SKK v Republic (Criminal Appeal E057B of 2022)
[2024] KEHC 888 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEHC 888 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CRIMINAL APPEAL E057B OF 2022

RK LIMO, J

JANUARY 31, 2024

BETWEEN

SKK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. SKK, the Appellant herein was charged with the offence of rape contrary to Section 3(1) (a) (b) (3) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were that; the Appellant on the 15th day of April 2020 at 1930 hours at Kithivo location in Matinyani Sub-county within Kitui County, intentionally and unlawfully caused his penis to penetrate into the vagina of JNM without her consent.

3. The Appellant was also charged with the alternative charge of committing an indecent act with an adult contrary to Section 11(a) of the *Sexual Offences Act*. No. 3 of 2006. The particulars of the alternative charge are follows; the Appellant on the 15th day of April 2020 at 1930 hours at Kithivo location in Matinyani Sub-county within Kitui County, intentionally and unlawfully touched the buttocks and vagina of JNM aged 53 years with his hands against her will.

4. The Appellant was also charged with the alternative charge of committing an indecent act with an adult contrary to Section 11(a) of the *Sexual Offences Act*. No. 3 of 2006. The particulars of the alternative charge are follows; the Appellant on the 15th day of April 2020 at 1930 hours at Kithivo location in Matinyani Sub-county within Kitui County, intentionally and unlawfully touched the buttocks and vagina of JNM aged 53 years with his hands against her will.

5. The Appellant when produced in the trial court to answer to the charge pleaded not guilty and the matter proceeded to full trial where the prosecution presented four (4) witnesses. The summary of their testimonies/evidence in the trial court are as follows:

> "JNM (PW1) the complainant testified that she was walking home from work on the material day at around 7.00pm when she encountered the appellant. She stated that she knew the appellant and referred to him as a cousin. She proceeded that to state that the two walked together for a while as they talked when suddenly, the appellant grabbed her by the neck, dragged her into a bush and raped her. The complainant described the clothes that the appellant was wearing, she stated that he was in black clothes, specifically black jeans. She proceeded to tell the court that she proceeded home after the incident and she took a shower and that she experienced pain on her legs, back and shoulders. The following day, the complainant reported the incident at Kathivo Police Station and was later treated at Kitui hospital. She testified that the appellant was apprehended and held at Matinyani Police Station on 20th April 2020."

6. She insisted that it is the Appellant who raped her after tearing her biker and threatening her. She added that she was in pain and that she could not reveal to her daughter (PW 2) what had happened to her given her age. She denied of existence of any grudge.

7. AM (PW 2) a girl aged thirteen (13) years testified that on the material day (15.4.2020) at around 9.00pm her mother arrived home looking dirty and covered in sand. She testified that the clothes the mother wore were soiled and on inquiring she stated that the mother told her that the Appellant accosted her. She testified that she warmed some water for her mother upon which she bathed and that she massaged her as she was in a lot of pain and could not eat or sleep.

8. PC Andrew Maina (PW3) testified that he was the Investigating Officer in the case having taken over the investigation file from his colleague one PC PK who had gone on transfer. He told the trial court about how the report of the incident was received and the action taken to apprehend the appellant.

9. Doctor Muriithi Mano (PW 4) a Medical Doctor from Kitui Referral Hospital testified on behalf of one Dr. Thomas Kituka who had examined the complainant and filled the P3 form and PRC form. Doctor Miano testified that he had worked with the said Thomas Kituka since 2013 and therefore was familiar with his hand writing and signature. He tendered the P3 form as exhibit 3 and outpatient card in respect to the treatment accorded to the complainant as P exhibit 4. The Doctor stated that on examination the complainant was found not be a virgin but some lacerations on the vagina were noted. He added that there was no STI revealed when the laboratory tests came out.

10. When placed on his defence gave an unsworn defence and stated that the complainant was a cousin who did not wish him well. He denied committing the offence of rape and that he slept in his house on 20th April 2020. He further stated that he was arrested and taken to Kathivo Police Post on rape but denied the offence insisting that he was being framed up with a view to grabbing his parcel of land.

11. The trial evaluated the evidence tendered and found that the prosecution had proved its case beyond reasonable doubt and convicted the appellant. He was sentenced to serve twenty-five (25) years in jail.

12. The appellant felt aggrieved about both conviction and sentence and filed this appeal raising the following grounds namely;

    i. That the proceeding magistrate erred in both law and facts when she relied on evidence tendered by the prosecution witnesses which was not supportive of the charge and the same was not proved beyond reasonable doubt as regard by the standard of the law

ii. That the Learned Trial Magistrate also erred in both law and fact when he did not evaluate and consider the nexus of the case leaving doubts of grudge of the two families issues of land

iii. That the identification of the assailant was not proved beyond reasonable doubt then the Honourable Magistrate convicted on the same doubtful evidence from the scene of crime

iv. That the age assessment of the complainant was not proved in accordance of the document authored by the doctor from Kitui Referral Hospital and the main charge sheet.

v. That the proceeding magistrate also erred in law and fact and not view the weight and gravity of the case then convicted on same.

vi. That the sentence imposed upon the appellant was harshly excessive.

13. The submissions were filed on 10th May 2023. The Appellant submits that penetration was not proven and takes issue with the complainant's oral testimony. He indicates that the complainant failed to explain the violence and injuries inflicted on her. He takes issue with the fact that the alleged dirty and torn clothes were not produced as exhibits and states that medical evidence failed to corroborate the complainant's testimony.

14. On the element of consent, the Appellant submits that there was no evidence tendered indicating that he posed a danger or threat to the complainant. He submits that he was framed. He also takes issue with his identification as the perpetrator and submits that the same was unsafe.

15. He also submits that the charge should have been that of incest. The appellant further submits that the sentence was erroneous as it was rendered by a Resident Magistrate and also takes issue with the testimonies of PW 3 and PW4 for testifying on behalf of their colleagues.

16. The Respondent through the ODPP has opposed this appeal vide written submissions dated 28th June 2023. It contends that the prosecution's case was proved to the required pointing out that the element of penetration was proved well through the evidence of the complainant and corroborated by the medical evidence.

17. The State submits that the complainant knew the Appellant well and therefore the question of identification or recognition was well settled.

18. The Appellant has appealed on both conviction and the sentence of 25 years. As the first appellate court, this court has the duty to re-evaluate the evidence presented during trial while at the same time appreciating that the Trial Court is the one that had the opportunity of actually hearing the testimonies and seeing the evidence. This duty was succinctly stated by the Court of Appeal in *Okeno v Republic* (1972) EA 32 as follows: -

> " An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellant's court own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses"

19. Rape is a sexual offence defined under Section 3 (1) of the *Sexual Offences Act*.

> " 3. (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."

20. The prosecution was therefore required to establish penetration, absence of consent, and that the Appellant was the perpetrator of the act.

Penetration

21. The complainant testified that the Appellant had raped her. That on the material day, she was walking home from work when she encountered the Appellant who she referred to as her cousin. She stated that the two talked and walked for a while but as they walked the appellant grabbed her by the neck, dragged her near a bush and raped her. She stated that she attempted to scream but the appellant threatened to kill her if she screamed.

22. Penetration could also be proved by medical evidence tendered and, in this case, PW4, Dr. Muriithi Miano was called to testify on behalf of his colleague Dr. Thomas Kituka who had retired from Kitui Referral Hospital. His testimony was that Dr. Kituka had examined the complainant on 16th April 2020. The witness proceeded to produce P3 and PRC forms filled by the said doctor and the same was marked as P exhibit 1 and 2 respectively. Before delving into what was recorded in the forms, the Appellant took issue with PW4's testimony and production of medical evidence.

23. The Appellant during trial was asked if he had any issue with Dr. Mano testifying and tendering medical evidence on behalf of his colleague and he had no objection to the same.

24. Section 33 of the *Evidence Act* allows for production of statements or evidence of persons who cannot be found as follows;

> Section 33:
>
> > "Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases."

25. The prosecution was required to lay basis before PW 4 testified. This was done in my view though the prosecution should have done better by laying basis on the expertise of both PW 4 and the Doctor who filled the P3.

26. This court however finds that even without the medical evidence, a sexual offence can be proved to the required standard.

27. The trial court placed reliance on the testimonies tendered by the complainant as well as PW2. The trial court noted that the complainant described and detailed the violent and forceful sexual act. The trial court also took into the testimony tendered by PW2 on her mother's appearance after the incident and stated that it supported the complainant's testimony. The position that a victim's testimony is

sufficient to support a conviction for the offence of rape is fortified by the holding of the Court of Appeal in *Martin Nyongesa Wanyonyi v Republic* (2015) eKLR where the appellate court cited the case of *Kassim Ali v Republic* Criminal Appeal No. 84 of 2005 (Mombasa) and stated that:

> " The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or circumstantial evidence."

28. Similarly, in the case of *Stephen Nguli Mulili v Republic* [2014] eKLR the court of appeal had this to say; regarding reliance on Section 124 of the *Evidence Act* to convict in sexual offences;

> " as a general rule of evidence embodied in Section 124 of the *Evidence Act*, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section make an exception in sexual offences and provides as follows:
>
> > "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."

29. Again, the Court of Appeal in *Denis Osoro Obiri v Republic* (2014) eKLR considered the issue of medical evidence though this was a case of defilement. The Court of Appeal cited the case of *Geofrey Kionji v Republic* Cr. Appeal. No. 270/2010 (Nyeri) where it was stated as follows:

> " Where available medical evidence arising from examination of the accused linking him to the defilement would be welcomed. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the victim was penetrated by the accused person."

30. This court being the first appellate court is called upon to re-evaluate the evidence and make its own determination. On the element of penetration, the complainant stated as follows;

> " He took me 'ngeta' and dragged me into a bush near the dark. I attempted to scream, he grabbed my neck with him arm and said if I scream for held, he would kill me. He then tore my biker and raped 'alinirape'..."

31. This court is satisfied that based on the evidence tendered at the trial, the element of penetration was proved beyond reasonable doubt. The trial court was correct to make that finding.

32. On the element of consent, the sections 42, 43(1) and (2) of the *Sexual Offences Act*, provide;

> 42. For the purposes of this Act, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice.
>
> 43 (1) An act is intentional and unlawful if it is committed—
>
> > a. in any coercive circumstance;
> >
> > b. under false pretenses or by fraudulent means; or

c. in respect of a person who is incapable of appreciating the nature of an act which causes the offence.

(2) The coercive circumstances, referred to in subsection (1) (a) include any circumstances where there is—

a. use of force against the complainant or another person or against the property of the complainant or that of any other person;

b. threat of harm against the complainant or another person or against the property of the complainant or that of any other person; or....

c. abuse of power or authority to the extent that the person in respect of whom an act is committed is inhibited from indicating his or her resistance to such an act, or his or her unwillingness to participate in such an act.

33. In *Republic v. Oyier* [1985] eKLR, the Court of Appeal held as follows:

> " 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.
>
> 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."

34. In the present case, evidence tendered by the complainant was that she did not consent to the sexual activity. Her evidence was that the Appellant attacked her on her way home, held her by her neck, dragged her into a bush, threatened and raped her This narration from the complainant did not indicate that she gave her consent.

Identity of Perpetrator

35. As regards to the identity of the perpetrator, the complainant stated that she knew the appellant and referred to him as a cousin. She stated that people referred to him as 'Musee' at home. As to the material time, the complainant described how she met the appellant on her way home. She indicated that she saw two people on her path, she identified one of them as Kitheka who she stated passed her and went on his way. The other person was the appellant, she stated that he approached her and walked beside her and the two walked together as they talked before the assault occurred. PW2 also stated that the complainant told her that her that the appellant had attacked her. The appellant also referred to the complainant as his cousin. The appellant was therefore positively identified as the perpetrator of the assault.

36. This court finds that the prosecution case against the Appellant was well established and proved beyond doubt. All the criminal elements of penetration, lack of consent and positive identification of the perpetrators were all proved beyond doubt.

37. On sentence, Section 3 (3) of *Sexual Offences Act* states that a person found guilty of rape is liable to imprisonment for not less than ten (10) years but which may be enhanced depending on circumstances.

38. The Appellant contends that he should have been charged with incest but the evidence tendered does not fall into the definition of incest under Section 20 (1) of the *Sexual Offences Act* because of the relationship between the Appellant and the complainant.

39. The trial court in sentencing the Appellant to twenty five (25) years took into consideration of the fact that he complainant lived in fear and shame owing to the fact that the Appellant had become a terror in the village. The trial court however failed to call for a social inquiry to establish the veracity of the claim by the complainant that the Appellant was known for terrorizing women at Kathivo Location. The social inquiry could have guided the trial court in the exercise of her discretion. It is on the basis of that omission that I find the sentence was a bit harsh and so I uphold the conviction, I allow the appeal on sentence. The sentence of twenty five (25) years in prison is set aside and in its place the Appellant will now serve fifteen (15) years in jail and that sentence shall run from the date he was arraigned on 27th April 2020. He has fourteen (14) days Right of Appeal.

DELIVERED, DATED AND SIGNED AT KITUI THIS 31ST DAY OF JANUARY, 2024.

HON. JUSTICE R. LIMO

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR