Maina v Republic (Criminal Appeal E027 of 2022)
[2024] KEHC 6113 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6113 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E027 OF 2022

DKN MAGARE, J

MAY 9, 2024

BETWEEN

JAMES WANJOHI MAINA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of the Hon V.S. Kosgei – PM given on 1/9/2023 in Karatina Sexual Offences No. 26 of 2020.

2. The Appellant was convicted and sentenced to life imprisonment. He appealed with leave given in Nyeri Misc. Criminal Application No. E057 of 2021. He set forth the following grounds: -

    a. That the trial magistrate erred in both law and fact in not considering that there was a land dispute between our families which resulted the instant matter.

    b. That the trial court erred in both law and fact by failing to consider that the medical evidence was not proved in a required standard; for instance, the DNA analysis was not done to prove the pregnant.

    c. That the trial court erred in law and fact in failing to consider that the prosecution failed to avail essential witnesses; for example, the village elder to withstand their allegation.

    d. That the trial magistrate red both in law and fact in rejecting my defence which was not challenged by the prosecution side and more so, I wish to be in person when this appeal is placed for its hearing to enable me erect some grounds in support of the same.

3. The Appellant was charged with between 2015 and March 2020 in Mathira West Sub County within Nyeri County intentionally caused his penis to penetrate the vagina of G.W a child of 15 years.

4. I am not amused that the charge sheet has full names of the minor the same should be redacted forthwith and only initials used. There was as usual an alternative count under Section 11(1) of the *Sexual Offences Act*, that is committing an indecent Act with a minor.

5. The Appellant pleaded not guilty. The court ordered that documents be and were actually supplied. The minor testified that she is 16 years as at 30/10/2020 having been born on 13/3/04. She was a student at class 8. He knew the Appellant who was as uncle. When the minor came to stay with the grandmother in 2018, the Appellant could take her to the coffee plantation. She was then 11 years.

6. They could do the same at night at home. She disappeared to stay with a friend and the came and beat her in the morning. He took her home. He kept doing so for all these years until 2020. Things came to the fore while she became pregnant. She was 8 months pregnant then. No relevant question was asked in cross examination.

7. PW2 gave evidence that she is the mother of the minor. She was called by the chief and told about the pregnancy. It is sad that she could not take care of her child. She needed to be charged. When they found the pregnant she reported on cross examination the appellant asked about money and pregnancy.

8. The child was born on 11/12/2020. She died later in hospital. PW3 gave evidence. He stated that he had worked for 5 years with Dr. Mwangi. He produced the report was produced. The defilement was from the time she was 9 years old. The pregnancy was 16 weeks.

9. The P3 showed she was bound on 3/4/2015. No serious question was asked in cross examination. PW4 gave evidence and produced exhibits. He was not cross examined. On being put on defence, the Appellant disappeared till he was brought on warrant. On being put on defence she said she has never slept with the girl.

10. The court analysed the evidence and found the Appellant guilty as charged. She convicted him to life imprisonment. The Appellant Appealed. The matter came before me on 13/3/2024. He told the court that he is 36 years old and had filed submissions. I have perused the entire file and submissions. I am alive to the duty of this court as the first Appellants court.

11. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

12. This was aptly stated in the case of Peters vs Sunday Post Limited [1958] EA 424 where, the court of Appeal therein rendered itself as follows: -

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

13. This was set out succinctly in the case of Okeno Vs. Republic [1972] E.A 32 as follows: -

> " 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 Vs. Republic [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. Rulwala Vs. Republic [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."

14. 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."

15. The main evidence was that of the child. Her evidence was cogent and unshaken.

16. The court meticulously analyzed the provisions of Section 8 (1) and 8 (3) of the *Sexual Offences Act*. Before proceedings with evidence, I must debunk the imbroglio that is the Appellant's submissions that the child was 15 years as per the change sheet. The charge sheet has a continuity of the defilement offence spanning 6 years from 2015 to 2020.

17. The minor was born on 13/3/2004. In 2015 she was 10 years. In 2020 she was 16 years. The defilement took place when the minor was below 11 years. This is where primacy is given. The current age of 15/16 has little to offer since the offence started being committed when she was below 11. Therefore, Section 8 (1) is the proper Section where the was charged.

18. The said section states as follows: -

> "8.
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
>
> (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
>
> (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon

conviction to imprisonment for a term of not less than fifteen years.

19. The evidence was cogent and believable. Even in cases where circumstantial evidence was raised it was corroborated by the evidence of the minor. It is surprising that the Appellant was more concerned with the burial of his child than the welfare of his niece.

20. Regarding circumstantial evidence, it must point to irresistibly to the guilt of the appellant, in other words, the evidence must be inconsistent with the Appellant's innocence. In the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR, Court had this to say on circumstantial evidence:

> " However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -'
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> "It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

21. I find from the medical evidence that the penetration took place from 2015 to 2020. It resulted in a birth, unfortunately the new child died. It is cavalier to impregnate a child and desire to framerate her more with DNA. The Appellant did not ask for the same.

22. The prosecution evidence was strong enough without DNA. The appellant raised the issue the village Elder. He did not say which evidence he/she was to give. I am satisfied that the prosecution proved its case. The minor's evidence 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."

23. What the court set out in paragraph *30* was that the minor knew the assailant and was positive though identification. The complainant was saying the truth. The minors evidence was corroborated by the medical evidence. The court believed on the truth of the evidence of the complainant.

24. The Appellant's evidence was shaky. It did not answer any of the questions. In any case, the respondent had no duty to proof anything. However, when the evidentially weight was against him, surely he could dispel the same.

25. The burden of proof was on the state. 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."

26. 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."

27. 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."

28. In the circumstances the conviction was proper. I dismiss the Appeal for on conviction. The court considered mitigation. The appellant asked for forgiveness and said he was 30 years old. The court stated that Muna Fetu does not apply to defilement. The court noted that this was a serial offence where he had coitus with a child of tender years in 2015, 2016, 2017, 2018, 2019 and 2020. She beat her when she sought refuge.

29. In the end the court found that life imprisonment is ideal. I cannot fault the court. The sentence was deserving. However, there has been 2 decisions of the Court of Appeal which interpreted what life

imprisonment is. In Kisumu CA CRA 22 of 2018 Evans Nyamari Ayako -vs-– Republic, the Court of Appeal (OKwengu, Omondi and Joel Ngugi JJA stated as follows: -

30. In the case of *Barasa v Republic (Criminal Appeal 219 of 2019)* [2024] KECA 324 (KLR) (15 March 2024) (Judgment), the court of Appeal stated as follows: -

> " Given the circumstances in which the offence was committed, the complainant being a young girl whom the appellant as the stepfather ought to have protected but instead violated, the appellant deserved a deterrent sentence. The sentence of life imprisonment was an option which was available in the exercise of discretion in sentencing and would in our view have been appropriate.
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> 13. In accordance with our decision in Evans Nyamari Ayako v Republic (supra), translating life imprisonment to a term sentence of 30 years' imprisonment, we allow the appellant's appeal; on sentence to the extent of substituting the sentence of life imprisonment that was imposed on the appellant with a term sentence of 30 years' imprisonment. The sentence of 30 years shall be calculated from the date the appellant was first arraigned in court in accordance with Section 333(2) of the Criminal Procedure Code.

31. In *Manyeso v Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR) (7 July 2023) (Judgment)the Court of Appeal sitting in Malindi Nyamweya, Lesiit and Odunga, JJA) held that life imprisonment unconstitutional substituted the same with 40 years. They stated as follows: -

> " We recognize that although the Judiciary released elaborate and comprehensive Sentencing Policy Guidelines in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence. Nevertheless, we are in agreement with the High Court decision in Jackson Wangui, supra, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature.'"
>
> 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."

32. It is therefore my understanding that in each case we shall translate what life imprisonment means. In this case a sentence of 40 years translates to life imprisonment.

33. I therefore substitute the life sentence, with its equivalent, that is 40 years. The period shall run as per Section 333 (2) of the Criminal Procedure Code from date of arrest excluding the period between 22/7/2020 and 7/5/2021 when he was on bond.

Order

a. In the circumstances I dismiss the appeal on conviction I substitute life sentence with 40-years imprisonment to run from the date of arrest excluding the period between 22/7/2020 and 7/5/2021 when he was on bond.

b. The appellant to be placed in the register of sexual offenders.

c. The file is closed.

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:-

Miss Kaniu for the state

Appellant in person

PC James Njiru present at Manyani Maximum prison

Court Assistant- Brian