Njega v Republic (Criminal Appeal E015 of 2023)
[2023] KEHC 22953 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22953 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL E015 OF 2023

LM NJUGUNA, J

SEPTEMBER 29, 2023

BETWEEN

DENNIS MUNENE NJEGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. S.M. Nyaga (SRM) in Senior Resident Magistrate's Court at Baricho Sexual Offence No. 39 of 2019 delivered on 05th December 2022)

JUDGMENT

1. The appellant has filed a petition of appeal being dissatisfied with the decision of the trial court, seeking the following orders:
    a. That the appeal be allowed;
    b. The conviction be quashed and the sentence be set aside; and
    c. The appellant be set at liberty.
2. The appeal is premised on the grounds that the trial magistrate erred in law and facts by:
    a. Failing to consider that penetration was not satisfactorily proved;
    b. Failing to consider that the appellant was denied access to some witness statements and a chance to cross-examine PW1;
    c. Failing to consider that the investigations done were shoddy and unfounded;
    d. Failing to consider that the medical report (P3 form) adduced was incomprehensive;

e. Imposing a harsh and excessive sentence without considering the fundamental rights and freedoms enshrined in *the constitution*;

f. Failing to consider the appellant's defense and mitigating factors.

3. The appellant was faced with the charge of defilement contrary to Section 8(1) as read together with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that, on 23rd November 2019 in Mwea West sub-county within Kirinyaga County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of LWM a child aged 15 years.

4. The alternative charge was, committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that, on 23rd November 2019 in Mwea West sub-county within Kirinyaga County, the appellant intentionally and unlawfully caused his penis to come into contact with the vagina of LWM a child aged 15 years.

5. The appellant pleaded not guilty to the main and the alternative counts and the plea of not guilty was thus entered. The prosecution proceeded to call 4 witnesses in support of their case.

6. PW1, the complainant, gave sworn evidence following voire dire. She stated that the accused person was her boyfriend. That on 23rd November 2023, she had attended her friend's birthday party at a different village and she stayed there for 2 more days after the event. That after those 2 days, the accused person, went to pick her up and took her to his one-bedroomed house and had sex with her everyday for one week. That whenever he left the house he would lock her inside the house until he returned.

7. That after one week, PW1's mother and the area chief went to get her from the house of the accused, reported the matter at Sagana Police Station and then took her to Sagana Sub-county hospital for medical examination and treatment, then back to the police station. That while at the police station, the mother and wife of the accused went to see her and the former threatened to kill her if she said the truth about what had happened. That she was then taken to Kianyaga Children's Home until when her mother picked her up. On cross-examination, she stated that the accused person's wife was not at home and that she was not aware that the wife of the accused was her distant relative. That she had not slept with any man before the accused person took her with him.

8. PW2 is the mother of the complainant who confirmed that the complainant was born on 06th October 2004 and therefore a minor at the time of the incident. That on 11th November 2019, PW1 went out but did not return home for 3 days, prompting her to report the matter to the area chief. That she received a tip-off from one Millicent Wanjiru who said that PW1 had been spotted at the house of the accused. That she proceeded in the company of the chief and one other elder to the house of the accused and found PW1 in the house. That after the incident, the accused said that PW1 had stolen his phone. On cross-examination, she said that the accused had a wife with whom they are estranged. That Wanjiru saw PW1 on 22nd November 2023 and tipped PW2 off. That at some point, the accused had caused PW1 to be arrested for stealing his phone but he later said that phone was not stolen.

9. PW3 is a Clinical Officer at Sagana Sub-County Hospital and is the one who examined the victim following the incident. He observed that there was nothing to show that the minor was involved in sexual activity recently. That the hymen was broken but he couldn't tell how long ago it had been broken. He produced the P3 and treatment notes.

10. PW4 was the investigating officer in the case. She stated that when the case was allocated to her, she took both the accused and the victim to the hospital. That the victim denied having sexual intercourse with the accused and that she had sexual relations with one Ken Murimi for a long time. That the accused had multiple partners but she did not have sex with him. On cross-examination, she confirmed

that the victim disappeared on 10th November 2019 and was found on 23rd November 2019 with the accused. That Ken Murimi was still at large.

11. After the close of the prosecution's case, the accused was placed on his defence.

12. He gave an unsworn statement and did not call any witnesses. He stated that sometime in July 2019, he had moved with his family to Ciagini from Mbui-Njeru village. That he was a casual laborer and on 22nd November, he had gone back to Mbui-Njeru but had intended to return home to Ciagini because his wife was pregnant. That his bike broke down as he was on the way at night. That the following day, he went to repair the bike and afterwards, picked up his cousin and they went back to his house to cook. That the victim in the company of another girl, went to their house and asked for drinking water. That the village elder then came looking for him and then he, alongside the victim, were arrested. That his cousin Munene and the other girl were not arrested and have since lost touch with the accused. He also stated that the mother of the victim had a grudge with him and his wife and even once told the accused's wife that she would want her to miscarry the pregnancy.

13. Following close of the defense case, the court found him guilty of the offence and sentenced him to the mandatory minimum sentence of 20 years imprisonment.

14. In this appeal, the appellant submitted that the prosecution's evidence was uncorroborated, contradictory, insufficient and failed to make a strong case to sustain a conviction. That the prosecution failed to establish that he was indeed living with the victim for a week, having sex with her every day, yet the evidence by PW3 does not corroborate the victim's statement. That the trial court misinterpreted Section 124 of the *Evidence Act* and also rushed in making its finding simply because the trial magistrate was going on lengthy annual leave. That he disregarded the Judiciary Sentencing Guidelines (2014) and the pre-sentencing report and failed to give sufficient reasons for reaching the conviction. It was also his submission that he was not allowed access to some of the witness statements in good time to enable him prepare adequately for his trial. That the court did not consider the standing feud between the family of the victim and that of the accused. He concluded by stating that the victim had confirmed that she was sexually active and behaves like an adult.

15. The respondent in its written submissions, stated that the prosecution had proved the offence beyond reasonable doubt. That the appellant was accorded sufficient time to cross-examine the witnesses and he cannot claim that the court failed to grant him the statements. The prosecution also discredited the testimony of PW3, the clinical officer, terming it as shoddy and not at all helpful to the case. They stated that Section 124 of the *Evidence Act* was correctly applied and that PW1's evidence is credible and sufficient to sustain the conviction. That PW1 firmly stated that the appellant kept her in his house for one week, having sex with her daily and locking her in the house whenever he left. It was the respondent's submission that the trial court was right in going by the evidence of PW1. They also submitted that the sentence was commensurate to the offence and that the trial court correctly applied the same according to the law. On this, they relied on the case of *Alister Anthony Pariera v State of Maharashtra* (2012) 2SCC pg. 648 para 69.

16. In my view, and upon perusal of the trial court record and the petition of appeal and submissions herein, the issue for determination is whether or not the offence of defilement was proved beyond reasonable doubt. In order to do this, I shall discuss the elements of the offence as provided for under Section 8(1) and (2) of the *Sexual Offences Act*, which elements must be proven beyond reasonable doubt. They are:

    a. The age of the complainant- that the complainant was a child;

    b. Penetration as defined under Section 2(1) of the *Sexual Offences Act* happened to the child; and

c. The perpetrator was positively identified.

17. According to the birth certificate produced in evidence, it is settled that the victim was 15 years old at the time of the alleged offence, having been born on 06th October 2004.

18. On the issue of penetration, the word is defined under Section 2 of the *Sexual Offences Act* as "the partial or complete insertion of the genital organs of a person into the genital organs of another person." This, in our present case was to be established by the prosecution through its witnesses. I shall take the liberty to note early in my discussion, that the respondent submitted that the evidence by PW3 was shoddy and did not make a positive impact to their case. Nonetheless, that evidence, among others, is what this appellate court will rely on in making its findings. The evidence of PW3 is taken under Section 77 of the *Evidence Act* which provides:

> "(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
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> (2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.
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> (3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."

19. However, I do not forget that expert opinions are usually not binding to the court and must be considered alongside all other evidence. Further, PW3 is an expert witness and I cannot over-emphasize the importance of expert witnesses in criminal matters. In the case of *Vander Donckt v Tuelluson* (1849) 8 C.B. 12, Maule J said:-

> " All persons, I think who practice a business or profession which requires them to possess a certain knowledge of the matter in hand are experts so far as experience is required."

20. In the case of *Stephen Kinini Wang'ondu v The Ark Limited* (2016) eKLR the court held that:

> " Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, provided; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.
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> While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. Four consequences flow from this.

Firstly, expert evidence does not "trump all other evidence". It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.9

Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing.12 A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.

Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.

Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones."

21. On the issue of penetration, PW1 stated that she was picked up by the appellant, her boyfriend, who took her to his house and had sex with her every day for one week. PW2 stated that PW1 was rescued on 23rd November 2019 and taken to the hospital on the same day for examination. Going by the evidence of PW1, I understand this to mean that even the night of 22nd November 2019, PW1 and the appellant engaged in sexual intercourse. However, PW3 states that from his examination of PW1, "...it is hard to know if she had sex recently." While examining these pieces of evidence side by side, I share the sentiments of the courts on this kind of uncertainty in evidence. In the case of *WWN v Republic* (2020) eKLR the court was unable to uphold the trial court's conviction because of uncertainty in the evidence of a medical practitioner. It was held:

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"27. With tremendous respect to the medical officer, nothing was easier if he had ascertained penetration than to indicate in the report that the conclusion made was evidence of possible penetration. His use of the word 'possible' no doubt cast doubt not only in the mind of the court but in his mind that he was not sure that penetration was committed. This then drives me to only one conclusion, that his findings were premised on guess work and therefore suspicion, merely because of the history given of the case. This is vindicated by the treatment notes which clearly showed that he relied on the history of the case given.

28. In *Joan Chebichii Sawe v Republic* (2003) eKLR, the court held that:
"The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt."

29. There was nothing difficult in coming up with an unambiguous conclusion and prognosis in the medical documentation, which documents cannot be taken lightly given that they were authored immediately after the offence when the victim went to hospital and the injuries were examined. The witnesses cannot give evidence that strays too far from the documentary evidence

particularly when the departure from the express findings is not substantiated. There is a great difference between possibility of an action and an actual happening of an action. The difference has greater weight in criminal law where the standard of proof is beyond mere possibilities."

22. In another case of *Mohamud Omar Mohamed v Republic* (2020) eKLR the court relied on a decision by the Court of Appeal as follows:

> " In *John Mutua Munyoki v Republic* (2017) eKLR, the Court of Appeal in this regard held that:
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> "Therefore, in order for the offence of defilement to be committed, the prosecution must prove each of the above ingredients beyond reasonable doubt...The clinical officer was categorical that he was not in a position to ascertain the act of defilement after examining the complainant. He testified that he conducted vaginal examination and found no tears, no bruises, no hymen and no discharge. In addition, there were no spermatozoa and yeast cells or fungal cells. The complainant had also confirmed to him that she had previously engaged in sexual intercourse and was therefore not a virgin. Accordingly, the lack of hymen could not be attributed to the alleged incident involving the appellant. In a nutshell, there was no evidence of penetration. Faced with similar situation, this Court in the case of Arthur Mshila Manga v Republic [2016] eKLR observed while allowing the appeal that:
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> 'But did the medical evidence on record establish that JM was defiled? We do not think so. It is apposite to produce verbatim the findings of Jenliza after examining JM, as narrated before the trial court by PW3. No blood stain was seen on clothes. On the head, abdomen and thorax nothing was seen. On the genitalia the hymen was absent and the vagina was open. No discharge was seen. No injuries on the legs or hands. Pregnancy and HIV tests were negative. The urine was negative. HIV test was to be done after three months. I wish to produce the PW3 form as PEXI.'
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> The Court proceeded and stated that:
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> 'From both the evidence of PW3 as well as the P3 form, which we have carefully perused, other than noting absence of hymen and consequently an open vagina, Jenliza never expressed any opinion that the JM had been defiled, or defiled the previous day. There was nothing on record to suggest that JM had lost her hymen the day before Jenliza examined her. The medical evidence having failed to confirm that JM was defiled, the only other evidence of defilement was that of JM. It is trite that under the proviso to section 124 of the *Evidence Act*, a trial court can convict on the evidence of the victim of a sexual offence alone. (See Mohamed v Republic (2008) KLR G&F, 1175 and Jacob Odhiambo Omuombo v Republic (2008) eKLR. However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief.'
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> As we shall endeavour to demonstrate later in this judgment, much as the trial court believed the testimony of the complainant, there was no strict compliance with the requirements of the proviso to section 124 of the *Evidence Act* aforesaid. It is quite clear that there was doubt as to whether the complainant was actually defiled by the appellant since there was no credible evidence as to the penetration of the complainant. It is trite that those doubts should have been resolved in favour of the appellant."

23. The issue of penetration, being tied together with identification of the perpetrator were determined by the trial court through heavy dependency on the proviso to Section 124 of the *Evidence Act*. This provisio states:

> " 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. In the judgment, the trial magistrate stated "...as the victim who was over 15 years at the time of trial told the court the truth and, this, she in the same manner reported to police, hospital and parents and local leaders when she was rescued. Her testimony suffice..." From a collective evaluation of the testimonies by prosecution witnesses and evidence adduced, I am not satisfied that PW1 is truthful and her testimony is to be subjected to corroboration as indicated in the main provision on Section 124 of the *Evidence Act*. The best corroboration available to us at this point is the testimony of PW3 and the Medical examination report produced. This report confirms penetration but fails to link this penetration to the appellant.

25. In my view, the elements of the offence of defilement as discussed herein above are like a three-legged stool; if any one of them is not proved beyond reasonable doubt, the other two cannot stand the test as well.

26. I do share the sentiments of the court in the case of *Okeno v Republic* [1972] EA 32 where it was held that:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions...It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding should be supported."

27. In the end, having considered the petition of appeal, the submissions, and the relevant caselaw, I do find that the appeal is merited and is hereby allowed. I therefore quash the conviction, set aside the sentence and direct that the appellant be set at liberty forthwith unless he is otherwise lawfully detained.

28. It is so ordered.

DELIVERED, DATED AND SIGNED AT KERUGOYA THIS 29TH DAY OF SEPTEMBER, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent