JMN v Republic (Criminal Appeal E017 of 2021)
[2022] KEHC 279 (KLR) (7 April 2022) (Judgment)

Neutral citation: [2022] KEHC 279 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E017 OF 2021

JM MATIVO, J

APRIL 7, 2022

BETWEEN

JMN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against Judgement, conviction and sentence in SO Case Number 22 of 2018- Wundanyi, Republic v JMN, delivered by E.M.Nyakundi, RM, on 18.6.2019)

JUDGMENT

1. JMN (the appellant) was sentenced to serve 35 in prison in SO No. 22 of 2018 at Wundanyi SRM's Court for the offence of incest contrary to Section 20 (1) of the *Sexual Offences Act* [1](the Act). The appellant now seeks to quash both the conviction and sentence citing 4 grounds in his supplementary grounds of appeal which can be condensed into 2 grounds, namely; (a) did the prosecution prove its case to the required standard, and (b) was he properly sentenced.

2. In determining this appeal, this court has a legal duty to re-analyse, re-evaluate and assess the evidence adduced in the lower court so as to come up with its own conclusions bearing in mind that it did not have the benefit of seeing the witnesses testify.[2]

3. On 13th FMM, the complainant informed the court that she was not defiled and that she only brought the charges against her father because he had not paid her school fees. At this point the Prosecutor informed the court that he believed that the complainant had been compromised and prayed that the OCS Mwatate investigates the witness interference and avail a report. The court ordered that the OCS

1 Act No. 3 of 2006.

2 See *Okeno vs Republic {1972) E.A*, 32at page 36, *Pandya vs Republic {1957} EA 336*, *Shantilal M. Ruwala vs Republic {1957} EA 570* & *Peter vs Sunday Post* {1958} EA 424.

Wundanyi to investigate and that the complainant be escorted to Wundanyi Police Station to record a statement. On 19th February 2019, the Prosecutor informed the court that the report was ready and one Sophia Mlamba was the culprit was subsequently charged in court.

4. On 19th March 2019, the complainant took the witness stand again. She testified that on 26th July 2018 at 8pm the appellant who is her father did bad things to her, that he touched her private parts and raped her and he used a condom. She said he threatened to kill her if she ever told anyone. She said she told her teacher a one Mrs M. She gave her age as 13 years old and produced her birth certificate.

5. PW2, Dr. Furaha Faraji from Wesu Sub County Hospital produced the treatment notes, the P3 form and Post Rape Care Form. He said he saw the complainant on 28th July 2018 who had pain in the gait and tenderness at the right groin region and genitalia. He stated that no spermatozoa was seen, that pregnancy and HIV test were all negative, her hymen was broken and she had a whitish discharge. He produced her P3 form, treatment cards and Post Rape Care Form as exhibits.

6. PW3 RWN, the complainant's teacher stated that the complainant started missing school so she sent for her to find out what was happening and she came with her mother but despite constantly asking her the problem, she said nothing. She took her to the hospital and upon examination, no spermatozoa was seen but she wrote on a piece of paper that her father defiled her. PW4, AW, the complaints mother said she only came to know her husband was defiling the complainant at the police station while PW5 Omari Bahola stationed at Mghange Police Post was the investigating officer. He produced her birth certificate in court.

7. Upon being put on his sworn defence, the appellant stated that he took himself to the police on 19th October 2018 after he learnt that the police were looking for him. He stated that there was a problem between himself and his wife who had re-united with her ex-husband whom he found in his house on 20th July 2018.

8. The learned Magistrate analysed the evidence and the law and he was persuaded that the offence of incest was proved. She convicted him and sentenced him to serve 35 years in prison.

9. The appellant seeks to quash the conviction and sentence citing 4 grounds in his supplementary record of appeal which can be condensed into 2, namely, did the prosecution prove the offence to the required standard; and, is there any basis for the court to interfere with the sentence.

10. In his submissions, the appellant submitted that he was not afforded the right to legal representation, that the Magistrate erred by failing to conduct a voir dire examination in breach of section 197 (1) (a) of the *Evidence Act*.[3]Additionally, he submitted that the charges were framed as evidenced by the complainant's own statement in court that she lied because her father had refused to pay her fees. He also faulted the manner in which the documents relied upon by the prosecution were produced. He argued that penetration was not proved and that the prosecution evidence was full of contactisations.

11. The Respondent's counsel cited section 20 (1) of the Act and submitted that the offence of defilement was proved, and that the identity of the offender is not in doubt. Additionally, he submitted that the appellant's rights under Article 50 of the Constitution were not violated. As to the failure to conduct voir dire examination, he submitted that as was held by the Court of Appeal in *Maripett Loonkomok v Republic*[4] not all cases where voir dire is not administered or is not administered properly would vitiate the entire trial. Lastly, he submitted that the documentary exhibits were properly produced and that the evidence tendered is cogent and not inconsistent.

[3] Cap 80, Laws of Kenya.

[4] e {2016} e KLR.

12. For starters, the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty. As the Supreme Court of Nigeria held in *Ozaki and another v The State*,[5] for a defence to be rejected it must be incredible and that the defence must be weighed against the evidence offered by the prosecution. In *Uganda v Sebyala& Others*,[6] the court stated: -

> " The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts."

13. The accused has only what is referred to as the evidential burden which means the duty of adducing evidence or raising the defence of alibi.[7] Once an accused person discharges the evidential burden of adducing evidence of alibi, it's the duty of the prosecution to disprove it. The duty of the curt is to test the evidence of alibi against the issue adduced by the prosecution and if there is doubt in the mind of the court the same is resolved in favour of the accused.

14. The onus on the prosecution to prove the charge against the accused beyond reasonable doubt never shifts and there is no onus on the accused to prove the alibi beyond that of introducing the evidence of alibi. A trial court has a duty to weigh the evidence adduced in court by all the parties in totality and make a finding on the culpability or otherwise of the accused. Choosing to analyse the prosecution evidence and leave out that of the accused defence is a fatal mistake. It's a duty bestowed in every court to weigh one set of evidence (prosecution) against another (defence) before arriving at a conclusion. This is the basic calling of every Court without exception.[8] As was held in *Ricky Ganda v The State*[9]: -

> " The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true...the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses....it is acceptable in totality in evaluating the evidence to consider the inherent probabilities....
>
> The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt."

5 Case No. 130 of 1988.

6 {1969} EA 204.

7 See *OrteseYanor& Others vs The State* {1965} N.M.L.R. 337.

8 *John Matiko & Another vs Republic*, Criminal Appeal No. 218 of 2012.

9 {2012}ZAFSHC 59, Free State High Court, Bloemfontein.

15. It is not open for the court to ignore evidence tendered or to make inferences which are not supported by evidence. Two fundamental issues arise in this case. When the complainant first took to the witness box, she denied that she was defiled. The court or the Prosecution never gave her a chance to explain why. Instead, the Prosecutor interjected and told the court that he believed the complainant had been compromised and asked for the matter to be investigated. The prosecution request was granted. The trial Magistrate ordered that the complainant be "escorted to the police station." To me, if at the complainant was traumatized as alleged, escorting her to a police station without ascertaining the basis of her claim was even worse and more traumatizing.

16. The next time the matter came up in court, the prosecutor told the court that a one Sophia Mlamba had been charged. This is the first and last time this crucial issue was mentioned in court. Granted these are serious allegations because they could either ruin the prosecution case or the defence. It was necessary for more to be done, at least to establish whether the complainant was being forced to give evidence on tramped up charges or whether it was true someone was interfering with her. One would have expected the trial Magistrate to spare some ink and paper and address the issue, and possibly, the Investigating Officer ought to have availed the charge sheet (if any) and update the court on the status of the case including providing the case number if at all such a case existed.

17. Equally important and closely intertwined with the alleged "interference with the complainant" is the appellant's defence that his wife who had gone back to her ex-husband was behind the charges. The appellant's defence viewed in totality, and weighed against the complainant's attempt to disown the charges cannot be ignored.

18. The other fundamental flaw is the Magistrate's act of delving into the arena of the dispute by making conclusions not supported by the evidence. The complainant at page 20 of the proceedings claimed that she was defiled only once. However, the Magistrate at page 2 of the judgment stated: - "in all the instances she was defiled, the accused had used a condom" clearly alluding to other instances of defilement which contrary to the complainant's evidence. A similar statement is replicated at page 5 of the judgment stated i.e., "in all instances, the father had used a condom..." Again, the Magistrate referred to other instances not supported by the complainant's testimony.

19. It is not clear which other instances the trial Magistrate was alluding to when the complainant clearly referred to only one incidence. Additionally, it was improper for the trial Magistrate to dismiss or ignore the defence offered by the appellant without according it due weight. It was improper for the trial Magistrate to make conclusions not founded on the evidence and basing the conviction on such conclusions and inferences. In fact, by making conclusions which went against the testimony of the complainant, the trial Magistrate not only misdirected herself, but also dangerously descended into the arena of the dispute.

20. To me, the defence raised by the appellant and the complainant's attempt to dissociate herself from the charges, raises reasonable doubts on the prosecution case. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.[10] This is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right.

[10] Duhaime, Lloyd, Legal Definition of Balance of Probabilities, Duhaime's Criminal Law Dictionary.

21. I find that there were reasonable grounds for creating reasonable doubts as to the guilty of the accused. The conviction was supported by very weak evidence and/or it went against the weight of the evidence. Our system of justice is deeply concerned that no person who is innocent of a crime ought to be convicted of it. In order to avoid that, a court must consider all the evidence with great care, especially when it is the only evidence because the law is not so much concerned with the number of witnesses called as with the quality of the testimony given. A guilty verdict is permitted, however, only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the charged crime have been proven and that the evidence irresistibly points to the accused and that the evidence is both truthful and accurate.

22. The upshot is that this appeal succeeds. Consequently, I hereby quash the conviction, set aside the sentence and order that the appellant John Mwanyalo Nyambu be released from prison forthwith unless otherwise lawfully held.

Right of appeal 14 days

SIGNED, DATED AND DELIVERED AT VOI THIS 7TH DAY OF APRIL 2022

JOHN M. MATIVO

JUDGE