**HSA v Republic (Criminal Appeal E010 of 2023)**
**[2023] KEHC 21846 (KLR) (30 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21846 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**CRIMINAL APPEAL E010 OF 2023**

**DKN MAGARE, J**

**AUGUST 30, 2023**

**BETWEEN**

**HSA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from Original conviction and sentence by Hon Irene Thamara – Resident Magistrate at Malindi Law Courts dated 14th December, 2022)***

## JUDGMENT

1. The Appellant was charged with the offence of incest contrary to section 20 (1) of the *Sexual Offences Act*. The court convicted him and sentenced him to 50 years in prison. The Appellant filed a Memorandum of Appeal and filed an amended Memorandum of Appeal and raised the following grounds, both on conviction and sentence: -

    a. That the learned trial magistrate erred in both law and facts in failing to appreciate that the prosecution case was not proven beyond reasonable doubt.

    b. That the learned trial magistrate erred in both law and facts in failing to appreciate the contradictions and (un) corroboration of witness evidence.(sic)

    c. The learned trial magistrate erred in law and facts by failing to order for DNA test.

    d. The learned trial magistrate erred in law and facts by failing to discard the hearsay evidence of the witnesses.

    e. The honorable learned magistrate erred in law and facts by convicting the appellant on a poorly inadequately and shoddy investigated matter.

f. The honorable learned magistrate erred in law and fact in meting a sentence that was excessive in the circumstances.

2. The last ground was added in the morning today, when the Appellant applied to amend include a ground on sentence. The was after the court noted that the appeal is on both sesntnese and conviction but there is no ground on sentence.

**Duty of the Court**

3. The duty of the first appellate court is well settled. In OKENO v REPUBLIC [1973] EA 32, the former Court of Appeal for Eastern Africa held as doth: -

> " An Appellants on first appeal is entitled to expect the evidence as a whole to be submitted to afresh 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

4. 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 and evidence**

5. PW1 testified that the appellant is her uncle. They were living in a family house with the Appellant and the wife. According to her in July 2020 the appellant entered her room/her mother's house, and had sex with the complainant. She became pregnant. This was done three times. She was examined in August 2021 and found to be 16 pregnant. She identified the ultra sound, and P3 form. The P3 form is clear that the offence occurred in July 2020. On cross examination she denied that she was stating what she had been told to say.

6. PW2 testified that she is MSA. She testified that the incident occurred in July 2020, between her niece and the brother. The complainant was found to be pregnant

7. PW3 testified that she is a doctor. She treated the applicant in April 2022. She filled a p3 on 30/8/2021. The complaint was that the complaint was that the complainant had sexual activity since July 2020. This was not the evidence the Complainant testified on. She had said they had sex 3 times in July 2020.

8. PW4 testified that the compliant had sex in different dates in July 2020 while the girl was asleep. She did not scream as the Appellant threatened to kill her. The last time they had sex was in February 2021. The aunt asked the complainant on 27/8/2022(I presume it is 2021). The pregnancy was said to be 10 weeks and 6 days. The last aspect contradicted the medical evidence in the P3 that the pregnancy was 15 weeks and 6 days.

9. Pw4 was recalled to produce the birth certificate,

10. On being put on his defence, the appellant narrated how he came home and found the wife waiting for him in a rather different way. The Appellant was rising the daughter as her mother was serving a prison sentence. He had raised her since she was 2 years. She was asked about the relationship with the complainant. She wanted the Appellant to take money and escape. He refused. He enquired from her sister what this was about and even accompanied her to the police station, only to be arrested. He could not answer the allegations because they were too painful for him. On cross examination the Appellant said that he had no conflict with the sister. However, he had issues with Maimuna, her other sister. He said that the complainant was coerced to say those words. He stated that he was not angry with the complainant as he was the one paying school fees.

11. Not surprisingly, on conviction, he was still worried on the schooling of the complainant who had dropped out of school

**Submissions**

12. The Appellant filed submissions to the effect that the prosecution called 4 witnesses for the 2 charges. They did not order a DNA test and the investigations were poor and shoddy. He relies on the case of RWG –vs- Republic [2019] eEKLR and some foreign decisions. I am unable to trace the case referred to in eKLR.

13. On inconsistence and uncorroborated evidence, he relies on the case of Mutonyi -vs- Republic [1982] eKLR, the Court of Appeal defined corroboration as:

> "an important element in the definition of corroboration is that it affects the accused by connecting him or tending to connect him with the crime, confirming some material particular not only the evidence that the crime has been committed but also that accused committed it."

14. On the aspect of failure to conduct DNA test, he relied on the case of David Mpata-vs-Republic, where Justice Githinji is said to have held that failure to conduct DNA on the Appellant and the child sired cause an injustice. I cannot trace this case in the eKLR. I take it that either the two cases are nonexistence or it is a wrong citation.

15. On hearsay, he stated that it is not possible for parties who were staying therein not to realize what was going on for months. Finally, on investigations it is the Appellant's case that the investigations were not thorough.

**Prosecution's submissions**

16. The prosecutor did not file Submissions. He requested for time and the court gave him time to read the record. The prosecution supported the conviction and sentence, though he was of the view that the sentence is excessive. On the question dealt with the next paragraph the prosecutor conceded that this was not explained.

**The Elephant in the Room**

17. I realized both parties were leaving the court with the towel, water and the baby. I then asked the prosecutor to address me on the elephant in the room. If defilement was done in several occasions in July 2020, how come the minor was still 16 weeks pregnant on 30/8/2021? I asked this because the minor, in her evidence narrated only evidence of July 2020. The investigating officer without prompting stated the appellant and the last time the duo had sex was February 2021. This was not a case of diverse dates between July 2020 and august 2021. It was a specific date.

18. I am aware that the court is entitled, under section 60(1) m, to take judicial notice of the ordinary course of nature. A pregnancy caused in July 2020 could have resulted in a birth by April 2021. The complainant was only 16 weeks pregnant at the time of examination. The pregnancy is not sine qua non liability. However, the complainant was not candid. The charge did not possibly relate to the pregnancy available in August 2021.

**Analysis**

19. I have perused the record and I am uncomfortable with the way the evidence was taken. The case was set to fail at this level for reasons known to the prosecution. The first issue is the leading of the evidence of the child. On 9/12/2021 the court recorded as follows; -

> "I have examined the 14-year-old child. She is intelligent enough for her evidence to be recorded. She mentions the meaning of oath. Later in the proceedings the court indicates that the minor is a child of tender years."

20. She gave sworn evidence both times she testified. I note that the court should not indicate that it has examined a child without the record of the examination. Nevertheless, nothing turns on this on the issue since the child was 15 years.

21. The complainant testified that she was born on 4/3/2007. This makes her 14 years as at July, 2020. She stated that the Appellant was a brother to the minor's mother. She narrated the incident.

22. PW 1 continued that in July, 2020 her the uncle entered the room at 12.00am and had sex with her. She is said to have seen the appellant. This was said to have been done 3 times. The mother went to hospital and there was a pregnancy test for 30/8/2021. The girl had missed her periods and as such the need to have the pregnancy test.

23. Pw 2 stated that on 27/8/2021, the minor did not get her periods. The minor then offered an explanation that they have been having sex with the Appellant.

24. On cross examination, the accused brought out an issue that it is money that got lost that resulted in this case. The minor was treated at Malindi General Hospital on 17/4/2022. It is indicated that the minor was having sex since July, 2020. I have a re-look at the minor's evidence. She has not touched on any sexual activity in 2021. If the minor was treated in April, 2022. The could pregnancy cannot be related to July, 2020.

25. The pregnancy is stated to be for 15 weeks by August, 2021. This means it relates to an incident April, 2021. Pw 4 in his evidence, stated that the last time the offence was allegedly committed was 16/2/2021. They could have made the complainant 6 ½ months pregnant as at 30/8/2021. There is something that does not add up.

26. The offence as indicated in the charge sheet, was committed in various days in July, 2020. Could it have been July 2021? This did not add up as this will have given maximum of 8 weeks pregnancy. The doctor's report on pregnancy was not impeached. I digress.

27. A story is told a great hunter. One day he left the house in hurry to go hunting. He usually carried a gun. On that day, without thinking, he aimed and shot. The lion fell and died. When he tried to re-cock his gun, he realized he was carrying an umbrella. To this day he has been wondering, if I was carrying an umbrella, how come, I shot the lion and actually heard sound of a gun. How did the lion die, if I was carrying an umbrella? Can an umbrella shoot. The jury is still out.

28. It is the duty of this court to rely on proper evidence, and using the evidence, free form our own emotions, convict or acquit. I see the totality of the evidence as follows: -

> " The complainant was 15 weeks and 6 days pregnant on 30/8/2021. The complainant was still pregnant as at April, 2022. The complainant was examined and the P3 indicated the nature of the injuries was habitual in August 2021. COULD it be possible that sex held in July 2020 resulted in this pregnancy. What is they are wrong only on the date, it is July 2021? This gives 12/5/2021 as the conception date. How come the investigating officer found out that February 2021 was the last date? This will have given the pregnancy as 6 moths. By April 2022, the child could have been born. Whichever way this is seen, someone is not truthful.
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> 28. I am guided by Section 124 of the *evidence Act*, which provides as follows: -
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> > " 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. There needs to be corroboration of evidence of a single witness unless the court, for reasons recorded belief that the complainant in a sexual offence, is telling the truth. The court found a very telling fact, that the complainant opened the door on one occasion. She did not know who opened the door in other occasions. Not that if she is the one who opened, it will have made any difference in defilement or incest cases. She was not candid.

30. Unfortunately, the court did not consider Section 124 of the evidence and the truthfulness of the complainant. In absence of such consideration there needed to be corroborated. There is none.

31. The Appellant has complained that the state ought to have tendered DNA evidence. I disagree. It is the state's duty to find adequacy in it's own evidence. If they wished not to have DNA evidence, no one can be grudge them. The Appellant should not strengthen the state case. If they wished to do, it was their case.

32. The evidence they produced was not in support of the charge. The charge related to various dates in July, 2020. The pregnancy was 4 months on 30/8/2021. There is doubt as to the origin of the pregnancy. I am aware that there gestation period in human beings, is 9 months. There is no possibility that the alleged sexual activities of July, 2020 led to 4 months pregnancy on 30/8/2021. It is not the case that every sexual offence must lead to a pregnancy. It is a case that this evidence produced does not support the charge.

33. There has been absolutely nothing linking the accused to the alleged sexual escapades. Had the complainant been truthful, then the court could have invoked section 124 of the *Evidence Act*. She was however less than candid.

34. In WLN v Republic [2021] eKLR, the court, F. M. Gikonyo stated as doth, regarding DNA as doth: -

> " 50. It bears repeating that, that exclusion by DNA result does not absolve any other sexual intercourse with the minor which may be proved through other evidence. It is the onus of the prosecution to properly tie or connect through evidence, the penetration of a child to the accused. I am aware of the proviso to section 124 of the *Evidence Act* which permits conviction on the sole evidence of a child who is the victim of sexual assault as long as the court has recorded the reasons of believing the child. I have found that the fact that DNA report excluded the Appellant as the father of the child routs the core of the testimony by PW1- the victim child which was to the effect that she had sex once with the appellant which resulted into the pregnancy. In addition, there was no other cogent and strong evidence which proved any other penetration of the victim by the appellant. I wonder why no efforts were made to establish the person who impregnated the victim herein. It is also strange that the first report to the police did not contain the name of the suspect. These matters cast doubt on whether the Appellant defiled the complainant."

35. The court in the above case, in arriving at the above decision relied on the decision of Odero J, in the case of Simon Gichuki Maina v Republic [2016] eKLR where it was stated that:

> " Whilst paternity test cannot conclusively prove the fact of defilement, these DNA results cast genuine doubt on the evidence of the complainant and bring her veracity into question. If as proved appellant was not the father of her child, then the complainant must have had sexual intercourse with a person other than the appellant and that person fathered her child. Her identification of the appellant as the man who defiled her is cast into doubt. The very real possibility that the complainant only named (identified) the appellant purely to shield some other third party cannot be entirely ruled out.
>
> Nobody witnessed the defilement. Nobody saw appellant in the company of the complainant. The complainant's claim that the appellant fathered her child through this act of defilement has been disproved by scientific evidence. I find that pertinent and genuine doubts remain regarding the identification of the appellant by the complainant. Once a witness is found to have been untruthful in one aspect of his testimony, then the entire

testimony of that witness is cast into doubt. The benefit of such doubt must be awarded to the appellant. As such he was entitled to an acquittal.

36. The complainant was of the considered view that the pregnancy belonged to the Appellant. It was from July 2020. Given the tenuous nature of the evidence, and given that there was a pregnancy, it was incumbent upon the state to request for DNA. There is nothing real to fear. The resulted will have eliminated the doubt. the doubts are not just fanciful. No one so through the set up. Therefore, when the Appellant stated twice that this was a dispute over money that led him to be framed, the court ignored the same. It was clear that the two siblings have a deep seated dispute. It is over money or property.

37. The defence evidence was cogent and consistent. He accompanied her sister to the police station only to be locked up for defilement. She was actually enquiring on the beatings the minor had gotten. The Appellant's sister killed three birds with one stone.

38. She was able to disabling her niece by her dropping out of school, lock up her brother and refuse to pay the appellant money they were quelling over. This was open throughout the evidence. The only question is why the investigating officer could not see though the façade. Why couldn't the office of the public prosecution see through these holes.

39. Finally, the court, ignore evidence and went on a frolic of its own. There was absolutely no evidence to convict the Appellant. There was no cogent evidence to place the Appellant as a perpetrator. The evidence tendered relate to sex in 2021, where the Appellant was not in the scene.

40. It should be remembered that the acquittal is not because of the pregnancy. It is because, the complainant linked the sex to the pregnancy and the scientific evidence points otherwise. Whether in July 2020 or July 2021, there is no way the Appellant was responsible for the pregnancy. Therefore, attributing the pregnancy to the alleged sex in 2020, is a lie. The Complainant, was not candid or someone made not to be candid. Whichever the case, her evidence is not useful. Even if DNA had been positive, it could not have supported the charge in court.

41. 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 ...
>
> 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."

42. 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;
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> > ''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.''

43. 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."

44. 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
>
> 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;"

45. 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.

46. In the circumstances the conviction is not safe. I allow the appeal. The conviction against the Appellant is hereby quashed and sentence of 50 years' imprisonment is set aside. The Appellant is hereby set free unless otherwise lawfully held.

**DELIVERED, DATED AND SIGNED AT MALINDI ON THIS 30TH DAY OF AUGUST, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM AND PHYSICALLY IN OPEN COURT.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of: -**

Mr Nyoro for the state

Appellant in person at Malindi prisons

Court Assistant - Jungo