Mutuku v Republic (Criminal Appeal 121 of 2021)
[2023] KEHC 24165 (KLR) (16 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24165 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL 121 OF 2021

GMA DULU, J

OCTOBER 16, 2023

BETWEEN

JEREMIAH MUSYOKA MUTUKU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From the conviction and sentence in Criminal Case No. 95 of 2019 delivered on 14th December 2021 at Makindu Law Courts by Hon. B. N. Irieri (SPM)

JUDGMENT

1. The appellant was charged in the Magistrate's court with rape contrary to Section 3(1)(a)(b)(3) of the *Sexual Offences Act* No 3 of 2006. The particulars of offence were that on 15th September 2019 in Nzaui Sub County within Makueni County intentionally and unlawfully caused his penis to penetrate the vagina of JNM (name withheld) without her consent.
2. In the alternative, he was 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 and at the same place intentionally touched the vagina and breasts of JNM with his penis against her will.
3. He denied both charges. After a full trial, he was convicted of the main count of rape, and sentenced to 10 years imprisonment.
4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal, through counsel C.M Muthiani Advocates on the following grounds:-
    1. That he pleaded not guilty to the charges.
    2. That the trial Magistrate erred both in law and facts by relying on inadmissible hearsay testimony by the witnesses who actually testified to the prejudice of the appellant.

3. The learned trial Magistrate erred in law and facts in shifting the burden of proof to the appellant and further meting out a harsh sentence without considering the compelling mitigation given.

4. That the trial Magistrate grossly erred in law and facts in relying on suspicious and fictitious evidence of PW1 and without noting that PW1 was subjected to duress thus incriminating the appellant.

5. The trial Magistrate erred in law and facts in convicting on mere allegations and presumptions and holding the testimonies of the prosecution witnesses are truthful and free from doubt on pregnancy claim by PW4 without the benefit of properly conducted Deoxnuclei Acid (DNA) required under Section 2 of the *Sexual Offences Act* and imposing a sentence on the appellant over a case where the post rape care (PRC) form clearly indicated that the pregnancy test done on the complainant was negative. Nothing was produced in court to ascertain whether or not the appellant was linked with the commission of the alleged offence.

6. The trial Magistrate erred in law and fact by failing to note that the investigating officer did a shoddy job in that the evidence was insufficient, fabricated, lacked probative value to justify a conviction, thus no eyewitness testimony that a person was seen fleeing from the crime scene of crime and no fingerprints nor anything found linking the appellant with the commission of the alleged offence.

7. The trial Magistrate failed to test the evidence of the prosecution witnesses and caution the circumspection thereby convicting on flimsy and mere allegations that was not watertight enough to warrant a conviction.

8. The trial Magistrate erred in law and facts by failing to note that the prosecution ought to prove its case beyond all reasonable doubt as required by law and not beyond any shadow of doubt.

9. The trial Magistrate erred in law and facts by relying on hearsay evidence from PW1 which was as a result of grudge, in that there was likelihood that the charges against the appellant were born out of malice and ill will.

5. The appeal was canvassed through written submissions. I have considered the submissions of the appellant's counsel C. M. Muthiani Advocates and the submissions of the Director of Public Prosecutions.

6. This being a first appeal, I have to start by reminding myself that as a first appellate court, I am required to re-evaluate all the evidence on record, and come to my own independent conclusions and inferences see *Okeno v Republic* (1972) EA 32.

7. In proving their case, the prosecution called seven (7) witnesses. The appellant on his part, chose to keep quiet and not tender any defence statement.

8. I note that the appellant's counsel has listed many grounds. In his submissions however, counsel was very brief.

9. The appellant was convicted of rape. The ingredients of the offence are in Section 3(1) of the *Sexual Offences Act*, which states as follows:-

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(1) A person commits the offence termed rape if-

a. He or she intentionally or unlawfully commits an act which causes penetration with his or her genital organs;

b. The other person does not consent to the penetration; or

c. The consent is obtained by force or by means of threats or intimidation of any kind.

10. Though the appellant's counsel has stated that there is no evidence connecting the appellant to the alleged encounter of the appellant and the complainant PW4 JNM, the evidence on record is clear and confirms the encounter that night. It is the evidence of PW4 as well as the evidence of PW1 JMK.

11. PW1 was a motorcycle driver, who had nothing to lose by implicating the appellant. PW3 also reported the incident to PW2 BMW, and PW5 MMN – the parents immediately on arrival home that night and described what happened.

12. The only thing I have to bear in mind is that all the elements of the offence of rape had to be proved, that is the sexual penetration, lack of consent, and the identity of the culprit.

13. In my view, with the evidence of the prosecution witnesses on record, sexual penetration was not proved beyond reasonable doubt, because the evidence of the complainant was not supported by PW2 Okoga Cliffort, whose evidence on medical examination established bruises on the neck and the back, but the genitalia was normal, only that there was presence of whitish discharge, and no blood was noted.

14. In my view, though there was evidence of a violent struggle, there was no proof of sexual penetration beyond reasonable doubt.

15. As regards consent, it was obvious from the evidence of the complainant, and the medical evidence that physical injuries were inflicted on the complainant, and that there was no consent to the attempted sexual advances of the culprit.

16. As for the culprit, PW1 knew the appellant well. There was thus no possibility of mistaken identity. The appellant was a motor cycle rider just like PW1. They talked a number of times that night at close range and PW1 allowed the complainant to be carried on a motor cycle by the appellant.

17. In my view, from the evidence on record, the prosecution did not prove the offence of rape beyond any reasonable doubt, but proved the lesser offence of attempted rape. I will thus substitute the conviction for rape with a conviction for attempted rape contrary to Section 4 of the *Sexual Offences Act*, and sentence the appellant accordingly.

18. As for sentence, the minimum sentence for attempted rape is imprisonment for 5 years, which can be enhanced to life imprisonment. I note that the trial court meted the minimum sentence for rape. I will also pronounce the minimum sentence for attempted rape.

19. Consequently and for the above reasons, I quash the conviction for rape and set aside the sentence imposed. I however, convict the appellant for the lesser offence of attempted rape contrary to Section 4 of the *Sexual Offences Act*. I order that the appellant will serve five (5) years imprisonment from the date he was sentenced by the trial court.

DATED, SIGNED AND DELIVERED THIS 16TH DAY OF OCTOBER 2023 VIRTUALLY AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Appellant

Mr. Kazungu for State