Rotich v Republic (Criminal Appeal 49 of 2018)
[2025] KECA 136 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 136 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 49 OF 2018

MA WARSAME, A ALI-ARONI & WK KORIR, JJA

FEBRUARY 7, 2025

BETWEEN

JACOB KIPKEMOI ROTICH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nakuru (Odero, J.) dated 9th May 2018 and delivered on 18th May 2018 in HCCRA No. 125 of 2016)

JUDGMENT

1. The appellant, Jacob Kipkemoi Rotich, was charged before Molo Law Courts with the offence of gang rape, contrary to section 10 of the *Sexual Offences Act* ("the Act"). The particulars of the offence were that the appellant, on 13th September 2015 within Nakuru County, intentionally and unlawfully caused his penis to penetrate the vagina of RC without her consent within the view of another not before the court.

2. In the alternative charge, he faced the charge of committing an indecent act with an adult contrary to section 11(6) of the Act. The particulars of the offence were that on 13th September 2015 at around 17:00 hrs within Nakuru County, he intentionally touched the buttocks/breast/vagina of RC with his penis against her will within the view of another not before the court.

3. The appellant pleaded not guilty to the main and alternative charges, and the matter proceeded to trial, where the prosecution called 3 witnesses. The appellant was placed on his defence, and upon considering the evidence, the trial magistrate convicted him for the offence of gang rape and sentenced him to twenty (20) years. Being aggrieved by the judgment, the appellant appealed to the High Court which dismissed his appeal on conviction but substituted the sentence to fifteen (15) years imprisonment. The appellant was aggrieved by the decision of the High Court, which informed the filing of the instant appeal.

4. The evidence before the trial court may be summarized as follows; -

> RC (PW1) testified that on 13th September 2015, she encountered the appellant in the company of one Thomas in the forest at 'Paradise'. She knew both men who were her neighbours. Thomas seized her. She fought him, prompting him to call the appellant, who then grabbed her by the neck. They pushed her down, she fell and lay on her back. The appellant then tore her panty, biker, and her blouse. All the while, Thomas was seated watching. The appellant unzipped his trouser and forcefully penetrated her vagina with his penis. When he was done, he ran away. Thomas then approached her and attempted to rape her, but she grabbed his penis and pulled it, and he ran away. Subsequently she gathered herself, went and informed Nyumba Kumi of the incident. The appellant and Thomas were arrested, but Thomas managed to escape. She testified that her right hand, leg, and head sustained injuries during the incident. During cross-examination, she stated that she knew both the appellant and Thomas and had no conflict with the appellant.

5. PW2, Julius Kipng'eno, a clinical officer, examined PW1 on 15th September 2015. He testified that she had a history of having been raped. She had injuries on her back and bruises on her hands and legs, particularly near her thighs. He filled out PW1's P3 form, which he produced in court.

6. PW3, Charles Kitheka, the investigating officer, testified that on 14th September 2015, while at the station at around noon, he was informed of a girl who had been raped in Olenguruone. He proceeded to the crime scene, where members of the public had already apprehended the appellant. He interrogated PW1, who was present, and she informed him that two persons had raped her, and when she screamed, one fled while the other was captured.

7. They brought the appellant and PW1 to the police station, where PW1 documented her report and statement, received a P3 form, and was guided to visit the hospital. She returned the completed P3 form, after which the appellant was charged with the offence in court.

8. Upon closing the prosecution case, the trial magistrate considered that a prima facie case had been established against the appellant, thus putting him on his defence.

9. The appellant gave an unsworn statement and denied the offence. It was his testimony that on 13th September 2015, he had gone to Narok to deliver chicken to a client. Upon return, he stayed overnight at a guest house in Mulop as it was late and went home the next day. He reached his home at around 11:00 a.m., and shortly thereafter, a Nyumba Kumi elder arrived at his home with PW1 seeking for the appellant's brother, alleging that he had assaulted her. The Nyumba Kumi elder then slapped the appellant and called the police, who arrived and arrested the appellant, taking him to the station where he was placed in cells. On 16th September 2015, he was taken to court and charged with the offence.

10. In the first appeal, the High Court (Odero, J.) upheld the conviction in a judgment dated 9th May 2018 but reduced the sentence to 15 years. The appellant, dissatisfied with the outcome of the first appeal, lodged the instant appeal by filing un-dated grounds of appeal, which can be summarized as follows: the learned judge erred in law by failing to appreciate that the prosecution case was marred with contradictions and inconsistencies; the prosecution did not discharge its duty of proving its case beyond any reasonable doubt; the medical evidence was insufficient to corroborate the charge or support a safe conviction; the complainant sought other Alternative Dispute Resolution measures as the case proceeded with the hearing.

11. The appellant did not file submissions. He briefly submitted orally at the plenary hearing, stating that there was a contradiction in the prosecution evidence. For example, he pointed to the evidence of PW1

that after the incident she stood and went to Nyumba Kumi to report which was different from the evidence of PW3 who did not mention the report to Nyumba Kumi; further that PW1 went to the hospital after 3 days. He urged the court to consider the time he spent in the remand.

12. On its part, the respondent filed written submissions and a list of authorities dated 2nd July 2024. The respondent distilled the issues into seven; whether the appellant committed gang rape; whether the prosecution proved penetration; whether PW1 identified the perpetrators; whether PW1 consented to the act; whether PW1's evidence was corroborated; whether the appellant's defence was considered and whether the sentence was harsh.

13. On the first issue, the respondent submitted that the prosecution proved all the elements of the offence; on the second issue, the respondent submitted that there was overwhelming evidence of penetration of the victim by the appellant; that both the trial court and the first appellate court examined and evaluated the evidence and rightly concluded that there was overwhelming evidence of penetration.

14. On whether PW1 identified the perpetrators, the respondent submitted that there was overwhelming evidence showing that PW1 identified the appellant by recognition; PW1 knew the appellant very well before the incident as the appellant was her neighbor. She had also struggled with the appellant for two hours, between 4:00 pm and 6:00 pm hence her evidence was cogent and credible; that the trial court considered the issue of identification of the perpetrators and rightly concluded that PW1 recognized the appellant during the incident.

15. The respondent relied on the cases of Maitanyi vs. Republic Criminal Case No. 6 of 1986 & Kariuki Njiru and 7 Others vs. Republic [2001] eKLR, where the court in emphasizing the care to be exercised when placing reliance on the evidence of identification.

16. The respondent submitted that the learned judge observed that PW1 gave clear evidence, remained unshaken under cross- examination, identified the appellant satisfactorily, and correctly found no possibility of mistaken identity.

17. On whether PW1 gave her consent, the respondent relied on the case of Republic vs. Francis Otieno Oyier [1985] eKLR, DPP vs. Morgan [1975] 61 Cr. Appl, R 136 HL & R vs. Harwood K [1966] 50 Cr App R 56 to support the contention that PW1 resisted, did not consent to the sexual assault, and, in the process, sustained injuries.

18. On whether PW1's evidence was corroborated, the respondent submitted that the proviso to section 124 provides that in a criminal case involving a sexual offence, if the only evidence is the victim's, the court shall receive the evidence and convict if satisfied that the victim is telling the truth. The respondent further submitted that the trial court was satisfied that PW1 was credible and truthful, and the first appellate court made a similar finding. Further, PW1's evidence was also corroborated in material aspects by the evidence of PW2 and PW3. The respondent in support relied on Karanja & Another vs. Republic [1990] KLR.

19. On whether the appellant's defence was considered, the respondent submitted that the trial magistrate considered the appellant's defence and rightly concluded that the same failed to displace the evidence on record; equally, the first appellate court found that the appellant did not place credible evidence to displace the prosecution's case and concluded that the magistrate was correct to dismiss the alibi defence as improbable under the circumstances of the case; that the concurrent findings of fact by the trial court and the first appellate court were well founded, based on evidence and that both courts acted on the correct principles.

20. On sentence, the respondent submitted that the first appellate court considered both conviction and sentence, and concluded that the same was lawful, but set aside the 20 years' imprisonment and

substituted it for 15 years; that the appellant's mitigation notwithstanding, the circumstances of the case called for a severe sentence.

21. We have carefully considered the record of appeal, submissions by the appellant and the respondent, case law cited, and the law. We are also mindful that by dint of the provisions of section 361 of the Criminal Procedure Code, this Court must confine itself to issues of law as set out in the case of Karani vs. R [2010] 1 KLR 73, where the role of the second appellate court was succinctly set out as follows:

> "This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

22. We discern the issues for consideration by this Court therefore to be:

i. Whether the offence of gang rape was proved to the required standard.

ii. Whether the identification of the perpetrators was safe.

iii. Whether the sentence meted out by the first appellate court is lawful.

23. Section 3(1) of the Act defines rape as; -

> Where a person intentionally and unlawfully commits an act which causes penetration with the organs of another without consent to do so or where consent is obtained by force or by means of threat or intimidation.

Section 10 of the Act defines gang rape 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 as gang rape and is liable upon conviction to imprisonment for a term of not less than 15 years but which may be enhanced to imprisonment for life.

24. The two courts below found that PW1, the complainant, was accosted by two people; one grabbed her, and as she resisted, he called his companion to assist, and they threw her to the ground; one inserted his penis into her vagina despite her resistance as the other watched. When he was done, the second person attempted to rape her, but she grabbed and pulled his penis, and he let go of her. With the concurrent findings by the two courts below, this Court has no basis for interfering with the findings. Further, the evidence of PW1 was cogent and truthful, and the doctor's evidence corroborated her testimony.

This Court held in the case of Kariuki Njiru & 7 Others vs. Republic [2001] eKLR that the evidence relating to identification must be scrutinized carefully. It stated:

> " The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see R. v.Turnbull [1976]63 Cr. App. R.132). Among the factors the court is required to consider is whether

the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all."

25. The first appellate court, in its determination, stated:

> " The next crucial question is whether there has been a positive identification of the man who raped the complainant. The complainant herself identified the appellant as the man who raped her. She told the court that she knew the appellant very well as he was her neighbor. The complainant all throughout referred to the appellant by his given name of "Jacob." In her evidence at page 13 line 18 the complainant says (sic)
>
> "Jacob is my neighbor. We live in the same neighbourhood. He is known to me."
>
> The complainant went on to deny that the appellant was her boyfriend. I am inclined to believe her on this as a boyfriend would not have needed to accost his girlfriend in a forest and force her into having sex."

We are therefore satisfied that both courts properly arrived at the conviction.

26. Regarding the sentence, the first appellate court already reduced the sentence from 20 to 15 years. The appellant caused serious injuries to PW1 apart from the trauma and mental anguish he caused her. We, therefore, see no basis to interfere with the sentence further.

27. In the end, we dismiss the appeal on both the conviction and sentence.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 7TH DAY OF FEBRUARY, 2025.

M. WARSAME

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JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR