SA v Republic (Criminal Appeal E008 of 2022)
[2024] KEHC 3317 (KLR) (18 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3317 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E008 OF 2022

JN KAMAU, J

MARCH 18, 2024

BETWEEN

SA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon S. O. Ongeri (SPM) delivered at Vihiga in Senior Principal Magistrate's Court in Criminal Case No 37 of 2019 on 8th September 2021)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of rape contrary to Section 3(1)(a)(c) (3) (sic) of the *Sexual Offences Act* No 3 of 2006. He had also been charged with an alternative offence of committing an indecent act with a child contrary to Section 11(A) (sic) of the *Sexual Offences Act*. The Charge Sheet was amended and he was charged with the offence of assault as Count II.

2. He was tried and convicted on the main charge by the Learned Trial Magistrate, Hon S. O. Ongeri, Senior Principal Magistrate who sentenced him to ten (10) years imprisonment.

3. Being dissatisfied with the said Judgement, on 22nd August 2022, the Appellant lodged the Appeal herein. His Petition of Appeal was undated. He set out seven (7) grounds of appeal. On 19th January 2024, he filed Supplementary Grounds of Appeal dated 2nd October 2023. He set out three (3) Supplementary Grounds of appeal.

4. His Written Submissions were dated 3rd October 2023 and filed on 19th January 2024 while those of the Respondent were dated 5th February 2024 and filed on 6th February 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.

7. Having looked at the Appellant's Grounds of Appeal, Supplementary Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issue that had been placed before it for determination were as follows:-

    1. Whether or not the Charge Sheet was defective;

    2. Whether or not the Prosecution proved its case beyond reasonable doubt; and

    3. Whether or not the sentence that was meted to him was excessive warranting interference by this court.

8. The court therefore dealt with all the said issues under the following distinct and separate heads.

I. Charge Sheet

9. Ground of Appeal No (1) of the Petition of Appeal was dealt with as hereunder.

10. The Appellant had asserted that the charges against him were defective contrary to Section 214 of the*Criminal Procedure Code* Cap 75 (Laws of Kenya). Both he and the Respondent did not submit on this issue. Nonetheless, this court deemed it proper to consider the issue as the same had formed part of the Appellant's Grounds of Appeal.

11. Notably, the said Section 214 (1)(i) of *Criminal Procedure Code* stipulates that:-

    > " Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:
    >
    > Provided that—
    >
    > i. where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge"

12. It was not clear what the Appellant's argument relating to Section 214(1)(i) of the *Criminal Procedure Code* was. Be that as it may, a perusal of the proceedings of 26th June 2019 showed that he denied the charge. On 9th June 2021, the Prosecution applied to the court to amend the charge sheet to add the Count for assault. He indicated that he was not aware (sic). The amended charge was read to him and he pleaded not guilty to the same.

13. As a charge sheet could be amended at any time before the close of the Prosecution's case and the charge read to an accused person to plead again pursuant to Section 214(1)(i) of the *Criminal Procedure Code* which was the procedure that was adopted during the Appellant's trial, this court was not persuaded that the Appellant's right to fair trial under Article 50(2) of the *Constitution* of Kenya, 2010 was violated, infringed upon and/or contravened.

14. In the premises foregoing, this court found and held that Ground of Appeal No (1) of the Petition of Appeal was not merited and the same be and is hereby dismissed.

II. Proof of Prosecution's Case

15. Grounds of Appeal Nos (2), (3), (4), (5), (6) and (7) of the Petition of Appeal and Supplementary Grounds of Appeal Nos (1) and (2) were dealt with together under the following distinct and separate heads.

A. Identification

16. The Appellant placed reliance on the case of *Maitanyi v Republic* [1986] eKLR where it was held that many witnesses did not properly identify other person even in the day light. He also referred to the case of *James Chege Wanja & Another vs Republic* [2014] eKLR 424 where it was held that in the absence of an enquiry into the nature of light or its intensity, the evidence of recognition could not be free from error.

17. He further relied on the case of *Odhiambo v Republic* [2002] 1 KLR 241, 247 where it was held that where it was a single witness and circumstances of identification were known to be difficult, what was needed was either a corroboration of direct or circumstantial evidence pointing at the guilt of an accused person from which the court could reasonably conclude that identification was accurate and free from the possibility of an error.

18. He argued that the evidence of identification herein had many short comings as recognition was done at 7.00p.m and that the Complainant, DM (hereinafter referred to as "PW 1") did not establish the source of light under which her identification by recognition was made for the court to test the nature of light intensity and brightness to see if she positively identified the person who emerged and waylaid her as she fetched water.

19. He contended that she testified that she could not remember how long her perpetrator did the act thus could not establish her time under the observation of her attacker (sic). He added that she did not also state if she identified her attacker by his voice. He pointed out that she contended that there was a heavy rainfall that could not allow her scream to be heard.

20. He averred that Beatrice Atieno (hereinafter referred to as "PW 3") testified that the suspect ran when she approached the river and hence did not seem to have seen the suspect but asked PW 1 about him. He further stated that PW 3 testified that she had a torch that she used to see the perpetrator but did not establish the distance between the perpetrator and where she was so that the court could test the intensity of light. He termed PW 3 as a single eye witness under difficult circumstances which had to be tested with great care. He pointed out that mistaken identity of even the closest relatives existed.

21. He was categorical that there were conflicting evidence, contradictions and discrepancies that were inconsequential to conviction and went to the root of the case. He asserted that the onus of proof lies on the prosecution and did not shift to him. In this regard, he invoked Section 107 of the *Evidence Act*.

22. On its part, the Respondent submitted that he was positively identified as PW 1 stated that he was her uncle and lived five (5) minutes' walk from her home.

23. PW 1 was the only single identifying witness in the case. Under Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya), a trial court could convict a person on the basis of uncorroborated evidence of the victim if it was satisfied that the victim was telling the truth.

24. Notably, the proviso of Section 124 of the *Evidence Act* states 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 (emphasis)."

25. However, a trial court must exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person's word against the other. Other corroborating evidence could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful.

26. PW 1 testified that the Appellant was his uncle and that he raped her on the material date of 6th June 2019. She said that his house was opposite her home and was five (5) minutes away on foot. Her evidence was that she went to the river at around 5.30 pm when he waylaid and raped her. In his unsworn evidence, he admitted that PW 1 was his niece but denied that he raped her.

27. Indeed, PW 1 struggled with the Appellant as she tried to flee to no avail. This was sufficient time for her to have clearly seen who her attacker was. They were not strangers to each other as they were not only relatives but they were also neighbors. The incident occurred during daytime when the lighting conditions were favourable for a positive identification without the possibility of mistaken identity.

28. Without belaboring the point, this court found that identification was by way of recognition and consequently, the Appellant was positively identified as the perpetrator of the heinous crime.

B. Penetration

29. The Appellant submitted that the evidence of prosecution was marred with contradictions. He contended that Paul Muturi Welangu (hereinafter referred to as "PW 2") testified that the hymen was raptured but there was no visible discharge and that that meant the hymen had been broken long ago. He added that No 86662 PC Rael Ambisi (hereinafter referred to as "PW 4") confirmed that the clothes were stained with mud but not blood.

30. He questioned how PW 1 could have gone to the river to fetch water while it was raining. He asserted that the Clinical Officer, Paul Muturi Welangu (hereinafter referred to as "PW 2") contradicted himself when he testified that there was no evidence of penetration and again said that the injuries PW 1 sustained had been caused by human body without explaining what "human body" was. He pointed out that the hymen was ruptured but that there was no evidence of discharge.

31. He also cast aspersions on PW 3's evidence that she got PW 1's blood stained bikers and questioned where the blood was coming from.

32. On its part, the Respondent submitted that PW 1 stated that the Appellant inserted his penis in her vagina and she felt pain and that her evidence was corroborated by that of PW 2 who stated that she had injuries on the labia and that her hymen was ruptured which lead him to conclude that there was penetration.

33. PW 2 testified that he found bruises on PW 1's labia. Her hymen was also ruptured. He stated that the probable type of weapon that caused the injuries was a human body. The fact that there were injuries to PW 1's labia was evidence that there was force during the sexual engagement on the material date.

34. The Appellant's defence that he did not meet PW 1 that day did not sound plausible. The fact that she did not consent to the act was proof that the offence of rape was established. Indeed, in the case of *Republic vs Oyier* (1985) KLR pg 353, it was held that lack of consent was an essential element of rape

35. The Appellant's assertions that PW 2 did not state what human body caused PW 1's injuries were not correct. Indeed, in the P3 Form, it was indicated that the probable type of weapon was "human body part (penis)" which is what PW 1 stated had caused her injuries.

36. Without belabouring this point, this court came to the firm conclusion that the Prosecution had proven the case herein beyond reasonable doubt. The Trial Court therefore correctly determined that the Appellant committed the offence of rape.

37. In the premises foregoing, Grounds of Appeal Nos (2), (3), (4), (5), (6) and (7) of the Petition of Appeal and Supplementary Grounds of Appeal Nos (1) and (2) were not merited and the same be and are hereby dismissed.

III. Sentence

38. The Respondent did not submit on the issue of sentence but urged the court to uphold it.

39. On his part, the Appellant cited the case of *Edwin Wachira and 9 others* Petition No 97 of 2021 (eKLR citation not given). He did not, however, highlight the holding that he relied on therein. He cited Section 333(2) of the *Penal Code* (sic) and contended that he was a first offender and had served three (3) years in prison which was sufficient time to meet the requirements of punishment, deterrence and rehabilitation and that he had transformed him into a person who no longer posed any threat to the public. He pleaded with court to consider that he was still a young man. He urged the court to reduce his sentence to a least prescribed one pursuant to Section 26(2) of the *Penal Code* and Article 50(2) (p) of the*Constitution* of Kenya, 2010

40. Section 3(1) (a) and Section 3(3) of the *Sexual Offences Act* provide that:-

    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.

    2. In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this *Act*.

3. A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life (emphasis court).

41. The Trial Court sentenced the Appellant to ten (10) years imprisonment This was within the law as it could exercise its discretion and sentence him up to life imprisonment.

42. Despite there being emerging jurisprudence to reduce sentences under the *Sexual Offences Act* as can be seen in the case of *Dismas Wafula Kilwake vs Republic* [2018] eKLR where the Court of Appeal held that Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing offences, the African Charter on Human and Peoples' Rights on the Rights of Women in Africa provides that any practice that hinders or endangers the normal growth and affects the physical and psychological development of women and girls should be condemned and eliminated. Rape is one of those practices and actions. It must therefore be condemned in the harshest terms.

43. Rape is a crime that robs the victim his or her dignity and carries lifelong trauma. It is an unforgivable crime because the perpetrator takes something valuable from the victim by force and unexpectedly. It is similar to the offence robbery with violence that leaves a victim shocked and traumatised.

44. Considering that the Appellant was an uncle to PW 1, who ought to have protected her and not attack her to the extent of raping her, this court restrained itself from disturbing the sentence of ten (10) years that was meted upon him as the same was fair. His assertion pursuant to Section 26(2) of the *Penal Code* and Article 50(2)(p) of the *Constitution* of Kenya, 2010 therefore fell on the wayside.

45. For the completeness of records, this court considered the period he had spent time in custody while his trial was ongoing as provided in Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) which provides as follows:-

> "Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall (emphasis court) be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody" (emphasis court).

46. This duty to take into account this period is also contained in Clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines where it is provided that: -

> "The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

47. This duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in the case of *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR.

48. A perusal of the proceedings of the lower court showed that although the Trial Court granted the Appellant bond of Kshs 100,000/= with one (1) surety of a similar amount, there was no indication in the court file if he was released on bond/bail while the trial was ongoing. He remained in custody throughout his trial. He was arrested on 25th June 2019 and was sentenced on 16th September 2021. That period therefore ought to be taken into account while computing his sentence.

Disposition

49. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 22nd August 2022 was not merited and the same be and is hereby dismissed. The Appellant's conviction and sentence be and is hereby upheld as they were both safe.

50. For avoidance of doubt, it is hereby directed that the period between 25th June 2019 and 15th September 2021 be and is hereby taken into account while computing his sentence as provided in Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).

51. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 18TH DAY OF MARCH 2024

J. KAMAU

JUDGE