Wanjiru v Republic (Criminal Appeal 143 of 2023)
[2024] KEHC 5966 (KLR) (28 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5966 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL 143 OF 2023

DR KAVEDZA, J

MAY 28, 2024

BETWEEN

OBED MWAI WANJIRU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. SO Case No. E26 of 2022 by Hon E. Riany on 12 April 2023)

JUDGMENT

1. The Appellant, Obed Mwai Wanjiru, was charged with the following offences: In count 1, he faced a charge of rape contrary to section 3(1) of the *Sexual Offences Act* No. 3 of 2006. In count 2, he was charged with attempted rape contrary to section 4 of the *Sexual Offences Act* No. 3 of 2006. In count 3, he was charged with robbery with violence contrary to Section 296(2) of the Penal Code. He pleaded not guilty to the offences. After a full trial, he was found guilty of rape, attempted rape and robbery with violence and convicted accordingly. Consequently, he was sentenced to serve ten (10) years imprisonment in respect of count 1, five (5) years in respect of count 2 and life imprisonment in respect of count 3. Being aggrieved by his conviction and sentence, the Appellant filed the instant appeal.

2. The Appellant raised three (3) grounds in his Petition of Appeal to which he expounded in his written submissions dated 15th March 2024. These were as follows: that the trial court erred in law by failing to find that the appellant's right to a fair trial was infringed contrary to Article 50(2)(g) of *the Constitution*; that the trial court erred in by failing to observe that the entire prosecution case was impeachable under section 163(1) of the *Evidence Act*; and that the appellant's defence was not given adequate consideration contrary to section 169(1) of the Criminal Procedure Code. Further, that the identification evidence was flawed and contrary to Identification Parada Rules for failure to call the

maker of the ID parade forms; that the offences of robbery with violence and rape were not proved; and that the sentence was manifestly harsh and excessive.

3. In opposing the appeal, the respondent filed grounds of appeal dated 25 March 2024 and maintained that the appeal is unsubstantiated and an abuse of the court process. It was further submitted that the appellant was properly convicted before the trial court and that the prosecution did discharge its burden of proof beyond reasonable doubt. The respondent therefore urged the court to dismiss the appeal.

4. First appellate court is under duty to re-evaluate the evidence presented at trial and draw its own independent conclusions. Except, it must bear in mind that it neither saw nor heard the witnesses give their testimonies. Thus, matters of demeanor are best observed by the trial court. See Okeno vs. Republic [1972] E.A 32.

5. On October 8, 2022, the complainants, PW1 (AA) and PW2 (FN), left their school at Kenya Medical Training College (KMTC) in Kabarnet and arrived in Nairobi around 10 PM. Due to a curfew, the police used teargas to disperse people. A motorbike rider offered to take them home to Thika Road and suggested using the Parklands route to avoid the police. They fueled at Rubis Petrol Station, where PW1 paid Kshs. 200/=. The rider then diverted to a rough road, accelerated, and stopped in some bushes, instructing them to alight to cross a nearby river. PW1 got off first, and the rider revealed a knife, threatening PW1 to stay still or he would kill PW2. The rider ordered them to sit down, took their phones, PW1's cash, and PW2's charger. He forced PW2 to surrender her Mpesa pin and transferred around Kshs. 400/= after punching her.

6. The motorbike rider then told the complainants to undress and he took PW2 and forced her to bend on the motorbike. He ordered PW2 to apply saliva on her genitalia and attempted to penetrate her vagina, and when he was unsuccessful to do so, he attempted to penetrate her anus, which he also failed. As for PW1, it was her evidence that when the motorbike rider was done with PW2, he turned to her and ordered that she removes her pant and skirt while hitting her with his elbow. After undressing, the motorbike rider raped her and after he was done, he took his motor bike and left.

7. After the incident, the complainants found a nearby police officer who helped them report it. They were referred to Nairobi Women's Hospital for assessment and treatment. Later, they were called to Spring Valley Police Station for an ID parade and identified the appellant as their assailant. PW1 identified the appellant by touching him among nine people, while PW2 identified him by his height, complexion, face, and the bluish jacket and boots he wore on the incident day. PW2 also noted that after replacing her SIM card, she found unauthorized Mpesa transactions of Kshs. 100 and Kshs. 300 on October 8, 2022.

8. PW3, John Njuguna a Clinician at Nairobi Women's testified on behalf of Faith Mutisya who examined the complainants at Nairobi Women's Hospital. She observed that no injury was observed on PW2's body. On genital examination of PW2, no injury was noted, her clothes were not stained and the laboratory test revealed no STD. Nevertheless, PW2 was given PEP and emergency pregnancy preventive drugs. PW3 produced the duly filled Post Rape Care (PRC) form and P3 form as exhibits. As for PW1, PW3 observed that no injury was demonstrated physically and the anal region was normal. There was incidental hemorrhage at 12 o'clock position and no STD were noted during blood analysis. PW3 produced the PRC form and P3 as exhibits.

9. PW4 PC Esther Wanjiru was the investigating officer. It was her testimony that on 8th October 2022 at about 11:45pm, while she was in the office, she got a report from PW1 and PW2. She recorded their statements and took them to Nairobi Women's Hospital. She told the court that there were several cases of sexual assault around the same area during the Covid period and that she later called

the complainants to an ID parade to identify their assailant and it is then that they identified the appellant. PW4 produced the DNA report which indicated that the anal swab from the complainant was examined and found not to be stained with semen, spermatozoa or blood. PW4 further produced the ID Parade reports and PW2's Mpesa statement.

10. When put to his defence, the appellant in a sworn statement denied committing the offence and testified that he was a boda boda operator living in Shauri Moyo. On 8 October 2021, he went to work as usual and later while he was at home, he received Kshs.100 via Mpesa. He did not know the sender but he called the number and found that it had been switched off. On 23 February 2022, he was at work until 12:30pm when he was called by a customer to meet at Mwalimu wines and spirit where he had been lured by the police and subsequently arrested. On cross-examination, he maintained that the money he received had been sent by a stranger and that he didn't reverse the transaction.

11. Upon carefully re-evaluating the evidence on record and considering the parties' respective submissions, I find that the following are the issues for determination: whether the prosecution proved the offences of robbery with violence, rape and attempted rape against the Appellant to the required standard and whether the sentences were proper.

12. The first issue is whether the offence of robbery with violence was proved beyond reasonable doubt in determining this issue, the court ought to first consider whether the evidence on record established the offence of robbery with violence. The offence is established where the prosecution proves that either of the circumstances prescribed under Section 296(2) of the Penal Code obtained during the robbery incident. These are that:

    a) The offender is armed with a dangerous or offensive weapon or instrument; or

    b) The offender is in the company of one or more person or persons; or

    c) If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any personal violence to any person.

13. The Court is not required to look for the presence of all three ingredients, as proof of one of the ingredients would suffice to secure a conviction. (See. Dima Denge Dima & Others vs Republic, Criminal Appeal [2013] eKLR.

14. PW1 and PW2 testified that they boarded a motorbike to head home along Thika Road. However, due to the curfew that was in effect to contain the spread of COVID-19, the motorbike rider told them that they would use another route through Parklands to evade the police. While on the way, he deviated to a secluded area and robbed off the complainants their phones while armed with a knife. He went ahead and forced PW2 to surrender her Mpesa pin whose account had some cash and transferred money to himself. PW4 confirmed that the said incident was reported at Spring Valley Police Station on 8th October 2022. In the premises, I find that two of the elements, either of which is sufficient to prove that the offence of robbery with violence, were established.

15. The next question that the court has to answer is whether the Appellant was positively identified as the robber. The appellant submitted that the identification evidence was flawed and contrary to the Identification Parade Rules. He was aggrieved that no description of the complainant's assailant was given to the police. It is instructive to reiterate that it is not necessary for the identifying witness to point out special features of an accused person. The threshold to be met is narrower than that. It all boils down to the strength of the evidence of the identifying witness.

16. According to the evidence on record, the incident is alleged to have occurred at around 10:00 p.m. when it was obviously dark. However, PW1 and PW2 told the court that when the appellant picked them

up in town, he removed his helmet, and they clearly saw his face as the motorbike lights as well as the streetlights were on. Additionally, PW2 took note of the appellant's body, physique, complexion, face, and voice as they spoke when he gave directions. PW2 even recalled that the appellant was wearing a bluish jacket and boots. The complainants also saw him well at Rubis Petrol Station, which was well lit, as they fueled the motorbike at Parklands. In these circumstances, it is discernible that the complainants must have had a good look at the appellant. Furthermore, the evidence of the complainants regarding the identity of the assailant is corroborated. They were able to pick the appellant out of an identity parade, and therefore they could not be said to have been influenced in their identification.

17. In the case of Nzaro –vs- Republic [1991] 2KAR 212, the Court of Appeal held as follows on the issue of identification:

> " A careful direction regarding the conditions prevailing at the time of the identification and the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error was essential."

18. In so far as I agree with the appellant that it would have been more proper for the ID Parade forms to be produced by the ID Parade officer, namely Kennedy Owino, as opposed to the Investigating Officer, I find that no prejudice was occasioned to the appellant. He did not deny having participated in the ID parade exercise and was given a chance to cross-examine on the same but did not, neither did he raise an objection to their production. This ground therefore fails.

19. As to whether the robbery took place, the appellant submitted that the complainants failed to prove ownership of the items alleged to have been stolen, namely, the ITEL and Samsung A50 phones and as such there was lack of proof of the elements of robbery with violence. The appellant has also alleged that PW2's Mpesa statement produced as exhibit 7 was inadmissible having not been accompanied by a certificate prepared under section 106B of the *Evidence Act*.

20. I have perused the said Mpesa statement which clearly indicates that PW2's phone number sent Kshs.100 to Obed Wanjiru, the appellant herein, around the same time when PW1 alleges to have been attacked by the appellant and compelled to surrender her Mpesa pin. It is important to note that that an M-pesa transaction is electronic evidence which can only be admissible if accompanied by a certificate prepared under Section 106B (4) of the *Evidence Act* by a person who is competent in the management of the electronic devise, outlining the manner in which the information was extracted. In the absence of such a certificate, I agree with the Appellant that the M-pesa statement's authenticity was questionable.

21. Be that as it may however, the indisputable evidence on record, as even admitted by the appellant, is that on the date of the incident, the appellant received Kshs.100 in his Mpesa account from an unknown number. This happened to be the time the assailant had demanded for PW2's Mpesa pin.

22. Concomitantly, looking at the circumstantial evidence aspect, it was well covered by the trial magistrate when she held as follows:

> " Strangely, when the accused is arrested, he is found to be a motor bike rider. Apart from that, it is confirmed that the illegal Kshs.100/= that was sent from PW2's phone on the night they were molested and their phones stolen and forced to give out their pins had been sent to the accused. Apart from that, when an identification parade is carried out, both victims positively identified him. This cannot be a coincidence. In his defence, accused stated how on the material day he had been at work as normal and went home. He went ahead to confirm that Kshs.100/= was sent to him while he was at home. He didn't know the

sender thus called the number but the same was switched off. He was later arrested after an officer posed as a customer and he fell for the bait. All the evidence herein points towards the accused."

23. Similarly, I find that there was ample evidence on the identification of the appellant and that he committed the robbery. In addition to direct evidence, there was also circumstantial evidence. PW1 and PW2 clearly saw the appellant when he picked them up in town on the material day. Despite it being at night, the streetlights and the motorbike lights were on, and they also passed by Rubis Petrol Station, which was well-lit, where the complainants clearly saw the appellant. Furthermore, he was positively identified by the complainants in the identification parade that was conducted later. As such, I am satisfied that the appellant's conviction for robbery with violence was proper.

24. The second issue is whether the offence of rape was proved. Having settled the issue of the identification of the Appellant hereinabove, I will not belabour the point but only determine if the appellant also raped PW1. The offence of rape is provided for under Section 3 of the *Sexual Offences Act* as follows:

> "(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
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> (c) The consent is obtained by force or by means of threats or intimidation of any kind."

25. In Republic v Francis Otieno 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."

26. As to whether there was unlawful penetration of PW1's vagina, I note that PW1 gave clear and uncontroverted testimony regarding how the appellant ordered her to remove her pant and skirt while hitting her with his elbow. After undressing, the appellant allegedly raped her, and after he was done, he took his motorbike and left. PW1's evidence was corroborated by PW2, who was also at the scene and witnessed the events, and by the medical report adduced by PW3, which classified the degree of the injury as harm. I therefore affirm the appellant's conviction for the offence of rape.

27. On the offence of attempted rape, Section 4 of the *Sexual Offences Act* provides:

> "Any person who attempts to unlawfully and intentionally commit an act which causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term which shall not be less than five years but which may be enhanced to imprisonment for life."

28. Further Section 388 of the Penal Code;

> "(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence"

29. PW2, in her testimony, stated that the appellant ordered her to remove her clothes, after which he told her to bend over the motorbike and apply saliva to her genitalia. The appellant attempted to penetrate her vagina but was unsuccessful, and then attempted to penetrate her anus, which he also failed to do. PW2's evidence was corroborated by PW1, who was also at the scene and testified to the same facts. The medical report produced by PW3 classified the degree of injury as harm.

30. The appellant's second major ground of appeal was that there was no tangible medical evidence adduced to link him with the rape and attempted rape of the complainants. He also argued that a DNA examination did not link him to the offences. In my view, such evidence was not necessary and, in any event, the trial court found that there was sufficient evidence from the testimony of PW1 and PW2 to link the appellant to the offences. In Aml v Republic [2012] eKLR (Mombasa), the Court of Appeal upheld the view that: "The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

> This was further affirmed in the case of Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa) where the court stated:
>
> "... [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

31. On the allegation that the appellant's defence was not considered, it is clear from the record that the appellant in his sworn evidence mainly denied the allegations and as such the trial magistrate in the judgement held that he did not cast any doubt to the prosecution's case.

32. The appeal on conviction therefore fails.

33. As regards the sentence, the appellant has submitted that the same was harsh and excessive and has further challenged the legality of the death sentence. In view of Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR, the death penalty was held to be legal and what was declared unconstitutional is the mandatory nature of the sentence that had taken away the discretionary power of the courts in sentencing. It is trite that the courts can now impose an appropriate sentence after considering the nature of the offence, how it was executed and the mitigating factors among other reasons.

34. A cursory reading of the sentencing notes reveals that the trial magistrate in imposing the death sentence had considered that the victims are still traumatized, the appellant abused their trust as a transporter and up to now, the appellant has not taken responsibility for his actions. It is instructive to note that despite considering all mitigating and aggravating factors, the hands of the trial court were tied by the mandatory nature of the sentences it could only impose. To that extent, the appeal has merit on the ground that this Court can interfere with the mandatory sentences that were imposed by the trial court.

35. In considering the appropriate sentence, I note that each case must be evaluated in light of its own circumstances. Before me is an appellant who betrayed the trust of his victims as their transporter, deviated from the road to a secluded area, and while armed with a knife, robbed his victims and sexually assaulted them. I further note from the probation report that the appellant is a repeat offender and that prior to his conviction, he had an ongoing case at Makadara Law Courts where he was charged with robbery with violence. In mitigation, the appellant only stated that he was a young man yet to marry and that he was the sole breadwinner. Despite the robbery being aggravated by rape and attempted rape, I also take into consideration that the appellant did not seriously injure the victims during the commission of the offense.

36. In my view, the sentences that were meted out were lawful in the circumstances and will only interfere as follows:

    i. The ten (10) years imprisonment imposed for the offence of rape is set aside and substituted with seven (7) years imprisonment;

    ii. The five (5) years imprisonment imposed for the offence of attempted rape is affirmed; and

    iii. The life imprisonment imposed for the offence of robbery with violence is set aside and substituted with twenty (20) years imprisonment.

    iv. The sentences shall run concurrently from the date of arrest which is 23rd February 2022 pursuant to section 333(2) of the Criminal Procedure Code, Cap 75 Laws of Kenya.

    It is so ordered.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 28TH DAY OF MAY 2024.

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D. KAVEDZA

JUDGE

In the presence of:

Ndegwa for the Appellant

Ms. Tumaini for the Respondent

Appellant present

Joy Court Assistant