the prosecution case leaves no doubt as to the fact that appellant was the perpetrator of this heinous crime. I do not see or find any material inconsistency or contradiction in the prosecution case at all.

30. Lastly on sentence, as seen above the sentence provided for is a term of not less than 10 years imprisonment, but which may be enhanced to life imprisonment. The appellant was sentenced to

serve 10 years imprisonment. He was therefore awarded the lowest sentence for the offence. I find this sentence both legal and proper considering the grave circumstances of this case. I have no reason whatsoever to interfere with the same.

31. It is incumbent upon the prosecution to prove the guilt of the accused person beyond any reasonable doubt. In this case, I am convinced that the prosecution diligently discharged this burden. I therefore do not find any merit in the appeal of the appellant dated 8/12/2022. I accordingly dismiss the same wholly, and order that the appellant shall serve out the sentence as ordered by the trial court. It is so ordered.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 6TH DAY OF JUNE 2023.

OGEMBO D. O

JUDGE

6/6/2023

Court

Judgment read out online in the presence of the appellant, Hadija-Court Assistant, Ms Mueni for the appellant and Ms Njoroge for the state.

OGEMBO D. O

JUDGE

6/6/2023