Cheruiyot v Republic (Criminal Appeal E048 of 2022)
[2024] KEHC 3133 (KLR) (27 February 2024) (Judgment)

Neutral citation: [2024] KEHC 3133 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E048 OF 2022

RL KORIR, J

FEBRUARY 27, 2024

BETWEEN

WELDON CHERUIYOT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Conviction and Sentence in Sexual Offence Case Number 75 of 2020 by Hon. Kiniale L. in the Principal Magistrate's Court at Bomet)

JUDGMENT

1. The Appellant was convicted for the offence of rape contrary to section 3(1) as read with section 3(3) of the *Sexual Offences Act*. The particulars of the charge were that on 27th August 2020 at about 1900 hours, at Silibwet Trading Centre within Bomet County, he intentionally and unlawfully caused his penis to penetrate the vagina of M.C without her consent.

2. The Appellant faced an 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 charge were that 27th August 2020 at about 1900 hours, at Silibwet Trading Centre within Bomet County he intentionally touched the vagina of M.C with his penis against her will.

3. The Appellant pleaded not guilty to both charges and a full hearing was conducted. The Prosecution called six (6) witnesses in support of its case.

4. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellant and he was accordingly put on his defence.

5. At the conclusion of the trial, the Appellant was convicted for the offence of rape and was sentenced to serve 10 years in prison.

6. Being dissatisfied with the conviction and sentence, the Appellant appealed to this court through his Memorandum of Appeal dated 25th October 2022 and relied on the following grounds:-

   i. That the learned Magistrate erred in law and fact by relying on unsubstantiated and/or contradictory reports and/or documents produced by PW4 while convicting the Appellant herein.

   ii. That the learned Magistrate erred in law and fact by convicting the Appellant without regard to the fact that crucial witnesses mentioned in the proceedings were not called to give evidence.

7. The Appellant filed further grounds of Appeal on 14th February 2023 reproduced follows: -

   i. That the trial Magistrate erred in law and fact by failing to realize that the ingredients for the present offence were not established against the Appellant.

   ii. That the trial Magistrate erred in law and fact by failing to realize that there were two medical reports from different health facilities with different details of PW1.

   iii. That the trial Magistrate erred in law and fact by not realizing that the Prosecution case was not proved beyond reasonable doubt.

   iv. That a prima facie case was not established.

   v. That my right to a fair trial was violated as I was not furnished with all documents that the Prosecution relied on including the investigation diary contrary to Article 50 (2) of *the Constitution*.

   vi. That the trial Magistrate erred in law and fact by convicting me the Appellant on single uncorroborated evidence of PW1.

   vii. That the present case was shoddily investigated leading to miscarriage of justice.

   viii. That the Prosecution case was marred with contradiction, inconsistencies, discrepancies and glaring gaps that were not cured.

   ix. That PW1 was an incredible and untrustworthy witness and her evidence was unsafe to secure a conviction.

   x. That the trial Magistrate erred in law and fact by failing to realize that the vital witnesses like the doctor who attended to PW1 first at Chelimo Hospital was not brought to court to testify and whose testimony could have guaranteed my acquittal.

   xi. That the trial Magistrate erred in law and fact by failing to give a benefit of doubt to the Appellant after the Prosecution failed to produce exhibits mentioned by PW1 and PW4 which were never escorted to the Government Chemist for analysis on allegation that they were blood stained.

   xii. That the trial Magistrate erred in law and fact by convicting the Appellant when there is no Government Analyst Report indicating the thick discharge and blood stains found on the missing pant (not produced as an exhibit) neither belonged to the Appellant nor the victim.

   xiii. That the trial Magistrate erred in law and fact by demonstrating that he was biased and prejudicial against the Appellant.

   xiv. That I was not examined to ascertain the truth of the complainant's allegations

xv. That the mandatory minimum sentence executed against me was unconstitutional and lacked the element of Article 28 of *the Constitution*.

xvi. That the medical report from Chelimo hospital was concealed and not broyght to court. This amounts to a new and compelling evidence.

xvii. That the burden of proof was shifted to the Appellant.

xviii. That my alibi defence was unlawfully dismissed without further investigations by the Prosecution as the law requires.

8. As far as I can distil from the numerous and expanded grounds listed above, the Appellant's is basically stating the grounds that the ingredients of the offence were not adequately proven; that the medical evidence was wanting that the complainant was not truthful and that his alibi defence was not considered.

9. As a first appellate court, I am conscious of my duty to re-evaluate the evidence given at the trial court. This duty was succinctly stated by the Court of Appeal for Eastern Africa in Pandya vs. Republic (1957) EA 336 where it stated:-

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

The Prosecution's Case.

10. It was the Prosecution's case that the Appellant raped M.C (PW1) on 27th August 2020. PW1 testified that on the material day, the Appellant gave her a lift home in his motor vehicle but instead of allowing her alight at her destination, he sped off heading towards Silibwet. That the Appellant stopped the car, removed PW1's inner clothes and inserted his penis into her private parts.

11. It was PW1's testimony that the Appellant had sex with her without her consent.

12. Philip Mutai (PW4) testified that he was a clinical officer and that he examined PW1 on 28th August 2020. That upon examination, he found that PW1 had tenderness, swelling and bruises on her vulva and that her hymen was broken with significant raw margins. PW4 further testified that penetration had occurred.

The Appellant's case.

13. The Appellant gave unsworn testimony. He testified that on 28th August 2020, he went to the farm to pluck tea and at around 1 pm, he took the tea leaves to the tea buying centre and stayed there until 7pm. That he left and went home.

14. It was the Appellant's testimony that on the following day, he hired an ox to plough land and that exercise took approximately one month. That on 19th November 2020, he was accused of rape and was arrested.

The Prosecution's/Respondent's Submissions.

15. The Prosecution/Respondent conceded the Appeal. In their undated submissions received in the court registry on 11th May, 2023, the Prosecution used a most unsavoury language to submit that the case was in all probability one of consensual sex. They submitted that the complainant testified that she was raped on 27th August 2020 but when she was cross examined, she could not remember the date. That this lapse in remembering the dates pointed to some form of mischief.

16. It was the Respondent's submission that it was not clear to them why PW1 had to leave her young sibling at Betty's shop and go home alone if there were no clandestine machinations. That Betty was the Appellant's relative and appeared to have arranged for the Appellant and PW1 to meet and have an affair. It was the Respondent's further submission that Betty should have testified as she would have shed more light on the matter.

17. The Prosecution submitted that the affair between the Appellant and PW1 was only exposed once the Appellant's wife got wind of it. That the Appellant's wife assaulted PW1 after finding her in her husband's car. The Prosecution further submitted that love triangles gone sour often leads to criminalization of romantic relationships.

18. It was the Prosecution's submission that sexual fabrication(sic!) was rife in our society and as much as they sympathised with PW1, they were not convinced that the offence of rape was committed and as such, they could not, in good conscience support the conviction and sentence.

The Appellant's submissions.

19. The Appellant submitted that PW1 was over 18 years old at the time of the commission of the offence and had the ability to consent to sex. That PW1 willingly asked for a lift and that he did not lure or coerce her into his car. It was the Appellant's further submission that PW1 consented to his sexual advances.

20. The Appellant submitted that the exact date and time of the offence was unknown. That the Prosecution witnesses all gave different testimonies in regards to the time the offence was committed. The Appellant further submitted that he was framed.

21. It was the Appellant's submission that the doctor who examined PW1 at Chelimo hospital was not brought to testify. That his testimony would have guaranteed his acquittal. He relied on Bukenya vs Uganda (1972) EA 549.

22. The Appellant submitted that PW1 was an untrustworthy witness who created doubt in the court's mind because she alleged that she was 17 years old but when the birth certificate was availed to the Investigating Officer, she was found to be 18 years old. That it was unsafe to rely on Prosecution evidence which was doubtful. He relied on Geoffrey Otieno Bor vs Republic (2021) eKLR.

23. It was the Appellant's submission that the clinical officer did not tell the trial court how old the injuries suffered by PW1 were. That the alleged thick vaginal discharge with blood stains was not taken to the Government chemist and no report was presented to court. It was the Appellant's further submission that a broken hymen was not proof of rape. He relied on P.K.W vs Republic (2012) eKLR.

24. The Appellant submitted that he was not positively identified. That there were no descriptive features given by PW1 and that no one could tell the trial court the registration number of his alleged motor vehicle.

25. It was the Appellant's submission that the mandatory minimum sentence of 10 years was unconstitutional and he prayed that this court interferes with the sentence.

26. The Appellant submitted that the Prosecution did not prove its case against him beyond reasonable doubt.

27. I have gone through and given due consideration to the trial court's proceedings, the Memorandum of Appeal dated 25th October 2022, the Appellant's Amended Grounds of Appeal and written submissions both filed on 14th February 2023, and the Respondent's written submissions filed on 11th May 2023. The main issue in this Appeal is whether the prosecution proved its case against the Appellant to the required legal standard. In order to arrive at a determination, I have isolated the following issues:-

    i. Whether penetration was proved.

    ii. Whether the Appellant was properly identified as the perpetrator.

    iii. Whether there was lack of consent and

    iv. Whether the sentence was proper

(i) Whether penetration was proved

28. Section 3(1) of the *Sexual Offences Act* provides that: -

    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.

29. With regards to penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. In the case of Bassita vs Uganda S. C Criminal Appeal Number 35 of 1995, the Supreme Court held that:-

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence....."

30. Penetration is proved through the victim's evidence corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred.

31. M.C (PW1) testified that on the material day, the Appellant inserted his penis into her private parts. When she was cross examined, she confirmed that it was the Appellant who had raped her.

32. It was a ground of the Appeal that the Prosecution failed to call the doctor who examined PW1 at Chelymo Medical Centre to testify. It was the Appellant's contention that the said doctor's testimony would have exonerated him.

33. I begin by dismissing the above ground on witnesses called. It is the position of this court that the Prosecution has the discretion on the number of witnesses to call and this court cannot dictate or compel the Prosecution on the number of witnesses it should avail. This court is only concerned whether the Prosecution proved its case to the required legal standard.

34. Section 143 of the *Evidence Act* provides as follows: -

> No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact.

35. In Julius Kalewa Mutunga vs Republic (2006) eKLR the Court of Appeal held as follows: -

> "...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

36. I am also persuaded by Kariuki J. in Edward Wanyonyi Makokha v Republic (2020) eKLR, where the court held that: -

> "The court was categorical that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly, it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case."

37. Philip Mutai (PW4) testified that he was the clinical officer and that he examined PW1 the following day (28th August 2020). That upon examination, he found the PW1 had bruises, tenderness and swelling on her vulva. He also found that the hymen was broken with significant raw margins and it was his conclusion that PW1 had been penetrated.

38. PW4 produced treatment notes from Chelymo Medical Centre, a P3 Form and a PRC Form and they were marked as P.Exh 1, 2 and 3 respectively. The treatment notes (P.Exh1) indicated that PW1 was examined on the material day and she was found to have lacerations on her labia minora. PW1 was examined again the following day by the clinical officer (PW4) and the P3 Form (P.Exh 2) indicated that she had a bruised and swollen vulva and a broken hymen. The findings on the PRC Form (P.Exh 3) mirrored those indicated in the P3 Form.

39. The findings contained in the P3 Form, PRC Form and the treatment notes buttressed the testimony of the clinical officer that there was penetration. The authenticity of the exhibits was not challenged by the Appellant and I therefore find them to be admissible.

40. It is my finding that it was not necessary for the Prosecution to call the doctor who wrote the treatment notes (P. Exh 1). The findings contained in the treatment notes mirrored those contained in the PRC Form (P.Exh 3) and P3 Form (P.Exh 2). They provided medical evidence that proved that PW1 had been penetrated and they supported the findings of the clinical officer (PW5) who ably testified as to his findings.

41. I am satisfied based on the testimonies of the victim (PW1) and the clinical officer (PW4) and the contents of the treatment notes, PRC Form and P3 Form that M.C (PW1) was penetrated on the material day.

(ii) Whether the Appellant was the person who

penetrated the complainant

42. In regards to identification, it is clear from the record that none of the other prosecution witnesses witnessed the alleged offence. The Court of Appeal in of Wamunga Vs Republic (1989) KLR 426, it was held:-

> " It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."

43. M.C (PW1) testified that it was the Appellant who penetrated her on the material day. She said that she had taken her 3-year-old sibling to her mother who worked at one Betty's place in Kipkebe. That the Appellant who was at Betty's place gave her a lift in his motor vehicle and sped off to Silibwet Green Stadium where he penetrated her without her consent. It was her further testimony that they were the only people in the said motor vehicle. When she was cross examined, she confirmed that it was the Appellant who gave her a lift and then raped her.

44. JC (PW2) who was the victim's mother testified that PW1 had just dropped her younger sibling to her at her workplace around 6pm when the Appellant who had also come to the home to drop some goods wanted to leave. That he was asked by Betty to give the complainant a lift. Her testimony therefore corroborated that of PW1 that PW1 had been given a lift by the Appellant in his motor vehicle. It was PW2's testimony that she worked for Betty Cheruiyot who was a relative of the Appellant.

45. The above evidence was evidence of recognition. PW1 testified that she knew the Appellant as she used to see him on the road. PW1 and her mother (PW2) both confirmed the fact that the Appellant gave PW1 a lift in his motor vehicle. There is no doubt in my mind that the Appellant was well known to PW1 and there was no chance of mistaken identity. Furthermore, PW1 testified that they were alone in the car and that testimony was unchallenged during cross examination. It is therefore my finding that the Appellant was positively identified by PW1.

46. It was a ground of the Appeal that the Appellant was not medically examined therefore there was no way of ascertaining PW1's allegations of rape. He also stated that there was no forensic examination conducted on the thick discharge and blood stains on the victim's inner clothing so as to link him to the offence. Section 36(1) of the *Sexual Offences Act* provides that: -

> Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

47. The Court of Appeal in the case of Robert Mutungi Mumbi vs Republic (2015) eKLR, held that: -

> " Section 36 (1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly, that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved."

48. Similarly, in AML vs Republic (2012) eKLR the Court of Appeal held:-

> " The fact of rape or defilement is not proved by a D.N.A test but by way of evidence."

49. It is my finding that it was not mandatory for the Appellant to be medically examined to provide a link between him and the offence. What the Prosecution needed to prove was penetration which they did. They also adequately identified the Appellant as the person who penetrated the complainant.

(iii) Whether there was lack of consent

50. Having found that the Appellant penetrated the complainant, the next issue is whether the sexual act was consensual.

51. Before delving into the issue, I must at this point observe that the Appellant's appeal was incoherent. This is because on the one hand he admits that he had sexual intercourse with the Complainant while on the other he argues that there was no medical evidence linking him to the offence. As earlier stated however, the Appellant was positively identified as the person who gave a lift to the complainant and had sexual intercourse with her in his car.

52. For the charge to stand, the Prosecution had to prove that M.C (PW1) had been penetrated without her consent. As already noted, the Respondents conceded the Appeal on grounds that there was no evidence to prove that the penetration was not consensual. I therefore revisit the entire evidence to come to my own conclusion on this.

53. Consent is defined in Section 42 of the *Sexual Offences Act* as: -

> 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.

54. In the case of Republic vs 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."

55. Similarly, in the persuasive authority of Peter Wanjala Wanyonyi vs Republic (2021) eKLR, Kimaru J. (as he then was) held that:-

> " The burden of proof lies upon the prosecution to prove that the sexual intercourse was without the consent or against the will of the complainant. A woman is said to consent

only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power, to act in a manner that she wants. Consent may be either expressed or implied depending upon the nature and circumstances of the case".

56. In this case, M.C (PW1) testified that the Appellant had sex with her without her consent. When she was cross examined, she testified that the Appellant gave her a lift and instead of dropping her at her destination, he sped off towards Silibwet. It was PW1's further testimony that in an effort to free herself, she tried to hit the window and scream for help but the Appellant covered her mouth. That when the Appellant was done, he left her in the car and went to the shops never to return. That she came out of the car when members of the public appeared and asked her what she was doing. She further testified that the Appellant's wife and her sister approached and assaulted her asking her what she was doing in her husband's car.

57. The Appellant gave unsworn testimony. His defence has already been captured earlier in this judgment. The Appellant basically described how his day (28th August 2020) went. That he took tea to the buying centre at 1pm and returned home at 7pm. That the following day he ploughed his farm and thereafter he relocated to Chebunyo Sigor until 19th November, 2020 when he was arrested.

58. The Appellant has stated in this appeal that the trial court did not consider his alibi defence. Looking at his defence, the supposed alibi was clearly false as the Prosecution witnesses placed him in Betty's home from where he picked the complainant around 6pm on the material day. This ground of appeal was therefore for dismissal.

59. I have agonized on whether the Appellant drove past the complainant's bus stage on to Silibwet without her consent. I have also agonized on whether the sexual act upon reaching and parking at the Silibwet Green Stadium was consensual or not. From my evaluation of the surrounding circumstances this was not a clear cut case. PW2 stated that the distance from Betty's home to the complainant's home was a five-minute walk. While taking a lift in itself was not wrong, this court must wonder whether the lift was necessary or was part of a consensual plan to drive away. Secondly, the complainant testified that after the Appellant raped her, he said he was going to the shop and left her in the car and did not return. That members of the public came and asked her what she was doing. That the Appellant's wife and her sister attacked and assaulted her accusing her of snatching her husband.

60. The fact of assault was supported by the medical officer's evidence that he treated the complainant for injuries sustained in the assault. This was buttressed by the evidence of PW6, the investigating officer who stated that she escorted her to hospital for treatment and had the P3 Form filled in a government hospital. PW6 told the court that the assault case was settled out of court by the families.

61. The evidence above creates two scenarios. Either the complainant suffered a double tragedy of being raped by the Appellant and then being assaulted by the Appellant's wife on suspicion of having an affair with her husband; or that the complainant and the Appellant were having consensual sex when busted and assaulted by the Appellant's wife. The first scenario is an indictment on the investigation for not doing thorough investigation. The later scenario creates doubt in the mind of the court as to whether or not penetration was consensual. It was the duty of the prosecution to prove lack of consent to the required legal standard which is beyond reasonable doubt. As the law stands any doubt must be resolved in favour of the Accused.

62. Consequently, it is my finding that the ingredient of lack of consent was not adequately proven.

63. The Appellant while denying the offence, did not admit having had consensual sex, which he has now raised on his appeal. This raises a very strong suspicion in the mind of the court that he did commit the

offence. It is trite however that suspicion alone, however strong cannot found a conviction. It was upon the prosecution to prove the case against the Appellant. He bore no burden to prove his innocence.

64. In the end, I allow the appeal. I quash the conviction and set aside the sentence. The Appellant is set at liberty forthwith unless otherwise lawfully held.

65. Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 29TH DAY OF FEBRUARY, 2024

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of Ms. Boiyon holding brief Mr.Njeru for the State the Appellant acting in person and Siele(Court Assistant)