Magiri v Republic (Criminal Appeal E015 of 2023)
[2024] KEHC 5054 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5054 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E015 OF 2023

DKN MAGARE, J

MAY 9, 2024

BETWEEN

NICHOLAS MWITI MAGIRI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This is an appeal from the judgment and Decree of the Hon V.S. Kosgei given in Karatina Chief Magistrate Sexual Offences No. 033 of 2021 delivered on 8/3/2023.

2. The Appellant was charged with an offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offence Act. The particulars being that on 28/11/2021 at Thaithi Village, Tumutumu location within Mathira West Sub- county jointly with another not before the court intentionally caused his penis to penetrate the vagina of SWK a child aged 11 years. There was an alternative count of indecent Act with a minor.

3. Plea was taken on 7/12/21. The minor testified on oath on 26/1/2021. The court recorded evidence quiet well. However, it could be nice if she recorded the actual words of the minor used.

4. In some instance she used technical terms like defilement or gang defilement which are conclusions of the law. Given that the minor was testifying in Kiswahili. It is good to have the actual words, like “tabia mbaya”, “Ngono” or whichever words she used. However, invite wo the questioned asked in cross examination nothing turns on the issue. The minor testified that he knows the Appellant by seeing.

5. On 28/11/2021 she was from church going home and met 2 people. The Appellant was one of them. They got hold of her and tied her hands, and took her to the Banana planation.

6. There were 2 people whom she identified. One was a rasta, which I understand to be threads or braids of locked hair common among the Rastafarians, a religion with roots in Jamaica. It is a monotheistic

religion which worship Jah. They attribute Jah to emperor Haile Selassie. It therefore take judicial notice of what having rastas mean. I digress.

7. The minor testified that Rasta removed her clothes and penetrated her vagina first using a vagina. They closed mouth was closed. They defiled her in turns and then hey untied her. Rasta removed a knife and demanded that to know her home. When she opened her mouth she screamed and the grandmother came.

8. She did not report to anyone after going to school. She met the Appellant and the rastaman again. When coming back Rasta got held of her and threatened her. They did not defile but slapped her several times and threatened to cut the minor. Baba L came to the farm and saw them.

9. They had put the minor in a hole. He called a neighbor MM. They called Baba J who came to her to the station. The Appellant was dressed in white gumboots, white jacket and white trouser. The minor stated that she used to see the Appellant before defilement. She told her grandmother and was treated.

10. PW2 was the grandmother. She stated that the birth certificate was destroyed. She stated that on 28/11/202 she heard the grandmother scream. She stated that she was too sick to do anything. Later they found the minor inside a hole [the court indicates as a whole]. The matter was reported to the police.

11. On cross examination the witness said she did not know the Appellant PW3. Moses Gachau Nderitu stated that she heard a child cry on the road where charcoal burning takes place. She saw her in inside a kiln. She had been defiled. She identified the assailant as a man in white clothes and white gumboots.

12. When the minor said so, the witness knew it was the Appellant. It is the only person in the area who wears gumboots. The Appellant was identified and arrested.

13. PW4 JWK testified that the minor is a neighbor. It was her evidence that the minor stayed with her grandmother. The witness also knew the Appellant. On 5/12/2021 she was with her son she was called by MG to see what had happened. She found the minor had been thrown into a kiln. The minor had fainted. Despite vivid evidence, the cross examination was on gumboots only.

14. PW5 Benson Wachira Kibote a retired KDF officer stated that he knew the complainant. The Appellant is known as baite and works for Kamwaro Kacheche. Where he had worked for one year. Baite appears to be an informal name simply indicating that the Appellant was from Meru.

15. He stated that on 5/12/2021 at 5 – 6 pm Maina Mwangi came and stated that the minor had ben defiled. The witness informed the Nyumba kumi elder and the police were notified. He used his car and took the crying child to Tumutumu Patrol base where they were referred to Kiamachibi police station. The officers went and arrested the Appellant. On cross examination the witness stated that the officers took the minor to hospital.

16. PW6 Grace Murugu testified that she is a green grocer (mama mboga) and a village elder. She knows the minor complainant who stays with her grandmother. She also knows the Appellant as Baite as he is from Meru. She went to the scene on 5/12/2021. She found the child was down, crying and shaking and could not stand. They took her to Tumutumu hospital. She stated that she had been defiled by two people. One of them was Meru and had white gumboots. They knew that it was the Appellant. They went to his employer's house and found a panties belonging to child. On cross examination, the only question asked related to panties. Nothing on the identity of the assailants.

17. PW7 DW testified that the complainant is her neighbour. She was called by G (PW6), and stated that a child had been thrown into a kiln and they decided to take her to hospital. The child was in pain and

screaming and could not answer questions well. She stated that one of the two people who defiled was Meru and had white gumboots. She knew it was the appellant. He was arrested on the same day.

18. Later a doctor turned up to produce documents. The Appellant insisted on the maker be called. The court ordered that it be so.

19. Dr. Mabeya Eric, was called as a witness. He stated that he was a medical officer of 12 years' experience. It was his evidence that he examined the minor then aged 11 years. The minor told the Doctor that she was defiled by two men and later met the two men who threatened to her not to report. She had hitherto met the 2 men on 28/11/2021, who took her to a bush and defiled her. She could identify them as one worked near a shop near her place.

20. He stated that her grandmother took no action. His evidence was that from examination the doctor noted the minor had no abnormal discharge. She had reddish to indicate hit or rub and her hymen was broken with erythema around the vaginal walls -this is skin redness who causes are not due to underlying causes.

21. He produced the P3 form and PRC form. In spite of insisting on the maker to come, the Appellant had no useful question to ask the medic. PW9 – PC (W) Nzilani Gladys testified that on 5/12/2021 a minor came accompanied by two elders (PW6 and PW7). The minor had been defiled by 2 people when form church. The minor informed him that she could identify them.

22. The investigating officer. PC-w Gladys Nzilani testified how she received the report and had the Appellant arrested. She stated that two elders reported. The child was examined. She had identified the assailant as having Meru accent. The villagers assisted to have the assailant arrested and charged. The birth certificate was not produced. However, there was a health card. There was no cross examination on age. The Appellant cross examined only on gumboots.

23. The PC Sylvester Ondieki, PW10 testified produced a health card showing that she was born on 16/4/2010. He was no cross examined.

24. On Being put on his defence, he stated he was asleep only to be arrested. It was not him. He stated that he was 37 years old.

25. The court analysed evidence and found the offence was proved. She found the Appellant guilty and after mitigation sentenced him to life imprisonment. He mitigated for a less sentence and said he is a bread winner.

Analysis

26. 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."

27. 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."

28. 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."

29. In the case of R vs. Lifchus {1997}3 SCR 320 the Supreme 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."

30. 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."

31. 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."

32. The minor was consistent in her testimony. I do not need medical evidence to know that she was defiled. The Appellant was the perpetrator. He did not question any of the three elements for defilements. Nevertheless, I shall address them seriatim. They stated that elements of the offence to be proved were proof of penetration of the complainant vagina, proof of the complainant's age and that the Appellant was the perpetrator

33. On cross examination and production of the health card, the aspect of age was not contested. The court found that the Appellant did not oppose production of the health card. That may not be the proper way of putting it. The prosecution proved that the minor was 11 years old. On voire dire being conducted the court found she has sufficient intelligence.

34. The clinic card was produced which was issued on 22/4/2010. It gave the date of birth as 22/4/2010. Further the ground mother was expecting the minor's first menses around the period the offence occurred. The entire evidence chain together with medical evidence confirm that the age was proved.

35. In the Ugandan Court of Appeal case of Francis Omuroni –vs- Uganda, Criminal Appeal No. 2 of 2000 stated that: -

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

36. In Criminal Appeal No. 61 of 2014; Richard Wahome Chege –vs- R, the Court of Appeal sitting in Nyeri (Visram, Koome & Otieno-Odek JJ.A) found the evidence of the complainant's mother to be sufficient proof of age as follows;

> " On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant and the complainant herself."

37. I find and hold that age was proved.

38. The medical evidence, in the P3 and PRC confirmed that the minor was penetrated. The issue of penetration was not seriously contested. The court exercised its discretion properly. I have no doubt on the issue of penetration. The issue raised was DNA not having been conducted. This was never requested for and in any case there was direct evidence from the occurrence. There was no need of DNA evidence.

39. The Appellant raised the issue of discrepancies. I have perused the entire file and cannot see any discrepancies. The complainant's evidence was vivid. It was detailed and unimpeached. Under section 124 of the *evidence Act*, the court below is entitled. The section states as follows: -

> " 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."

40. What the court set out in paragraph *22* was that the minor knew the assailant and was positive though identification. This is one way of stating that she believed complainant was stating the truth. This is also corroborated by chain of evidence. The minor was thrown into a Kiln. The Appellant was studious silent on this point. In spite of length evidence from 10 witness, she was concentrating on gumboots only.

41. He never gave any alibi evidence placing him outside the scene of the crime. The Appellant has no burden of proof. However, certain matters are within his knowledge. For example, where he was on the day the Minor said she was defiled. Section 111 of the *Evidence Act* provides as doth: -

> " Burden on accused in certain cases (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist: Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

(2) Nothing in this section shall—

(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or

(c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity."

42. I Find that the Assailant was properly identified.

43. On sentence the appellant did not Appeal on sentence. The court is thus unable to address itself to the same. The Appeal is consequently dismissed. I note that the Appellant was sensitized to life imprisonment. The Court of Appeal recently equated life imprisonment to 40 years. In Malindi CACRA 12 OF 2021- Julius Kitsao Manyeso Versus RepubliC. The court of Appeal [Nyamweya, Lesiit & Odunga JJ.A], stated as follows: -

> " We are also alive to the fact that he was convicted for defiling a child of 4 years and of the likely ramifications of his actions on the child's future. We are therefore of the view that while the appellant should be given the opportunity for rehabilitation, he also merits a deterrent sentence. We, therefore in the circumstances, uphold the Appellant's conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the Appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction.

44. The Court Of Appeal sitting in Kisumu (Coram: Okwengu, Omondi & Joel Ngugi, JJ.A) Criminal Appeal No. 22 of 2018 Between Evans Nyamari Ayako versus Republic, the Court of Appeal stated as follows: -

> " In the circumstances of this case, given the objective severity of the offence committed by the appellant as analysed above, we hereby allow the appeal on sentence to the extent of ordering that the sentence of life imprisonment imposed shall translate to 30 years imprisonment. The record shows that the appellant was in custody since he was arraigned in court on 18th July, 2011. By dint of Section 333(2) of the Criminal Procedure Code, the imprisonment term of 30 years shall be computed to begin running from that date."

45. The Court of Appeal appears divided on what constitutes life. In the cases, it appears that the courts have liberty to oscillate between the years looking at what a particular life means. They may in future

give guidance more. Before they do that, it is my finding that the proper translated life sentence for this particular 37-year-old is 40 years.

46. Therefore, substitute the life sentence shall be equated to 40 years. I was not invited to consider the harshness thereof. I shall stop there.

Order

47. The upshot of the foregoing is that I make the following findings: -

    a. The Appeal hearing is a proper one. The conviction and sentence meted out are proper. Nevertheless, the court is bound by precedent to set aside the life sentence and substitute the same with 40 years starting from6/12/2021. The date of arrest, excluding any date the Appellant may have been on bond.

    b. The Appellant's name be included in the sexual offenders register.

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 Kaniu for the state

Appellant present in open court

Court Assistant- Brian