Kemboi v Republic (Criminal Appeal 63 of 2017)
[2024] KECA 818 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KECA 818 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 63 OF 2017

FA OCHIENG, GWN MACHARIA & WK KORIR, JJA

JULY 12, 2024

BETWEEN

KENNEDY KIBET KEMBOI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the Judgment of the High Court of Kenya at Nakuru (M. Odero, & J. Mulwa, J.) dated 16th December 2015 in HCCRA No. 293 OF 2010)

JUDGMENT

1. The appellant was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the offence were that; on 5th June 2010 at Stopat area in the then Nakuru District of the then Rift Valley Province, the appellant being armed with an offensive weapon, namely, a knife, robbed E. C., (name redacted), of one sack of green vegetables/Sukuma wiki valued at Kshs. 400 and cash, Kshs. 100 all totaling to Kshs. 500, and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the said E. C.

2. On count two, the appellant was charged with the offence of rape contrary to Section 3(1)(a)(b) as read with Section 3(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that; on 5th June 2010 at the then Nakuru District of the then Rift Valley Province, the appellant intentionally and unlawfully caused his genital organ, penis, to penetrate the genital organ, vagina, of E.C., without her consent.

3. In the alternative to count 2, the appellant was charged with the offence of committing an indecent act with an adult contrary to Section 11A of the *Sexual Offences Act* No. 3 of 2006.

4. The appellant denied the charges and was thereafter put on trial.

After the trial, the appellant was found guilty of the main offence of robbery with violence and the alternative charge of an indecent act with an adult. He was accordingly convicted and sentenced to death on the first count but was discharged on the alternative charge under Section 35 of the Penal Code.

5. The prosecution case was as follows: on the material day, the complainant boarded a matatu to Mangu town where she bought a supply of sukuma wiki and spinach to sell. At around 6:00 pm after she had waited for a matatu back to Mogotio in vain, she decided to move to a different stage. She then noticed a man, (the appellant), across the road who started following her, and eventually crossed the road and greeted her and they engaged in a conversation.

6. It turned out that the appellant was also waiting for transport to Mogotio. He offered to carry her load and as they walked, it soon became dark. When they got to a place where there were blue gum trees, the appellant pounced on her, held her by the neck and strangled her. When he saw a vehicle coming, he pulled her behind the tree and threatened to kill her. He demanded money and she gave him the Kshs. 100 which she had.

7. The appellant then ripped off her clothes in an attempt to rape her, but he was not able to because he could not get an erection. The appellant slapped the complainant severally and demanded that she caress his penis to give him an erection but it all failed. The complainant then ran, abandoning her bag of vegetables by the roadside, and hid in a wheat farm. She then started walking towards Kabarak. At around 10:00 pm, PW4 who was riding a motorcycle spotted her and took her to his home. She reported the incident at Menengai police station the following day. She described her assailant as tall and a little bit dark, with long hair. He was wearing light blue jeans trousers, and a cream jacket whose shoulders were dirty. One of the police officers stated that the description fits someone he knew. The complainant was issued with a P3 form and went to the hospital to be treated. The appellant was later arrested and charged.

8. PW2 was the clinical officer who examined the complainant. She observed that the complainant's dress and panty were torn and dirty. The complainant also had bruises on her private parts and all over her body.

9. PW4 was riding his motorcycle at around 10:00 pm when he came across the complainant in a torn blue dress. He assisted her and took her to his home.

10. Put to his defence, the appellant in his sworn testimony denied the charges. He told the court that he did not know why he was arrested and on what charges.

11. However, after the learned trial magistrate gave due consideration to the evidence adduced, she convicted the appellant.

12. Aggrieved, the appellant appealed to the High Court on the grounds that: he was not given witness statements, he was ill during the trial, there was no proper identification, lack of sufficient evidence, and contradictory evidence.

13. The learned Judges found the appellant's claim that he had not been supplied with witness statements to be an afterthought as he had not at any given time during the trial informed the Court that he had not been provided with the said statements. He had informed the court that he was ready to proceed with the hearing when the matter was first set down for hearing, and when the complainant was stepped down to allow for the prosecution to obtain exhibits, the appellant still did not raise the issue of statements.

14. The learned Judges observed that on 5th July 2010, the appellant informed the court that he was ill. However, he was overruled by the trial magistrate and the matter was directed to proceed to a hearing as the appellant had indicated to the court earlier at 9:30 am that he was ready to proceed and the matter was allocated a hearing time at 2:45 pm. The learned Judges found no reason to doubt the trial magistrate's observations that the appellant's allegation of illness was an afterthought and a tactic to waste time. They found the appellant not to be genuine. The learned Judges also held that the appellant did not suffer prejudice as the complainant was stood down and the appellant did not cross- examine her on that day.

15. The learned Judges also held that the complainant had told the Court that the appellant himself had told her that his name was Ken Kemboi. The learned Judges further held that since the complainant had spent a considerable amount of time with her assailant, there was no possibility of mistaken identity.

16. The learned Judges further held that there was no doubt that the complainant had sustained injuries in the course of the robbery as per the P3 form and the evidence of PW2.

17. The learned Judges held that the ingredients of Section 296(2) were present as the complainant had been assaulted, terrorized, and sexually assaulted, in the process of being robbed.

18. The learned Judges also held that the appellant's defence had been considered and dismissed as a mere denial.

19. As the question of penetration was not clearly alleged or proven, the learned Judges held that the appellant's actions of removing his trousers to expose himself and forcing the complainant to caress his penis demonstrated indecent assault.

20. Consequently, the learned Judges upheld the appellant's conviction and the sentence.

21. Dissatisfied with the judgment on both conviction and sentence, the appellant lodged this appeal in which he raised the following grounds:

    a. The learned Judges erred by relying on the evidence of dock identification.

    b. The learned Judges erred by failing to appreciate that the appellant's rights were infringed when he was compelled to proceed with the hearing while he was unwell.

    c. The learned Judges erred by failing to appreciate that the appellant was not issued with witness statements.

    d. The learned Judges erred in upholding the conviction when the trial court had misdirected itself and dismissed the appellant's defence without any cogent reasons.

    e. The learned Judges erred by failing to hold that the appellant had been convicted on the weakness of his defence and not on the strength of the prosecution case.

22. When the appeal came up for hearing on 13th March 2024, Ms. Cherono, learned counsel appeared for the appellant whereas Mr. Omutelema, Assistant Deputy Director of Public Prosecutions appeared for the respondent. Counsel relied on their respective written submissions. Nevertheless, Mr. Omutelema made brief oral highlights.

23. In his written submissions, the appellant submitted he was not informed of his rights under Article 50(2)(g) & (h) of *the Constitution*, and this amounted to an unfair trial. He relied on the cases of David

Njoroge Macharia v Republic [2011] eKLR and Douglas Kinyua Njeru v Republic [2015] eKLR to buttress his submission that he was entitled to free legal representation.

24. Asserting that his identification was not supported by the evidence, the appellant submitted that where a suspect is arrested in the absence of the victim or witness, an identification parade ought to be mounted to test the accuracy of the identification. However, in this case the appellant was deliberately exposed to the identifying witness. He relied on the case of Douglas Kinyua Njeru v Republic, (supra), in submitting that identification parades are meant to test the correctness of a witness' identification of a suspect. He was of the view that since no identification parade was mounted, his identification was nothing more than dock identification.

25. The appellant further submitted that the failure to conduct an identification parade was in contravention of the Police Standing Orders under the *National Police Service Act*, which provides that a suspect should not be exposed to the witness prior to an identification parade.

26. The appellant pointed out that he was not given the opportunity to have his advocate or a friend present during the identification parade, thereby causing him substantial injustice. He also pointed out that there was no Form 156 filed by the police on the identification parade.

27. The appellant submitted that the investigating officer did not conduct proper investigations and only relied on the information and account of the complainant, which the appellant deemed false and inaccurate.

28. Opposing the appeal, Mr. Omutelema submitted that the appellant was seen by PW3 when he alighted at the stage where the offence was allegedly committed. Counsel further submitted that the 1st appellate Court properly considered the evidence of identification by a single witness. The complainant was robbed and raped at that stage. The complainant gave the details of the appellant, including the jacket he was wearing, and his name at the time of giving the report.

29. Counsel also pointed out that there were aggravating circumstances as the appellant knew that the complainant was in poor health, alone, and vulnerable. He sexually molested her and left her traumatized. He urged the court to grant a severe sentence.

30. Still contending that the appellant was properly identified at the scene of crime, the respondent submitted that the complainant first saw the appellant at 7:00 pm when conditions favoured identification. Further, the evidence of PW3 corroborated the complainant's evidence that the appellant was wearing a cream jacket.

31. The respondent submitted that since the appellant had been placed at the scene of the crime by PW3, who saw him alight from a vehicle at the Ravine stage, he was expected to explain his presence at the scene, failure to which a rebuttable presumption, that he had committed the crime, would be drawn under Section 111 of the *Evidence Act*.

32. The respondent further submitted that all the ingredients for the offence of robbery with violence were proved because vegetables worth Kshs. 400 and Kshs. 100 in wascash were stolen from the complainant, the appellant used violence on the complainant, and the appellant sexually molested the complainant.

33. The respondent was of the view that although the appellant was acquitted of rape, the offence was proved beyond reasonable doubt as there was partial penetration which could not be sustained due to the appellant's lack of an erection.

34. The respondent submitted that the appellant's defence was a mere denial, and it did not challenge the prosecution's evidence.

35. The respondent also submitted that the appellant's claim that his trial was not fair was an afterthought.

36. We have carefully considered the record of appeal, the submissions, the authorities cited, and the law. The issues for determination are whether or not the appellant was properly identified, whether or not the appellant was accorded a fair trial, whether or not the case against the appellant was proved beyond reasonable doubt, and whether or not the sentence meted out against the appellant was lawful.

37. This being a second appeal, we are legally constrained to consider only issues of law raised in the appeal and not to consider matters of fact that had been determined by the trial court and the appellate court on the first appeal. This is by dint of Section 361(1) (a) of the Criminal Procedure Code. This position was reiterated in the case of M'Riungu v Republic [1983] KLR 455 where the court stated thus:

> " Where the right of appeal is confined to the question of law, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the 1st appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision was bad in law."

38. It is common ground that although the complainant saw and spoke to her would-be attacker when they exchanged pleasantries at the stage, she did not know him prior to the incident. The appellant contended that the police relied on dock evidence and failed to conduct an identification parade, whereas the respondent was of the view that the two courts below properly relied on the evidence of a single identifying witness.

39. It is common ground that the complainant was the only witness who identified the appellant as her assailant. PW3 had seen the appellant alight from the vehicle she was in and identified him as someone she had previously arrested. When the complainant reported the incident to the police, PW3 immediately stated that she knew the appellant and that when he alighted from the vehicle while it was dark, he looked suspicious. Based on the complainant's description of her assailant, the name given and PW3's suspicion that he might be the person she had previously arrested, the police started looking for, and arrested the appellant. In the case of Mary Wanjiku Gichira v Republic, Criminal Appeal No 17 of 1998, this Court held that:

40. Similarly, in Sawe v Republic [2003] KLR 364, this Court held that:

> " Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

41. The Tanzania Court of Appeal in R *v Ally (Criminal Appeal No. 73 of 2002*) [2006] TZCA 71 that:

> " Suspicion, however grave, is not a basis for a conviction in a criminal trial. The appellant ought to have been given the benefit of the doubt and acquitted."

42. It follows, therefore, that however strongly PW3 suspected that the person described by the complainant was the appellant, she ought to have investigated the matter further before arresting the appellant, or at least mounted an identification parade. Identification parades are not conducted in respect of people who are recognized but in respect of strangers, whom witnesses claim that given a chance, they can be able to identify as the perpetrator. In this instance, the appellant was a stranger to the complainant.

43. When the appellant was arrested, PW3 proceeded to point him out to the complainant who in turn identified him as her assailant. No identification parade was conducted in this instance. The appellant was simply pointed out to the complainant. In this instance, there was no need for an identification parade to be conducted as the same had been rendered moot. This Court quoted with approval the case of Githinji v Republic [1970] E.A 231 in stating that:

> " Once a witness knows who the suspect is, an identification parade is valueless."

44. In the case of Ajode Vs Republic [2004] 2 KLR 81, this Court stated thus:

> " Once a witness has been able to see the suspect before the parade is held, then he will be doing no more than demonstrating his recognition of the suspect and not identifying the suspect. That indeed is the reason why no identification parade is required in cases of recognition."

45. In the circumstances, we find that the evidence of the complainant had no probative value for we do not know whether the purported identification was genuine or not. We cannot be able to test her truthfulness and accuracy of memory. Identification parades are conducted to verify a witness's identification of a suspect. This was emphasized in Njihia v Republic [1986] KLR where the Court held that:

> " ...If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course, if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime."

46. The fundamental aim of eyewitness identification evidence is reliably to convict the guilty and to protect the innocent. Testimony from eyewitnesses is crucial in contested cases. Memory is fragile and malleable and can produce unreliable yet convincing evidence. Mistaken witnesses can be honest and compelling, so there is a high risk of wrongful conviction in eyewitness identification cases, potentially leading to injustices.

47. Our justice system is committed to ensuring that innocent individuals are not wrongfully convicted. To achieve this, Courts must carefully assess identification testimony, especially when the only evidence against the accused comes from a single witness. The focus of the law is on the quality, rather than the quantity, of the testimony presented. A guilty verdict can only be given if the evidence is of high enough quality to prove beyond a reasonable doubt that all aspects of the crime have been established and that the identification of the accused is both truthful and accurate.

48. In the case of Charles O. Maitanyi v Republic [1988-92] 2 KAR 75, the Court noted the importance of thoroughly testing the evidence of a single witness regarding identification. The absence of corroboration should be treated with great care. In the case of *Kariuki Njiru & 7 Others v Republic, Criminal Appeal No. 6 of 2001* (Unreported), the Court emphasized that evidence related to identification must be carefully scrutinized. The Court should only accept and act upon identification

evidence if it is satisfied that the identification is positive and free from the possibility of error. In the case of R. v Turnbull and Others [1976] 3 All ER 549 Lord Widgery CJ stated as follows:

> " Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. 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 press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize

49. This Court in the case of *Chumba v Republic (Criminal Appeal 34 of 2019)* [2023] KECA 1342 (KLR) (10 November 2023) (Judgment) addressed itself to the issue of identification parades where the victim had already seen his assailant as follows:

> " The complainant informed the police that he was accosted and robbed by two men on a motor cycle who were armed with a knife. Four days later, the complainant saw the appellant at Emgwen hotel with his phone. He was able to identify his phone. When the appellant was arrested, the police conducted an identification parade and the complainant was able to identify the appellant in the parade. However, since the complainant had already seen the appellant prior to the identification parade, the said parade was an exercise in futility. We therefore find that the identification of the appellant at the parade was not proper."

50. In the circumstances, we find that the appellant was not properly identified as no identification parade, which was necessary in the circumstances of the case, was conducted. His arrest was based on suspicion of PW3, and the fact that the police had previously arrested the appellant for other offences.

51. In the result, we find the appeal herein to be meritorious. We accordingly allow the same. The conviction is quashed, and the sentence is set aside. We order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 12TH DAY OF JULY, 2024.

F. OCHIENG

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JUDGE OF APPEAL

G.W. NGENYE – MACHARIA

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR