Jumbali v Republic (Criminal Appeal E016 of 2023)
[2023] KEHC 21991 (KLR) (31 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21991 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E016 OF 2023

DKN MAGARE, J

AUGUST 31, 2023

BETWEEN

FREDRICK MWAROME JUMBALI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. Being an appeal from the original conviction on 23/2/2023 and sentence meted out on 9/3/2023 in lower court criminal case SO No. E 010 of 2020 in the chief Magistrate Court at Malindi before Hon Ivy Wasike PM.

2. As the good scriptures posit, you shall know the truth and the truth shall set you free. Once you know the truth you shall be free indeed. Reading this file, I get that uncanny feeling that the court may not know what the truth means, anymore. If people decide to lie, they must do so in the most intelligent way possible. I have taken time to read this file and understand, what was in the mind of the prosecutor who recommended filing of these charges.

3. I was equally surprised that the court could, without referring to the Appellant's opinion start a matter de novo. This brings an inescapable conclusion that the prosecution wanted to seal and fill loopholes identified during the earlier part of the hearing. Section 200 of the Criminal Procedure Code, provides as doth: -

   200. Conviction on evidence partly recorded by one magistrate and partly by another

   (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.

(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.

4. The right to demand to be re-heard, under section 200(3) is a right of the accused not the prosecution. The right can however be limited if circumstances demand so. However, in this matter, the accused had already exercised their right to have the matter proceed from where it had reached. The court suo motto stated that there was a mix up of evidence with CR 9. OF 2020. I have perused the file and confirmed that there is no mix up. This was a ruse to patch up the holes the prosecution had noted.

5. Despite the foregoing by submissions dated 29/8/2023, the prosecutor stated that there were no contradictions in evidence. They state, that in the case of *Richard Munene v Republic* [2018] eKLR, the court of Appeal held as doth: -

> " Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.
>
> It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.

6. I must hasten to add that the same case of Richard Munene v Republic [supra], the court of Appeal held as follows: -

> " We repeat what, in our view is elementary principle of criminal law that, although the prosecution must avail all witness necessary to establish the truth and whose evidence appear essential to the just decision of the case, no particular number of witnesses is required for the proof of any fact; and that the prosecution is not obliged to call a superfluity of witnesses. See Section 143 of *Evidence Act* and *Bukenya & Others v Uganda* [1972] EA 549.

7. The foregoing is a restatement of section 143 of the Criminal Procedure Code and as rightly pointed out by the prosecution in *Ngugi v Republic* (Criminal Appeal 128 of 2019) [2022] KECA 26 (KLR) (4 February 2022) (Judgment), where the court held as doth;

> "As it has constantly been stated, the prosecution need not call a plethora of witnesses to prove a fact. Indeed section 143 of the *Evidence Act* reiterates this fact. That in the absence of a provision of the law, no particular number of witnesses is required to prove a fact. In *Donald Majiwa Achilwa & 2 Others v. Republic* [2009] eKLR, this Court stated as follows: -
>
> "The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses 'evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution with-holds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case."

8. Though the prosecution addressed the issue of violation of the *constitution*, the same was otiose as it was not raised by the Appellant.

9. The prosecutor, relied on two cases- that they have relied on in all the submissions filed before me. These were the cases, *Okeno v. Republic* [1972] EA 32) and *George Opondo Olunga v Republic* [2016] eKLR. The latter case identifies the key ingredients of the offence of defilement as: -

   a. proof of the age of the complainant,

   b. proof of penetration and

   c. proof that the appellant was the perpetrator of the offence.

The duty of the first Appellate court.

10. 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.

11. In the Case of *Okeno v. Republic* [1972] EA 32, the then court of Appeal for Eastern Africa, was succinct that in first appeal, it is the duty of this court to re-evaluate the evidence before the trial court and to arrive at its own conclusion whether or not to support the conviction while bearing in mind that the trial court had the advantage of seeing the witnesses.

12. The said duty had also been dealt with earlier by the former Court of Appeal for *Eastern Africa in Pandya -v- Republic* [1957] EA 336 , where they posited that: -

> "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."

13. In a case of *Mark Oiruri Mose v Republic* [2013] eKLR, the Court of Appeal of held as hereunder: -

> " It has been said over and over again that the first appellate court has the duty to revisit the evidence tendered before the trial court, afresh analyse it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that. The well known case of *Okeno v Republic* (1977) EA 32 which sets out that principle has been referred to in several decisions of this Court and of the High Court. In our view, it does not appear that the learned Judge was alive to those legal requirements or if he was, then he did not apparently put them into practice."

14. In the case of *SA v Republic* [2021] eKLR, the court Justice Grace L Nzioka stated as doth: -

> 18. Having considered the entire appeal, I note that, the appellant has raised the following grounds of appeal namely; the charge sheet was defective, evidence was contradictory, crucial witnesses were not called, the trial was unfair and his plausible defence was dismissed. In addressing these issues, I am well guided by the laid down principles that, as the first appellate court, this court should, reconsider the evidence adduced in the trial court, evaluate it itself and draw its own conclusions, bearing in mind that it has neither seen nor heard the witnesses and make due allowance in this respect.
>
> 19. The role of the first appellant has been summarized in several decisions *inter alia*; *K. Anbazhagan v. State of Karnataka and Others*, Criminal Appeal No. 637 of 2015, *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123 and *Okeno v. Republic* (1972) EA 32, as follows: -
>
> > " The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge"

15. *Alexander Ongasia & 8 others v Republic* [1993] eKLR the Court of Appeal held that:-

> " .....it is not enough; indeed there is no need, to loudly announce in the judgment that the evidence has been re-evaluated. Such re-evaluation must be apparent on the face of the record and if that is done, then there is no occasion to announce it.....but it is clear to us that he broadly agreed with the conclusions reached by the trial magistrate and he also found as a fact that the evidence against the appellants was overwhelming. We think he was right in his general conclusions and in the circumstances of this case, his failure to analyze in detail the evidence before the trial court did not occasion any failure of justice to any of the appellants."

The record

16. There is a misguided notion that once a matter starts de novo, the evidence tendered earlier ceases to be part of the record. Unless evidence is specifically expunged, it forms part of the record. Meaning that where there are major departures in evidence by the same witness, that is a major inconsistence that can be noted. The court cannot close its eyes on evidence and documents already on the file.

17. In the case of *Erick Onyango Ondeng' v Republic* [2014] eKLR, the Court of Appeal cited *Twehangane Alfred v Uganda*, (Crim. App. No 139 of 2001, [2003] UGCA, 6, in which the Court of Appeal of Uganda stated:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

18. *Annah Kendi v Republic* [2016] eKLR, Justice Ruth N. Sitati the court stated as doth: -

> "26. Before I return to the provisions of section 200(4), I will first say something about alleged contradictions in the evidence of the prosecution witnesses. Yes, there are some contradictions in the evidence, but the fundamental issue when considering contradictions in evidence is whether such contradictions have caused prejudice to the appellant. If the contradictions are minor and not material, they can be cured by Section 382 of the CPC. In the case of *Twehanga M. Alfred – vrs – Uganda*, Criminal Appeal No. 139 of 2001 [2003] UGCA the court expressed itself thus on the issue of contradictions.
>
> "With regard to contradictions in the prosecution case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case"

19. In the case of *Karisa Masha v Republic* [2015] eKLR, that a court cannot ignire evidence on record. It stated: -

> "We agree that the trial court cannot ignore evidence on record suggestive of the appellant's insanity merely because the defence has not specifically raised it. Indeed as the Court stated in *Marii V. Republic* (1985) KLR 710, the state of mind of the accused is to be gathered from the evidence in the case."

20. In *Dakianga Distributors (K) Ltd v Kenya Seed Company Limited* [2015] eKLR stated:

> "... Since the plaintiff did not object to that evidence being adduced and allowed the said cheques to be introduced in evidence and are therefore on record, this court cannot simply ignore or overlook them. They must be taken into account more so considering the contrasting evidence tendered on the same by both the plaintiff and defendant...
>
> My humble view all the evidence between the taking plea to the sentencing for part of the record. Though they cannot be used to convict, the evidence taken earlier is still on record and helps highlight contradictions. A witness who changed tune in the course of trial

cannot be ignored simply because the evidence he said so, is no longer, the main evidence. The reason to start de novo is not to re-engineer evidence but for the court to observe the demeanor of witnesses. It is never, used to seal loopholes, change evidence or even lie.

Burden and standard of proof

21. Standard of proof in criminal matters is circumscribed. It is not enough that there is some evidence. There has to be evidence that an offence has been committed and the Appellant is the perpetrator. That evidence must be proved beyond reasonable doubt.

22. According to Phipson on the Law of Evidence, the term 'burden of proof' has two distinct meanings:

    1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.

    2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence."

23. In this case the burden of proof is on the prosecution. It is anchored in the constitutional imperatives of presumption of innocence and the right against self-incrimination. The burden of proof is always on the prosecution and it never shifts to the defence.

24. The courts have dealt and settled what constitutes the burden of proof. In *Republic v Silas Magongo Onzere alias Fredrick Namema* [2017] eKLR, the court, Justice R. Nyakundi, stated as doth: -

> " As to what constitutes the burden of proof beyond reasonable doubt the case of *Miller v Minister of Pensions* [1947] 2 ALL ER 372 – 373 provides as follows in a passage alluded to me considered the greatest jurist of our time Lord Denning:
>
> "That degree is well settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice."

25. In our criminal justice system there is no duty on the accused to prove anything on the allegations of a criminal nature filed by the state in a court of law. The burden of proof of an accused's guilt rests solely on the prosecution throughout the trial save where there are admissions by the accused person. In crimes where certain presumptions are made, they place an evidentially burden on the accused- never the legal burden of proof.

26. This also means that only crimes he has been accused of is to be proved. The court will see that an offence was committed, but it is not the duty of the court convict of offences proved but not charged. For example, it is a perfect alibi, to proof that one was busy stealing at point x and could not possibly

have committed murder or rape. The court is not to measure the moral worthy of the accused. The duty of the court is to deal with the offence charged. If there is evidence then and only then can a conviction arise.

27. The exception are cases where there are major crimes and lesser crimes, where the court in finding that murder was not committed, can substitute with manslaughter. For rape and defilement there is no such major or minor crimes. In that case the Accused must be charge with main count and alternative count. If there is no alternative court, and the main charge is not proved, an acquittal follows.

Analysis

28. Though there are three ingredients to defilement, this case deals with one main issue- penetration. I am under duty to evaluate the evidence and establish its sufficiency. Since the issue of corroboration is raised, I need to dispense with the same. It is not all matters where corroboration is required as seen from section 124 of the *evidence Act*. However, there is a process and parameters to be met to fit into the proviso to section 124 of the *evidence act*. There are certain circumstances calling for dispensing with corroboration. This is elucidated in section 124 of the *evidence act* as doth: -

> " 124. Corroboration required in criminal cases 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."

29. It is not in all sexual offences that corroboration is not required. It is in the following circumstances: -

    a. It is a sexual offence

    b. Only the alleged victim's evidence is available.

    c. There are reasons recorded on the record and

    d. the court is satisfied that the alleged victim is telling the truth.

30. It is not enough for the court to perfunctorily, record that it is satisfied. The reasons must themselves be such that any reasonable person, properly informed and with sufficient knowledge considering the reasons given will come to the same conclusion.

31. Where there is evidence other than the victim's evidence, section 124 does not apply. The evidence must be corroborated. The raison d'etre for this was to avoid a situation where sex pests lured children or sexually venerable persons and then escape punishment in a situation where it is the victim's words against the perpetrator.

32. The truth is universal. Therefore, what is believable most cases it is self-evident. The court cannot believe some phony evidence as truth and want the higher court to give it a true pass, as it is.

33. In such cases, in order to protect the children, it is important for the court to be sufficiently neutral in order not to let innate bias come out.

Evidence

34. Before dealing with the Appeal, it is necessary to evaluate the evidence on record. This includes testimony, charge sheet and documents. The charge sheet related to an offence of defilement contrary to section 8(1)3 of the *sexual offences act*.

35. The Appellant was charged with defilement of RSK, a girl aged 14 years. The offence is said to have occurred on 12/12/2019. There was an alternative count of committing an indecent Act with a minor contrary to section 11(1) of the *sexual offences act*. The charge was filed on 10th February 2020. The appellant was accused of using his penis to penetrate the minor's vagina. The two tools are crucial in this determination.

36. Section 8 of the *sexual offences Act*, creates certain offences as doth: -

    (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.

37. The Appellant pleaded not guilty on 10/2/2020. The matter was set down for hearing. The prosecution was under duty to prove that: -

    a. The appellant used his Penis

    b. Inserted the penis into the complainant's vagina.

    c. The complainant was a child aged 14 years.

38. The case was heard twice. During the first hearing, first witness was Ibrahim Abdullahi, a clinical officer examined a 17-year old girl who had a broken hymen and found she had been vaginally penetrated. He produced the treatment notes, lab results and birth certificate. Though indicated as a birth certificate, it is actually a clinic card showing the date of birth as 1/7/2005. This makes the minor to be 14 years. That aspect was indeed proved.

39. The history given in exhibit 2 is that the complainant was suspected of having sexual relation with a pastor. The girl herself had disputed that fact and stated she had never had sex with any man. On vaginal examination, the hymen was broken. There were no bruises but the clinical officer concluded that there was defilement. The inconsistent in this was glaring. There were no injuries but vaginal penetration was alluded to.

40. The P3 form, indicates that the complainant was a 14-year old. The finding was the hymen was broken and she was not pregnant. There was no other finding. The implication was said to be vaginal penetration. The part where the presence of discharge around the anus or thighs is left blank. The defilement, according to the clinical officer occurred on 25/12/2019. Examination was carried out on 25/12/2019 and had first been seen on 31/12/2019.

41. PW2, the complainant testified on 6/12/2021 that she was 15 years, having been born on 1/7/2005. She stated that the Appellant asked him through someone to go to his house. She slept in the same bed with the wife. They had sex. The appellant did not insert his penis into the vagina. She testified that the Appellant is said to have inserted his penis into her anus.

42. They had slept the three of them, the Appellant, the wife and the complainant. They were arrested in the morning. The complainant was said to have been at the Appellant's home for 2 years. The complainant denied having had sex with the Appellant. On cross examination by the Appellant, the complainant stated she recorded a statement whose contents she forgot. She stated that in her initial statement she had said that penetration was in the vagina.

43. The Appellant cross-examined her on the issue of fabricating the story. She admitted that she gave a wrong statement but stated that she was shaking.

44. PW2 was a village Elder. He stated that in May 2019, a man came to their village. He did not report to the adminstration as regards from whence he came from. The said man was conducting activities that were against the village protocols. He did not state what the said protocols. The said stated that was a preacher.

45. The Appellant was summoned by 6 pastors and interrogated on his religious activities. The administration told him to leave the village. He did not leave and did not stop his religious activities. The could not explain his religious teaching and alleged miracles. They learnt that he was taking young girls to go and pray for them and return them after 3-4 days. The girls were being taken to Tulu in Marereni for prayers. Their complaint was one of these were school children who were going for prayer and as such they decided to interrogate him further.

46. A complaint was made to the police about his religious activities and wanted him arrested to stop taking school children for prayer. The complainant was reportedly found in the Appellant's home. The witness was not there, when the finding happened. The pastor was not praying for boys. He did not indicate the source of this information. Only one child was found, that is the complainant. No other girl was arrested.

47. On cross-examination the witness stated that he was testifying on the Appellant's operating a church without permission. He denied the story to be a fabrication. He denied that the administration wanted

the Appellant to close his church. He was, however, very candid that had the pastor left, nothing would have happened to the Appellant. This is telling. Something happened because he did not leave.

48. I have no problem with arrangements related to religious activities. However, given the freedom of conscious and religion, it cannot come out of the chief or the elder's mouth that they have a right over religious rites. They also had no authority to require someone to leave any part of Kenya. They can only require that he ceases certain activities.

49. PW3 was BK She is the mother of the complainant. She testified that the daughter had issues and was taken for prayers. Nothing happened. The child was healed initially and became sick again and was taken back. She was sick and was screaming. This was why they took the child to the pastor, the Appellant to treat only, she only sent two daughters to be prayed for they went using a Boda boda. They were arrested after two days. What happened in that home and they were warned against taking their children for treatment to the pastor. The child stayed with the pastor for 2 months.

50. There was change of guard since the trial magistrate was transferred and as such the matter started de novo. The Accused had opted that the matter proceeds from where it had reached. Though the accused has a right not to require starting de novo, the court for what she calls a mix up, started the case De novo. This appears to have been geared to filling holes in the prosecution case.

51. The evidence of PW1, Ibrahim Abdullahi remained the same. He talked of vaginal penetration. He produced exhibit 2, where the complaint denied ever having sexual activity with any man. The hymen was broken but there were no bruises or external tenderness noted. There was presence of discharge on 30/12/2019. The activity is said to have occurred on 12/12/2019. The examination is being done 18 days later. The discharge could be the normal anatomical permutation.

52. PW2, the complainant testified on 1/9/2022. The court first carried out voire dire for her. It is comical because this was not a child of tender years. There was no need of voire dire. She testified that the Appellant inserted his penis in her anus. On cross examination she admitted that she as slept in the same bed with the Appellant's wife and the appellant was in the next room.

53. On cross examination, she stated that she was on the inner side of the bed and the wife on the outer side. She then stated that while the duo were sleeping, the Appellant jumped over the wife and had anal sex with the complainant. He asked her to turn and she did not.

54. This was in the presence of the Appellant's wife, in the same bed. She did not know whether the wife heard it or not. It is on cross examination she introduced the issue of vaginal penetration. In the first testimony, she had stated that she had been told that she slept with the Appellant. She had denied vaginal penetration. She admitted that she was not a virgin.

55. I cannot avoid evidence that is already on record simply because the court decided to have a second bite on the cherry. The evidence of the complainant is totally unbelievable. It is not plausible, unless the wife is totally deprived, to sleep and watch the duo have sex in her presence. Anal sexual is not natural. Any penetration could cause excruciating pain and wake up the wife. She was not drugged. I hold and find her evidence is strained. She kept changing her testimony even within the same set of evidence.

56. She was not sure of the date she was born. However, she was sure in the earlier testimony she stayed for two days or more. She never told the mother this piece of evidence.

57. PW4 is an elder. They received a report of the Appellant praying for children. He gave evidence on how the plan to have the appellant arrested was arrived at. It was deliberated and agreed with six pastors to summon the Appellant and interrogate him.

58. He was interrogated on the basis of his miracles and was told to leave the village. He did not and was arrested with one girl and the other girl was not there at the time of arrest. This other girl was not named and no testimony relates how she came to that home. His evidence was hearsay as he was not at the locus in quo when the arrest occurred.

59. PW5 is the assistant chief of Fundisa sublocation. He received a report that the appellant could take children to pray for and return then after 3-4 days. He summoned pastors and found that what he was doing is against the bible tenets. His complaint was that the girls were not going to school. He complained that the appellant did not leave despite being told to do so. The rest of the evidence was inadmissible hearsay.

60. PW6 PC James Mburu, produced a witness statement of PC Caroline Kwamboka, who was on transfer to Voi Police Station, still within coast province. This was also during the error of online hearing. The so-called evidence was nothing at all a statement is not evidence. Further, even if it were, section 33 of the *evidence act* was not complied with. The Appellant lost a chance to ask the investigating officer, the loss of the chain of evidence. If defilement was on 12/12/2019, and the Appellant was arrested the following day: -

    a. Why was examination of the minor being done 18 days later ?

    b. Why did it take up to 10/2/2020 to charge

    c. The evidence by the Appellant that he was arrested on 27/12/2020?

    d. What happened to the evidence of Omar and Mwalimu, two independent witnesses who were at the, locus in quo?

    e. The minor indicated she was at the Appellant's home for 2 months, from which date to which one.

    f. The charge sheet has no date of arrest, any comment?

    g. Where is the investigation diary and chain of custody of exhibits.

    h. The child had been in the Appellant's home for 2 years. From which dates?

    i. The decision to charge?

61. All these questions will never be answered. My take is as I am bound to find, that had the investigating officer

62. On being put to defence the Appellant gave sworn evidence that he was called to pray for the children. They had suffered from hallucinations. The parents sent a ticket for the Appellant to come. This was 5/5/2019. They prayed for 2 months. The children became well. He was again called by the complainant's father that the complainant was unwell. put the child on a motor bike to Kikambala. The child arrived with Omari and Mwalimu. This was on 12/12/2019. They were received by the Appellant's wife. They went there on 24/12/2019 in Thulu.

63. They spent the night at Kambi ya Waya. They were fatigued and as such spent the night of 26/12/2019 there. On the following day, was arrested on 27/12/2019. He had issues with a neighbouring church over worshippers. The elders wanted him to close his church and leave. He continued with his ministry despite the resistance.

64. He was no cross examined on the important dates he had talked about. More importantly, the statement that was produced, corroborates that the Appellant was arrested on 27/12/2019. The

minuting was done on 27/12/2019. The P3 equally indicates that the report was done on 27/12/2019 at 9.00 hours.

Analysis

65. I have painstakingly gone through the evidence. The court had found him guilty of defilement as charged. I have painstakingly done the analysis of the evidence that was tendered. What comes out clear is that the evidence tendered was below the required standard. The appellant may have been a bad man who took children out of school to pray for them.

66. Through evidence in the matter, I had to restrain myself from making certain comments. First the appellant was correct in stating that there were contradictions in evidence. The evidence tendered early and later differed substantially. The prosecution departed from their evidence.

67. The complainant was categorical that he was told that she had been told that she was defiled. She stated as follows: -

> " on 12/12/2019, I was at home. I was unwell. I have a sickness that makes me scream. My parents were with the pastor [this man]- {the Appellant}. He came to pray for me...on Christmas day the accused called me though a person to go to the accused's home. My parents allowed me to go and stay with him and his wife as he went to Mtwapa for Christmas. After two days I was still at his home. I was in the bed in a room with his wife. he has 2 rooms and a verandah. He found me and his wife in the same bed. He came to bed and started to touch my breasts and buttocks. He told me to turn. I did not turn..."

68. This is the evidence that the court believed. The accused on his evidence in chief and cross examination stated as doth: -

He thought I was in thulu but I was in Mtwapa. ..

On cross—there is nothing to show that I was moving from Mtwapa to Thulu."

69. The prosecution evidence already showed, he was in Mtwapa while the complainant and Appellant's wife were in Thulu. It is also clear that there is no offence that was committed on 12/12/2019.

70. The court was not bothered with the truth. At least the complainant's evidence, if it was believable, exonerated the Appellant.

71. She later stated it was anal penetration. The penetration then came to be on 25/12/2019. The charge sheet related to 12/12/2019. The evidence tendered departed from the charge sheet, Substantially. I will have ignored the dates, if it were not for the prejudice the cause the Apellant. I note the following, which is the basis of doubt on veracity if the state evidence: -

a. Free from coercion, the complainant confirmed she had never had sex with a man, when first meeting the clinical officer.

b. First testimony she stated it was anal penetration. She ruled out vaginal penetration.

c. The second time, she stated it was virginal anal penetration. had another girl that she had vaginal and now she's saying what I know and anal penetration. She only added both at the trial end of cross examination.

d. She confirmed nothing happened on 12/12/2019.

e. Medical evidence does not support forceful penetration, either side.

72. The question in my mind which has bothered me, is, how come the minor was defiled in the presence of the wife, in the anus without the wife realizing. Put in the alternative, is it plausible that someone will defile or even have consensual extra marital affair in the same bed with the wife without any reaction. The tragedy is that from the explanation, the Complainant was next to the wall while the wife was the first one on the outer side of the bed. How did this defilement happen?

73. How could she tell the clinical officer that she had not had sex then came to court to say she was not a virgin. Why not tell her mother, if anything occurred? How come she forgot that she was penetrated from the anus and suddenly remembers does both anal and vaginal.

74. The reason that the Appellant was being sought for to be moved from the area because of his teachings are said to be against the tenets of the bible. This man was making children drop out of school to go and prayer.

75. The Appellant was not charged with the foregoing of false preaching or the like, if they exist. He has not been charged preaching without a license or preaching in a manner likely to cause a breach of the public peace. It is important that the society to protect his children. It is not enough to mistrust a stranger and know that it could be a security risk.

76. He could be as well be a thief or any other thing but then, the charges of defilement he was faced should be proved. It is a specific charge of vaginal penetration on a specific time and date. There was no scintilla of evidence on the charge. The narration on 12th, does not add up. The one on 25th is well explained by the defence. The defence evidence was cogent and plausible.

77. The Story of defilement of 12th is part of the church wars. One witness was candid by saying that had the Appellant left, these things could not have happened. I do not believe for one that the appellant would have sex in the presence of the wife, however depraved he was. The story of the defilement does not add up. The child had been treated and recovered. He was prayed for again.

78. The Appellant ideas could be unconventional. He could even be a conman. That however, is not for the court today. However, a man cannot be punished for being different. I am alive to the provisions of Section 124 of the *Evidence Act*, hitherto referred to in paragraph 24 above.

79. The court in this matter had more witnesses section 124 was not applicable. I therefore agree that the witnesses who were not called could have had adverse evidence against the prosecution case.

80. The second issue in this Appeal is the burden of proof. Whosoever alleges must proof. In the case of *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017)* [2017] KESC 42 (KLR) (Election Petitions) (20 September 2017) (Judgment) (with dissent - JB Ojwang & NS Ndungu, SCJJ) , the Supreme Court stated as doth: -

> " The common law concept of burden of proof (onus probandi) is a question of law which can be described as the duty which lies on one or the other of the parties either to establish a case or to establish the facts upon a particular issue. Black's Law Dictionary, defines the concept as [a] party's duty to prove a disputed assertion or charge....[and] includes both the burden of persuasion and the burden of production. With that definition, the next issue is: who has the burden of proof ...
>
> Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition

of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.

2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence."

81. In *Peter Wafula Juma & 2 others v Republic* [2014] eKLR, the court, Justice F. Gikonyo, stated as hereunder: -

> " Nonetheless, the subject on shifting the burden of proof becomes more complicated when one realizes that the expression ''Burden of proof'' entails; 'legal burden of proof' and 'evidential burden'. The two should not be confused, and I will write something to elucidate on what each entails later. Of instant benefit to this appeal is that, after a long raging debate, dating back to the late part of 1700, on whether or not legal burden of proof could shift under any circumstances, it is now a well settled principle of law that, the legal burden of proof in criminal matters never leaves the prosecution's backyard. *Viscount Sankey L.C in the case of H.L. (E)* woolmington V DPP* [1935] A.C 462 pp 481 in a subtle and masterly fashion stated the law on 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...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.''

82. In this case, the court shifted the burden of proof to the Appellant. The Court stated as follows: -

The accused in his defence mentioned notihng in regard to the allegations of his waking at night while other were asleep and creeping in to where the complainant was and having sex with her while his while slept."

83. This is a misdirection. There was no duty on the Appellant to proof falsity of the evidence. The Appellant had already shown and the prosecution had confirmed that these were wars over worshippers. There were protocols he did not follow. Had he followed, nothing will have happened.

84. The minor had already confirmed, in a document recorded at the hospital that she had never had sex with any man. There was no explanation on how come the clinical officer was able to find penetration, on the face of his own record. There ws no explanation proffered. Indeed, the standard in interpreting documents is that they speak for themselves.

85. In *Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd* (2017)eKLR , the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> " Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed..."

86. The trial court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document. The document in issue records as follows: -

History – suspected to have had a sexual relationship with a pastor.

On examination- has not received mancare

The girl reports to have never had a sexual relationship with any man

Head to toe examination -normal

Vaginal examination – presence of discharge

Hymen broken

No bruises or any tenderness

Implication: defilement

87. The conclusion does not flow from the evidence. Only the hymen was broken. However, the minor had already admitted not to have been a virgin. In any case, breakage of hymen is not evidence of defilement. In the case of MM v Republic [2020] eKLR, hon Lady Justice H Ong'undi held as doth: -

> 34. Defilement of a four-year-old child by an adult as the Appellant cannot miss the eye of examination by the medical staff. I think it is also high time that our medical practitioners besides telling us of a missing hymen indicated to the court whether the hymen was freshly torn or not. A missing hymen per se is not proof of penile penetration as there are many causes of a missing or broken hymen in a child.
>
> 35. In conclusion, I find that the medical evidence does not support the claims by Pw1 and Pw2. There is also no evidence to support the alternative count. Having no proof of penetration or even an attempt to penetrate, I will not deal with the issue of identification of the perpetrator.

88. I agree. It is important to indicate whether the hymen was freshly torn or it is an old healed wound. It this case, there were no injuries or any abrasions. The Clinical officer did not there explain how he came to the conclusion of defilement and how long ago that happened. The medical evidence only showed that there was a breaking of the hymen. It does not show that the breaking was by the Appellant. The treatment notes are not corroborated by facts of the case.

89. It is the duty of the state to prove the occurrence of the offence, proof that it is the appellant and no other person committed the offence and he had knowledge that this was a minor. By requiring the accused to tender evidence to exonerate himself, the magistrate fell into deep error and committed an atrocity against the constitutional imperatives. The direction is in direct breach of the 50(2)(a), (i) and (l) of the *constitution*. The same provides as doth: -

> " Every accused person has the right to a fair trial, which includes the right
>
> a. to be presumed innocent until the contrary is proved;

i. to remain silent, and not to testify during the proceedings;

l. to refuse to give self-incriminating evidence;"

90. By requiring the Appellant to exonerate himself, the court veered off and affected the fundamental protections constitutional safeguards and protections granted to the accused to be presumed innocent. It also derogates from the right to keep silent, the right not to tender incriminating evidence and the right to be presumed innocent. The court proceeded on frolics of its own the basis of a wrong basis.

91. The idea of being defiled is a figment of the imagination of the elders who wanted the Appellant out of the village. When the child was taken to hospital she maintained that she was not be defiled. The issue of Anal penetration cropped up in the first testimony. The same cascaded into the subsequent testimony. The court had no right to correct its proceedings in a guise of starting de novo. The Appellant had already chosen to proceed from where the matter had reached. The re- testifying was therefore unnecessary and an afront to the Appellant's right to fair hearing.

92. All said and done, I have said enough to show that the evidence is inconsistent and doubtful. The doubt I have is reasonable. The Appellant is entitled to the benefit of the doubt. This especially so, when the witnesses admitted that their discomfort related to the Appellant being a security risk and the complaint from the 6 pastors.

93. The prosecution case was such a weak case that no reasonable court could have convicted. The two men in the house, were not called. The investigating officer was unexplainably not called. I note that proceedings were virtual. This means that the investigation officer was available but there was no desire to call her. The court is bound to make a negative inference that had they been called, their evidence could be adverse to the state case. In the case of *David Kioko Maundu v Republic* [2022] eKLR, Justice George Dulu stated as doth: -

> " 12. In my view, since the prosecution was required to prove the appellant guilty beyond any reasonable doubt, the unexplained failure of the prosecution to avail the Investigating Officer in court to testify even after he attended court created sufficient doubt, on his intended testimony, and the court was entitled to make an adverse inference that his or her evidence would most likely contradict the evidence of the other prosecution witnesses who had testified. I make such adverse inference and rely on the case of *Bukenya –v- Uganda* (1973) E.A 549. I thus give the benefit of the adverse inference to the appellant, which means that his appeal will succeed on that account."

94. There is also production of exhibit 5. It is a useless piece of evidence. A recorded statement is not evidence. The maker should be called and testify on this. This is particularly crucial when the maker is an investigating officer Such a document serves absolutely no purpose its otiose.

95. By charging the Appellant with vaginal penetration and testifying on anal penetration, the state sent the court on a wild goose chase. By charging the Appellant with penetration through the vagina when the evidence pointed to the anus, it is a clear case of Fabrication.

96. Nothing could have been harder than to charge penetration of the anus and in which case there could have been evidence to show penetration. None was tendered.

97. In a nutshell a broken a hymen per se is not evidence of virginal penetration. It is not plausible that the discharge 18 days later can be attributed to the Appellant. The case was not proved beyond reasonable doubt. The conviction is unsafe.

98. I therefore the set aside both the conviction and sentence and set the Appellant free forthwith, unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT MALINDI ON THIS 31ST DAY OF AUGUST, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM AND PHYSICALLY IN OPEN COURT.

KIZITO MAGARE

JUDGE

In the presence of:

Mr Miss for the state

Appellant in person at Manyani Maximum Security Prison.

Court Assistant - Jungo