Chelangat v Republic (Criminal Appeal E014 of 2023)
[2024] KEHC 14212 (KLR) (15 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14212 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL E014 OF 2023

JRA WANANDA, J

NOVEMBER 15, 2024

BETWEEN

SILAS KIPTOO CHELANGAT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of rape contrary to Section 3(l)(a)(c) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 12/03/2023 at around 1425 hours in [particulars withheld] in Keiyo North sub county within Elgeyo Marakwet, he intentionally and unlawfully caused his penis to penetrate the anus of EK by use of threats that he would kill him. He was also charged with the alternative charge of the offence of committing an indecent act with an adult contrary to Section 11(A) of the *Sexual Offences Act* No. 3 of 2006.

2. The Appellant pleaded not guilty and the case proceeded to full trial in which the prosecution called 6 witnesses. At the close of the prosecution's case, the Court found that the Appellant had a case to answer and placed him on his defence. The Appellant then gave a sworn statement and did not call any witness. By the Judgment delivered on 30/08/2023, he was convicted on the main charge and sentenced to serve 10 years' imprisonment.

3. Dissatisfied with the decision, the Appellant filed this appeal on 12/09/2023 raising 6 grounds as follows:

    i. That (I) pleaded not guilty at the trial court.

    ii. That the learned magistrate erred by relying on unsatisfactory, unbelievable and unreliable medical evidence as an ingredient of rape.

iii. That the trial magistrate grossly erred in law and facts by not observing that the prosecution did not prove their case beyond reasonable doubt.

iv. That the trial court erred in convicting (me) whereas disregarding (my) testimony in (my) plausible defence.

v. That the Appellant was not subjected to a fair trial as he was not supplied with prosecution statements in full, the P3 form was missing thus affecting (my) defence.

vi. That, other grounds to be adduced during the hearing.

Prosecution evidence before the trial Court

4. PW1 was the complainant. He stated that he was a Form 1 student at [.....] day Secondary School. He testified that he did not know the Appellant who on 12/03/2023 came and told him to accompany him for the day's activities, and that the Appellant asked him whether he was circumcised and started touching his penis. He stated that this happened when they were in a forest and were alone, that the Appellant then removed PW1's trousers and underwear, unzipped his own trousers and then penetrated PW1's anus. He stated that when the Appellant finished and left, PW1 went home and informed his aunt who took him to hospital for examination where he was provided with a P3 form. He stated that he was bleeding from the anal region and it was swollen and painful. In cross-examination, he reiterated that he did not know the Appellant but agreed to accompany him to the forest, that he informed one M (PW3) of the incident. He denied that they had framed the Appellant and stated that the forest was close to their home, being about 10 metres away. He also stated that he did not scream, that they were near a path used by many people and conceded that had he screamed, people could have heard him. He testified that the Appellant forced him to escort him, that it was his first time to see him and that the Appellant had never come to his home. He testified further that the Appellant was herding cows near PW1's home with a neighbour who however did not record a statement, and that PW1 was in their shamba when the Appellant came to him.

5. PW2 was one RK who stated that he is PW1's father. He testified that that he did not know the Appellant, that he received a phone call from the said M (PW3) who told him to rush home, that he went and upon arrival, M told him that PW1 had been raped by another man. He stated that they then took PW1 to hospital and the doctor confirmed that indeed, PW1 had injuries on the anal region and that he then reported the matter to the police. In cross-examination, he stated that he did not know the Appellant and denied framing him.

6. PW3 was the said M. She testified that PW1 was her nephew and the Appellant is a neighbour. She testified that on 12/03/2023 at 3.00 pm, she went home and found that PW1, whom she had sent to do some digging had not returned, that when PW1 returned, he told her that Silas (Appellant) had come and asked him about circumcision, took him to the hills and raped him by penetrating his anal region. She testified that she then reported the matter to the Chief, and that they went and recorded statements. In cross-examination, she stated that it is not her who made the phone call to the police, and that the call was made by the Chief. She testified further that from the hills where the incident is alleged to have taken place, she could hear from her home if somebody screamed. She stated that at the relevant time, she was herding cows about 30 metres away. She denied that she had framed the Appellant and agreed that they have neighbours around.

7. PW4 was Philemon Kittony, a clinical officer at Iten County Referral Hospital. He testified that PW1 went to the facility with a history of sodomy, that on examination, he found that PW1 had an anal opening at 12 O'clock, about 5x2 cm, the penile part was reddened and inflamed, and was swollen on

the opening and urethra, and that there was no discharge but the anal area was red. He stated that on laboratory examination, on anal swab, nothing was detected. He testified that he then made the conclusion that there was anal rape and produced the Post Rape Form and P3 Form exhibits. In cross-examination, he testified that PW1 had pus cells, that the anus and the vagina are different in that while in the vagina, sperms stay up to 72 hours, in the anus, sperms cannot be retained due to mucus membrane and cannot be seen in the anus even for 3 hours. He conceded that he had not availed any inner clothing and stated that while the incident occurred on 12/07/23 at around 11.00 am, he conducted the tests on 13/07/2023. He stated further that PW1 stated that he knew the perpetrator.

8. PW5 was Police Constable Gilbert Kemei, the investigating officer in the case. He stated that he received a report of the incident on 12/03/2023 at 8.34 pm from R (PW2) and who was accompanied by the complainant (PW1), that the Report was for an allegation of sodomy by a known person. He stated that he booked the Report and referred them to the doctor, and that he issued them with a P3 form and recorded their statements. He stated that he then arrested the Appellant and charged him with the offence. He then produced a copy of PW1's birth certificate indicating that he was born on 13/10/2001. In cross-examination, he stated that he visited the scene, that it was a forest about ½ kilometre from PW1's home, and that the Chief accompanied him.

9. PW6 was Andrew Cheruiyot, a clinical officer at Tambach sub county hospital. He testified that the Appellant was brought to the facility with a history of sodomy, that on examination, he found the penis to be of normal shape, that on the laboratory result, there were pus cells in the urine which showed an infection in the urinary tract and for which they treated the Appellant, and that the urinary tract infection showed that there were sources of entry such as a sexual act. He then produced the Appellant's P3 Form. In cross-examination, he testified that he did not find anything in the Appellant's clothing, that the laboratory results showed pus cells in the Appellant's urine, that the Appellant had no injuries on his private parts, and that the pus cells showed sexual activity. He testified further that where is active infection which is not treated within 72 hours, the infection will start dropping minor urine.

Defence evidence

10. In his defence, the Appellant gave sworn testimony as DW1. He testified that on 12/03/2023 he went to herd cows near PW1's home and left the area at 3.00 pm when he proceeded for lunch and then went for a meeting at Kapkore area and which meeting finished at 10 pm. He gave the names of several people who were with him in the meeting and stated that they, and also his wife, could absolve him but stated that for various reasons, he was unable to present them as witnesses. He denied committing the offence and claimed that he was framed and that the prosecution had coached witnesses and also that PW3 had a grudge with him due to a water problem incident that occurred in November 2022. He then claimed that police officers broke into his house during the arrest and that his land was grabbed but that the Chief stopped the case. In cross-examination, he stated that he was herding cows with one "Abraham".

Hearing of the Appeal

11. The Appeal was canvassed by way of written Submissions. The Appellant's Submissions is undated and it is not clear when it was filed. For the State, its Submissions also does not appear to have been formally filed but the hard copy handed over to the Court by Prosecution Counsel Calvin Kirui is dated 29/05/2024.

Appellants' Submissions

12. The Appellant submitted that the Prosecution did not prove the case beyond reasonable doubt, and that he was never served with full statements before the case proceeded. He submitted that from the evidence on record it is clear that the complainant did not know the Appellant and the witnesses also agreed that they did not know the Appellant, that the complainant testified that the incident occurred 10 metres from his aunt's home and therefore, any commotion would have drawn the attention of the family, that although the complainant mentioned that the Appellant threatened to kill hm, he did not mention any exhibit and that therefore the charge was a lie and fabrication. He submitted further that the prosecution told the Court that the offence was committed on 12/03/2023 but that the date stated in the medical report was 11/03/2023, and that it was the duty of the trial Court to evaluate the errors by the prosecution and make a conclusion that the charge sheet was defective. He added that it was the complainants' testimony that he was forced to have sex and told the Court that the Appellant was herding cows with a neighbour meaning that the neighbour knew what happened. According to him, the trial Court was biased against him. He also faulted the trial Court for not taking into account his defence evidence that he had already left herding his cows near the complainant's home and was attending a meeting by the time that he is alleged to have committed the offence, and that he had a grudge with PW3 and who had as a result, framed him. He contended that he and the complainant are neighbours and the complainant's allegation that he did not know the Appellant proves that the complainant was coached and forced to tell lies about the Appellant.

Respondents' submissions

13. Regarding the definition of the offence of rape, Counsel for the Respondent cited Section 3 of the Sexual Offence *Act No. 3 of 2006* and also the case of Makau v Republic (Criminal Appeal E055 of 2021) [2022] KEHC 9798 (KLR). He also appreciated that the prosecution is under a duty to establish or prove all the elements of the offence beyond reasonable doubt and that this duty or burden of proof does not shift to the accused person who is under no duty to adduce or challenge evidence adduced by the prosecution.

14. Regarding "penetration", Counsel cited the definition in Section 2 aforesaid to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person". He recounted PW1's testimony that the Appellant took him to a nearby forest removed his trousers, underwear and unzipped his trousers before removing his penis and penetrated his anus, and that the complainant was taken to hospital and examined by PW4. He submitted that PW4 testified that he examined the complainant and found that there was a cut in his anal opening, that the penile part was reddened and inflamed, and swollen on urethra opening, and that these findings were noted in the P3 form, and which also confirmed penetration. According to him, this evidence proved beyond reasonable doubt that there was defilement as contemplated by the Act. Regarding "consent", Counsel urged that the complainant testified that the Appellant told him to accompany him for the day's activities before he forced him to have sex, and that the Appellant did not seek the complainant's consent. On "identification" of the Appellant, he submitted that the same was clear, that the complainant is old enough to have a clear recollection of the ordeal and that the incident happened during the day and therefore, there cannot be any doubt on identification of the Appellant.

15. Counsel then submitted that although the Appellant denied committing the offence and elected to adduce sworn evidence which was a mere denial of the incident, he called no witness to corroborate his testimony, that this denial was untrustworthy and that the trial Court rightfully held that the prosecution had discharged its burden to prove the offence. He urged that the prosecution witnesses and evidence were consistent, that there were no doubts or contradiction, and the evidence was credible

and reliable. He submitted further that the Appellant failed to create any doubt and failed to challenge the credibility of the witnesses, and that the trial Court considered the offence and mitigation by the Appellant and exercised its discretion exercised judiciously and in accordance with the law.

Determination

16. As a first appellate Court, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses (See Okeno vs. Republic [1972] E.A 32)

17. The issue for determination herein is "whether the charge of rape against the Appellant was proved beyond reasonable doubt".

18. The definition of rape is set out in Section 3 (1) of the *Sexual Offences Act* as follows:

> "(1) A person commits the offence termed rape if—
>
> (a) he or she intentionally and 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."

19. The main ingredients of the offence of rape are therefore "intentional" and "unlawful" penetration of the genital organ of one person by another, coupled with the absence of consent. This was restated by the Court of Appeal in the case of Republic vs. Oyier [1985] KLR 353 in the following terms:

> "The learned magistrate had the correct appreciation of the mens rea in rape. It is primarily an intention and not state of mind. Thus the mental element is to have intercourse without consent, or not caring whether the woman consented or not: DPP v Morgan (1975) 61 Cr Appl. R 136 HL The prosecution must prove either 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; Archbold Criminal Pleading Evidence and Practice 40th Edn pp 1411 – 1412 paragraph 2881 and R v Harwood K (1966) 50 CR App R 56. So if a woman yields through fear of death or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact."

20. In this case, the complainant testified that the Appellant took him to a forest and removed his clothes and raped him. There were no other witnesses to the alleged act. Section 124 of the *Evidence Act* therefore comes into play. In respect to the evidence of a single witness, the Section provides as follows:

> "Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim

and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

21. Regarding "penetration", Section 2(1) of the *Sexual Offences Act* defines it as follows:

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

22. In the case of Mark Oiruri Mose v R [2013] eKLR the Court of Appeal stated that:

> " Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ."

23. In this case, the fact that there was penetration into the complainant's anus was, in my view, well proved. PW4, the clinical officer who examined the complainant found that PW1 had an anal opening at 12 O'clock, about 5x2 cm, that the penile area was reddened and inflamed, and was swollen on the opening and urethra, and that the anal area was red. He stated that he therefore made the conclusion that there was anal penetration and produced the Post Rape Form and P3 Form exhibits. In cross-examination, he testified that the complainant had pus cells, and stated that although anal swabs did not reveal anything of significance, the anus and the vagina are different in that while in the vagina, sperms stay up to 72 hours, in the anus, sperms cannot be retained due to mucus membrane and cannot be seen in the anus even for 3 hours. In the absence of any contrary evidence, I am satisfied that the trial Magistrate correctly found that penetration had been established.

24. Regarding "consent", the complainant testified that he did not consent to the sexual act. This is how he testified:

> " I do not know the accused person. On 12.3.2023 I was at home. The accused person came and told me to accompany him for the day's activities. He asked me if I was circumcised. I told him I am yet to undergo. He started touching my penis with his hands. We were in a forest. We were just the two of us. He proceeded to penetrate my anus. He removed my trousers, underwear, he unzipped his trouser before removing his penis and penetrated my anus. He finished and left and I went home. I went home and informed my aunt. ....."

25. In cross-examination, he responded as follows:

> " I informed M ..... of the incident. I did not know you but I agreed to accompany you. I do not accompany everyone who requests me. We did not frame you with M..... You came to our home. You were headed to the forest. The forest is not very far from our home. It is about 10 metres. I did not scream. You can scream. There is a path used by many people. If I had screamed people would have heard. You forced me to escort you. It was my first time to see you. You have never come to our home. ....."

26. From the foregoing, the complainant's testimony is therefore that he was at home when the Appellant came over. It will be noted that nowhere in his evidence-in-chief did the complainant state that he was forced in any way by the Appellant to accompany him to the forest where the incident is alleged to have occurred. The complainant's testimony is simply that the Appellant told him to accompany him and that he (complainant) voluntarily did so without any question. The first time that the complainant mentioned the issue of "force" was in cross-examination, when he stated that the Appellant forced him

to escort the Appellant to the forest. I however note that even so, he again still contradicted himself by stating that he "agreed" to accompany the Appellant. Further, although the complainant stated that the Appellant undressed him and raped him, nowhere in his testimony did he even remotely mention any use of threat or coercion by the Appellant. He never stated that the Appellant was armed with any weapon or did not at all even attempt to explain in which manner the Appellant threatened him, whether physical or verbal. He did not also state whether he resisted in any way and if he did not, why he never resisted. This is relevant considering that the certificate of birth produced in evidence indicates that the complainant was born in the year 2001. The incident having been alleged to have occurred in the year 2023, then it means that the complainant was a full-bodied adult aged 22 years. On the other hand, according to the Appellant's P3 Report dated 14/03/2023, the Appellant is stated to have been 28 years old. These were therefore two well-bodied men of ages almost within the same range. There is no mention that the complainant was retarded in any way or that he was sickly or was suffering from any kind of disability that would have made him an "easy prey" to the Appellant. It is doubtful that a physically fit and abled male adult of 22 years of age would be so easily subdued by another single unarmed man of almost similar age, undressed, positioned for the act of sodomy, penetrated in the anus and violated to the end without the slightest resistance or a fight. Further, although he concedes that his home was nearby and that there was a busy footpath also nearby regularly used by passers-by, he does not state why he did not scream or cause any kind of motion to attract the attention of passes-by or neighbours or to call for help in any way.

27. The complainant also, in my view, did not come out as a credible and/or truthful witness. Although he vehemently denied knowing the Appellant whom he termed a stranger, his own aunt (PW3) who was the first person to whom the complainant is stated to have reported the incident, confirmed that the Appellant is a neighbour well known to all of them. She also stated that the complainant told her that he had been raped by "Silas" (Appellant). Besides, the complainant's P3 Form is express that the complainant reported a case of sodomy by a person who was "well-known to him". PW4, the clinical officer, also stated that the complainant told him that he knew the perpetrator. PW5, the investigating officer also stated that he received the report from the complainant and his father for an allegation of sodomy "by a known person". Clearly therefore, the complainant and the Appellant were known to each other. There is no explanation why the complainant lied about this seemingly innocent fact but what it does is that it raises suspicion and diminishes the complainant's credibility as a truthful witness. The question that would normally arise under such circumstances would be; if the witness lied about this one presumably immaterial fact, what else therefore has he also lied about?"

28. Further, although there is also evidence that there was a third person by the name "Abraham" in the vicinity, who was herding cows with the Appellant at the time that the act is alleged to have occurred, this "Abraham" was never called as a witness. According to the complainant, the police did not even record this "Abraham's" statement. There being no explanation why this "Abraham" who clearly possessed crucial evidence, was not called, I find his omission to be also suspicious.

29. The above analysis is also relevant in this case because the Appellant, at every opportunity, and even in his cross-examination, continuously kept on alleging that he was framed by the complainant's aunt (PW3) as a result of a land dispute between them. This angle ought to have been pursued and interrogated by the prosecution since as conceded by the Prosecution Counsel Mr. Kirui, even where an accused person raises a defence, the burden of proof never really shifts to the accused person but the burden to disprove such defence still basically remains with the Prosecution.

30. For the above reasons, I find that it was unsafe for the trial Court to have convicted the Appellant under the shaky state in which the prosecution evidence was presented. In my view, the complainant's evidence left substantial loopholes that remained unexplained. The evidence was also materially

inconsistent and contradictory thus raising the suspicion that there was "more than meets the eye". In my assessment, the evidence was not sufficient to warrant conviction of the Appellant.

Final Orders

31. The upshot of the foregoing is that I make the following orders:

    i. This Appeal is allowed.

    ii. The conviction of the Appellant by the trial Court in Iten Senior Principal Magistrates Court Case No. E013 of 2023 is hereby quashed and the sentence imposed therein set aside.

    iii. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 15TH DAY OF NOVEMBER 2024

WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

Appellant present physically in open Court

N/A for the State

Court Assistant: Brian Kimathi