Muriithi v Republic (Criminal Appeal E022 of 2024)
[2024] KEHC 10630 (KLR) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 10630 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E022 OF 2024

DKN MAGARE, J

JULY 30, 2024

BETWEEN

JOHN MAINA MURIITHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Arising from Sexual Offence Case No. E035 of 2021 at Karatina Law Court)

JUDGMENT

1. The Appellant was charged with defilement contrary to Section 8(1)(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on diverse dates between the months of April 2020 up to October 2020 at (Particuars withheld) village (Particuars withheld) sub-county within Nyeri County, the Appellant intentionally caused his penis to penetrate the vagina of S.A.O. a child aged 10 years.

2. There was an alternative count of an indecent act with a minor. The Appellant pleaded not guilty and was released on Kshs. 300,000/= bond with a hearing on 2/3/2022.

3. The matter proceeded on 2/3/2022 where a total of 3 witnesses testified. The matter was adjourned to 18/5/2022 when the last witness was heard. The court immediately placed the Appellant on his defence upon whereof they indicated Section 211 of the Criminal Procedure was complied with. Accused responds “sworn with no witness.”

4. The matter was fixed for defence hearing on 20/6/2022. The Appellant defended himself where the Appellant changed and asked to give unsworn evidence. The court found the Appellant guilty and convicted him to serve life imprisonment on 29/6/2022. That resulted in this appeal.

5. The procedure adopted is strange in that it started as an application to extend time within which to appeal. Then converted to an appeal. I have issued directions to rectify the anomaly. I must commend this court for meticulous recording and procedural propriety in taking proceedings.

Evidence

6. PW1 P.M was a teacher teaching the minor in grades 3/4. The minor was jovial but withdrew. Upon enquiry she told the teacher that a male adult requested her to fetch water then take her to his house and defiled her. The child used to be alone. She decided to report. She had developed trauma behavior as she was not coming to school. She was going to the man's house. On cross examination, she stated that the child stayed home for 8 months. She stated that she was interested in justice.

7. The minor born on 5/4/2011 was taken through voire dire and gave sworn evidence. She stated that the Appellant asked her to fetch water for him. He gave her Kshs. 10/= and went to Jimmy's place. He came and showed her the house. She stated that the Appellant tried to insert the penis into the vagina but was unable. He inserted into the anus. He did so many times. The Appellant had 2 houses. He was inserting into the anus. He did so twice. On cross examination, the child stated that she never screamed. She told his father everything.

8. PW3 was the investigating officer. She stated that the minor indicated that Joshua defiled her. In the neighbourhood the Appellant is reportedly known as Joshua. She stated that she found the photo of the minor hanged on the wall with that of the Appellant. The report came from PW1 who noted change of behavior. The neighbours declined to record statements as they said the child kept going to the Appellant's home. On cross examination she stated that she brought the photo because he had no explanation for the photo of the minor in his house yet there was no relations. She stated that the victim identified the Appellant and took the police to the house.

9. PW4 testified that he filled P3 and PRC. He found the hymen was broken. She had a history of being defiled between April 2020 to October 2021. The doctor did not examine her anus.

10. The Appellant stated that he understood the charges. He stated that he moved out of Karatina in 2004 and returned in 2018. He said Maureen had a grudge with him. He stated that he had receipts to show that he was from Nairobi on 15/12/2021.

Analysis

11. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

12. This was aptly stated in the case of Peters vs Sunday Post Limited [1958] EA 424 where, the court of Appeal therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

13. The duty of the first Appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows:-

> " 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."

14. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a 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 draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

15. The issue in this case is whether the prosecution proved its case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481 , comes in handy in describing the legal burden of proof in criminal matters, that;

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

16. In the case of R vs. Lifchus {1997}3 SCR 320 the Supreme court of Canada explained the standard of proof as doth:-

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient.

In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

17. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

18. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 stated that:-

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

19. The offence of defilement is completed, even where there was partial penetration. Section 8 of the *Sexual Offences Act* provides as follows: -

> " 8.
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
>
> (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
>
> (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
>
> (5) It is a defence to a charge under this section if –

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* and the Children' s Act.

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity."

20. The penetration can be in the anus or a vagina. Section 2 of the *Sexual Offences Act* describes penetration as follows: -

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

21. In the same breath it describes the genital organs as: -

> " genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus;

22. To be able to deal with this appeal, we must start with the defence of alibi. It is an absolute defence. The defence given is basically an alibi. His defence was that: -

23. I moved out of Karatina in 2004 and returned in 2018. There was a lady who could give me 200 as I was from Nairobi. I left there and worked somewhere else. I have receipts to show that I was from Nairobi on 15/12/2021. In the year 2020 and 2021 I was working in Nairobi as a chokora."

24. The receipts attached were for 4 days lodging on unknown days. The receipts though changed does not cover the days in question that is, between April 2020 and October 2021.

25. The duty of the state is to displace the same. However in this case the Appellant did the honours. He set alibi that is so porous that it does not need to be displaced. The Appellant was in Nairobi between 2004 and 2018. He was not there when the child was being born in 2011. However, this was not on trial. The crucial dates of April 2020 to October 2021 fall outside this period.

26. Secondly the travel from Nairobi on 15/12/2021 accords with the prosecutor's evidence that the Appellant was running away. This was outside the period under review.

27. Thirdly, the alibi on the places was not solid. The Appellant stated that he moved somewhere else. This was not a place. He stated that he was working as a chokora. This is not an alibi. An alibi relates to a place. He could for example say that he was in Dandora dumpsite or any of the other bases. Being a street urchin somewhere is not an alibi. It is the duty of the court to analyze the Alibi before dismissing or accepting the same. The court cannot place the burden of disproving the alibi on the Appellant. In

Karanja v Republic [1983] eKLR, the court of Appeal [Hancox JA, Chesoni & Platt Ag JJA] stated as follows: -

> " There was no misdirection such as occurred in Okethi Okale v Republic (supra), where the trial judge talked of displacing the case built by the prosecution. As Goddard LJ said in Mahon v Osborne [1939] 1 All ER 535 at page 556:
>
> "Has there ever been, I wonder, a summing up of a long and difficult cause, by ever one of the greatest masters of our law which does not contain some sentence, which, taken by itself, is open to criticism? The most that can be required is that the judge, in addition to stating the law correctly, shall give a fair summary of the evidence and of the contentions of either side".

28. The duty was well enunciated in the case of Victor Mwendwa Mulege Vs Republic (2014) eKLR where the court of appeal stated;-

> " It is trite law that the burden of proving the falsity of all of an accused's defence of alibi lies on the prosecution."

29. What happens then when the alibi is so general as not to amount to an alibi? Further, the alibi is self defeating. The Appellant stated that he was a casual labourer and had a grudge with Maureen. This crucial fact escaped the Appellant when cross-examining the teacher, PW1. No evidence was tendered on any grudge with anyone.

30. The minor positively identified the Appellant as the assailant. Her evidence was cogent. Though she tried to protect the Appellant, the horse had bolted. The penetration was both in the vagina and the anus. The mere fact that the Appellant could not sustain an erection and opted for a narrower orifice does not erase the offence.

31. The evidence was so overwhelming that it displaced the alibi and other defences raised in submissions. I agree with the court below that the defence raised was not cogent and issues of a grudge was not raised during trial. It was not even raised during his own defence. The discussion with Maureen are unrelated to the case.

32. The doctor indicated that the labia majora and labia minora were intact. There was no evidence of penetration. It appears that the escapades were not substantial. This is in the realms of attempted defilement or indecent act. The circumstances of the case appear to dictate that the offence of defilement through the vagina was not proved. Unfortunately, the court cannot deal with anal penetration.

33. These are also not in the PRC and P3. The minor does not appear to have told the investigating officer these facts. It is meant to shield the Appellant from the consequences that are likely to befall the Appellant.

34. However, the offence of indecent act with a minor was proved. From her evidence the penetration refused after he attempted to insert. That is enough to prove indecent act. Section 11(1) of the *Sexual Offences Act* provides as doth:-

    11. (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

35. I note that the court purported to dismiss the alternative count. The court has no jurisdiction to deal with the alternative count once the main count has been proved. Nevertheless, I have already set aside the entire judgment for misdirection. I find the alternative count was proved beyond reasonable doubt.

36. The minimum sentence provided is 10 years. However, the court can enhance. The court has to have regard to mitigation. The Appellant was stating that the charges were trumped up and sought forgiveness. This is evidence of lack of remorse. I note that the Appellant was 62 years at the time of commission of the offence.

37. Having regard to his personal circumstances, lack of remorse and the multiple times the Appellant attempted, and continuously had an indecent act, the matter calls for an enhanced sentence. I find a sentence of 20 years imprisonment to suffice.

38. In the circumstances the appeal is partly allowed.

Order

39. The upshot of the foregoing is that I make the following orders:-

    a. The conviction for defilement is set aside together with life imprisonment.

    b. In lieu thereof I find the Appellant guilty of the offence of Indecent Act with a minor. On basis of the mitigation on record and his quest for forgiveness and lack of remorse, I sentence the Appellant to sentence of 20 years imprisonment which sentence shall run from the date of arrest on 16/12/2021.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 30TH DAY OF JULY, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Miss. Kaniu for the State

Appellant present

Court Assistant - Jedidah