Cheruiyot v Republic (Criminal Appeal 111 of 2019)
[2023] KECA 1481 (KLR) (8 December 2023) (Judgment)

Neutral citation: [2023] KECA 1481 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 111 OF 2019

F SICHALE, LA ACHODE & WK KORIR, JJA

DECEMBER 8, 2023

BETWEEN

JAMES CHERUIYOT ALIAS DAVID HASSAN MATHOYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Eldoret, (Kemei J), dated and delivered on 22nd November 2018 in HCCRA No 88 of 2017)

JUDGMENT

1. James Cheruiyot alias David Hassan Mathoya (the appellant herein), has preferred this second appeal challenging the dismissal of his first appeal by the High Court which he had lodged against his conviction and sentence that had been imposed by the Chief Magistrate's Court in Eldoret (Hon E. Kigen then resident magistrate), for offences of rape contrary to section 3 (1) (a) (c) as read with section 3 (3) of the *Sexual Offences Act* No 3 of 2006 and assault causing actual bodily harm contrary to section 251 of the *Penal Code* cap 63 of the Laws of Kenya.

2. The appellant faced an alternative charge of committing an indecent act with an adult contrary to section 11 (a) of the same Act.

3. The particulars in the main charge were that during the night of 7th and 8th day of October 2016, in Kesses sub-county within the Uasin Gishu County, he intentionally and unlawfully caused his penis to penetrate the vagina of IC without her consent by use of force and threats.

4. The particulars in the second count were that at the same day and place, he wilfully and unlawfully assaulted IC thereby occasioning her actual bodily harm.

5. The appellant denied the charges after which a full trial ensued with the State calling a total of 6 prosecution witnesses while the appellant gave a sworn statement and did not call any witnesses. In a

judgment delivered on August 20, 2017, Hon E Kigen found him guilty of the first and second counts and sentenced him to 30 and 2 years' imprisonment respectively, with an order that both sentences do run concurrently.

6. Being aggrieved with the aforesaid conviction and sentence, the appellant moved to the High Court on appeal and vide a judgment delivered on November 22, 2018, Kemei J, found the appeal to be devoid of merit and dismissed the same in its entirety, upheld the conviction and affirmed the sentence.

7. Unrelenting, the appellant has now filed this appeal *vide* a notice of appeal dated December 5, 2018 and undated grounds of appeal in which essentially and in a nutshell, raised the following grounds of appeal;

    1. Whether the two courts below infringed/contravened his rights to a fair trial pursuant to article 50 (1) (2) and 27 (1) (2) of the *Constitution*?

    2. Whether the two courts below erred in failing to find that the charge sheet was defective?

    3. Whether the identification of the appellant in the instant case was proper?

    4. Whether the two courts below erred in their analysis and re-evaluation of the evidence on record thus shifting the burden of proof to the appellant?

8. The relevant facts in this appeal as narrated by the testimony of the prosecution witnesses are as follows; on October 7, 2016 IC(PW1), was coming from the shamba when suddenly somebody hit her on the neck and dragged her to his house which was not far and placed a panga on the table and proceeded to rape her. She was subjected to threats of being killed apart from being beaten and being raped at intervals.

9. In the course of the ordeal, she screamed loudly and members of the public came to her rescue. She then went home and narrated to her husband what transpired whereupon her husband called the village elder and the appellant was arrested immediately and handed to Kesses Police Station. She knew the appellant as he was a neighbour. She later went to Moi Teaching and Referral Hospital where she was examined and treated.

10. PW2 is a resident of Bindura and a village elder. On October 8, 2016 at 6:00 a.m, he was coming from work when he met a crowd of people going towards the appellant's house as there were screams emanating from there. He joined the crowd and at the appellant's house the appellant informed them that he had arrested a thief stealing from his shamba, when PW1 suddenly emerged and narrated how the appellant had dragged her and forcefully took her to his home and raped her severally while threatening to kill her. PW2 knew the appellant as he was a neighbour.

11. PW3 was Robert Koech and a resident of Bindura village. He too knew the appellant as a neighbour and that on October 8, 2016 at 3:00a.m, he was asleep in his house when he heard screams and somebody was calling out his name. He went to the road next to the appellant's house and confirmed that the screams were coming from the appellant's house. He then shouted and the screams went silent and his neighbor, one Henry came and they decided to wait until morning whereupon, the appellant came from his home with a panga and told them that he had arrested a lady thief who had since left.

12. PW1 later came and narrated to them what had happened and the chief later arrived and called police officers who arrested the appellant.

13. PW4 was DKK and another resident of [Particulars Withheld], Tulwet, Kesses location. On October 7, 2016, he came back from work at 6:00p.m and proceeded to his 2nd wife's(PW1) house where she lived with his other children but on reaching there, he found the children sleeping but his wife was not

there. He waited until 11:00pm but she did not turn up whereupon he went back to sleep in his 1st wife's house. The following day he saw missed calls in his phone and he called the number and PW1 informed him that she had been kidnapped by David (the appellant), who had dragged her to his house and raped her. He then went to the center and found a Baraza where the chief and the village elder were present and he informed the chief what had transpired and the chief called PW1 who narrated the events of that night. The appellant was later interrogated and arrested.

14. PW5 was PC Michael Atsango attached to Kesses police post under Kiambaa police station and the investigations officer in this case. On October 8, 2016, at around 10:00AM. He was instructed by the OCS to rush to Bindura and contact the area chief. He proceeded to Bindura and found the chief with members of the public who had arrested the appellant and tied him with a rope.

15. He recorded witness statements and referred PW1 to Moi Teaching and Referral Hospital for treatment and issued her with a P3 Form.

16. PW6 was Dr Philip Rono attached to Moi Teaching and Referral Hospital. He produced a P3 Form in respect of PW1 who had an allegation of having been raped by a person known to her. On examination, he found injuries on her genitalia which confirmed that indeed she had been raped.

17. The appellant in his defence gave a sworn statement and called no witnesses. He denied having committed the offence and testified that on October 6, 2016, he was at work and that he came back the following day when he was arrested by the chief when preparing to go to Church.

18. When the matter came up for plenary hearing on July 19, 2023, the appellant appeared in person and relied on his undated written submissions. He submitted that had suffered a lot and that he was now a good person.

19. Miss Githaiga on the other hand while holding brief for Miss Kipyego appeared for the respondent and relied on her written submissions and list of authorities dated July 14, 2023.

20. The appellant submitted that during the trial he had sought to be furnished with copies of written statements for purposes of the case as provided for under section 392 of the *Criminal Procedure Code*, but the same was however not furnished to him and that the prosecution went ahead to prosecute him to finality. He contended that this was a judicial right denied to him thus amounting on unfair trial.

21. Turning to the issue of a defective charge, the appellant submitted that there were two accused persons in this case but only one accused person was tried and that this rendered the charge sheet defective since the prosecution did not amend the charge sheet under the provisions of section 214 of the *Criminal Procedure Code* and that as such, he was wrongly charged and convicted and should thus be acquitted.

22. Regarding identification, the appellant submitted that in the instant appeal, there were more than two different assailants and that the criteria that was used to single out one against the other had not been stated. Further, that if the identification and recognition of the appellant herein was cogent, then, he could not have been charged with a co-ghost accused person. According to the appellant his alleged identification by recognition was inconclusive.

23. Finally, and as to whether the two lower courts failed in their analysis and re-evaluation of the evidence thus shifting the burden of proof on the appellant, the appellant submitted that all the evidence that was tendered by PW2, PW3, PW4, PW5 and PW6 is what they had been told by PW1.

24. On behalf of the respondent, it was submitted that the appellants right to a fair trial under article 50 and the right to equal and benefit of the law under article 27 of the *Constitution* were not infringed in any manner; that during the trial the trial court made an order for supply of statements and documents and

on the next day, both the prosecution and the appellant indicated that they were ready to proceed and at no point in the proceedings, did the appellant state that he was never supplied with those documents. Further the appellant did not raise this issue at the first appeal in the High Court.

25. Regarding the defectiveness of the charge or otherwise, it was submitted the appellant understood the charges facing him the ingredients thereof and that in this case, the particulars in the charge sheet made clear reference to the offence of rape. It was submitted that the appellant's assertion that he was charged alone yet there were other people was baseless as the complainant stated that she was raped by the appellant alone.

26. Turning to identification, it was submitted that the victim identified the appellant positively as he was her neighbor and that on the night of the ordeal, there was light from a torch and fire and that as such, the identification was by recognition.

27. Lastly and as to whether the learned judge erred in re- evaluating the evidence on record thus shifting the burden of proof on the appellant, it was submitted that the evidence of the medical doctor corroborated the evidence of the victim which confirmed that the victim was raped as the doctor had observed that there were fresh hymenal tears. It was further submitted that the assertion by the appellant that the victim's injuries could be due to beatings from her husband were unfounded.

28. We have carefully considered the record, the rival written submissions by the parties, the authorities cited and the law. The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of section 361 (1) (a) of the *Criminal Procedure Code*, we are mandated to consider only matters of law. In *Kados v Republic* Nyeri Cr Appeal No 149 of 2006 (UR) this court rendered itself thus on this issue: "...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ..."

29. In *David Njoroge Macharia v Republic* [2011] eKLR it was stated that under section 361 of the *Criminal Procedure Code*:

> "Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also *Chemagong v Republic* [1984] KLR 213)."

30. With regard to the first issue and as to whether the appellant's right to a fair trial were threatened/ infringed pursuant to articles 50 (1) (2) and 27 (1) (2) (4) of the *Constitution*, the appellant contended that the trial court gave orders that he be furnished with copies of the written statements and other relevant documents for purposes of his trial case but this was not complied.

31. We have anxiously gone through the record and the same clearly shows that when the appellant was arraigned in court on October 11, 2016, the charges were read to him and he denied the same and the court entered a plea of not guilty. The court *suo moto* subsequently directed that he be supplied with witness statements.

32. When the hearing eventually took off on November 7, 2016, the record shows that the prosecutor intimated to court that he had three witnesses and was ready to proceed. The appellant equally intimated to court he was ready to proceed. It is imperative to note that on this date the appellant did not raise the issue of witness statements having not been supplied to him and neither did he raise the

same throughout the trial. Additionally, the appellant did not raise this issue in his first appeal before the High Court.

33. In view of the above, it is evident that the appellant's contention that he was not supplied with witness statements is clearly without basis. Similarly, it has not been demonstrated that the appellant's rights to equality and freedom from discrimination pursuant to article 27 of the *Constitution* were infringed/ threatened/violated in anyway as contended by the appellant. Consequently, nothing turns on this ground of appeal and the same must fail in its entirety.

34. Regarding the second ground of appeal, the two courts below were faulted for failing to note that the charge sheet was defective in that there were two accused persons in this case but only the appellant was tried and that this rendered the charge sheet defective since the prosecution did not amend the anomaly.

35. On the other hand, the respondent contended that the charge sheet was not defective as it disclosed the offence in which the appellant was charged with and that the appellant's assertion that that he was charged alone yet there were other people was baseless as the complainant stated that she was raped by the appellant and did not mention any other person.

36. We have carefully gone through the charge sheet and the same clearly indicates that the appellant herein faced a charge of rape contrary to section 3 (1) (a) (c) as read with section 3 (3) of the *Sexual Offences Act*. In the alternative, he faced a charge of committing an indecent act with an adult contrary to section 11 (a) of the same Act. Additionally, he faced a second count of assault causing actual bodily harm contrary to section 251 of the *Penal Code*. In all the three counts, there is no reference of any other person except the appellant alone. Similarly, from the evidence of the prosecution witness and particularly PW1 who was the complainant, there is no mention of any other person except the appellant.

37. The record further shows that when the appellant was first arraigned in Court on October 11, 2016, there was only one accused person (the appellant herein), whereupon he took plea and denied the offence. Be that as it may, the record indicates that on January 31, 2017, March 2, 2017,March 16, 2017,April 6, 2017, April 20, 2017, May 4, 2017, May 18, 2017, May 30, 2017, June 5, 2017, June 15, 2017, June 30, 2017, July 11, 2017, July 24, 2017 up to August 14, 2017, when the appellant eventually conducted his defence hearing, that there were "two accused persons." However, only the appellant testified during the defence hearing and there is no indication of a second accused person having testified during the defence hearing. As to whether this was a typographical error or otherwise, this court will not delve into the realm of speculation. In any event, in a second appeal to this Court such as in the instant appeal, this Court confines itself to matters of law only. Again, the appellant did not raise this issue in his first appeal before the High Court.

38. From the circumstances of this case, can it then be said that the charge sheet herein was defective? This Court in *Peter Ngure Mwangi v Republic* [2014] eKLR stated as follows as regards a charge being defective;

> "A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, *Criminal Pleading, Evidence and Practice* (40th edn), page 52 paragraph 53, this court stated in *Yongo v R* [198] eKLR that:
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> > "In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:
> >
> > (i) when it does not accord with the evidence before the committing magistrates either because of

39. Further, in *Peter Sabem Leitu v R*, Cr App No 482 of 2007 (UR) this Court stated;

> "The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant." (Emphasis ours).

40. Applying the tests enumerated in the above two cases we have cited, we are not satisfied that the charge sheet herein was defective as contended by the appellant for the following reasons; firstly, the particulars in the charge sheet clearly disclosed the offences that the appellant was facing. The particulars of the charge were read out to him and they made reference to the three counts that that the appellant was facing namely; rape, indecent act with an adult and assault causing actual bodily harm to which he denied all and a plea of not guilty entered. Further they were in conformity with the evidence tendered by the prosecution witnesses. Additionally, when the matter eventually took off for hearing, the appellant indicated that he was ready to proceed and we ably cross examined the prosecution witnesses and even sought an adjournment in two occasions when he intimated to court that he was not feeling well, a request that was acceded to. In any event the appellant has not contended that the particulars did not disclose an offence. The contention by the appellant that there was another accused person was clearly without basis and was not supported by any evidence. Consequently, this ground of appeal is without merit and the same must fall by the wayside.

41. Turning to identification, the appellant faulted the two courts below for failing to note that his identification was not proper. Firstly, we note that the appellant did not raise this issue in his first appeal before the High Court. The crux of the appellant's submission was that there were two assailants in the instant case and that the criteria that was used to single one of them against the other had not been stated. As we have alluded to earlier, there is nothing on the record to suggest that there was more than one assailant as contended by the appellant and this contention is therefore clearly without any basis.

42. PW1 who was the complainant in this case testified that on October 7, 2016, she was going home from the shamba when the appellant hit her on the neck, dragged her to his house and proceeded to rape her severally until 3a.m the following morning. Though, the time when the incident occurred was not stated, there is nothing on record to suggest that the lighting at the time was not conducive for a positive identification/ recognition. PW1 further stated in examination in chief that the appellant was well known to her as a neigbour and that he had even once ploughed her land and that he was using light from his torch and the fire. All this piece of evidence remained consistent and unshaken even in cross examination. As a matter of fact, the appellant in cross examination did not raise any issue regarding his identity. Additionally, the appellant spent quite a considerable period of time with PW1 until 3a.m the following morning when PW1 managed to escape.

43. Though the appellant during the defence hearing while being cross examined by Ms Karanja for the prosecution stated that he did not know PW1, he seemed to suggest while cross examining PW1 that he had bought PW1 "hair" and that they had even talked about marriage. Can it then be said that the appellant was allegedly buying "hair" and discussing issues concerning marriage with a total stranger? We think not. It beats logic and common sense and the same can only be a mere denial.

44. Having carefully re-evaluated the evidence on record, we are satisfied beyond any reasonable doubt that the appellant was positively identified by PW1 as the perpetrator of this offence and we have no reason whatsoever to disturb the findings of the two courts below on this aspect. In any event this was a case of positive recognition as opposed to identification as the appellant was well known to PW1 prior to this incident. See *Kenga Chea Thoya v Republic* Criminal Appeal No 375 of 2006 (Unreported) where this court stated thus;

> "On our own re-evaluation of the evidence, we find this to be a straight forward case in which the appellant was recognized by the witness (PW 1) who knew him. This was clearly a case of recognition rather than identification and as it has been observed severally by this Court, recognition is more satisfactory more assuring and more reliable than identification of a stranger – see *Anjononi v Republic* [1980] KLR 59."

45. Consequently, we find no merit on this ground of appeal and we dismiss the same.

46. Lastly, the two courts below were faulted in their analysis and revaluation of the evidence which allegedly ended up shifting the burden of proof to the appellant. It was submitted by the appellant that all the evidence that was tendered by PW2, PW3, PW4, PW5 and PW6 was all emanating from PW1 and that none of the witnesses corroborated PW1's evidence. It is common knowledge that offences of this nature normally happen in private and in most circumstances there are no witnesses. It is also common ground as we have found above that the identity of the appellant was not in question.

47. Contrary to the appellant's contention that PW1's evidence was not corroborated by any of the witnesses, PW1 gave clear detailed evidence of how she was accosted by the appellant who hit her on the neck, dragged her to his house and proceeded to rape her severally until the wee hours of the morning while all along threatening to kill her. PW1's evidence remained unchallenged throughout the trial. Additionally, the same was corroborated by the P3 form produced by PW6 which confirmed that she had injuries on her genitalia and that indeed she had been raped and that further, she had injuries on the neck, fresh marks on the upper lips and that her neck was swollen. This actually gives credence to PW1's evidence that the appellant had inter alia hit her on the neck.

48. From our analysis and re-evaluation of the evidence or record, we are unable to agree with the contention by the appellant that the prosecution shifted the burden of proof on him. More tellingly so, even before the trial commenced, and before any of the prosecution witnesses testified, the appellant intimated to court that he was seeking forgiveness from PW1 pursuant to which PW1 remarked; "I don't want to forgive the accused wanted to kill me." Why would the appellant seek forgiveness from PW1 if indeed he was innocent as he now contends?

49. In view of the above, and having re-evaluated the evidence on record, we are satisfied that all the ingredients of the offence of rape and assault causing actual bodily harm were proved to the required standard and this ground of appeal must fail in its entirety.

50. Accordingly, we are in agreement with the concurrent findings by both the trial court and the High Court that the prosecution established the offence of rape and assault causing actual bodily harm against the appellant. There was overwhelming evidence to sustain a conviction against the appellant for a charge of rape and assault causing actual bodily harm. We are in agreement with the two courts below that it was the appellant who raped PW1 and proceeded to assault her, occasioning her actual bodily harm.

51. We therefore find and hold that the appellant's conviction for the offence of rape and assault causing actual bodily harm was safe and sound, which conviction we hereby uphold and consequently, dismiss the appellant's appeal on conviction.

52. Turning to sentencing, and with regard to the first count, the appellant had been charged with the offence of rape to which he was subsequently convicted and sentenced to 30 years' imprisonment. Regarding the second count of assault causing actual bodily harm, he was sentenced to 2 years' imprisonment.

53. Section 3 (3) of the *Sexual Offences Act* No 3 of 2006 provides that any person charged with the offence of rape shall be liable upon conviction to a sentence of 10 years which may be enhanced to life imprisonment. Section 251 of the *Penal Code* cap 63 of the Laws of Kenya on the other hand provides that any person who commits assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.

54. In the instant case, PW1 was raped severally throughout the night until the wee hours of the morning. To add insult into injury, the appellant assaulted her severally and threatened to kill her. It is not lost to us that the appellant placed a panga within reach as he committed the heinous act. There is no doubt that PW1 underwent a harrowing experience in the hands of the appellant which she will never forget for the rest of her life. In view of the above, we consider the circumstances under which these offences were committed to be aggravated and we are not inclined to disturb the sentences.

55. The upshot of the foregoing is that the appellant's appeal is without merit and the same is hereby dismissed in its entirety.

56. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 8TH DAY OF DECEMBER, 2023.

F. SICHALE

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JUDGE OF APPEAL

L.A ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR