Wamukhuyu v Republic (Criminal Appeal 44 of 2018)
[2024] KEHC 15150 (KLR) (14 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15150 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL 44 OF 2018

SC CHIRCHIR, J

NOVEMBER 14, 2024

BETWEEN

JULIUS OBWIRE WAMUKHUYU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. T.A.Odera SPM in Mumias chief Magistrate's court criminal case No. 681 of 2015)

JUDGMENT

1. The Appellant herein was charged alongside one SO, , with 2 counts of gang Rape, contrary to Section 10 of the *Sexual Offences Act* (The Act).

2. The particulars were as follows:-

   Count I;-

   on the 1st September, 2015 at about 5.00 Pm at(xx) village (xx) Sub-Location (xx)Sub-County in (xx)County in association with another not before court intentionally and unlawfully, caused his penis to penetrate the vagina of SAO a child aged 14 years. (particulars withheld)

   Count II;-

   On the 1st September, 2015 at about 5.00 Pm at (xx) village (xx) Sub-Location (xx) Sub-County in(xx) County in association with another not before court intentionally caused his penis to penetrate the vagina of DSC a child aged 13 years.

3. On each count, the Appellants faced an alternative charge of of committing an Indecent Act with a child contrary to Section 11(1) of the Act.

4. Following a full trial, the Appellant and his co-accused were convicted of the main charge in Count I and of the Alternative Charge in Count II, and sentenced to 15 years on count 1 and 10 years on the alternative charge in count II .The sentences were ordered to run concurrently.

5. Dissatisfied with the outcome, the Appellant filed this Petition of Appeal and set out the following grounds;-

    1. That the learned trial magistrate grossly erred in law when he failed to observe that the evidence tendered did not disclose the offence of gang rape as charged.

    2. That the learned trial magistrate grossly erred in law when he failed to observe that the trial without considering that the trial failed to meet the threshold of a fair trial as stipulated under article 50 (2) (g) (h) and (j) of *the constitution*.

    3. That the learned trial magistrate erred in and or misdirected himself in law and in facts in placing inordinate weight on doubtful, fabricated, inconsistent and suspicious testimonies of the prosecution witnesses.

    4. That the learned trial magistrate gravely erred in law and in facts in failing to consider that the evidence adduced did not adequately disclose penetration.

    5. That the learned trial magistrate erred in law and facts in failing to consider that material and mentioned witnesses were not called to testify.

    6. That the learned trial magistrate erred in law and facts when he rejected my defense thereby shifting the burden of proof on the appellant.

6. The Appeal was canvassed by way of written submissions

Appellant's Submissions

7. It is the Appellants Submissions that, he has already served 23 of the term; that he has conducted himself well while in prison; that he is remorseful of the offence and he would not repeat the same mistake. The Appellant further submits that he is a young man, who needs a chance to make use of the productive stage of his life. The Appellant further informs court that, though he had to drop out at class 6 upon being arraigned in court, he has managed to complete his studies while in prison and attained a score of C- in his KCSE examination . That was in the year 2022.

Respondent's Submission

8. It is the Respondents submission that there was sufficient evidence to sustain the charge of penetration in respect to Count 1; that penetration need not be complete. In this regard the Respondent has relied on the provisions of 2 of the Act on what constitutes penetration. The decision of the court in the case of Eric Onyango Ondeny VS Republic (2014) eKLR has also been relied on. In the said case the Court of Appeal held:- ' In 'the Sexual Offences the slightest Penetration of a female organ by a male organ is sufficient to constitute the offence.....".

9. It is further submitted that the testimony of the PW1 touching on Count I was corroborated by the Clinical Officer (PW5) who told the court that there was evidence of vaginal penetration in respect to the complainant in count 1

10. The prosecution further points out that the trial court committed a legal anomaly by convicting the Appellant on the main and Alternative charged at the same time.

11. On the issue of some of the witnesses not being called, it is submitted that the number of witnesses presented were sufficient to prove the charge.

Analysis and Determination.

12. A casual perusal of the appellant's petition of Appeal shows that he has confined his Appeal to sentencing only notwithstanding that his petition of Appeal is against both the conviction and sentencing. However, I take not of the fact that the Appellant is unrepresented, and hence I will consider the entire Appeal.

13. This is a first Appeal and it is trite law that the role of an appellate court is to review the evidence, evaluate it and arrive at its own conclusion

14. I have considered the memorandum of Appeal, the Lower Court record and the submissions of the parties herein. I have identified the following issues as lending themselves for determination:

    a. Whether the evidence tendered proved the offence of rape Whether the trial met the threshold of fair trial

    b. Whether some crucial witnesses were left out.

    c. Whether his defence was not considered.

Whether the evidence proved the Offence of gang rape.

15. Section 10 of the *sexual offences Act* provides as follows:- "any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who with common intention is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less the fifteen years but which may be enhanced to imprisonment to life."

16. Thus to constitute gang rape the prosecution must prove that the accused committed the offence of defilement; in association with others; or committed in the company of another or others who commit the offence of rape or defilement with common intention.

17. The Appellant was convicted of the above offence under Count I. The victim in Count I was SOA, a child aged 14 years.

18. SAO testified as PW1. She told the court that on the material day, she was going to look for firewood when the wife of the 2nd Accused, who were working on the farm called her, and requested SAO to go to her house with DSC (Complainant in respect of Count II) when they were done with the day's chores. The girls went to the 2nd Accused's house in the afternoon as requested. On arrival, 2nd Accused's wife gave the two girls vegetable to cut and she excused herself to go somewhere. The 2nd Accused was in his house with the 1st Accused and a Mr. W. The said W was never arraigned.

19. She further testified that the 2nd Accused, the Appellant herein and the other man kept going outside the house, and appeared like they were discussing something. From their third trip outside , the 2nd Accused pulled DSC outside and took her to the kitchen. SOA was locked inside the main house with the Appellant herein. The Appellant asked her to have sex with her but she refused. He forcefully removed her clothes, including her panty. He tripped her, and she fell. He inserted his fingers to her vagina. He then put his penis but it slid. He tried again but it slid. As the Appellant tried to look for a condom, she made her escape.

20. PW1's evidence was corroborated by PW5 the clinical Officer, who told the court that there was evidence of tears and bruises on the complainant's pant and it was stained with blood. A vaginal swab done showed the presence of epithelial cells, which she said, signified friction.

21. The testimonies of the above two witnesses therefore proved penetration. The act of placing his penis but which kept on slipping constituted partial penetration. Penetration was partial and as correctly submitted by the prosecution , penetration need not be complete. Her testimony was corroborated by PW5 as aforesaid. I am satisfied that the evidence presented proved penetration.

22. PW1 also told the court that prior to the incident , the three men kept going out and appeared to be discussing something; that it is the 2nd Accused who pulled DSC and took her to the kitchen, while he locked her inside the main house with the Appellant herein. The offence was therefore committed in association with others.

Fair Trial

23. The Appellant has not addressed this issue in his submissions. However a perusal of the record shows that, notwithstanding the fact that the Appellant had no Advocate, he sufficiently cross-examined the witnesses. Further, there was no issue raised during trial touching on the conduct of the trial or any complain relating to violation of any element of a fair trial. This complaint is without merit.

Whether some witnesses were not summoned.

24. Section 143 of the *Evidence Act* provides as follows:

> " Number of Witnesses
>
> No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact." And in the Court of Appeal decision in the case of Keter v Republic [2007] 1 EA 135, it was held : -"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

25. Thus the law does not prescribe to the prosecution, the number of witnesses they must call. The only requirement is that they need to call such number of witness as they are necessary to prove the charge. Again the Appellant has failed to pin-point the particular witnesses that were left out. I am satisfied that the witnesses summoned were satisfactory.

Whether his defence was ignored.

26. Contrary to the Appellant's plea, the court did consider his defence and found that it could not displace the prosecutions case. I have considered the said defence. He told the court that he had been at the 2nd Accused house on the material date. The 2nd Accused's was the crime scene. Thus the Appellant placed himself on the crime scene. His only defence is that he did not do it. I agree with the trial court that the evidence could not displace the prosecution's evidence.

27. On the Alternative charge in Count II , the victim was DSC (PW3) .she gave a sworn testimony upon being taken through viva voce examination. She told the court that the 2nd Accused pulled her outside and took her to the kitchen. He found W in the kitchen. He removed her clothes and tore her panty. He then removed '' his thing for urinating and put it on her''. The '' thing remained there for 10 minutes'' ,she told the court. However her medical examination by PW5 did not prove that there was any penetration. I have seen the observations of the trial court in this regard which I agree with entirely.

The Magistrate's observation was that, based on the evidence of PW5, she was convinced that PW3 was not defiled but what the child was describing was an indecent touching. she further stated that she found the witness candid and did not give the impression of being untruthful.

28. In an Appeal ,the Appellate court must give allowance to the fact that the trial court had the benefit of seeing and hearing the witnesses first hand. I dully make this allowance by the trial court in this regard.

29. The prosecution has submitted that the trial court erred in convicting the Appellant on both the main charge and the alternative one. My reading of the judgment however does not support this submission. What the magistrate did was to convict the Appellant on the main charge in count I and the alternative charge in count II.

The sentence

30. Gang Rape attracts a minimum sentence of 15 years where the victim is a child and 10 years for Indecent Act. The fact that the victims were children and their respective ages was not contested.

31. The Sentences are minimum and mandatory, they are based on law. Thus there is nothing illegal about the sentences. The Appellant's submissions are really mitigation, in an apparent plea for review of sentence. However, this plea has no legal basis. Thus the sentence being legal, I decline to interfere with it.

32. In conclusion, the Appeal against both Conviction and Sentence fails, and the Appeal is hereby dismissed.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 14TH DAY OF NOVEMBER, 2024.

S. CHIRCHIR

JUDGE

In the Presence of:-

Godwin Luyundi- Court Assistant

The Appellant

Mr. Mboonzi for the Respondent.