Kinyua v Republic (Criminal Appeal 118 of 2018)
[2024] KECA 252 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KECA 252 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 118 OF 2018

W KARANJA, J MOHAMMED & AO MUCHELULE, JJA

MARCH 8, 2024

BETWEEN

ELIUD KINYUA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Meru (D.S. Majanja, J.) dated 16th October 2018 in HCCRA No. 75 of 2018)

JUDGMENT

1. The appellant, Eliud Kinyua, was on 22nd May 2018 convicted by the learned Resident Magistrate at Nkubu of rape contrary to sections 3(1) and 3(3) of the *Sexual Offences Act* whose particulars were that on 20th April 2016 in Imenti South Sub-County within Meru County he intentionally and unlawfully caused his penis to penetrate the vagina of L.W. "a person with mental disability". He was sentenced to serve 10 years in jail. Being dissatisfied with the conviction and sentence, he appealed to the High Court at Meru. The appeal was heard by the learned D.S. Majanja, J. who on 16th October 2018 found it without any merit, and dismissed it.

2. The appellant has come before us on second appeal. His complaint as contained in the Memorandum of Appeal had the following grounds:-

> " 1) That the learned Judge while addressing the appeal erred in law and facts by upholding the conviction of the appellant when the charge and their particulars were not proved beyond reasonable doubt as required in a criminal trial.

2. That the learned Judge while addressing the appeal erred in law and facts by relying on uncorroborated evidence of witnesses to convict and sentence the appellant.

3. That the learned Judge while addressing the appeal erred in law and facts by failing to interrogate the available medical evidence which exonerated the appellant.

4. That the learned Judge while addressing the appeal erred in law and facts in failing to acquit the appellant for lack of any medical evidence to prove the complainant/victim was of mental disability and lacked the capacity to consent or that there was any act of rape or indecent act.

5. That the learned Judge while addressing the appeal erred in law and facts by failing to ensure all the ingredients of the charge were proved beyond reasonable doubt and therefore came up with the wrong decision."

3. The evidence on which the appellant was convicted was that L.W. (PW 1) was aged twenty-seven (27) years old and was not mentally stable, but on treatment. She had a child. PW1's mother was R.W. (PW 2). They lived in separate houses but in the same plot as the appellant whom they knew well. It was normal for PW 2 to lock PW 1's door from outside to prevent her from escaping at night. During this night PW 2 had not locked PW 1's door. PW 1 was woken up when the door was opened. She thought it was her mother coming in, but found out it was the appellant. The appellant held her and took her to his house where he undressed her and begun to have sexual intercourse with her, while she protested by screaming. PW 2 heard the screams and also heard a radio with loud volume coming from the appellant's house which was locked from inside. On peeping through the appellant's window, she saw him on top of PW 1 who was naked in bed, lying on her back. PW 2 screamed and neighbours came. She contacted police who came. The appellant refused to open the door. Police forced him to open the door. They found that he had sexually known PW 1. He was arrested, and PW 1 was taken to Kanyakine District Hospital for medical examination and treatment. Clinical Officer Seberina Kaimatheri (PW 3) noted that PW 1's hymen was absent but she had no injury on her genitalia. PW 3 completed the P3 form to that effect and the same was produced in court as exhibit.

4. The appellant's defence was sworn. His case was that he returned at 11.00 pm from his work as a mechanic and found the plot gate locked. He jumped over the gate and entered his home. The landlady called the police who came and knocked his door. He opened for them and they arrested him. He denied committing the offence. He did not call any witnesses.

5. The trial court considered the evidence and concluded that the prosecution witnesses had told the truth, and that the appellant's defence was a mere denial and an afterthought. It was found that the prosecution had established beyond reasonable doubt that the appellant had sexually penetrated PW1, using force. The learned Judge agreed with the findings of the trial court.

6. During the hearing of this appeal, learned counsel Mr. Gikunda Anampiu represented the appellant while learned counsel Ms. Nandwa appeared for the State. Each side had filed written submissions on which it relied.

7. Making reference to the decisions in *Chila v R*. [1967]EA 722, *Margaret v R* [1967]eKLR and *R v Charap Arap Kinei & another* (1936) 3 EACA 124, learned counsel for the appellant submitted that the medical evidence called had not corroborated PW1's testimony that there was an act of sexual intercourse between her and the appellant; that penetration had not been established. It was further

argued that the mental capacity of PW 1 had not been proved. On the issue of sentence, learned counsel urged us to set aside sentence after quashing the conviction.

8. According to learned counsel Ms. Nandwa, the prosecution had proved its case beyond reasonable doubt; that PW 1's evidence had been corroborated by that of PW 2; and that there was no consent as PW 1 had been dragged by the appellant to his house. Regarding the argument by the appellant's counsel that the medical evidence had not supported penetration, it was learned counsel's submission that such medical evidence was not necessary given what PW 1 and PW 2 had told the trial court. Reference was made to the decision in *AML v Republic* [2012]eKLR. Regarding sentence, the State's position was that the 10 years that were meted out was lenient given that the appellant had taken advantage of PW 1's mental condition.

9. We have considered this appeal and the rival submissions. Our jurisdiction under section 361 of the *Criminal Procedure Code* is limited to the consideration of issues of law only. We will only interfere with the concurrent findings of fact by the two courts below if it is shown that the findings were not based on evidence or were based on misapprehension of the evidence or that it is demonstrated that no reasonable tribunal could have reached that conclusion (See *M'Riungu v Republic* [1983]KLR 453). Put differently, the appellant has to show that the learned Judge erred in law in that he had not treated the evidence as a whole to that fresh and exhaustive scrutiny which he (the appellant) was entitled to expect, and, as a result of the error, affirmed the conviction resting on evidence which, had it been duly reviewed, must have been found to be so defective as to render the conviction manifestly unsafe (see *Pandya v Republic* [1957] EA 336).

10. According to the record, the appellant admitted that Police found him in his house. They knocked his door for him to open. That is how he came to be arrested. The evidence of PW 2 was that, following the screams of PW 1, she peeped through the window to the appellant's house and saw PW 1 naked in bed while facing up. When police came they threatened to break the door if he did not open. He opened. This is what PW 1 told the trial court:-

> " I heard the door being opened. I thought it was mother I went to see who had come in. I then saw it was the accused he held me and took me to his house..... I was weak and could not defend myself. His house is next to mine he took me to his house locked me inside, removed my clothes he started to rape me had had and removed his clothes. By rape I mean he had sex with me by force I screamed. My mother heard the screams..... the police came accused opened the door he was arrested and I was taken to hospital that night..... "

11. This is the evidence that the learned Judge received and, after considering the appellant's denial in sworn defence, accepted the prosecution version as contained in the evidence of PW 1 and PW 2. We have no reason to depart from the learned Judge's findings regarding the incident. PW 1 may have been a mental patient on treatment, but the learned Judge considered what PW 2 had stated: that PW 1 was on medication and had her lucid moments. The learned Judge proceeded as follows:-

> " During the proceedings there was no indication that PW 1 was unable to testify or answer any questions put to her."

It was also noted that there was no suggestion or indication by the appellant that he had been framed by either PW 1 or PW 2. They were his neighbours and there was no evidence of any disagreement.

12. It was the submission by the appellant's counsel that the evidence of PW 3 had not corroborated PW 1's evidence that she had been penetrated; that she had no lacerations or injuries to her genitalia. We agree with the learned Judge that the absence of medical evidence to support the fact of penetration

is not decisive as this can be proved by the oral evidence of the victim or by circumstantial evidence (see *Kassim Ali v Republic*, MSA Crim. Appeal No. 894 of 2005). Given what PW 1 and PW 2 told the trial court, the learned Judge correctly found that the appellant had penetrated PW 1 and that she had not provided consent. There was lack of consent and that was why she screamed, seeking help. We find that the appellant's conviction on the offence was based on cogent and overwhelming evidence. We dismiss the appeal against the conviction.

13. Regarding sentence, the trial magistrate ordered the appellant to serve ten (10) years in jail. The learned Judge pointed out that under section 3(3) of the *Sexual Offence's Act*, this was the minimum penalty provided by the law. He affirmed it. The appellant's grounds of appeal and the written submissions did not fault the sentence. We say no more, except to reiterate that, usually, sentence is the discretion of the trial court and that the exercise of that discretion has to be faulted before there can be interference.

14. In conclusion, therefore, we dismiss the appeal in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH, 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR