Ringo v Republic (Criminal Appeal 88 of 2023)
[2024] KEHC 2783 (KLR) (19 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2783 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL 88 OF 2023

DR KAVEDZA, J

MARCH 19, 2024

BETWEEN

FRANCIS OWINO RINGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against original conviction and sentence delivered by Hon. A. Mwangi (CM) on 11th May 2023 at Kibera Chief Magistrate's Court Sexual Offences Case no. 73 of 2019 Republic vs Francis Owino Ringo)

JUDGMENT

1. The appellant was charged and, after a full trial, convicted for the offence of rape, contrary to Section 3(1)(a)(b) as read with Section 3(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the night of August 16, 2019, in Nairobi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of P.M.O. without her consent.

2. The appellant was sentenced to serve 10 years' imprisonment. He appeals against conviction and sentence in line with his undated petition of appeal. The appellant has filed seven grounds of appeal, and both parties have filed written submissions, which I have considered.

3. This is the first appellate court and in *Okeno v R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.

4. The thrust of the grounds of appeal is that the trial magistrate failed to appreciate that penetration was not sufficiently proven; that the complainant was not truthful; that the medical evidence did not link the appellant to the offence and that the prosecution's case was narrated with gross contradictions, inconsistencies, and illegalities.

5. I have considered the evidence and the submissions by both parties. I find that the issue in this appeal is whether the prosecution proved their case beyond reasonable doubt.

6. Rape is defined under section 3 of the *Sexual Offences Act* to mean,

> the intentional and unlawful penetration of a person's genital organ into another's genital organ without their consent.

7. The elements for rape are well settled in *Simon Kimiti David v Republic* [2017] eKLR where it was stated thus;

> " Without corroboration, the essential elements of rape consist of the following:
>
> (1) The act of intentional and unlawful penetration.
>
> (2) The act of sexual intercourse was done and against the complainant's will.
>
> (3) The consent is obtained by force or by means of threats or intimidation."

8. The prosecution was therefore required to establish the following ingredients; penetration, absence of consent, and that the Appellant was the unlawful perpetrator of the act.

9. The prosecution case was as follows. The Complainant (PW1) gave sworn testimony and stated that she was 21 years old. She narrated that on the night of 16.8.2019 at around 10 pm, she went to the toilet which was outside their house and on her way back, she met the appellant who pulled her into his room. The appellant demanded that she have sexual intercourse with him but PW1 declined. The appellant forcefully removed her clothes and had sexual intercourse with her. She told the court that the appellant first inserted his finger into her vagina and then raped her twice throughout the night before releasing her at 6 am.

10. Was there an absence of consent? A person is said to consent, if he or she agrees by choice, and has the freedom and capacity to make that choice. In the case of *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."

11. In the present case, during the ordeal, PW1 tried to scream but she could not since her throat was dry as a result of the flu. PW1 also tried to push the appellant away but her efforts were futile. It is clear to this court that PW1 was not in a position to consent to the sexual act since she was forcefully dragged into the appellant's house and subjected to forceful sexual intercourse. Despite being unable to scream, PW1 physically tried to push the appellant away but was unsuccessful. I hold that these actions are consistent with the testimony of PW1 that she did not consent to the sexual intercourse.

12. Further, both PW2 (PW1's brother) and PW3 (PW1's father) testified that the following morning after the incident, PW1 was crying and was distressed. PW5, an independent witness, also confirmed that PW1 was in distress when she confronted her about the incident. As rightly concluded by the trial magistrate, the foregoing conduct of PW1 was akin to that of a victim of sexual abuse.

13. PW 2's testimony did not require corroboration in accordance with the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if the trial magistrate recorded reasons why she believed the victim was telling the truth. The trial magistrate found PW1 to be a truthful witness and found no evidence as to any grudge between the appellant and the complainant that would make her give a false narration of the events. Further, I have thoroughly looked at the record and I note that PW1 was consistent in her narration of the series of events. Despite being subjected to rigorous cross-examination by the appellant, her evidence was not shaken on cross-examination.

14. Even so, to corroborate PW1's evidence on penetration, the prosecution called Dr. Corrine Arara, a medical officer at Kenyatta National Hospital (PW4) who examined PW1 on 17.8.2019 and who produced the Post Rape Care (PRC) form and the P3 form. Upon examination of PW1, there were no tears or lacerations on her genitalia, the hymen was torn with an old tear and there was mild tenderness on the vagina. She further stated that there was bleeding from the inside of PW1's vagina, which PW4 could not ascertain whether or not it was as a result of PW1's menses. In cross-examination, PW4 stated that PW1's trousers also had blood stains on them, which could have been out of a rape injury.

15. The appellant argued that while the complainant stated that she was a virgin before the sexual encounter, the findings of PW4 were that the hymen had an old tear, hence inconsistent with the complainant's testimony. He argued that this raises doubts about her truthfulness and reliability as a witness. On this issue, PW4 clarified on re-examination that the hymen can be broken by other factors or things other than the penis, such as tampons and fingers. The court of Appeal in *P.K.W v Republic* [2012] eKLR also observed thus:

> "In most cases of sexual offence we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however an erroneous, assumption. Scientific and medical evidence has proved that some girls are not even born with a hymen. Those who are, there are times when the hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, injury, and medical examinations, which can also rupture the hymen. When a girl engages in vigorous physical activity like horseback ride, bicycle riding, and gymnastics, there can also be natural tearing of the hymen."

16. The answer therefore is that the fact that there are no fresh tears on the hymen does not mean there was no penetration, other findings ought to be considered. From the medical evidence, and as indicated in the PRC form, PW1 had minimal bleeding from her vagina. Even though PW4 could not ascertain whether the said blood was from PW1's menses, I have noted that this finding was consistent with PW1's testimony that after the said act of penetration, she bled, which bleeding was also visible on the trousers she had on the material night. I am therefore of the view that the findings of medical evidence were consistent with the testimony of PW1.

17. The appellant also argued that despite samples being taken from PW1, a DNA test was not conducted to ascertain whether the appellant was the perpetrator. However, as was held in the case of *AML v Republic* (2012) eKLR, the fact of rape or defilement is not proved by DNA test but by way of evidence.

18. In this case, PW1 gave clear and graphic testimony of the ordeal. PW1 identified the appellant as Owino, who was the caretaker of the plot in which PW1 and her family lived, a fact which was not disputed. Further, despite the incident occurring at night, PW1 stated that she was carrying her mobile phone, whose flashlight she used to identify the man who accosted her. Having known the appellant

prior to the incident, and having been able to identify him using the phone's flashlight, I hold that PW1 positively identified the Appellant as the one who committed the act of rape.

19. In defence, while the appellant denied committing the offence on the material night, he confirmed that he was indeed alone in his house on the said night. The appellant also called DW2, a fellow caretaker at the plot, who testified that he could neither hear PW1's screams nor any other commotion in the appellant's house. The fact that DW2 was unable to hear any screams was consistent with PW1's testimony that she could not scream during the ordeal since she had a dry throat. PW1 also testified that she tried resisting but the appellant overpowered her, hence there being no commotion to raise an alarm. I have weighed the appellant's defence against the prosecution case and find that it amounts to a mere denial and it does not in any way raise doubts on the prosecution's witness testimonies. I therefore affirm the appellant's conviction.

20. With regard to the sentence imposed, the appellant was charged under Section 3(1)(a)(b) as read with Section 3(3) of the *Sexual Offences Act*. Consequently, the court imposed a sentence of 10 years imprisonment.

21. Sentences are intended, i*nter alia*, to punish an offender for his wrongdoing; they also aim to rehabilitate offenders to renounce their criminal tendencies and become law-abiding citizens. I do not doubt that the sentence imposed by the trial court was lawful and I therefore affirm it.

22. The upshot of the above analysis is that the appeal is found to be lacking in merit and is dismissed.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 19TH DAY OF MARCH 2024

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D. KAVEDZA

JUDGE

In the presence of:

Ms. Tumaini for the Respondent

Ms. Maina for the Appellant

Naomi/Joy Court Assistants.