ACK v Republic (Criminal Appeal E002 of 2023) [2023] KEHC 21843 (KLR) (30 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21843 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E002 OF 2023

DKN MAGARE, J

AUGUST 30, 2023

BETWEEN

ACK .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the original conviction and sentence in lower court criminal case No.E018 of 2022 in the Principal Magistrate Court at Kaloleni before Hon Ritah M. Amwayi – SRM on 15th December, 2022)

JUDGMENT

1. The Appellant was charged with defilement contrary to Section 8 (1) as read with Section 8(4) of the *Sexual Offences Act* No.3 of 2006. The charge was that on diverse dates between November, 2020 and January, 2022 at [Particulars Withheld] Village penetrated BM a girl aged 17 years. The accused was 20 years as at 23/5/2022. He was convicted and sentenced to 10 years imprisonment.
2. He appealed to this court raising 3 grounds of appeal. Today morning the state came with a notice of cross appeal, praying that I enhance the sentence. He requested for at least 15 years. The same was opposed by the Appellant.
3. This is the most unusual pay of prosecuting a cross appeal. It is filed after all parties have field submissions. For reasons, I will state shortly, it is unnecessary to deal with the cross Appeal.
4. The grounds of appeal set out herein are: -

   a. The learned magistrate erred in law and in fact in failing to consider that the prosecution did not prove their case against the appellant beyond reasonable doubt as required by law in breach of sections 109 and 110 of the *Evidence Act*.

b. The learned magistrate erred in law and in fact in by failing to consider sharp contradictions by the prosecution in breach of section 163(1) of the *Evidence Act*.

c. The learned magistrate erred in law and in fact by failing to consider that there was no cogent evidence to connect the appellant to the commission of the alleged offence

d. The learned magistrate erred in law and in fact by failing to adequately consider the defence evidence.

Duty of the court

5. The duty of the first appellate court is well settled. In Okeno V Republic [1973] EA 32, the court of Appeal held:

> " An Appellants on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 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 conclusion (Shantilal M. Ruwala v. Republic [1957] EA 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

6. Similarly in 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."

Background facts

7. The Complainant was 18 years as at the time of testifying in form 3. She was born on 27/5/2004. They were reportedly in a relationship. She agreed to the relationship and they met in the bush and had sex. At that time, they met, both were minors. This continued for some time a fact she told Mwinyi, the name she was calling the Appellant that she was going for a walk. They had sex in the bush on 1/1/2022.

8. She stated that when she went back home at 2pm, her father enquired from her where she was but she could not tell. Instead she ran away from home and went to the Appellant's house. She did not find

him and as such waited. She told the Appellant what happened, that is, that her father had beaten her and she ran away from home.

9. She testified that the appellant left for Mombasa in the morning and left her in the house. The village elder and assistant chief went to the Appellant's house and took her to the father. On cross-examination she stated that they are still friends with the Appellant. Crucially, she did not find the Appellant in the house and when arrested she was not with the Appellant.

10. PW 2 was the mother of the complainant. She stated that the duo appears to have started the relationship when she was in class 8. The mother warned the Appellant to stop, all in vain. On cross examination, she denied that there was a family dispute. It was disheartening to note that the mother appeared to have 'known' of the affair and was dissuading the boy. She never warned her daughter. I do not know how the magistrate treated her evidence as it was scanty. Her evidence was not germane to the crucial issue before the court.

11. Pw 3 is a village elder who received information from Mbaruk, the Appellant's brother that the complainant was in the Appellant's house. The girl informed the witness that they talked till it was late as a such that is the reason she was in the house. The brother was not called as a witness, nor did PW3 receive information that the Appellant was at home. What came out was that no one placed the Appellant at home. At that time the Appellant was not in the house. The prosecution, did not place the Appellant near a scene of the crime. The complainant admitted and repeated the same that the Appellant was not at home.

12. Pw 4 stated that they examined the complainant Pw1. The hymen was broken with loose sphincter vaginal muscles. The same was said to be habitual or what is said severally. This is to say that the girl was sexually active. With whom, is what the court was to decide.

13. Pw 5, PCW, Winnie Murei, stated that there was a report of a missing child and narrated how Appellant had sex in the bush. They stated that the complainant was born on 27/5/2004.

14. DW-1 testified that he was implicated. He stated that the complainant's family had threatened to implicate him. He denied the offence. I note that this is also borne out of the evidence of PW2, the complainant's mother. She stated that she had warned the Appellant. This is a case which if proved could still be what I term as Romeo and Juliet case. The girl was 4 months shy of her 18th birthday when the alleged offence occurred.

Analysis

15. Whereas the parties are submitting of 3 issues, I note that only one ingredient was missing worth considering penetration.

16. The complainant testified that she refused to tell the parents where she was. It is after the beating that she ran away to the Appellant's house. At arrest the Appellant was not in the house. There is no testimony that on the night of arrest they had any sex. In fact, what the complainant told Pw3 is that they spoke till late and that is why she slept there. This does not include sex. I cannot imagine why a young restless 'couple' could have sex in the bush and fail to have the same in the house, when there is no impediment.

17. I have perused the medical evidence. The same shows that the girl had sexual activity. It does not show sexual activity with the Appellant. The treatment notes do not show, any treatment. The examination showed loose sphincter vaginal muscles. The age of the injuries is several as indicated in the p3. The question that lingers in my mind, is why could not the complainant freely tell the parent who her abuser is?

18. The charge covers a period between November 2020 and January, 2022. There was no scintilla of evidence for the period November 2020. Only evidence given was for January 2022. The investigating officer was giving dates which the complainant herself did not give. What was the source of those dates. The investigating officer also stated that when the matter was reported, the Appellant went into hiding. This was not borne out of evidence by the complainant. She stated the Appellant left for Mombasa in the morning. By the time the complainant was found, the parents were on the way to report. PW2 stated as doth: -

> " her father decided to go and report to the police. While on his way he received a call from the village elder that she had been found."

19. The other disturbing issue was that communication is said to have been using the mother's phone. What was difficult producing the same. Though it is said to be on diverse dates only 1/1/2022 was mentioned. The phone could have corroborated her evidence.

20. There were friends with the complainant on the date of the alleged incident. They should have been called if the incident actually occurred. What come out is that the girl came home late, was beaten and went to the Appellant's home. The Appellant was not there. The search party also did not find the Appellant in his house.

21. It was alleged that Mbaruk informed the village elder that the girl was in the Appellant's house. He was not called to give any evidence. He was not even listed as a witness. I have doubts whether the matter complained of occurred. I am aware that there is no requirement of plurality of witnesses. However, where the case is not as tight, and the evidence is scanty, failure to call such witnesses should be construed against the Prosecution.

22. There were people who could have been called as witnesses but were not. I take it that had they been called their evidence would have been adverse to the State. There was said to be one Halima when the complainant met the Appellant. She could have been called. The same with Mbaruk. In the case of Suleiman Otieno Aziz v Republic [2017] eKLR, the court of Appeal, Nambuye, Kiage, & M'inoti, JJ.A, Stated as follows: -

> " The last ground of appeal is that the courts below erred by failing to draw an adverse inference on the prosecution's failure to call as witnesses, members of the public who arrested or witnessed the appellant's arrest. First, under section 143 of the *Evidence Act*, in the absence of a provision of law requiring a specific number of witnesses, no particular number is required to prove any fact. Secondly, as propounded in Bukenya v. Uganda [1972] EA 549, the proposition that the court may draw an adverse inference from the prosecution's failure to call important and readily available witnesses arises in cases where the evidence called by the prosecution is barely adequate. In Donald Majiwa Achilwa & 2 Others v. Republic, Cr. App. No 34 of 2006, this Court explained the position thus:
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> > "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 withholds 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."

23. I am alive to the provisions of Section 124 of the *evidence Act* provides as doth: -

> "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."

24. 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.

25. The other complaint 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.[46] Black's Law Dictionary[47] 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 ...
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> 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."

26. 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."

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

> " There is no reason given why the complainant could have implicated him, if did not commit the offence. He therefore is the one who had sexual intercourse with the complainant well knowing him to be a minor. He failed to exonerate himself from the offence."

28. This is a misdirection. There was no duty on the Appellant to exonerate oneself. 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
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> 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;"

29. 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 is 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.

30. The court misunderstood the case before her. It was not the Appellant case that he was not identified. His case was that he was framed. This may be so. She did not tell parents, from where she was coming from but ran to the accused's empty house. She had access to that house without the Appellant's help. She does not explain, when the Appellant came.

31. How she accessed the house or who gave her keys to the house, if any. Though she was hiding in the house, when village elder came, he entered the house since it was closed but not locked. This opened a possibility that she entered an empty house but the man she was waiting did not turn up.

32. The prosecution failed to place the Appellant in that house. PW 2, the Appellant's mother gave way the motive. She did not want her daughter relating with the Appellant. I will not go into medical evidence much as these was no evidence of recent sexual activities. The evidence tendered by PW 1 is that they had sex on 1/1/2022. There was no evidence of other sexual activities. However medical evidence

showed that the sphincter muscles had been exercised severally. Therefore, this was not evidence of sex on 1/1/2022.

33. The court failed to consider the defence. The defence that she was framed. The court stated that the child was found in the Appellant's house, and this was construed against the Appellant. There was no effort to call the Appellant on his phone, which the complainant admitted having. The minor was not, on her own testimony placed in the house by the Appellant. She took herself into the Appellant's house in the absence of the Appellant. Her testimony was as hereunder: -

> " He told me he was going to ask those I was with. He went to ask them and I ran away from home and went to the accused's home. I went to his house. I didn't find him. I waited for him. He came back at night when it was dark. I then told him what had happened. Held me to sleep in his house. He left me and went to his brother's house where he spent the night."

34. This is not a typical lover's conduct. This is a respectable young man who knew the importance of his own chastity. The boy, left the complainant in the house and left. He took refuge from his own house. He came in the morning and continued with his work. The girl appeared to have brought herself but the young man had other ideas. I don't for a second take it that the story by the complainant is true. The proper proposition is that the girl was with someone else whom she did not want the father to find out. She ran away to the Appellant's house when the father was going to enquire from her friends, who she was with. It is an answer the complainant did not want known. It is definitely not the Appellant since she could not ran to the same home where the friends were going to reveal. It could be some older man. Some relative or someone whom it could be known.

35. I do not find that evidence reveals that the Appellant ran away. He was not aware of being sought till his arrest. Though we ordinarily do not find innocence of parties, this particular boy was innocent. He was framed for reasons only to the parties involved. He should be contended that out of all this pain his purity was elucidated.

36. I wish to address this aspect of circumstantial evidence. In Ms Joan Chebichii Sawe v Republic [2003] eKLR, the court of Appeal, Kwach, Lakha & O'Kubasu JJ A, stated as follows:-

> " In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused."

37. In the circumstances, I find the conviction wrongful. It was done contrary to the evidence on record. The evidence on record do not show the Appellant as a perpetrator. Circumstantial evidence actually show that he is a man of impeccable character and chastity.

38. The evidence shows a man disinterested in the Complainant and had to give the comfort of his bed for her and then she went to find a place to sleep in the brother's house. No wonder the brother called for the family to collect their daughter who was stuck in their home. Instead they framed the Appellant, which has resulted in wasting over one year of useful time.

39. I find the conviction unsafe. I therefore the same aside both the conviction and sentence and set the Appellant's free forth with unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT MALINDI ON THIS 30TH DAY OF AUGUST, 2023.

KIZITO MAGARE

JUDGE

In the presence of:

Mr Nyoro for the state

Appellant in person at Manyani Maximum Security Prison.

Court Assistant - Jungo