Owino v Republic (Criminal Appeal E002 of 2024)
[2024] KEHC 12625 (KLR) (22 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12625 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL E002 OF 2024

WM MUSYOKA, J

OCTOBER 22, 2024

BETWEEN

ELIUD OCHIENG OWINO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from conviction and sentence by Hon. PA Olengo, Senior Principal Magistrate, SPM, in Busia CMCSOC No. E017 of 2022, of 21st December 2023 and 22nd January 2024, respectively)

JUDGMENT

1. The appellant, Eliud Ochieng Owino, had been charged before, and convicted by, the primary court, of the offence of gang defilement, contrary to section 10 of the *Sexual Offences Act*, Cap 63A, Laws of Kenya. The appellant, and another, had allegedly grabbed the complainant, MA, PW1, a minor female allegedly aged 13, took her into a maize farm, and defiled her in turns, by inserting their penises into her vagina. She was escorted to the police, and hospital, by her mother, leading to the arrest of the appellant, and his arraignment in court. A trial was conducted, where 4 witnesses testified. The appellant was put on his defence, after which he was convicted, on 21st December 2023, and sentenced to 70 years imprisonment, on 22nd January 2024.

2. The appellant was aggrieved, and brought the instant appeal. His grounds of appeal are the charge was incurably defective, and bad for duplicity; the testimonies of the witnesses were founded on hearsay and were contradictory; the evidence lacked probative value; new evidence was presented through the probation report, and the same was not subjected to cross-examination; Articles 49 and 50 of *the Constitution* were violated; the entire defence evidence was ignored; and the sentence imposed was harsh and degrading.

3. Directions were given on 17th April 2024, for canvassing of the appeal by way of written submissions. The written submissions, on record, were filed by the appellant. I have read through them, and noted

that they turn around the charge being defective; hearsay evidence and contradictions; on the elements of gang rape; penetration; identification; and alibi defence.

4. The appellant argues that the charge was defective and duplicitous, as the date, indicated in the charge, as to when the event happened, differed from the date in the first report made to the police, going by OB No. 10/19/2/2022. A charge is defective if it relates to a mistake or error or omission or irregularity in the structure of the charge. Its existence is not necessarily fatal, so as to lead to an acquittal, or the quashing of a conviction, unless it occasions failure of justice. The anomaly raised by the appellant, if it be an anomaly at all, would not be a defect in the charge. It would be a matter of evidence, as to whether the offence was committed on the date indicated in the police occurrence book, or in the charge sheet. It is not a defect, given that whatever is in the OB is not part of the court record, specifically it is not part of the charge sheet.

5. Duplicity is about 2 independent offences being charged in the same Count, presumably as 1 offence. The appellant has not submitted on the point of duplicity. I have perused through the charge sheet severally, and I have not come across anything that would suggest that the charge was duplicitous.

6. The next ground is on hearsay. The appellant argues that, other than PW1, all the other prosecution witnesses gave hearsay evidence, as they only narrated what they were told by PW1, and whatever they told the court could not be taken as being corroborative of the testimony of PW1. PW2 was the clinical officer, who produced the medical records adduced in evidence. PW3 was the mother of PW1, who, upon getting the report of what had happened to PW1, escorted her to the authorities, and filed a report. PW4 was the investigating officer, who received the report from PW1 and PW3, and thereafter investigated the matter.

7. Hearsay is evidence based on information received from a third party. Information conveyed directly by a victim to others, such as her mother, or a clinician, or a police officer, cannot be hearsay. A witness is expected to testify on what they directly see with their eyes, or hear with their ears, or touch with any part of their body, or smell with their nose. A witness who comes to tell the court about what a victim reported to them, cannot be said to be giving hearsay evidence, given that the case is about the victim, and whatever is being conveyed as evidence is what the victim herself would have conveyed to the witness. It would be hearsay where that information is from a party other than the victim, particularly where the person, the source of that information, will not even testify.

8. PW2, PW3 and PW4 testified on what they were informed by PW1, the complainant in the charge, and whatever PW1 told them could be conveyed to court, in evidence, by those individuals that she spoke to, without violation of the hearsay evidence rule, and such testimony would be corroborative of the testimony of PW1, with regard to what had befallen her.

9. On contradictions, the appellant points at the fact that PW1 had testified that she was with her sister, yet that sister did not testify. That would not be an incidence of inconsistency or contradiction. The one about PW3 talking of the incident happening on 29th February 2022, while the other witnesses spoke of 19th February 2022, would be an inconsistency or contradiction. However, the same would not be material, in view of the consistency of the other 3 witnesses on the date when the defilement happened. He points at the testimony of PW4, on the exact time as to when the offence happened on 19th February 2022, as between 12.50, 20.50 Hours and 8.30 PM. The victim of the offence was PW1, and her testimony on the time it happened was 5.00 PM, any mistakes made by individuals reporting on the same would be second hand, and the inconsistency would be immaterial. It would matter if the inconsistency, as to when it happened, were to come from the victim herself. He argues that PW2 talked of attending to a lady, not a child, while referring to PW1. PW1 was 13 years old. She was a child, by dint of being of minority age, but as she was a teenager, she could be referred to as a young lady,

and the reference to her by PW2 as a lady was not inaccurate, and certainly was not contradictory. I have considered all the other incidences of alleged inconsistency or contradiction, mentioned by the appellant, in his written submissions. I have noted that they were all minor, and did not undermine the overall picture, except for what I shall discuss in the receding paragraphs here below.

10. The other argument advanced is that the offence charged was gang defilement, yet the evidence adduced did not point to gang defilement, as the appellant was not said to have had committed the offence in association with another person. The particulars of the charge alleged that he was with another who was not before the court. PW1 testified that he was with another, called Babu. PW3 testified that PW1 had informed her that she had been defiled by Silas, who was with another man whose face was covered. PW1 testified that both men defied her in turns, saying that the appellant was the first to go, then the other man followed. She stated that the appellant had 3 turns, and the other man had 2 turns. All that happened in 1 transaction, which lasted 3 hours, according to PW1. Clearly, the evidence pointed to a defilement carried out in turns by 2 individuals, and that amounted to gang defilement or rape, as defined in section 10 of the *Sexual Offences Act*.

11. Penetration is the other issue. He submits that it was not proved, for Philip Ochieng, the person who filled the P3 Form did not testify. The best witness on penetration is the victim herself. The penetration would have happened to her. It would be her vagina that would have been penetrated. Any other evidence would be merely corroborative, and the court can convict, even in the absence of the corroborative evidence, in view of the totality of the evidence. PW1 came out quite clearly on the penetration. She testified that it happened, and 2 individuals were involved, and both inserted their penises into her vagina, at different times, or in succession. That was confirmed by PW2. When PW1 went for treatment, it was noted that she was bleeding from her private parts, which were swollen. Her anus too was swollen. Tests were done, and discharge and spermatozoa were noted. Her hymen was freshly broken. All that pointed to penetration. PW2 did not treat or make the P3 Form, but she testified on behalf of her colleague, who she said was unwell. Her testimony was based on the written record prepared by her colleague. There was adequate proof of penetration.

12. The other issue that he has submitted on is identity of the perpetrator. PW1 testified to seeing 2 boys, the appellant and Babu. They walked past PW1 and her sister. She knew Babu had notoriety, with respect to committing rape, and so she decided to hasten her steps home, but Babu got hold of her, and led her to a maize farm, followed by the appellant. At the farm, Babu removed her clothes, and the appellant began to defile her. She stated that while 1 of her assailants was defiling her, the other would keep a lookout. At cross-examination, PW1 stated that the appellant had masked his face with a shirt, but said that she knew his physical appearance. The OB was referred to in that cross-examination, and the court noted that the first report, to the police, was on Obanda alias Babu, and another man, who PW1 could not identify. PW1 testified that the report was made by PW3. PW3 testified that PW1 told her that she had been defiled by Silas and his friend, whose name PW1 did not know, although she claimed to know him physically. She added that PW1 had told her that the friend of Silas had had his face covered or blocked with a scarf. PW4 testified to receiving a report from PW1 and PW3, and the report was that she had been defiled by a certain Eliud Ochieng. PW4 said that the appellant left his shirt at the scene, which was presented in court, but he said that he had nothing to show that the shirt belonged to him.

13. The narratives by PW1, PW3 and PW4 on the identity of the perpetrators is inconsistent, even contradictory. PW1 testified that the person who pulled her to the maize farm was Babu, and that was the name that was entered into the OB. PW3 did not mention Babu, but said that PW1 had reported to her that she had been defiled by Silas and another. PW1 did not talk about Silas. No effort was made to make the connection between Babu and Silas. Whereas, at examination-in-chief, PW1 sounded as if she

was certain that the appellant was among those who defiled her, for she referred to him by his name, at cross-examination, it emerged that the report made to the police did not have the name of the appellant as one of the assailants, for the OB reflected that the man, that PW1 knew as Babu, was in the company of another person, who she could not identify, because his face was masked. She insisted that she knew the appellant physically, even though masked, although she did not point out any outstanding features of his physical appearance. The story that the second person was masked was corroborated by PW3, who told the court that PW1 had informed her that she did not know the name of that other person, she knew him only physically, and that during her ordeal the face of that person was covered with a scarf. PW4 told a different story, that when PW1 and PW3 came to report the incident to him, they were clear about the assailant, and that they gave him the name of the appellant, Eliud Ochieng.

14. The inconsistencies of these 3 narratives should have raised doubt on the identification of the appellant. The first report that was made to the police, as noted by the trial court during the cross-examination of PW1 was that she knew the name of Babu, but did not know the name of the other person. That was the story that PW3 was told by PW1. The first report had also indicated that that other person had his face covered with some cloth, a scarf according to PW3 and a shirt according to PW1 and PW4. PW3 said as much in her testimony. The narratives thereafter, that PW1 had identified the appellant during the ordeal, was revisionist, and so did that by PW4, that PW1 and PW3 had given him the name of the appellant. PW4 presented a shirt, allegedly left at the scene by the appellant, but he said, at cross-examination that he had nothing to connect that shirt to the appellant. PW1 was not shown that shirt, and cross-examined on it. There was no evidence that the shirt belonged to the appellant. Although PW1 claimed to have had seen both Babu and his friend prior to the incident, and that the appellant had covered his face with a shirt, during the defilement incident, she gave no indication of the stage at which the appellant covered his face.

15. The testimonies of PW1, PW3 and PW4 were not unequivocal on the identification of the appellant, as the perpetrator, and even that of his alleged accomplice. In view of that, the trial court ought to have found that there was insufficient evidence on the identification of the appellant, hence he could not be conclusively said to have been the perpetrator. In the face of such inconclusive evidence, the prosecution should have done more, such as subjecting the spermatozoa, found on PW1, to forensics, together with samples taken from the appellant. As it is, the trial court should have treated the evidence of PW1 on the identification of the appellant with great circumspection.

16. Finally, the appellant submits on his alibi defence. Did he raise any alibi defence? I do not think so. An alibi is evidence that the accused person was not at the scene of the crime, but at a different place altogether. In his defence, the appellant dwelt on where he was when he was arrested on 29th February 2022. He did not explain where he was on 19th February 2022. The only thing he said, in connection with 19th February 2022, was that the OB report, of that date, did not mention him. He did not raise nor present any alibi defence.

17. In view of the above, it is my finding and holding that the conviction of the appellant was unsafe, given the inconsistencies and contradictions on the evidence relating to the identification of the perpetrator. The trial court should have given the appellant the benefit of the doubt. The appeal herein is allowed on that account, with the result that the conviction of the appellant, on December 21, 2023, is hereby quashed, and the sentence imposed on him, on February 22, 2024, is hereby set aside. The appellant shall be set free, from prison custody, forthwith, unless he is otherwise lawfully held. Orders accordingly.

JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 22ND DAY OF OCTOBER 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Eliud Ochieng Owino, the appellant, in person.

Advocates

Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.