HMK v Republic (Criminal Appeal E027 of 2021)
[2022] KEHC 12786 (KLR) (31 August 2022) (Judgment)

Neutral citation: [2022] KEHC 12786 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E027 OF 2021

JM MATIVO, J

AUGUST 31, 2022

BETWEEN

HMK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the Judgement, conviction and sentence in SRMCC SO No. 13 of 2018- Wundanyi, Republic v HMK delivered by E. M. Nyakundi, on 26.11.2019)

JUDGMENT

1. HMK (the appellant) was sentenced to serve 30 years in prison in criminal case number 13 of 2018 at the Resident Magistrates Court at Wundanyi for of the offence of incest contrary to section 20 (1) of the *Sexual Offences Act*.[1] There was no finding on the alternative count of committing an indecent act with a child.[2]

2. 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.[3]

3. PW1, CHWK, a sister to the appellant and a grandmother to the complainant testified that on June 18, 2018, she received a phone call from the complainant's teacher, a one J who informed her that she had observed the complainant and it appeared that someone was having sex with her. She went

1 Act No. 3 of 2006.

2 Contrary to section 11 of the *Sexual Offences Act*, Act No. 3 of 2006.

3 See Okeno v Republic {1972) E.A, 32at page 36, Pandya v Republic [1957] EA 336,Shantilal M. Ruwala v Republic {1957} EA 570 & Peter v Sunday Pos/ {1958} EA 424.

to school on June 19, 2018 and found a one Madam Manyasi who told her that the child was found with another boy preparing to have sex and upon being interrogated by teachers she told them that her grandfather has been having sex with her. In her presence, the child refused to talk, but at home she told her that the appellant has been defiling her. She said she took her to Mwanyumba dispensary, and upon being examined the doctor said that she was not a virgin. She reported at Mwatate police station. The complainant was issued with a P3 form which was filled at Wesu sib-county hospital. She said the complainant was aged as 5 years and 10 months having been born on June 12, 2013.

4. PW2, JSM, a teacher at [particulars withheld] primary school testified that on June 14, 2018 the complainant them that uncle M had put his "mdudu" in her private parts. She said they escorted the child to the office of Mr M, the head teacher where they found him with the area assistant chief a one Sm who interrogated her but she started crying. She told them that uncle M had defiled her. She identified the appellant in court who she said was her neighbour.

5. PW3 Dr Furaha Faraji, a medical doctor at Wesu sub-county hospital produced the complaint's P3 form filled by Dr Mohammed Machi whom he had worked with for 7 months. He testified that the approximate age of the injuries could not be estimated because it was not clear when the defilement took place, but the probable weapon used was penile shaft. He testified that vaginal swap could not be taken because she was swollen, but on examination, her hymen was broken but she had no bruises. He said the complainant was aged 5 years.

6. The complainant was availed in court on October 3, 2019. The learned magistrate recorded: - "She refused to talk and instead broke down in tears. I find that she is a vulnerable witness and an intermediary need to testify on her behalf." The prosecutor made an application under section 31 of the *Sexual Offences Act*. The appellant did not object to the application, so the court allowed it. The prosecution called PW4 TM to testify as the intermediary. Her evidence was that he complainant looked sad and said she wanted to sleep. She said she could not sleep the previous night because her uncle kept on inserting his "mdudu" in her private part.

7. PW5, PC Amana Rebecca, the investigating officer took over the file from his predecessor. She said the complainant refused to talk to the investigating officer. She produced the complainant's birth certificate showing she was born on June 12, 2013.

8. After analysing the evidence, the trial court was persuaded that the accused had a case to answer and placed him on his defence. In his sworn defence, he stated that on June 23, 2018, two men who identified themselves as police and a village elder asked him to accompany them to Mwatate police station where he was held till June 26, 2019 when he was charged in court. He said that the witness report showed that the complaint was having sex with a boy called JK. He pleaded for justice. On cross-examination he denied defiling the complainant.

9. In her judgment, the learned magistrate was persuaded that the offence of defilement was proved. He sentenced him to serve 30 years in prison. The appellant seeks to overturn the said verdict. Eventhough the grounds cited are overlapping in certain respects, the appellants' challenge may broadly be understood as follows: - (a) that the case was not proved beyond reasonable doubt; (b) his defence was not considered. In his submissions, the appellant argued that the case was not proved to the required standard, that he was not properly identified as the offender and that his defence was not considered.

10. The respondent did not file submissions despite being granted time to do so.

11. In our system of law all persons accused of crimes are presumed innocent until their guilt has been proved beyond reasonable doubt. The burden or onus of proof is on the State to prove the guilt of

the accused person. Proof beyond reasonable doubt does not mean proof to an absolute degree of certainty. It means that there should be such proof as leaves no reasonable doubt in the mind of an ordinary man capable of sound judgment and of appreciating human motivations. It means a high degree of probability, not proof beyond a shadow of a doubt.

12. The State does not have to close every avenue of escape and fanciful or remote possibilities can be discounted as these do not lead to reasonable doubt. To be a reasonable doubt the doubt must not be based on pure speculation but must be based upon a reasonable and solid foundation created either from the positive evidence or gathered from reasonable inferences not in conflict with or outweighed by the proved facts. However, it is not necessary for the State to prove every single individual fact in a criminal case beyond reasonable doubt although the State must prove beyond reasonable doubt a fact which is particularly vital and upon which the whole State case hinges. The question which needs to be asked is: do all the facts taken together prove guilt beyond reasonable doubt? Even a number of lines of inference, none of which would be decisive, may in their total effect lead to there being proof beyond reasonable doubt.

13. If an accused person gives some explanation, he must be acquitted even if the court is not satisfied that his explanation is true if, nonetheless, the explanation might reasonably be true. Even if he gives an explanation which is improbable, an accused person cannot be convicted unless the court is satisfied beyond reasonable doubt that it is false. Even if his story is not believed in all of its details, an accused person must be acquitted if there is a reasonable possibility that his story is substantially true.

14. With all defences except insanity, once the evidential onus of introducing sufficient evidence of the defence to put the defence in issue is discharged (or to put it another way as soon as a foundation has been laid for the defence), the substantive onus to disprove the defence rests squarely on the prosecution. Once there is some material, whether adduced by the defence or emerging from the prosecution case, suggesting that such certain defence may be available the court must consider the defence. Evidence sufficient to raise a defence does not have to be evidence sufficient to establish the factual basis on a balance of probabilities; all that is required is that there be sufficient material evidence to make it a realistic issue and this evidence could emerge from the state case, from an accused person's confession, from the cross-examination of State witnesses or from evidence from the defence. Thus, once there is a sufficient foundation for the defence from whatever quarter this evidence comes, the onus rested squarely on the prosecution to prove that the defence does not apply.

15. PW2 raised a pertinent question which went to the root of the prosecution case and the accused person's innocence or guilty. Because of the importance of this piece of evidence, I find it necessary to spare some ink and paper to reproduce it. The relevant part states: -

> " On June 19, 2018 I left work and went to school. I went to see the teacher, J. I did not find J. I made a phone call and she told me she was away from school. I spoke to madam M. Madam M informed me that the child had been found with another boy preparing to do sexual intercourse. The teachers picked the child, took her to the classroom and interrogated her..."

16. From the above excerpt, it is manifestly clear that the child was found with another boy preparing to do sexual intercourse. Sadly, this was happening in school. PW2, a teacher said "the pupils were doing a thing of his or her own choice. Some of the pupils were teaching and others playing..." Much as it is proper for students to have free time in school, there was an element of laxity on the part of the teachers in that the pupils were not supervised properly to utilize their free time responsibly.Equally worrying is the fact that the learned magistrate ignored this crucial evidence which suggested that this child could have been sexually assaulted in school under the careless watch of teachers. There was no attempt by

the prosecution to discount such a possibility. Equally important is the appellant's defence that:- "...on receiving the witness report, it showed that the complainant was having sex with a child called JK..."

17. Again, the issue of the complainant having sex with another child/person came up in the appellant's defence. He made reference to the prosecution evidence. He even mentioned a name. He was not cross-examined on this crucial aspect. The defence must be weighed against the evidence offered by the prosecution. 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. This is the basic calling of every court without exception.[4] A trial court cannot afford to be seen to be selective in evaluating the evidence tendered before it. The question that follows is whether the explanation given by the appellant was reasonable or whether it rebutted the evidence adduced by the prosecution. The Supreme Court of Nigeria in *Ozaki and another v The State*[5] stated:-"it is settled law that the defence of *alibi* raised by an accused person is to be proved on a balance of probability and that for it to be rejected it must be incredible and that the defence of alibi must be weighed against the evidence offered by the prosecution."

18. In line with the sentence underlined above, the defence proffered by the appellant cannot be said to be improbable considering that it was raised by a prosecution witness and the prosecution never pursued it, though it was a crucial aspect of its case. The South African case of *Ricky Ganda v The State*[6] provides useful guidance. It was held:-

> "...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"

19. The explanation offered by the appellant is in my view probable and it casted 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.[7] As was held by the Supreme Court of Cananda in 1997 in *R v Lifchus*[8] :-

> "The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty. ...the term

4 John Matiko & Another v Republic, Criminal Appeal No. 218 of 2012.

5 Case No. 130 of 1988

6 [2012]ZAFSHC 59, Free State High Court, Bloemfontein.

7 Duhaime, Lloyd, Legal Definition of Balance of Probabilities, Duhaime's Criminal Law Dictionary

8 [1997]3 SCR 320.

beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.

A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high.

In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt"(emphasis supplied)

20. It was totally unsafe to convict the appellant yet the prosecution evidence suggested the possibility of another assailant. The trial magistrate misdirected himself in failing to appreciate and consider the disclosure by PW1 that the complainant was actually found "preparing to have sex with another boy in school." In fact, that was the reason why the complainant was taken to the headteacher's office for interrogation. There is no mention of the "boy" being interrogated. What emerged was a concerted effort to extract information from the complainant and that is how the appellant's name popped up after a sustained attempt. Where the teachers shifting blame from the school to the complainant's home?

21. When evaluating or assessing evidence, it is imperative to evaluate all the evidence, and not to be selective in determining what evidence to consider. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored.[9]

22. The facts found to be proven and the reasons for the judgment of the trial court must appear in the judgment of the trial court. If there was evidence led during the trial, but such evidence is not referred to in any way in the judgment, it is safe for a court of appeal to assume that such evidence was either disregarded or not properly weighed or even forgotten about at the time of delivering the judgment. The best indication that a court has applied its mind in the proper manner is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.[10] By failing to account for all the evidence tendered before him by both the prosecution and the defence, or by failing to gives reasons for disbelieving the said testimony, the learned magistrate fell into a grave error and in the process occasioned prejudice to the appellant.

23. To me, this is a clear case where the appellant ought to have been given the benefit of doubt. Accordingly, I am unable to uphold the conviction. The up-shot is that this appeal against both conviction and sentence is allowed. I quash both the conviction and sentence and order that the appellant HMK be released from prison forthwith unless otherwise lawfully held.

9 As Nugent J (as he then was) in S v Van der Meyden 1999 (1) SACR 447 (W) stated at 450.

10 As was stated in S v Singh 1975 (1) SA 227 (N) at 228

Right of appeal 14 days

SIGNED AND DATED AT VOI THIS 29TH DAY OF AUGUST 2022

JOHN M. MATIVO

JUDGE

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 31ST DAY OF AUGUST 2022

STEPHEN GITHINJI

JUDGE