Isaiya v Republic (Criminal Appeal E004 of 2024)
[2024] KEHC 15699 (KLR) (10 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15699 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E004 OF 2024

RE ABURILI, J

DECEMBER 10, 2024

BETWEEN

NATHANIEL OKIRO ISAIYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment, conviction and sentence in Maseno SPM SO Case No. E015 of 2022 delivered by Hon. Kimetto, Principal Magistrate)

JUDGMENT

1. The appellant herein Nathaniel Okiro Isaiya was charged, in Count 1, with the offence of rape contrary to section 3 (1) (9) (c) (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on the 9th February 2022 at xxxxx area in xxxxx sub-county within Kisumu County, the accused person who is the appellant herein intentionally and unlawfully caused his penis to penetrate the vagina of TO by use of force, intimidation and threats.

2. The appellant also faced the alternative charge of committing an indecent act with an adult contrary to section 11 (A) of the *Sexual Offences Act* No. 3 of 2006.the complainant is the same as the one in Count 1.

3. The appellant also faced a second Count of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code. The particulars of the charge are that on the 9th February 2022 at xxxxx area in xxxxxx sub-county within Kisumu County robbed TO of her phone make Oppo A54 worth Kshs. 21,000, Gas Cylinder worth Kshs. 4,000, Mattress worth Kshs. 4,000 and Kshs. 4,000 all valued at Kshs. 33,000 and immediately before the robbery, raped TO.

4. The appellant also further faced the alternative charge of handling stolen property contrary to section 322 (1) (2) of the Penal Code. The appellant denied all the charges levelled against him. The

prosecution called 6 witnesses in support of its case. Placed on his defence, the appellant gave sworn testimony.

5. In her judgement, the trial court found the appellant guilty of the offences in both the 1st Count of rape and on the 2nd count of robbery with violence. Subsequently, the trial magistrate sentenced the appellant to serve ten (10) years' imprisonment on the first count of rape and life imprisonment on the charge of robbery with violence.

6. Aggrieved by the conviction and sentence imposed, the appellant filed his petition of appeal dated 23rd January 2024 raising the following grounds of appeal:

    1. That the learned trial magistrate erred in law and fact by failing to consider that the mandatory nature of the sentence imposed is/was declared unconstitutional.

    2. That the learned trial magistrate erred in law and fact by inevitably relying on the discrepancies and inconsistencies meted.

    3. That the learned trial magistrate erred in law and fact by relying on tainted prosecution case.

    4. That the learned trial magistrate erred in law and fact by failing to adhere to the legal provisions of Article 50 (2) (p) of *the Constitution* of Kenya 2010.

    5. That the learned trial magistrate erred in law and fact by acting on wrong principle of law thus convicted me on the ambiguity of the sentence.

    6. That trial magistrate rested the burden of proof to me without considering that the same sound.

    7. That I wish to be present during the hearing of this appeal filed within the stipulated time required by law and so be pleased to supply me with the certified proceedings to enable me marshal more fundamental grounds as merited.

7. The appeal was canvassed by way of submissions.

The Appellant's Submissions

8. The appellant submitted that he never committed the offence, that the complainant was his girlfriend who he caught with another man in the house and who told him that they should share their household goods. It was his submission that the following day, he was arrested by the police.

9. The appellant submitted that he tried defending himself at the police station by informing the police that the complainant was his girlfriend but the police ignored him.

The Respondent's Submissions

10. Mr. Marete Principal Prosecution Counsel for the State made oral submissions opposing the appeal on both conviction and sentence. Mr. Marete submitted that on the rape count, there was penetration and further, that PW1 recognized the appellant in her house but feared disclosing for fear of being harmed. He further submitted that there was no consent and that the appellant had a panga, held the baby by the neck, threatened to cut them both and told the complainant to open her legs as he raped her. Mr. Marete submitted that the DNA carried out showed the appellant's spermatozoa was found in the complainant's vagina.

11. On the robbery with violence charge, Mr. Marete submitted that the appellant had a panga, used violence and stole the items listed in the charge sheet. It was his submission that the appellant was

positively identified and that he never raised the issue of the complainant being his girlfriend at the lower court where his defence was rightly disregarded.

12. On sentence, Mr. Marete submitted that the sentence imposed was lawful and that this court should not interfere with the same.

Analysis & Determination

13. I have considered the grounds of appeal and the submissions for and against the appeal. The role of the first appellate court is now well settled as was stated in the case of Okeno v R [1977] EALR 32 and later in Mark Oiruri Mose v R [2013] eKLR among other decisions, that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

14. The question, did the prosecution prove the two charges against the appellant beyond reasonable doubt? The first charge against the appellant herein was that of rape. Section 3(1) of the *Sexual Offences Act* provides that a person commits the offence of rape if:

> "a) He or she intentionally and unlawfully commits an act which causes penetration with his or 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."

15. The prosecution was therefore required to establish penetration, absence of consent, and that the Appellant was the perpetrator of the act. On the element of penetration, the complainant testified that on the night of the incident, she was in her house when the appellant managed to break into the house whilst armed with a panga and while holding the panga to her child's neck, ordered her to open her legs, removed her panty and proceeded to rape her.

16. PW4, the government analyst also testified that on examination of the High Vaginal Swab of the complainant, it tested positive for seminal fluid which when tested for DNA, matched the appellant's DNA. Penetration was also proved through the testimony of PW6, Dr. Ombok who produced the P3 form and the PRC Form for the complainant that proved that indeed penetration had taken place.

17. I am thus persuaded that that the prosecution proved penetration beyond reasonable doubt and I uphold the trial court's finding on the same.

18. As for absence of consent, the complainant testified that the appellant penetrated her without her consent whilst threatening her with a panga which he held to the complainant's child's neck. I find that this element was proven beyond reasonable doubt.

19. Finally, as to whether the appellant was positively identified, the complainant was firm in her testimony that it was the accused who raped her. She testified and reiterated in cross-examination that she knew the appellant prior to the incident and that during the incident, the lights were already on. She testified that she knew the appellant as Okiro.

20. Taking all the aforementioned into consideration, it is my opinion that the prosecution proved the charge of rape beyond reasonable doubt as against the appellant.

21. Turning to the charge of robbery with violence, the offence of robbery with violence is a creation of Sections 295 and 296(2) of the Penal Code. The sections provide as follows:

    295. Definition of robbery:

    Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

    296. Punishment of robbery:

    1. .....

    2. If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

22. From the foregoing provisions, the offence of robbery with violence is made up of two parts. The first part is the robbery and the other part is the use of violence. Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft, the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must, therefore, be proved for the offence of robbery to be established. They are theft and the use of or threat to use actual violence.

23. Once the offence of robbery is proved on one hand, the offence of robbery with violence, on the other hand, is committed when robbery is proved and further if any one of the following three ingredients are also established: -

    (a) The offender is armed with any dangerous or offensive weapon or instrument, or,

    (b) The offender is in the company of one or more other person or persons, or

    (c) The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.

24. On the issue of identification of the appellant, the evidence adduced in the court below in this regard was that the complainant knew the appellant prior to the offence as she had seen him at the market for some time. The complainant testified that she knew the appellant as Okiro and that she saw him properly on the night of the incident as the lights in the room were on.

25. The prosecution's case was substantially based on evidence of identification at night time by a single witness, PW1 the complainant herein. It is trite law that where such is the case, the evidence must be tested with greatest care see (Abdulla Bin Wendo & Another v R (1953) 20 EACA. 166). Lord Widgery L CJ, in the English case of R. v Turnbull [1976] 3 WLR 445, laid down the test in dealing with such evidence and stated:

> " How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a procession of people? Had the witness ever seen the accused before? How Often? If only occasionally, had he any special reason for remembering the accused?....."

26. In the instant case, there is no doubt that the offence was committed during the night time. PW1 testified that there was adequate light in the house and from her testimony, the perpetrator took time talking to her, holding her baby and threatening to cut the baby while asking her to open her legs to be raped. She had no difficulty observing what the appellant had in his possession. She said so, that he had a panga. She identified the accused person by visual identification as being a person she had known from the market.

27. The evidence of recognition was corroborated by DNA evidence adduced to show that the appellant's spermatozoa was found in the complainant's high vaginal swab.

28. I have re-evaluated the evidence as adduced in the court below and considered the prevailing circumstances as at the time when the attack took place which I find were favourable for proper identification by way of recognition of the attacker by PW1, the complainant.

29. I am however alive to the holding in Hassan Abdallah Mohammed v Republic [2017] eKLR, where it was stated that:

> " Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. The court in Wamunga v Republic (1989) KLR 424 at 426 had this to say:
>
> "Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction."

30. In the end, I am satisfied that the Appellant was recognized by PW1 who knew him well. The area where the incident took place was well lit and therefore, I am unable to find any possibility of mistaken identity in the manner in which the Appellant was identified by recognition. I am satisfied that the prosecution proved beyond any reasonable doubt that it was the appellant who attacked and raped the complainant and proceeded to rob her of the items listed in the charge sheet.

31. It is also on record that the appellant was armed with a panga when he attacked, raped and robbed the complainant. The complainant also testified that the appellant threatened both her and her child prior to committing the offence. That evidence remained unchallenged and I thus find that the appellant was armed and threatened the complainant prior to committing the offences.

32. Further to the above, PW2 and PW3 both testified that they were found in possession of goods, a gas cylinder, and mattress, that were stolen from the complainant and upon inquiry, both witnesses stated that the goods were acquired from the appellant thus proving that it was the appellant who robbed the complainant.

33. The appellant submitted that his defence that the complainant was his girlfriend and was setting him up was neglected. I have perused the trial court record and I am in agreement with counsel for the State that this defence was displaced by the overwhelming evidence adduced by the prosecution witnesses. It was therefore an afterthought defence and I proceed to dismiss it.

34. I have further considered the evidence adduced by the witnesses for the prosecution as a whole and in my view, I find no material contradictions as alleged by the appellant in his appeal. I therefore find no material contradiction in the evidence adduced by the prosecution witnesses. In any case, the Court of

Appeal in the case of Richard Munene v Republic [2018] eKLR stated as follows on contradictions in evidence:

> 'It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.'

35. Accordingly, in this case, I find that the assertions that the prosecution evidence was contradictory was devoid of any substance as no such contradictions were pointed out for this court to determine whether they were material contradictions that would vitiate the conviction of the appellant. I find no material contradiction in the prosecution case as to prejudice the appellant.

36. Taking all the above into consideration, I am satisfied that the prosecution proved its case against the appellant beyond reasonable doubt on both counts.

37. I thus uphold the appellant's conviction on both charges.

38. As regards the issue of sentencing, the appellant pleaded that the trial court violated his constitutional rights under Article 50 (2) (p) of *the constitution*. I have also read into the provision of Article 50 (2) (p) of *the Constitution*, 2010, which provides that:

> " Every accused person has the right to fair trial, which includes the right."
>
> (p) to the benefit of the least severe of the prescribed punishment for an offence, if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentence:

39. On the issue as to whether the sentence of 10 years was harsh and excessive section 3(1) of the *Sexual Offences Act* creates the offence of rape, provides for the ingredients of the offence to wit penetration and lack of consent whereas section 3 (3) of the Sexual Offence Act prescribes the penalty for the offence, section 3 (3) of the *Sexual Offences Act* states as follows:

> " A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life."

40. Sentencing is the discretion of the trial court, which discretion must be exercised judiciously and not capriciously. The discretion is however limited to the statutory minimum and maximum penalty prescribed for a particular offence.

41. In the case of Shadrack Kipchoge Kogo vs. Republic Criminal Appeal No. 253 of 2003 (Eldoret), the Court of Appeal stated as follows;

> " Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"

42. Similarly, in the case of Wanjema vs. Republic (1971) E.A. 493 the court stated as follows:

> " An appellate court should not interfere with the discretion which a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into consideration some immaterial fact, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."

43. As regards the offence of robbery with violence, section 296(2) of the Penal Code provides for death sentence as the mandatory sentence for the offence of robbery with violence.

44. The appellant was sentenced to life imprisonment which I find lawful as given that nothing has been shown that the trial court acted upon wrong principles or overlooked some material factors or considered irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle [See Shadrack Kipkoech Kogo v R., and Wilson Waitegei v Republic [2021] eKLR].

45. The appellant used violence and raped the complainant and threatened to cut her and her child with apanga before robbing her of her household items. In the case of Joseph Ochieng Osuga v Republic [2021] eKLR the court stated that the power to interfere with a sentence imposed by the trial court is limited by precedent except where certain conditions are met. The court cited the Court of Appeal in Bernard Kimani Gacheru v Republic [2002] eKLR where it was stated that:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

46. Bearing the above holding and having in mind the circumstances of this case, the question is whether there is any lawful reason to interfere with the discretion of the trial court in passing sentence.

47. The principles upon which an appellate court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of Ogolla s/o Owuor vs R, (1954) EACA 270 wherein the Court of Appeal stated as follows:

> " The court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R v Shershowsky (1912) CCA 28TLR 263)."

48. In the circumstances, I find no reason to interfere with the sentence rendered out by the trial court in this case. Contrary to the appellant's allegation that his right under Article 50 (2) (p) of *the constitution*, it is my view that the said provisions do not apply in the instant case. The appellant has failed to prove the alleged violation if any.

49. I accordingly find that the sentence meted out by the trial court is lawful.

50. The upshot of the above is that I find that this appeal lacks merit and I proceed to dismiss it and uphold the trial court's holding both on conviction and sentence.

51. The lower court file to be returned.

52. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 10TH DAY OF DECEMBER, 2024

R.E.ABURILI

JUDGE