Juma & another v Republic (Criminal Appeal E028 & E030 of 2022 (Consolidated)) [2023] KEHC 20449 (KLR) (18 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20449 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E028 & E030 OF 2022 (CONSOLIDATED)

GMA DULU, J

JULY 18, 2023

BETWEEN

NELSON MWAMBOLO JUMA ..... 1ST APPELLANT

LIVINGSTONE MWAJUMWA ALIAS MORGAN ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. 1219 of 2019 at Voi Law Courts delivered on 21st December 2021 by Hon. C. K. Kithinji (PM)

JUDGMENT

1. The two appellants Nelson Mwambolo Juma and Livingstone Mwajumwa alias Morgan were charged in the Magistrate's court with gang rape contrary to Section 10 of the *Sexual Offences Act* No 3 of 2006.
2. The particulars of offence were that on December 16, 2019 at around 22:30hours in Voi Sub County within Taita Taveta County acting in association intentionally and unlawfully caused their penis to penetrate the anus of SKI without his consent.
3. In the alternative, they were charged with committing an indecent act with an adult contrary to Section 11(A) of the *Sexual Offences Act*, the particulars of which being that on the same date, time and place, acting in association intentionally touched the anus of SKI with their penis.
4. They were also charged with a second count of assault causing actual bodily harm. The particulars of offence were that on the same date, place and time jointly unlawfully assaulted SKI thereby occasioning him actual bodily harm.

5. They denied all the charges. After a full trial, they were convicted of both main counts of gang rape, and assault causing actual bodily harm and sentenced to thirty (30) years imprisonment each for gang rape, and five (5) years imprisonment for assault causing actual bodily harm, sentences to run concurrently.

6. Dissatisfied with the conviction and sentence, the appellants filed two separate appeals which were consolidated.

7. The grounds of appeal relied upon by both the appellants are the amended grounds filed on January 19, 2023, as follows:-

    1. The learned Magistrate erred by convicting him on reliance on the identification evidence by recognition of PW2 and PW3, which allegedly occurred in difficult circumstances.

    2. The learned Magistrate erred in law and facts by convicting them based on the medical evidence of PW5 which does not sufficiently establish a complete claim which positively places them at the scene of the offence.

    3. The learned trial Magistrate erred in law and fact by holding that the prosecution had proved their case beyond reasonable doubt.

    4. The learned trial Magistrate erred in law and fact by failing to consider their mitigation and proceedings to impose a harsh sentence.

8. The appeals were canvassed through written submissions. In this regard, I have perused and considered the submissions filed by each of the two appellants, as well as the submissions filed by the Director of Public Prosecutions. All sides relied on decided court cases.

9. This being a first appeal, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see *Okeno Versus Republic* [1972] EA 32.

10. In determining this appeal also, I have to bear in mind that under Section 107 of the *Evidence Act* (Cap 80), the burden was on the prosecution to prove the allegations levelled against each of the appellants. This being a criminal case, the standard of proof is beyond any reasonable doubt see *Sawe versus Republic* [2003] eKLR.

11. I have evaluated the evidence on record. In proving their case, the prosecution called six (6) witnesses. On their part, each of the appellants tendered sworn defence testimony and did not call any additional witnesses.

12. I will deal with proof of each of the two offences. I start with gang rape. The definition of gang rape is contained in Section 10 of the *Sexual Offences Act*, which provides as follows:-

> "Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who with common intention is in the company of another or others who commit the offence of rape or defilement is guilty of the offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than 15 years but which may be enhanced to life imprisonment."

13. Thus when one commits either rape or defilement in association with another or in association with others, such person will be guilty of gang rape. I must also state here that sexual penetration through the anus is covered under the definition of rape.

14. A number of decided court cases have addressed the definition of gang rape. As submitted by the Director of Public Prosecutions on appeal herein, one of these cases is the case of *Francis Matonda Ogeto versus Republic* (2019) eKLR wherein the court stated inter alia as follows:-

    25. Under Section 10 of the *Sexual Offences Act*, the ingredients of gang rape are rape or defilement under the Act; committed in association with others or committed in the company of another or others who commit the offence of rape or defilement with common intention. It is therefore clear that defilement which is committed in association with others or with common intention notwithstanding the fact that the accused may not have defiled the victim amounts to gang rape according to the said section. It therefore matters not whether the offence was rape or defilement as long as the conditions under Section 10 are found to exist.

15. In my view, with the evidence on record from PW2 SKI the complainant, PW4 DMM who saw the complainant naked on the morning of December 17, 2020, and PW5 Joto Nyawa a Medical Officer at Moi County Referral Hospital Voi who tendered medical evidence and produced medical report like the P3 form, in which physical trauma injuries and spermatozoa in the anus of PW2 was noted, I find that indeed the complainant PW2 was raped. Thus like the trial court, I find that the prosecution proved beyond any reasonable doubt that the complainant was raped or penetrated through the anus.

16. With regard to the culprit or culprits, the incident occurred at night. It is on record that both the complainant PW2, and his relative with whom they were together that night PW3 JMW had taken alcohol at [Particulars Withheld] Pub before they came out on their way home on foot. These are the people who testified to meeting the appellants that night. It was during night time, at about 10p.m, thus what would connect the appellants to the offence was evidence of identification at night by people who had taken alcohol.

17. In my view, this being a case based on visual identification at night, I have to be guided by what was stated by the Court of Appeal in the case of *Wamunga versus Republic* (1989) eKLR 427 as follows:-

    "Where the only evidence against a Defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of the identification were favourable and free from possibility of error before it can safely make it a basis for a conviction".

18. In the present case, the complainant PW2 stated in evidence that he knew the appellants before. That there was a fight that night involving him and PW3 that night with one of the appellants. He stated that the appellants then turned on him to show him a lesson after PW3 had escaped, took him into the bush, maltreated him and raped him and left him for dead.

    In their defences, the first appellant Nelson Mwambolo denied the incident, and denied that they met with PW2 and PW3 that night. The 2nd appellant on the other hand, admitted in his sworn defence that there was a fight involving them and the complainant that night, but denied the subsequent gang rape.

19. In my view, with the evidence on record, the appellants were positively identified as the persons who gang raped the complainant (PW2) that night. They had reason to do so because of the preceding fight. They also had the opportunity to do so because it was at night, and there was nobody else in the vicinity to intervene, as PW3 had escaped.

20. Thus, just like the trial Magistrate, I find that the prosecution proved beyond any reasonable doubt that the appellants were the culprits in the gang rape committed against PW2. I will uphold the conviction for this offence.

21. I now turn to the offence of assault causing actual bodily harm, which is defined under Section 251 of the *Penal Code* (Cap.63).

22. The complainant PW2 stated that he was seriously and deliberately injured in the assault. According to him the assailants intended to kill him, but luckily he fainted and later gained consciousness.

23. The evidence of PW5 Dr Joto Nyawa confirms the injuries suffered by the complainant which is corroboration of the evidence of PW2 the complainant. I thus like the trial court, find that indeed, the prosecution proved that the complainant was assaulted and suffered actual bodily harm. The assault was done by the appellants. I will also uphold the conviction on this count. The appeal against conviction will be dismissed.

24. I now turn to sentence imposed by the trial court. Sentencing is an exercise of discretionary power by a trial court – see *Thomas Wambu Wenyi versus Republic* (2017) eKLR. Such sentencing should take into account various relevant facts including the gravity of the offence, well as the manner in which the crime was committed, and the effect or impact it had on the victim, and mitigation factors.

25. I note that the prosecutor stated before the trial court that the appellants be treated as first offenders. The 1st appellant said in mitigation that he was the breadwinner, and his father is deceased and there was nobody to care for his mother. The 2nd appellant also said in mitigation that his father was deceased and his female parent depended on him.

26. The learned trial Magistrate, in sentencing them, noted that the assailants put the complainant PW2 under a lot of suffering in that night ordeal, and noted that the minimum sentence would not suffice.

27. Though I find that the minimum sentence for gang rape will not suffice in the circumstances of this case, I nonetheless consider that 30 years imprisonment is on the higher side for first offenders. I will thus reduce the sentence for gang rape to twenty (20) years imprisonment. I will however uphold the sentence imposed for assault causing actual bodily harm, as the complainant was greatly tortured.

28. Consequently, and for the above reasons, I dismiss the appeals against conviction. I uphold the convictions of the trial court. With regard to sentence, I set aside the sentence of thirty (30) years imprisonment for gang rape, and order that instead the appellants will each serve twenty (20) years imprisonment for gang rape. They will serve five (5) years imprisonment for assault causing actual bodily harm. The sentences will still run concurrently, thus a total of twenty (20) years imprisonment. Right of appeal 14 days explained.

DATED, SIGNED AND DELIVERED THIS 18TH DAY OF JULY 2023 IN OPEN COURT AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Both appellants

Mr. Okemwa for the State

Mr. Otolo court assistant