Ouma v Republic (Criminal Appeal 80 of 2021)
[2024] KECA 1563 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KECA 1563 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 80 OF 2021

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

NOVEMBER 8, 2024

BETWEEN

RODGERS OUMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Garsen (R. Nyakundi, J.) delivered on 30th July, 2021 in High Court Criminal Appeal No. 8 of 2020)

JUDGMENT

1. This is a second appeal from the Judgment of the trial Magistrates court, where the appellant, Rodgers Ouma, was charged with two counts under the *Sexual Offences Act*.

2. In count 1, he was charged with the offence of rape contrary to Section 3(1) (a), Section 3(1) (c) and Section 3(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that, on 8th December 2019 around 2030 hours in his dwelling house within the Lamu Administration Police camp in Langoni Location of Lamu West Sub-County within Lamu County, he intentionally and unlawfully caused his penis to penetrate the vagina of RA, PW1, the complainant by use of intimidation or threats.

3. In the alternative Count, he was charged with the offence of committing an indecent act with an adult contrary to section 11A of the *Sexual Offences Act*. The particulars were that on the same day and place, he intentionally and unlawfully caused his penis to touch the vagina of RA, PW1, against her will.

4. In count II, he was charged with the offence of abuse of position of authority contrary to Section 24(2) (b) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 8th December 2019 in his dwelling house within the Lamu Administration Police residences in Langoni Location of Lamu West Sub-County within Lamu County, he took advantage of his position of authority as a police officer and

had sexual intercourse with RA (PW1) in his dwelling house situated within Lamu Administration Police Lines within the limits of the station to which he was appointed.

5. The appellant pleaded not guilty and the matter proceeded to hearing, where the Prosecution called a total of 6 witnesses.

6. On 8th December 2019 at 7 p.m, PW1, the complainant, went to the police station where she made a report against her husband who wanted her to terminate her pregnancy. She was unable to leave the police station because of heavy pounding rain. As she was waiting for the rain to subside, she met the appellant, a police officer, who lured her with the promise of following up her report and offered her shelter from the rain in his house. She accepted the offer and, on arrival at his house, he started being agitated by her communication with her male friend on phone whereupon he reached for a knife in his house and brandished it at her and imputed that he wanted to have sex with her. Sensing danger, she tried to phone a friend, Yusuf Mahmud, PW2, but the appellant grabbed her phone. He then tore her dera, found a condom which he wore and then inserted his penis into her vagina and raped her. When he was finished, on the pretext that she needed water to drink, she managed to run out of the house, leaving her brown bui bui, black boots, handbag, house keys, phone and pink panty behind.

7. She went to Yusuf's house, and he accompanied her back to the appellant's house where she recovered her house keys and phone, but the appellant refused to hand over the other items. She thereafter reported the incident to the OCS Lamu who referred her to the DCIO, whereupon she was taken to King Fahd Hospital where she was examined and a P3 form filled. During the trial, she identified her bui bui, pink panty, shoes and bag that were left in the appellant's house.

8. On the material night, Yusuf received a distress message from PW1. When he attempted to call her, a male voice answered. He also heard what appeared to be a tense exchange between PW1 and the male person. Soon after, PW1 entered his house in a torn dera wrapped in curtains, and she was crying. She sobbed all night and, in the morning, PW1 led him to a house in the Administration Police camp where he retrieved a bunch of keys and a phone from a man who was living in the house; he identified the man as the appellant.

9. Cpl. David Odero, PW3, the investigating officer was assigned the investigation of a rape case, where the complainant reported that the perpetrator was a serving police officer. He confirmed from the documentation that indeed the appellant was a serving officer. Accompanied by SSgt. Christopher Kiptoo, PW4, they traced the appellant to his house where the appellant handed over a pink panty, pair of black shoes, a black bag and a brown bui bui after which an inventory was prepared. Cpl. Odero established from investigations that PW1 went to the police station to file a report against her husband, and that it was there that she met the appellant who lured her to his house and raped her.

10. ASP James Kariuki, PW5, confirmed that the appellant was under his direct command and that he was appointed as an Administration Police Constable. He tendered documentation in support of the appellant's official position.

11. The Clinical Officer, Madi Sheyumbe Munyali, PW6, examined PW1 on 10th December 2019. She found that the complainant had a history of rape by a person known to her, which occurred on 8th December 2019. The examination revealed that PW1 had tenderness on the lower abdomen, a tender vagina and a brown discharge from the vagina.

12. When placed on his defence, the appellant denied the charges. He stated that he saw PW1 on the material day, and that she insisted on walking with him; that she entered his house and, while he was looking for his phone, she walked out leaving her bag and clothes in his house; that a man came the next day to collect the items which he handed over, but that the lady went and made a false report against

him for which he was arrested and charged. On cross- examination, he admitted that he hosted PW1 in his house, but denied raping her.

13. The trial Magistrate, upon considering the evidence, convicted the appellant on both counts of rape and abuse of office and sentenced him to serve life imprisonment.

14. Aggrieved, the appellant filed an appeal to the High Court which considered his appeal and upheld the conviction, but substituted the sentence from life imprisonment to 25 years' imprisonment for Count I and 10 years for Count II, the sentences to be served concurrently.

15. Dissatisfied, the appellant has filed an appeal to this Court on the grounds that the learned Judge was in error in law in equating penetration to rape; in failing to appreciate that the prosecution's case was replete with numerous contradictions which were not reconciled or corroborated; that the case was constructed from poor and shoddy investigations; that the conviction was based on questionable documentary evidence; that the burden of proof erroneously shifted to the appellant; and that the sentence imposed was both harsh and excessive since it was applied without consideration of the appellant's mitigation, the facts and circumstances.

16. The appellant filed written submissions. When the appeal came up for hearing on a virtual platform, the appellant appeared in person and stated that he would entirely rely on his written submissions. It was submitted that the Prosecution did not prove the case to the required standards, and that the complainant's evidence was inconsistent on the manner in which the alleged offence occurred; and that the complainant remained in the appellant's house until day break and did not escape after the ordeal.

17. The appellant further submitted that the medical examination conducted did not reveal that the pain on palpitation, brownish discharge and a tenderness on the vagina observed was caused by penile penetration by the appellant and was therefore inconclusive; that the complainant did not positively identify him through recognition or identification as, no description of her assailant was indicated in the Occurrence Book, and that the charges against him were influenced by senior police officers.

18. It was also submitted that he was subjected to double jeopardy as he was charged with both the offence of rape and that of sexual offences relating to a position of authority and persons in a position of trust, which was in contravention of Articles 50 and 25 of the Constitution.

19. On the inconsistencies in the complainant's evidence, the appellant asserted that her evidence remained largely circumstantial and was not corroborated, and neither did it draw any nexus that linked the appellant to the alleged offence(s); that further, the prosecution failed to avail any proof that the alleged residence was in the exclusive occupation by the appellant. It was also submitted that the alleged inventory did not indicate the residence number and that, therefore, it could not be stated with certainty that the complainant's personal items were recovered from the appellant's residence.

20. On her part, learned Prosecution counsel, Ms. Nyawinda for the State, also filed written submissions and submitted that the case against the appellant was proved to the required standards; that there was intentional and unlawful penetration of the genital organ of one person by another; that the absence of consent was established by the complainant, who testified that the appellant forcefully removed her bui bui and forced himself on her several times during the night, and that the identification of the perpetrator was properly established by the complainant.

21. Counsel submitted that the complainant's evidence was corroborated by the medical evidence of PW6 which showed tenderness to the lower abdomen, painful genitalia on palpation and tender vagina with brownish discharge, and that the injuries sustained corroborated the complainant's evidence and proved penetration and that the victim's own testimony, the medical report and the circumstantial evidence all pointed to the appellant as having committed the barbaric offence.

22. It was further submitted on Count II that the appellant failed to explain what prompted the complainant to hurriedly flee from his house in a torn dera, leaving behind her panty, bui bui and other belongings; that this proved that penetration occurred without the complainant's consent and through the use of threats, intimidation and force; and therefore the offence of abuse of a position of authority contrary to Section 24(2) (b) of the *Sexual Offences Act* was properly established; that the evidence disclosed that the appellant was an active serving administration police officer based at Lamu Police station who had lured the complainant into his house and raped her instead of protecting and upholding the rule of law, and that he abused and misused his powers.

23. On the sentence, counsel submitted that the sentence of 25 years and 10 years meted against the appellant are not excessive and harsh in the circumstances and that, in any case, both were to run concurrently

24. The mandate of this court on a second appeal, as is the one before this court, is confined to consideration of matters of law only by dint of section 361 of the Criminal Procedure Code. In Karingo vs Republic [1982] KLR 213, the Court stated:

> 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."

25. In the case of Adan Muraguri Mungara vs Republic, Cr. No. 347 of 2007 (Nyeri), this Court set out the circumstances under which it will disturb concurrent findings of fact by the trial court and the first appellate court in the following terms:

> As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."

26. In view of the specific mandate of this Court on second appeals, the issues that arise for consideration are: i) whether rape was proved; ii) whether the prosecution's case was inconsistent and contradictory; iii) whether the burden of proof was shifted to the appellant; iv) whether the appellant suffered double jeopardy; and v) whether the sentence imposed was harsh and excessive because the appellant's mitigations, facts and circumstances were not taken into account.

27. Beginning with the first issue, the appellant was charged with Count I for the offence of rape. The statutory definition of rape is set out in Section 3 (1) of the *Sexual Offences Act* which provides:

> (1 A person commits the offence termed rape if—
>
> a. he or she intentionally and unlawfully commits an act which causes penetration with his or her 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."

28. In essence, under Section 3 (1), the main ingredients for the offence of rape that the prosecution must prove are: i) the intentional and unlawful penetration of the genital organ of one person by another, ii) the absence of consent; and iii) the perpetrator's identity.

29. On the element of intentional and unlawful penetration, the complainant narrated how the appellant tore her dera and raped her. Her evidence was corroborated by the medical report and the evidence of PW6, the clinical officer.

30. In addition, under Section 124 of the *Evidence Act*, it is provided that:

> Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> > Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

31. In the case of Kassim Ali vs Republic [2006] eKLR, this Court stated:

> ... the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

32. In this regard, the trial Magistrate was satisfied that penetration was proved. To the required standard.

33. For its part, the High Court stated:

> The evidence on record is direct cogent evidence that is properly corroborated, and I am satisfied that the unlawful act did occur. I am also satisfied that the court properly relied on section 124 of the *Evidence Act*, though it did not warn itself of the evidence of a single identifying witness. I see no reason to doubt the evidence of PW1 because the chain of events as narrated by her, the persons who she reported to, was consistent as indicated by the testimonies of (PW2) and (P6) and I find that (PW1) was indeed truthful".

34. Given the foregoing conclusions, we have no reason to depart from the concurrent findings of fact by the two courts below that penetration was indeed proved.

35. With regard to the lack of consent, in the case of Republic vs Oyier [1985] KLR 353, this Court held that:

> 1. The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.
>
> 2. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.
>
> 3. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards

committed by force or against her will; nor is it any excuse that she consented after the fact."

36. The complainant in this case stated that, on reaching the appellant's house, he became angry and pulled out a knife and threatened to stab her if she did not comply with his demands. There was also evidence that he tore her dera, which PW3 confirmed. This evidence sufficiently proved that the complainant did not in any way consent to the appellant's sexual acts. The fact that she fled the scene leaving her possessions when she found an opportunity to do so also pointed to the fact that she was an unwilling victim of a heinous crime. Based on this evidence, it cannot be doubted that the complainant's consent was unequivocally absent given the circumstances.

37. On the appellant's assertion that he was not properly identified, the evidence before the trial court would lead us to conclude otherwise. The complainant met the appellant at the police station when she went to file a report at 7.00 p.m. It was raining heavily and he offered her shelter in his home. They went into his house where he attacked and raped her.

38. In the case of R vs Turnbull and others (1976) 3 ALL ER 549. Lord Widgery J. had this to say on identification of the accused:

> First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be convincing one and that a number of such witness can all be mistaken. 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 impended in any way, as for example by passing traffic or 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 original observation and the reason for remembering the accused" How long elapsed between 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 the actual appearance."

39. The prosecution evidence shows that the complainant spent a reasonable amount of time with the appellant. She testified that she was with him at the police station, which was well lit, and that she was also able to see her assailant as he raped her in his house. Further, after she filed a report, her pink panty, pair of black boots, a black bag and a brown bui bui were retrieved by the appellant himself, by Cpl. Odera and SSGT Christopher Kiptoo, and an inventory prepared. In his defence, the appellant admitted that the complainant was in his house on the date of the alleged incident.

40. The prosecution having proved all the ingredients for the offence of rape, that is penetration of the complainant without her consent by the appellant who was properly identified, we are left in no doubt, as were the two courts below, that the offence was established to the required standard and that, therefore, the conviction was safe. We would add that, notwithstanding that the appellant alleges that the prosecution shifted the burden of proof, as this was not established, we dismiss the allegation.

41. With regard to Count II in respect of the offence of abuse of position of authority contrary to Section 24(2) (b) of the *Sexual Offences Act*, the appellant did not challenge the evidence adduced by the

Prosecution. However, he complained that he suffered double jeopardy because he was charged with the offence of rape under Count I and with abuse of position of authority under Count II of the same Act.

42. A review of the proceedings and the judgments of the courts below does not disclose that this issue was raised at any time. This Court when faced with a similar issue in the case of Alfayo Gombe Okello vs Republic [2010] eKLR held:

> ... the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."

43. In the case of AT vs Republic (Criminal Appeal 63 of 2022) [2023] KECA 1393 (KLR), this Court held that:

> The reason why this Court shies away from interfering with decisions of the trial court or the first appellate court on matters not raised before the said courts is that this Court deals with the appellant's grievances based on allegations of errors of omission or commission committed by the said courts. Where the issues being raised are not matters which were placed before the lower courts and therefore the said courts did not address their minds to them, it would be improper to interfere with their decisions when they had no chance of dealing with the same and no finding was made in respect thereof."

44. In the case of Saidinga vs Republic (Criminal Appeal 41 of 2016) [2024] KECA 383 (KLR) this Court also held that:

> We are of the considered opinion that this court sitting as a second appellate court can only entertain matters that were considered by the court being appealed from. An appeal can only lie where there has been a decision made by a lower court. If an issue was not brought up before the lower court, and therefore not determined, then any decision made by the appellate court would not be considered a judgment on an appeal."

45. In the circumstances, since the appellant failed to raise the complaint of double jeopardy before the lower courts, so that there is no determination from which he has appealed, he cannot now seek to have it determined so late in the day by this Court. Consequently, there being no foundation upon which to determine the issue, it is accordingly dismissed.

46. The appellant also raised the complaint that there were contradictions in the prosecution's evidence. Addressing the question of contradictions in the case of Erick Onyango Odeng' vs Republic [2014] eKLR, this Court citing with approval the Uganda Court of Appeal case of Twehangane Alfred vs. Uganda, Criminal Appeal No. 139 of 2001, [2003] UGCA, 6 observed:

> With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."

47. In the Court of Appeal of Nigeria in the case of David Ojeabuo vs Federal *Republic of Nigeria {2014} LPELR-22555(CA), Adamu JA; Ngolika JA; Orji- Abadua JA; & Abiru JA. Where the court stated that:

> Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

48. The contradictions pointed out by the appellant ranged from whether the complainant followed him or whether he followed her from the police station; whether or not she gave him her mobile phone number, or he obtained it from the Occurrence Book; and whether or not the complainant made a distress call to PW2 before or after she was raped.

49. In our view, the contradictions highlighted are minor in nature and do not go to the heart of the prosecution's case and, in any event, are curable under Section 392 of the Criminal Procedure Code. Nothing turns on them, and we find that this complaint is without merit.

50. When all the evidence is considered, we are satisfied that both the trial court and the High Court reached the concurrent findings that all the ingredients for the offence of rape was proved to the required standards. Our reanalysis of the evidence leads us to likewise conclude that the prosecution proved its case. We are also satisfied that the offence of abuse of office was also proved to the required standard, and as a consequence of which we find, as did both courts below, that the appellant was properly convicted for both the offence of rape and abuse of office and have no reason to interfere with the conviction by the trial court as upheld by the High Court.

60. With regard to the sentences imposed, and as stated above, by virtue of Section 361(1) of the Criminal Procedure Code, where appeals lie from subordinate courts, as in the case before us, this Court is explicitly barred from hearing matters of fact. The appellant's appeal on the severity of the sentence is a matter of fact which falls outside the purview of this Court's jurisdiction. See the Supreme Court decision in the case of Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR). We therefore decline the invitation to interfere with the sentence imposed by the 1st appellant court.

61. In view of the foregoing, the appeal against conviction and sentence is without merit and is accordingly dismissed in its entirety.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF NOVEMBER, 2024.

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR