Lusava v Republic (Criminal Appeal E047 of 2023)
[2024] KEHC 4935 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4935 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E047 OF 2023

DKN MAGARE, J

MAY 9, 2024

BETWEEN

COLLINS AMBASA LUSAVA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This is an appeal from the decision of the Hon. Faith K. Muguongo SRM, given on 27/10/2020.
2. The Appellant filed a Memorandum of Appeal and raised 4 grounds of Appeal.
    a. That the learned magistrate erred in law and fact by failing to consider that the prosecution failed to all the elements as provided under section 8 (1) (3) of the *sexual offences act*.
    b. That the learned magistrate erred in law and fact by failing to consider that the prosecution failed to prove the medical evidence did not meet the required threshold.
    c. That the learned magistrate erred in law and fact by failing to consider the time spent in remand custody while undergoing trial as provided for under section 333 (2) of the criminal procedure code.
    d. That while considering the above stated ground, I humbly beg this court to consider a non-custodial sentence for the period that shall remain where the sentence runs concurrently.
3. At the time of filing a submission the Appellant filed what he called Amended grounds of Appeal. They had 3 grounds: -
    a. That the learned magistrate erred in law and fact failing to consider that the charge sheet was defective denied the appellant the right o fair hearing.

b. That the learned magistrate erred in law and fact by failing to consider that PW1 was not a credible witness worth of belief.

c. That the learned magistrate erred in law and fact by disregarding the appellant's defence.

4. The Appellant filed submission on 27/2/2024. He stated that he was charged with defilement of 14 years old SMW. He urged the court to acquit him. He stated that the age of the minor was different having been born on 27/12/2003 and was 16 as at 6/6/2020. He relied on the case of *Yongo –vs- Republic*. He further relied on Section 134 of the *Criminal Procedure Code*. This, according to the Appellant was buttressed by the case of *Sigilani -vs- Republic* (2004) 2 KLR 480.

5. It is their case that the age of the minor was crucial.

6. On ground. He stated that the evidence of PW1 was not credible. The minor was admitted at Ruringu Children Home to sweeten her testimony. He relied on the case of *Chila -vs- Republic* (1967) EA 722.

7. On the stated that PW2 had stated that 2 young girls were brought. PW2 is said to have a grudge. The minor stated that she was b eaten. H relied on Article 1 (1) on the convention against torture. He stated that the Appeal was merited and should be allowed.

8. The respondent filed submission on 13/3/2024. They stated that the offence was proved. They also addressed the 4 grounds and 3 additional grounds. On the Role of the court, they relied on the case of *David Njuguna Wairimu -vs- Republic* (2010) eKLR.

9. On the grounds of defective change sheet, they stated that the charge sheet was not defective. They relied on the case of *BND – vs – Republic* (2017) eKLR, where the court stated –

> " 29. The answer from our decisional law is this: the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him? If the answer is in the affirmative, it cannot be said in any way other than a contrived one that the charges were defective... There is no question in my mind that the Accused Person clearly understood the charges facing him well enough to understand the ingredients of the crime charged so that he could fashion his defence. In this case, he understood it well enough to offer an explanation when the facts were read out to him.

10. They stated that elements of the offence were proved, that is proof of penetration and proof that the Appellant was the perpetrator (See *Goa -vs-Republic* (2018) eKLR. They relied on Section 124 of the *Evidence Act* for the credibility of the witnesses. They state that the offence related a child between 12 and 15 years. They submitted that PW1 's evidence was cogent on the offence. It is their case that medical evidence corroborated PW1's evidence. They denied that the witness was coached. They relied on the case of *Mark Oiruri -vs- R* (2013) eKLR for incomplete penetration, where the curt held as doth: -

> " ..... Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ ...." (emphasis added).

11. They prayed that the Appeal be dismissed.

Evidence

12. On 31/11/2020 the minor testified that she did not know the Appellant. She first saw him in the year 2020. She stated that she went on 31/8/2020 to visit her friend. S.N. and did not spent the night at home. She found the Appellant and one Evans at Mugagati.

13. The appellant called SN but she did not stop. She stated that they had a long day. They went to SN's grandma's house and made a U-turn at the gate they went to Evan's home. They were asked to go in. They were 4. They were offered food and refused. They roasted maize and slept. The prosecution asked that the whiteness be remanded at Ruringu Children's Home because she was adamant. The children's home declined to take her without Covid 19 – certificate.

14. When the hearing resumed the witness was now wiser. She remembered different things. She also became illiterate. She wanted to speak in Kikuyu. She started from the middle. She stated they met the Appellant at Mugagati. The appellant told the witness to go and tell SN that the Appellant loves SN.

15. They went into the house on invitation and closed. Evans paired with Sharon and the Appellant with the complainant. They talked. They then left. They then had sex in the Appellant's house. She stated that she enjoyed the sex. The boys slept while the girls did not. They me and their father came found them and beat them. Daniel is the one who found them. On cross exanimation the appellant raised the issue of sex but the complainant was steady.

16. PW2 Daniel Kererige stated that he knew the Appellant who is employed by his brother, he stated that on 1/9/2020 he heard commotion. He opened the door and saw 2 men in bed plus one girl. The three were in one bed. He called the assistant chief.

17. Dr. Joyce Manzenzi form Nezero county referral hospital. She stated that she had a PRC for SNW.

18. On 1/9/2020. She gave history that she was at a man's house and nothing happened to her. The Dr. found that the hymen was old broken and vulva was hypothermic, suggesting recent sexual activity. No spermatozoa was seen. Spermatozoa can be seen 3 days after intercourse. The PRC was for 1/9/2021.

19. The P3 was for 7/9/2020. The PRC said the patient was born in 2008 while birth certificate showed she was born in 2006. In cross examination the doctor lied that spermatozoa was seen yet in chief she stated that none was seen. Another PW3 (Lucy Wanjira - testified that she w has children. The complainant was the 4th. She produced a birth certificate. She stated she was called PW4 was SN a minor.

20. She stated that they men the complainant and Deceased to visit their grandmother. They waited for the complainant and Evans to know what they wanted. She stated that she had sex with Evans and then left. Collins to go in with SNW and have sex.

21. The witness was stood down and remanded for 7 days. After being stood down, there was no cross examination. PW5 Florence Wambugu testified that she is the Assistant chief. She received a call from PW2 at 5000 hours. They knocked the door. They 4 could not give explanation. On cross examination PW3 stated that there was no grudge between them.

22. PW6 was the investigating officer. He testified and stated that they're-arrested two men and charged Collins with the offence.

23. The case was closed. At this point PW4's evidence should have been expunged as she was never recalled for cross examination. Evince is worthless, if it is not lifted through cross examination.

24. The Defended testified on a path that he is a shamba boy who went to Nyeri on December 2019. He knew PW1 as a customer at a Kinyozi. She said that along the way he met PW1 Sharon and Evans. They stopped her. Evans came with 2 girls and he enquired who the 2 were. He stated that the event took place at 1900 hours. She did not defile. He stated on cross examination that he only spoke to Evans. He did not defile the minor. The court convicted the Appellant and sentenced him to 10 years imprisonment.

Analysis

25. 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."

26. In the case of *Okeno v Republic* [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination *(Pandya v. R*., [1957] E. A. 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 conclusions. (*Shantilal M. Ruwala v. R*., [1957] E.A. 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, see *Peters v. Sunday Post*, [1958] E. A. 424."

27. The issue in this case is whether the prosecution proved is case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of *H.L. (E) Woolmington vs. DPP* [1935] A.C 462 pp 481 , comes in handy in describing the 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. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by

him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. 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."

28. In the case of *R vs. Lifchus* {1997}3 SCR 320 the Suupreme court of Canada explained the standard of proof as doth:-

> " 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 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."

29. According to *Halsbury's Laws of England, 4th Edition, Volume 17*, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

30. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in *Re Winship* 397 US 358 {1970}, at pages 361-64 stated that: -

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

31. In an uncanny and eerie sense of deva ju, the charge sheet supported the Appellants recollection of events while the rest of the events as narrated by the prosecution witnesses were off the mark. The charge sheet was that the Appellant on 31/8/2020 at around 1900 hours within Nyeri county unlawfully and intentionally caused his penis to penetrate the vagina of SNW a child aged 14 years.

32. The appellant denied the charge. The victim denied the charge. However, after being ordered to be remanded in custody, she remembered events, contrary to her earlier evidence. It is instructive to note that the offence took place at 1900 hours as per the charge sheet. This appears to have been the original report, which appears to have changed with PW2.

33. PW2 Testified that the same to be in the morning at 4:40 am. There may be strong suspicious on the intent of the two boys and girls locking themselves in the room. However strong suspicious, they cannot be basis for conviction. In the case of *Daisy Chepkoech v Republic* [2022] eKLR Justice R.LagaT-korir, posited as hereunder: -

> " 25. In the present case, the only evidence as to whether penetration occurred is that of the victim when he testified that they had sex. In my view this evidence is not cogent enough to sustain a criminal conviction for defilement. It is evidently clear that there is a strong suspicion that the victim and the Appellant were in a relationship, whether intimate or otherwise, and that the said relationship could have materialized into a sexual engagement on the night in question. However, the Court of Appeal already pronounced itself in this regard. Kwach, Lakha and O'Kubasu JJA in the case of *Sawe vs. Republic* (2003) KLR 364 stated thus:-
>
> > "Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."
>
> 26. I am therefore reluctant to find that the Appellant committed the offence of defilement and that the same has been proven beyond reasonable doubt. There is a strong suspicion that the Appellant and the minor victim were sexually involved. However, suspicion alone will not be enough especially where the liberty of an accused person is concerned."

34. Unfortunately, for the prosecution, the idea of forcing a witness to testify by locking them in custody does not improve their case. The only other witness who could have corroborated PW4 was stood down and not recalled.

35. The court did not address incomplete evidence. There appears to be a grand conspiracy to have the case lost. Though the mother stated that she had exhibit 1, the birth certificate, the same was not produced. The exhibit 1 that was produced was PRC and Exhibit 2 as per the exhibit memo the P3. Though the court found that the minor was aged 16 years, there was no evidence to that effect.

36. In the case of *Republic v Thomas Onyango Ogedi* [2020] eKLR, Justice, Kiarie Waweru Kiarie, was of the view that failure to call witnesses, an adverse inference should be made. By stating

> " Failure to adduce such crucial evidence may only lead to an inference that had it been adduced, it could have been adverse to the prosecution case. In the case of *Bukenya vs Uganda* [1972] EA 549, (Lutta Ag. Vice President) held:
>
> The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
>
> Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."

37. In this case a crucial witness was not cross examined. It is clear beyond peradventure, that had the witness finished her testimony, it could have been adverse to the prosecution. A witness who is not cross examined is worse than the one who did not testify. PW4 was stepped down and was never recalled. She was never declared a hostile witness.

38. At least from the charge sheet the minor was not a girl aged between 12- 14 years. This is still not a fatal issue. The question that arises is whether penetration was proved. The complainants stated that there was penetration barely a few hours, before theme. The PRC form stated that nothing happened. True she had hypothermic. However, spermatozoa was not seen. The broken hymen was an old one. Ipso facto she may have had sex recently but on 31/8/2020 at 1900 hours.

39. For absolutely no reason the doctor who was producing a report lied that there was spermatozoa. It is thus my finding that medical evidence did not support the evidence of defilement. I agree with the complaints original evidence that nothing happened. That is the same story she gave the doctor.

40. This particular minor had 3 stories. I cannot have a reason to believe any one of the 3 stories over another. The minor was succinct that they roasted maize and ate. It is not beyond an offence could have been planned. However, intent is not useful without the Actus reus.

41. There was no proof that penetration did occur. With the evidence of PW1 being worthless, the only other evidence could be medical evidence. Medical evidence says otherwise. The rest of the evidence is on the arrest which is itself contradictory.

42. The aspect of the commotion at 1900 is corroborated by the charge sheet. That was the original statement to the police. No amount of curing will help. The evidence was being twisted to fit a narrative of an overnight stay. Why will an adult be snooping at 4 PM in boys house.

43. In the circumstances I find that the offence of defilement was not proved. Consequently, I set aside the conviction and set the Appellant agree unless otherwise lawfully held.

44. The sentence of 10 years could have been otherwise lawful had the offence been proved.

Order

45. The court finds that the Appeal is merited. The conviction and sentence in Nyeri CM SO 49 of 2020 is hereby set aside. The Appellant is therefore set free unless otherwise lawfully held. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 9TH DAY OF MAY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms Muniu for the state

Appellant present in open court

Court Assistant- Brian