Muindi v Republic (Criminal Appeal E202 of 2022)
[2023] KEHC 23987 (KLR) (Crim) (24 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23987 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E202 OF 2022

DR KAVEDZA, J

OCTOBER 24, 2023

BETWEEN

KISILU MUINDI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence on 25th August 2022 in Kibera Chief Magistrate's Court SO case No. E082 of 2021 before Hon. M Maror, PM)

JUDGMENT

1. The Appellant, Kisilu Muindi, was charged with the offence of rape contrary to section 3 (1) (a) and 3 (3) of the *Sexual Offences Act* no 3 of 2006 ("the Act"). The particulars were that the appellant on the 8th day of July 2021 at about 2350hrs in Dagoretti Sub County within Nairobi County, intentionally and unlawfully caused his penis to penetrate the anus of SO by use of force and threats.

2. He faced a second charge of unnatural offences contrary to section 162 (a) of the *Penal Code*. The particulars were that the appellant on the 8th day of July 2021 at about 2350hrs in Dagoretti Sub County within Nairobi County, had canal knowledge of SO by making him suck his penis against the order of nature.

3. The appellant denied the charges and the matter proceeded to full hearing after which he was convicted and sentenced to 30 years on the first count and 14 years on the second count, to run concurrently. Being aggrieved with the judgment he filed this appeal on grounds that;

    i. The charges as drafted were bad in law therefore precarious enough to cause detriment.

    ii. The trial was unfair as per Articles 25, 47, 49 and 50 of the *Constitution*.

iii. The Prosecution did not prove vital features to the threshold required in such serious matters.

iv. Positive penile penetration was not legally proved.

v. PW1's age was not proved as per the statutory legal framework.

vi. The Prosecution's case was unproved on matters penetration.

4. As this is a first appeal, I am required to review all the evidence and come to my own conclusions as to whether to uphold the conviction and sentence bearing in mind that I neither heard nor saw the witnesses testify in order to assess their demeanour thereof. (see *Okeno v Republic* [1972] EA 32, *Kiilu and another v Republic* [2005] 1 KLR 174)

5. To proceed with this task, I shall outline the evidence as emerging from the trial court. The prosecution called three witnesses in support of its case.

6. SO., the complainant, PW1 told the court that on 8/07/2021, he arrived at satellite at 9.00pm from his workplace at Ruiru where he did casual labour. He decided to sleep at a Kibanda since it was late and he did not want to disturb his sister. At midnight, somebody woke him up and demanded for his Identification card. PW1 thought that it was a police officer. The man then asked PW1 to carry his bag and they proceeded to where the man works. Upon arrival, PW1 was told to carry the mattress upstairs. The man then removed a panga, threatening PW1. PW1 stated that the man said he loved him and wanted to have sex with him. PW1 resisted but both his hands were tied using his jumper laces which the assailant had cut using the panga. The assailant then hit PW1's knees with a rungu. PW1 only obliged to his the demands when the assailant threatened to cut him with the panga. The man then put his penis inside PW1's mouth and forced him to suck on it. He would then insert it into PW1's anus and vise versa, until it finally penetrated through PW1's anus. The man did that for about two hours while abusing PW1 as 'Ng'ombe' (cow). PW1 proceeded to tell the court that at 4am, he went to Satellite Police station and reported the case. He later went to Nairobi Women's hospital where he was treated. He identified the appellant as the perpetrator.

7. John Njuguna, PW2, is clinician from Nairobi Women hospital who produced the P3 form and Post-Rape care form which was filled by dr Cliff Anyende who had left the facility. Upon examination, PW1 had pain on the anal area, with a 3cm-cut at the 6 O'clock. The laboratory tests were negative. PW1 was treated and discharged. The conclusion of the examination was that there was penetration

8. No 107027 Police Woman Elizabeth Omusee of Riruta Police Station Crime and Gender Office, PW3, stated that PW1 reported that he had been raped. PW3 recorded PW1's statement which stated that on 8/07/2021, he was going to sleep at a Kiosk when he met the accused who offered him a place to sleep only for him to be raped at the location where he was taken. After the report was made, PW3 took PW1 to Nairobi Women's Hospital for treatment. PW3 further told the court that PW1 knew the perpetrator very well. PW1 directed both PW3 and Inspector Njoroge to the scene and found the accused standing outside the building. The accused was arrested and assessed. PW3 recovered a whistle, Muguka (miraa), ball gums and peanuts.

9. When put on defence, the Appellant in his unsworn evidence only gave an account of the day that he was arrested. He stated that on 8/7/2021 at around 8.30pm, he was at his work place when two men and one woman arrested him and on searching him, he was found in possession of a whistle. He was taken to Riruta Police Station and charged with the offence herein.

10. I have considered the evidence, the grounds of appeal and the submissions by both parties. I find that the issue in this appeal is whether the prosecution proved their case beyond reasonable doubt.

11. The elements for rape are well settled in *Simon Kimiti David v Republic* [2017] eKLR where it was stated thus;

> " Without corroboration the essential elements of rape consist of the following:
>
> (1) The act of intentional and unlawful penetration.
>
> (2) The act of sexual intercourse was done and against the complainant's will.
>
> (3) The consent is obtained by force or by means of threats or intimidation."

12. The prosecution was therefore required to establish the following ingredients; penetration, absence of consent, and that the Appellant was the perpetrator of the act.

13. Section 2(1) of the *Sexual Offences Act* defines penetration as:

> " the partial or complete insertion of the genital organ of a person into the genital organs of another person."

14. PW1 told the court that on the fateful night, he was sleeping at a kibanda when he was woken up by the appellant who took him to a certain house, on the pretext that he was offering a place to sleep. While at the house, the appellant told PW1 that he loved him and that he wanted to have sex with him. When PW1 resisted, the appellant tied both his hands and forced him to suck his penis. Thereafter he inserted it into PW1's anus. This act went on for two hours. The medical evidence adduced by the prosecution corroborated the fact that PW1 had been sexually assaulted. The medical evidence adduced by PW2 revealed that the victim had pain in the anal area, which had a cut of about 3cm at 6 0'clock. PW2 concluded that as per the examination, there was penetration.

15. The appellant argued that the ingredients of the offence of rape were not established because PW2 did not mention that there was presence of spermatozoa following the examination of PW1. PW2 was however categorical that the anal examination of PW1 revealed a 3cm tear and that the complainant was penetrated. As the Court of Appeal stated in *Andrew Apiyo Dunga and another v R* [2010] eKLR

> " That F was raped was confirmed by the medical report and there was no need to match the spermatozoa found inside her with that of each appellant as the offence of rape is complete once there is penetration of the female's genital organ with the male's penis. It is not necessary that spermatozoa be released. In this case medical evidence confirmed F's evidence that there was penetration of her vagina by a male organ. According to her evidence which both courts below accepted, the persons responsible were both appellants."

16. It is therefore not necessary, as the appellant argued, that presence of spermatozoa be established for the offence to be complete. I therefore uphold the submission by the respondent that penetration was proven. In any case, according to Section 124 of the *Evidence Act*, it was sufficient for the trial magistrate to proceed to convict on the evidence of the complainant, upon being satisfied that he was a truthful witness. From the record, I note that PW1 was consistent in his narration of the series of events. Despite being subjected to cross-examination by the defence, he remained steadfast in his testimony.

17. Was there absence of consent? A person is said to consent, if he or she agrees by choice, and has the freedom and capacity to make that choice. In the case of *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."

18. It was PW1's evidence that when he tried to resist, his hands were tied with a jumper lace which the perpetrator had cut using a panga. He resisted further but the perpetrator threatened to cut him with the said panga; that was when PW1 complied. From the trial record, I note that PW1 was emotional and bitter when he testified before court. The perpetrator of the sexual assault forced him to suck his penis and penetrated his anus for two hours. It is clear to this court that PW1 was not in a position to consent to the sexual act since he was threatened to be cut with a panga. The prosecution was therefore able to establish the element of absence of consent.

19. The third issue is whether the Appellant was positively identified as the perpetrator.

20. One of the cardinal principles on identification is that visual recognition must be free from any errors or mistake. This was revisited by the court in the case of *Paul Etole & another v Republic* Cr Appeal no 24 of 2002 where the court held that;

> " When dealing with visual evidence, the court ought to examine closely the circumstances in which the identification by each witness came to be made, that it should remind itself of any specific weakness which had appeared in the identification."

21. I have on my part subjected the evidence of PW1 to further review. From the record, the incident took place for about two hours where the appellant would alternately go from forcing PW1 to suck his penis or inserting it into his anus. This was sufficient time for PW1 to familiarize with the face of the perpetrator and to be able to identify him shortly after. I also note that PW1's testimony on the perpetrator was forthright and consistent with that of a person who was being truthful.

22. On the second count of committing an unnatural offence contrary to section 162 (a) of the *Penal Code*, it was the testimony of PW1 that the appellant forced him to suck his penis which he would then try to insert into PW1's anus. If the penis did not penetrate, he would make PW1 suck it again. The appellant alternated like that until the penis finally penetrated PW1's anus. I find that the offence was sufficiently proven.

23. The appellant did not dispute the testimony of PW1 that he was the perpetrator. In his defence, he only gave an account of events of the day of his arrest, 8/7/2021 at 8.30pm, at his place of work. His defence did not shake the prosecution's case at all.

24. This court is of the view that the evidence of the prosecution witnesses taken into totality was corroborative and the Appellant was positively identified as the perpetrator of the rape. The Appellant's defence was a mere denial and did not dent the otherwise strong culpatory evidence adduced against him by prosecution witnesses. This court, having re-evaluated the evidence adduced before the trial court, and the submission made on this appeal, cannot see any reason to disagree with the finding reached by the trial court. The Appellant's guilt was established to the required standard

of proof beyond any reasonable doubt. The Appellant's appeal on conviction lacks merit. The same is hereby dismissed.

25. As regards the sentence, Section 3(3) of the *Sexual Offences Act* provides for a minimum imprisonment sentence of ten (10) years for rape, which may be enhanced to life imprisonment. Section 162(a) on the other hand provides for an imprisonment of 14 years for committing unnatural offences.

26. In the present appeal, the Appellant was sentenced to serve 30 years' imprisonment in count 1 of rape and 14 years' imprisonment in count 2 of committing unnatural offences.

27. I have considered the mitigation of the appellant and that he is a first offender. I allow the appeal to the extent that the sentence of 30 years' imprisonment in count 1 is set aside and substituted with a sentence of 15 years' imprisonment. The sentence of 14 years' imprisonment in count 2 is affirmed. They shall run concurrently.

28. As the appellant had been in custody since he was arrested, the sentence will commence from the date of his arrest, 13th July 2021.

29. Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 24TH DAY OF OCTOBER 2023.

D. KAVEDZA

JUDGE

In the presence of: