Nderitu v Republic (Criminal Appeal E032 of 2022) [2023] KEHC 22396 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22396 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E032 OF 2022

FROO OLEL, J

SEPTEMBER 21, 2023

BETWEEN

DOUGLAS NGUNJIRI NDERITU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. The Appellant herein Douglas Ngunjiri Ndiritu was charged with the offence of attempted rape contrary to Section 4 of the Sexual Offence Act No. 3 of 2006. The particulars of the offence were that on the 4th day of July 2019 at around 14.00 hours in Laikipia central sub-county within Laikipia County, unlawfully and intentionally attempted to cause his penis to penetrate the vagina of VW without her consent.

2. In the alternative the Appellant was charged with the offence of committing an indecent act contrary to Section 11(A) of the Sexual Offence Act No. 3 of 2006. The particulars of the offence were that on the 4th day of July 2019 at around 14.00 hours in Laikipia Central sub-county within Laikipia County, intentionally touched the buttocks and breasts of VW with his penis against her will. The accused pleaded not guilty to the charges.

3. The Prosecution called four witnesses who testified in support of their case and at the close of the Prosecution case, the Appellant was put on his defence and gave sworn testimony. Upon considering the evidence as presented, the trial court did find that the accused guilty of the offence of Attempted rape contrary to section 4 of the *Sexual Offences Act* and proceeded to convict him under section 215 of the CPC and sentenced to serve Six (6) years imprisonment

Facts of the Case

4. PW1, VWM, testified that on 04.07.2019 at 2.00pm, she was at dreams bar located at Kona Mbaya where she worked as a bar maid, she went to Makutano to pick some alcoholic liquor for restocking the bar and on her return, used the back door to access the bar because the front door was closed. The permitted time for opening the bar was yet to reach.

5. As she was doing stock taking, the accused person entered the bar using the back door and sat at the counter, he appeared stressed. PW1 continued with her work and entered the counter section to arrange the alcoholic liquor. The accused person closed the back door using the upper latch. He then approached PW1, jumped on her from the front and she fell on her back, laying on the frame of the counter which in the process cut her back. She then fell on the floor, while still on her back and the accused laid on top of her. The accused then removed his penis and tried to undress her. Luckily, she was wearing a trouser, he tried to unbelt her trouser but was unable too.

6. The struggle continued for a while, as she screaming for help, until the accused released her after ejaculating on the floor. Her screams attracted people who were peeping through the glass window panes and the holes on the door. She managed to free herself off the appellant and opened the back door. She saw a crowd of people amongst them was the area chief, two police officers manning a china construction site and a lady who owns a butchery. The chief and the two police officers apprehended the accused and took him to Wiyumiririe Police post.

7. PW1 on cross examination stated that she did not know if the accused was drunk at the material time, that the accused got into the pub alone and closed the door. She denied that she brought the case to extort money from the accused and had declined compensation from the accused parent's in order to withdraw the case. she further denied asking for Kshs.30,000 from the accused parent's in order to withdraw the case.

8. PW2, Paratai Ole Kaparo, an NPR officer attached at Ndia Farm, testified that on the material time he was attached to Chinese site providing security and he got a phone call from the area chief alerting him of an attempt by the accused person to rape a girl. Together with Josphat a fellow police officer, they rushed to Dreams pub where they found the chief and a crowd. The crowd told them that the accused and PW1 were fighting and he used his skill and accessed the pub by knocking down the door. He found the accused had lowered his trouser and ready to rape PW1. PW1 told him that the accused chocked her and had attempted to rape her. They handcuffed the accused and took him to Wiyumiririe Police post.

9. On cross examination he stated that he did not know the accused before and was told by PW1 that he locked the door. when he broke the door, the appellant was lying on the ground with his trouser lowered. The appellant had resisted arrest and he had to overpower him in order to effect arrest. He arrested him without knowing whether he was drunk or not.

10. PW3, Lydia Wanjiru testified that on 04/07/2019, she was an employee at a butchery in Kona Mbaya at the material day, she heard PW1 calling her loudly from the Dreams club which was attached to the butchery where she was employed. She rushed to the backdoor of the club which she found locked. She peeped through the window and saw the accused person lying on PW1 and chocking her. She ran and called the chief who came to the scene.PW1 was rescued by the NPR officers who struggled and managed to open the door. She entered into the club where she saw white substances on the floor where the accused person was lying on PW1. The accused person's trouser was lowered and was not wearing his inner wear. She stated that the NPR officers struggled to arrest the accused. In cross examination,

she stated that she peeped through the front window and saw the appellant lying on PW1 and he only let her go when the door was broken down.

11. PW4, PC Josephat Kirwa, testified that he took over this case upon the transfer of the initial investigating officer, PC Josephine Wairimu to Nakuru and he produced the investigating diary as Exhibit P1. The appellant did not cross examine him.

12. The Appellant was placed on his defence and gave sworn testimony. He testified that on 25.09.2019, he visited the club where he met PW1 the complainant herein and ordered alcoholic drinks, though he alerted her that he did not have money.PW1 allowed him to drink on credit and pay before leaving. After a while he stood up for a short call but PW1 thought he was leaving without paying and rushed to close the door. PW1 got hold of him and screamed for help and only released him and went to open the door when there was a crowd. NPR officers then entered arrested him. He saw a crowd had already formed outside because of the screams by PW1. The appellant emphasised that PW1 locked all the doors, grabbed him at the door and screamed for help. He denied chocking her at any point.

13. In cross examination he stated that this was not his first time at that club drinking alcoholic liquor. He had never had any disagreement with the complainant and the NPR officers were not strangers to him as he had earlier quarrelled with one of the said officers. He denied committing the offence as charged.

14. The trial Magistrate considered the evidence tendered and did find that the prosecution had proved their case beyond reasonable doubt and proceeded to convict and sentence him to serve six (6) years imprisonment.

15. The Appellant being dissatisfied with the said conviction and sentence filed his petition of appeal on 11th April 2022. The same was amended and he filed supplementary grounds of appeal together with his submissions on 18th January 2023. The grounds of appeal raised included;

    a. That, the learned trial Magistrate erred in law and fact by failing to note that the investigations were poorly conducted.

    b. That, the trial Magistrate erred in matters law and facts by failing to note that PW1 the complainant herself confirmed that the appellant did not touch her anywhere.

    c. That, the trial magistrate erred in matters of law and facts by failing to note that no medical or documentary evidence was produced in court to prove PW1 allegations.

    d. That, the trial magistrate erred in matters law and in fact by failing to note that that the prosecution witness' evidence was inconsistent and un corroborating.

    e. That the Learned trial magistrate failed in matters of law and facts by failing to note that in this case, all was fabrications due to the unpaid bill that the appellant had spent.

    f. That the learned trial magistrate erred in matters of law and facts by rejecting the appellants defence without any cogent reason.

    g. That the sentence was harsh and excessive.

    h. That the prosecution did not prove their case to the required standards by law.

Appellants Submissions

16. The appellant filed his written submissions on 18th January 2023 and submitted that no investigations were conducted at all and that no report was brought before court to prove that the allegations made as against him were true. The investigating officer who testified had nothing to say concerning the

case and/or clarify the truth based on scene of crime. The prosecution was also faulted for failing to appreciate the importance of proper investigations, hence his prosecution resulted into inequity and prejudice.

17. The appellant submitted on ground two that the Complainant PW1 confirmed that the appellant did not touch her anywhere. If that be the position, how could it could be possible for him to ejaculate. There were no photographs taken and produced before court to indeed prove that the white substance purported seen on the ground were sperms and not something else like saliva or beer bubbles. Furthermore, if he was on top of the appellant as alleged, he could have ejaculated on her cloths and not on the ground as alleged.

18. The appellant further submitted that no any medical or documented evidence produced before court to prove PW1's allegations that she allegedly fell on her back and sustained injuries, the evidence of the prosecution witnesses was inconsistent and uncorroborated. PW1 testified that she was the one who eventually unlocked the back door, while PW2 also testified that he used his skills to unlock the door. PW1 had also testified that she fell on the floor and the accused then laid on top of her, while at the same time stating that the appellant did not touch her anywhere. PW1 was thus not a truthful witness. Whenever there are contradictions and in consistencies in the prosecution evidence, their testimony had to be taken with a pinch of salt as the said witnesses would be presumed to be telling lies.

19. The final issue raised by the appellant was that the trial magistrate did not take into consideration his defence which was clear and consistent. It was not an afterthought as alleged by the trial magistrate. The appellant also submitted that the sentence imposed was harsh and excessive. It was passed without considering and evaluating the evidence tendered by the prosecution and the circumstances under which the offence is alleged to have been committed. The appellant urged this court to scrutinize and evaluate the evidence tendered by the prosecution witnesses together with the accused defence and arrive at a new decision in favour of the appellant. He prayed that the appeal be allowed, conviction be quashed, sentence set aside and the accused be set free.

Respondents Submissions

20. The respondent did file their submissions on 23rd January 2023 opposing this appeal and stated that they had proved their case beyond reasonable doubt. The appellant had attempted to rape PW1 by jumping on her and attempting to forcefully have sex with her. He did not succeed and ejaculated on the floor. The appellant was positively identified as the perpetrator as he was known to PW1, whose evidence was corroborated by PW2 and PW3 who rushed to the scene and had the appellant arrested.

21. The appellants defence as raised was weak and the prosecution witnesses who testified had no reason to wrongly implicate the appellant. The trial court properly analysed the evidence adduced and rejected the appellants line of defence as an afterthought. The prosecution case was overwhelmingly proved by credible, corroborated and consistent evidence and the trial court properly convicted the appellant. The sentence imposed was to was lawful, proper and not manifestly excessive in the circumstances.

22. The respondent urged the court to dismiss this appeal

Analysis and Determination:

23. It is now well settled, that a trial Court has a duty to carefully examine and analyze the evidence adduced a fresh and come to its own conclusion, while at the same time noting that it did not have the advantage of seeing the witnesses and observing their demeanor See Okeno-Vrs- Republic 91972)EA 32 & Pandya Vs. Republic (1975) EA 366.

24. Further this being first Appellate Court, it must itself also weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala-Vrs-R (1975) EA 57. Where it was stated that it is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower Court finding and conclusion, it must make its own findings and draw its own conclusions only then can it decide whether the magistrate's findings should be supported in doing so, it should make allowance for the fact that the trial Court has made the advantage of hearing and seeing the witnesses.

25. Also in Peter's vrs Sunday Post(1958) E.A. 424 it was held that it is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.

26. The appellant raise eight (8) grounds of appeal which this court has considered together with the submissions filed. The issues raised can be synthesized as followed.

   a. Whether the burden of proof was effectively discharged by the prosecution and whether the trial Magistrate rejected the appellants defence without any cogent reason.

   b. Whether the appellant was convicted based on inconsistent and uncorroborated evidence.

   c. Whether the sentence passed was hare and excessive.

Whether the burden of proof was effectively discharged by the prosecution.

27. Section 4 of the sexual offence Act provides as follows;

> " Any person who attempts to unlawfully and intentionally commit an act, which causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which maybe enhanced to imprisonment for life."

28. Further, Section 388 of the Penal Code;

> " (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.
>
> (2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.
>
> (3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence"

29. An attempt to commit an offence was defined by the Court of Appeal in the case of Francis Mutuku Nzangi v Republic [2013] eKLR thus:

> " Our understanding of this provisions [section 388 of the Penal code] is that if a person conceives an idea or plan to commit an offence and sets out to effectuate the intention by taking definite steps or puts in motion a chain of events or state of things calculated to attain that objective as manifested by some open and discernible act or acts but fails to achieve his objective, he will be guilty only of an attempt to commit the offence. The attempt is proved whether or not that person did all the acts necessary to perfect the offence and quite irrespective of what intervening act or change of heart may have aborted the fulfillment. It also matters not that circumstances did in fact exist, unbeknown to the person, that would have rendered his success impossible."

30. The definition of attempted rape was also discerned in Njau v Republic Criminal Appeal No 130 OF 1992 [1993] eKLR . The court held that:

> " On this occasion the Court is asked to decide whether attempted rape was committed in the circumstances described above. Any crime of attempt consists of the following elements: (a) an intent to commit the crime, (b) an overt act towards its commission, (c) the failure to complete the crime, and (d) the apparent possibility of committing it. And to attempt to rape is, therefore to try to accomplish sexual intercourse with a person without consent of that person. Accordingly, attempted rape as an offence, is conduct indicating a determination to gratify sexual passion in spite of resistance or lack of conscious consent."

31. The evidence herein is that appellant did enter Dreams Bar situated at Corner Mbaya area and found PW1 taking stock. The appellant was a person well known to PW1. After a while he stood up closed the back door and attacked PW1 by jumping on her and wrestling her to the ground. As he lay on her he removed his penis from his trouser and attempted to forcefully have sex with Pw1 by removing her belt and trouser. When attacked PW1 started to scream for help and the appellant eventually let go of her after ejaculating on the floor.

32. Due to her screams her neighbors came and they included the area chief, a lady who works in the neighboring butchery, two police officer's and other member of the public. The appellant was arrested and taken to Wiyumiririe police post. PW1 evidence was corroborated by PW2 and he did confirm that when the door to the bar was eventually opened, they found the Appellant having lowered his trouser and ejaculated on the floor. PW3 also confirmed that she was the first to react to PW1 screams of help as the butchery where she worked was attached to the bar. She peeped through the club window and saw someone lying on PW1 as he choked her. She is the one who called the area chief who was in the vicinity and eventually when they accessed the bar they found the appellant had his trousers lowered and he had ejaculated on the floor.

33. This incident happened at daytime. The appellant was well known to PW1 and PW3 and this was a clear case of identification by recognition. The appellant obviously attempted to forcefully have sex with PW1 without her consent and that is why she resisted and screamed for help. The appellant was arrested and found with his trouser lowered and he did not have any inner wear. The appellants defense that the fight was over an unpaid bill was an afterthought as he never cross examined PW1 over the same and never explained why he had lowered his trouser and ejaculated. The appellant failed to put forward his defense at the early stage so as to have it tested and avoid the impression that it was an afterthought. See R Vs Ahmed Bin Abdul Hafid (1934) 1 EACA

34. Looking at all the evidence tendered, and weighing it with the appellant's evidence, the trial magistrate cannot be faulted in any manner and the appellant's guilt was established beyond all reasonable doubt.

Whether the appellant was convicted based on inconsistent and uncorroborated evidence

35. The appellant submitted that PW1 did testify that she is the one who unlocked the door, while at the same time, PW2 also testified that he used his skills to access the closed door by unlocking it. Further PW1 had testified that the appellant did not touch her anywhere and thus her evidence that he attacked her, fell her, and then laid on her cannot be true. The trial court thus relied on untruthful evidence to convict him, which was an error.

36. In Philip Nzaka Water-Vrs-Republic CA Criminal Appeal No. 29 of 2015 while relying in the decision of Dickson Elia Nsamba shapwater & Anor Vs- Republic CA App No. 92 of 2007 the Court of Appeal of Tanzania address the issue of discrepancies in evidence and conclude as follows

> " In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out one sentence and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradiction are minor or whether they go to the root of the matter."

37. Further in Joseph Maina Mwangi vs Republic (2000) Eklr it was held that;

> " In any trial there are bound to be discrepancies. An appellate court in considering these discrepancies must be guided by the wording of section 382 of the criminal procedure code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence."

38. In the case of Twehangane Alfred vs Uganda (Cr.App.No.139 of 2001(2003) UGCA it was held that it is not every contradiction that warrants rejection of evidence. The court delivered itself thus:

> " With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

39. The evidence adduced looked at in totality does not point out to the evidence adduced being deliberately untruthful. The inconsistencies pointed out as to whether PW1 opened the door or PW2 broke it down are minor. Secondly PW3 confirmed that when PW1 started to scream she peeped through the window and saw the appellant lying on PW1 and he was choking her. PW1 also confirmed that same by explaining how the appellant fell her down and attempted to remover her trouser while laying on her.

40. The evidence of PW1 where she stated that "he did not touch me anywhere" must be taken in context. PW1 evidence was that;

> " The accused attempted to undress me, he was attempting to undress the trouser that I was wearing. He did not touch me anywhere. The accused is my customer. I have never had any grudges with the accused." The statement of PW1 thus cannot be taken in isolation but in

the context of the entire testimony. PW1 basically meant that the appellant did not succeed in violating her.

Whether the sentence passed was harsh and excessive.

41. With regard as to whether the sentence passed on the appellant was appropriate or not, this Court is guided by the principles in the Court of Appeal case of Bernard Kimani Gacheru vs. Republic [2002] eKLR where it was stated as follows:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that 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."

42. In MMI Vs Republic (2022) Eklr the court referred to the case of S Vs Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that;

> " A court exercising appellate jurisdiction cannot, in absence of material misdirection by the trial court , approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court....... However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

43. The trial magistrate upon conviction of the appellant, allowed the appellant to mitigation, he considered judiciary sentencing policy and period served by the appellant while in remand before being released on bond. The court proceeded to sentence the appellant to serve six (6) years imprisonment.

44. The appellant has not pointed out, which error, or material misdirection which the trial court did not consider or which wrong material or which wrong principal was cited by the trial court. The law is that "Even if the Appellate court feels that the sentence is heavy and the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the decision of the trial court on sentence unless anyone of the matter stated i.e. shown to exist. "see Benard Kimani Gacheru Vs Republic (2002) eKLR

Disposition

45. Having considered all grounds of appeal as presented in this appeal I do find that all the grounds of appeal raised on conviction and sentence are without merit and this appeal is hereby dismissed.

46. Right of Appeal 14 days.

47. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 21ST DAY OF SEPTEMBER 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 21st day of September 2023