Mukhwana v Republic (Criminal Appeal E007 of 2022)
[2024] KECA 1136 (KLR) (29 August 2024) (Judgment)

Neutral citation: [2024] KECA 1136 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL E007 OF 2022

MA WARSAME, LA ACHODE & WK KORIR, JJA

AUGUST 29, 2024

BETWEEN

JOHN WANYONYI MUKHWANA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court at Kitale (Chemitei J) dated 25th January, 2017 in Criminal Appeal No. 45 of 2015)

JUDGMENT

1. This is the second appeal filed by the appellant, John Wanyonyi Mukhwana against his conviction and sentence. He was charged with a co-accused, Dennis Wanjala Nakitare in Kitale Chief Magistrate's Court with one count of gang rape contrary to Section 10 of the *Sexual Offences Act* No. 3 of 2006 (SOA). In the alternative, they were charged with committing an indecent act with an adult contrary to Section 11(A) SOA. The Appellant faced a second count of stealing contrary to Section 275 of the Penal Code and in the alternative, handling stolen property contrary to Section 322(1) of the Penal Code.

2. The particulars in count 1 were that on the night of 5th and 6th June 2014, in Trans-Nzoia County, the appellant in association with another, intentionally and unlawfully caused his penis to penetrate the genital organ, vagina, of SW without her consent. In the alternative, it was alleged that on the same night and at the same place he intentionally caused contact between his penis and S. W's vagina without her consent.

3. The particulars of the second count were that during the same night and at the same place, he stole a cell phone make Nokia X- 2, belonging to SW In the alternative, it was alleged that he dishonestly received, or retained the cell phone knowing, or having reason to believe it to be stolen property.

4. The appellant pleaded not guilty to both counts leading to a full trial. The prosecution's case was that the complainant who was 23 years old when she testified, was a resident of Kiminini in Trans-Nzoia County and a student of [Particulars Withheld] College, Kitale Campus. On 5th June 2014 at about 7:00 pm, she boarded a motorcycle in Kitale town as a fare paying pillion passenger to go to her boyfriend's home at Lukhuma. The rider was a stranger to her. On the way the rider stopped within a residential estate, entered a house and re-emerged with another man.

5. It was already dark and the second man had a flash light. The two men ordered the complainant to co-operate with them and dragged her into a one-roomed house amid her protests. They pushed her onto a bed and the motorcyclist undressed her and penetrated her vagina with his penis, as the second attacker continued flashing the torch. The motorcyclist raped her for about an hour and when he was done he told the second man that he was going to his home in Suam. The complainant noticed that her phone make Nokia x-2 was missing and asked the departing man for it, but he denied taking it and left.

6. The second man detained the complainant and also raped her for another hour. She managed to put on her clothes and escape from the house at about 5.00 am. She ran next door and found a woman (PW2), who took her to the village elder to get help. PW2 identified the house where the complainant said she had been detained as the home of her neighbour Dennis and that she had seen him standing at his door that morning. The incident was reported to the local administration Police. The police tasked one of Dennis's neighbours, (PW3) to scout the area for him. Later that morning Dennis was sighted at Namwanga Trading Centre. The police were alerted and they arrested him.

7. Dennis supplied the name of the motorcyclist who brought the complainant to his house and another motorcyclist led the police to his home in a place called Bikeke the same day. He was found and arrested. The complainant positively identified him as the motorcyclist who had carried her to Dennis's home and raped her first. That man of infamy is the appellant in this appeal. His wife who was at home with him was found in possession of the complainant's missing cell-phone. Her Sim Card had been removed and replaced with another but she identified the cell- phone.

8. The complainant was treated on 6th June 2014 at Kitale Sub County Hospital and on 9th June 2014 a medical report was prepared in that regard. Her hymen was found to have an old tear and there was no vaginal discharge noted. The appellant and his co accused were charged as set out above. The medical report and the recovered cell-phone were produced in evidence.

9. When placed on his defence at the close of the prosecution case, the appellant gave an unsworn statement and confirmed that he was arrested on 6th June 2014 at his home in Bikeke. He however, maintained his denial of the charges. The learned Chief Magistrate Hon. J. M. Nang'ea, found that the prosecution had proved the guilt of the appellant beyond reasonable doubt on both counts and convicted him accordingly. He was sentenced to 18 years imprisonment on count 1 and 2 years on count 2. The sentences were ordered to run concurrently.

10. This judgment displeased the appellant and he filed an appeal against both conviction and the sentence in the High Court at Kitale, raising grounds that: he was not properly identified because it was dark; the medical report was inconclusive; the Prosecution evidence was fabricated and contradictory; the prosecution failed to prove that the accused persons had a common intention to gang rape the complainant; the prosecution did not prove the case beyond reasonable doubt; and, his alibi defence was not considered.

11. Still disenchanted by the outcome of his first appeal, the appellant lodged this second appeal. The grounds in the amended memorandum of appeal can be collapsed into one ground. That is, that the sentence meted upon him was harsh and excessive. The appellant invoked Article 50 (2)(b) and (q) and

Article 165 (3)(b) of *the Constitution* to pray for a lenient sentence and for his further mitigation to be considered.

12. The appellant who was self-represented filed undated submissions and stating that: the sentence was not commensurate with the offence and the learned magistrate failed to exercise his discretionary powers during sentencing; that he is remorseful having served 10 years out of the sentence and thus the court should be lenient in considering the sentence; that in further mitigation, he was a first offender and was intoxicated when he committed the offence and he has a family that depends on him.

13. In opposition, the learned State counsel, M/s Jacklyne Kiptoo, Senior Assistant Director of Public Prosecution filed submission dated 19th June 2024 for the respondent. Relying on *Mwita v Woodventure (K Ltd & anor (Civil Appeal 58 of 2017*)

    (222) KECA 28 (KLR, she urged that this being a Court of second appeal it is confined to determining matters of law only, unless the court below failed to determine, or erred in determining certain matters of fact. The appellant's grounds in the memorandum of appeal are generally matters of fact. Further that having not mitigated in the trial court after he was found guilty, the mitigation offered now is an aforethought and should be dismissed. Indeed, the appeal is unmerited and should be dismissed in its entirety.

14. We have considered the grounds of appeal, the rival submissions and the applicable law. This is a second appeal and our mandate is circumscribed by Section 361 of the Criminal Procedure Code to consideration of matters of law only. In Karinga v Republic [1982] KLR 2013 this Court stated as follows:

> " A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did"

15. The singular ground of this appeal is the severity of the sentence imposed upon the Appellant and he has offered mitigation in the hope that this would cause this Court to review the sentence downwards. Under Section 361(1)(a) of the Criminal Procedure Code, severity of sentence is a matter of fact. It is therefore, not a legal issue open for consideration by this Court on second appeal unless the trial court acted in error. We note no such error in this case, that would invite our intervention to interfere with a lawful sentence imposed by the trial court and upheld by the court of first appeal.

16. Consequently, we find that the appeal is lacking in merit and dismiss it in its entirety. Both the conviction and sentence are upheld.

    It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF AUGUST, 2024.

M. WARSAME

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.