Nyaguthii v Republic (Criminal Appeal E071 of 2023)
[2024] KEHC 4973 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4973 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E071 OF 2023

DKN MAGARE, J

MAY 9, 2024

BETWEEN

PETRICK KIBOI NYAGUTHII ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This is an appeal from the decision of the Hon. M N Munyendo given in Nyeri so 4 of 2020 on 29/4/2021. The appellant was convicted and sentenced to serve 15 years in prison. It is in respect of both the conviction and sentence that an Appela was preferred.

2. The duty of the court in criminal matters is now well settled, for the first Appellate court. The court is a retrial court. 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.

3. It is the duty of this court as the first Appellate court to re-evaluate the evidence and make its own conclusion. 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] EA 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] EA 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] EA 424."

4. The Court of Appeal for Eastern Africa in *Pandya v 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."

5. The court is not involved in finding evidence to support the conviction. It is involved in wholesome review of evidence and reaching its own conclusions. In *Kiilu & another v Republic* [2005]1 KLR 174, the Court of Appeal held that:

> "An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. 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; 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."

6. As I evaluate the evidence I must bear in mind that the burden of proof is on the prosecution. This burden stays with the prosecution throughout. It is never shifted to the Appellant as an accused person. In the case of *Republic v Silas Magongo Onzere alias Fredrick Namema* [2017] eKLR, Justice R Nyakundi stated as hereunder: -

> "It is the law in Kenya as entrenched in the *Constitution* under Article 50 (2) (a) that an accused person is presumed to be innocent until the contrary is proved. The *Evidence Act* Cap 80 of the Laws of Kenya at section 107 (1) provides thus: "whoever desires any court to give judgement as to any right or liability dependent on the existence of facts which he asserts, must prove those facts exist."
>
> As to what constitutes the burden of proof beyond reasonable doubt the case of *Miller v Minister of Pensions* [1947] 2 ALL ER 372 – 373 provides as flows in a passage alluded to me considered the greatest jurist of our time Lord Denning:
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> > "That degree is well settled. It needs not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence

> is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice."

> In our criminal justice system there is no duty on the accused to prove anything on the allegations of a criminal nature filed by the state in a court of law. That burden of proof of an accused guilt rests solely on the prosecution throughout the trial save where there are admissions by the accused person. So likewise at the close of the prosecution case under section 307 (1) of the *Criminal Procedure Code* the prosecution must satisfy by way of the evidence presented so far that a prima facie case exist to warrant the accused person to be called upon to answer.

7. Regarding the offence of defilement, as stated in the case of *Dennis Njuki Muranga v R* [2020] eKLR, the prosecution must establish the complainant's age, penetration and the identity of the perpetrator.

8. The Appellant submitted that the complainant was 17 years while he was born in 1980 and was therefore 34 years). The mathematics I know calls one that he was 44 at the time of commission of the offence. He was sentenced to 15 years imprisonment. The Appellant submitted that he is not the one who defiled the minor herein. He states that the family asked for 100,000/= to withdraw the case. He stated he was drunk and he became hyptomotised. He stated he was framed and they had a case with a person called Maina.

9. He stated that *Sexual Offences Act* should not be used to settle scores. Reliance was placed on the case of *Eliud Wachira v Republic* (2019) eKLR where the Court of Appeal lamented extortion using Sexual Offences. He stated that the matter herein was surrounded with mystery misfortunes and the witness indicates the Appellants innocence.

10. He states that suspicion however strong should not be a basis for conviction. This was in reference to the case of *Sawe v Republic* (2003) eKLR 346.

11. 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 v DPP* [1935] AC 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."

12. In the case of *R v 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."

13. 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."

14. 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."

15. The Appellant raised issue that the age of the minor was not proved and there was no penile penetration and identity of the perpetrator. He stated that the girl was pregnant and they failed to conduct the examination. He stated the clinical officers report supported this case. He stated that there could be no explanation of the presence of spermatozoa. One month and 4 days coupled with a pregnancy. He questioned the authenticity of Medical Evidence. They relied on *Traly Peerage* (183c) 10 Ciff 154 191. He stated that where scientific evidence in based it should be disregarded.

16. He stated that the burden of proof was shifted to him. He is stated that the court erred in dismissing this defence. See *Geoffrey Nguku v Republic* (1983) CR App No 106.

17. The Appellant was arrested on 8/4/2020 and taken to court 6 days later on 14/4/2002. The offence is aid to have occurred on 28/2/2020 at gather sub location.

18. PW1 testified. That she was born on 25/5/2003. She stated that Patrick had sex with him she stated that this was the first time she was having sex. She stated that the parents were tracking Patrick's phone. She stated that she had charged schools. She stated on cross they had sex in 28/2/2020. She stated she was do carry out the DNA test but the pregnancy terminated. She stated she had sex for first time on

28/2/2000. She miscarried around March 2020. PW2 testified she examined the minor at Gichichie Health Centre for 10 years. She examined the complainant who was aged 16 years.

19. The witness examined the complainant. Her labia minora and majora were intact. The vaginal orifice was roomy accommodating 2 fingers (4 cm). He found male spermatozoa. The girl was 8 weeks pregnant. This was on 7/4/2002. The hymen was broken along time. She stated that spermatozoa could stay for 72 hours. This meant that the spermatozoa related to April 2020. He did not establish who was responsible for the pregnancy.

20. The police officer stated that he did not find the Appellant with the minor.

21. PW4 Peter Maina gave evidence. He stated that he knew the Appellant. He stated that he was resolving issues with his wife with one Macharia. He went to look for his wife.

22. On cross examination he stated that they knew each other. He was annoyed with the Appellant who said Macharia was sleeping with the witness's wife. He lamented that the Appellant brought chaos to the witness's life. He stated that the daughter was not in school. She was in the process of admission to form one.

23. The defendant gave unsworn evidence. He stated he was chewing miraa when he was arrested. He stated that he states that the complainant used to beg from him. He stated that Peter would chase his wife to control the money they were begging from the witness. He used to give tover which they could routinely quarrel. He stated hat at the time of the alleged incident the complainant was pregnant. The complainant had a relationship with one Maina. The complainant's father was looking for the man who was sleeping with his wife. The stated that he was framed instead of looking for Maina who may have committed. The court found him guilty and sentenced him to 15 years.

Analysis

24. The Documents were produced in evidence. A P3 form was filled on 7/4/2020. However, the PRC report was not filled. After testimony that was intense, with emotion as can be seen from the record, the Appellant was found guilty.

25. The question is whether the Appellant committed the offence charge. The complainant alleged to have been 17 years. It makes no difference that the charge sheet indicated 16 years. The difference could have been had the minor been 18 years old.

26. There is clear evidence of bad blood between the two families. What the court must decipher was whether the parties maintained sufficient neutrality in spite of the issue of the complainant's mother's issues.

27. PW4 is not a reliable witness. A witness with revenge and hate for the Appellant cannot be sufficiently neutral. Instead of dealing with the daughter issue, he was lamenting how the wife's adult, for which he blames the Appellant had destroyed his family. It is not that the Appellant committed the adultery. It is because the Appellant informed him of the adultery. He was happy to live or feign innocent and ignorant bliss. The knowledge of the adultery made the wife chose between the two men. The Witness was the loser in that bet.

28. The witness did not want to raise the issue with the co-husband and the Appellant became the easier target. Why did the appellant have to tell the witness?

29. The complainant narrated how the offence occurred. It is only her evidence that was available. The evidence can be used to convict the Appellant if it is credible and for reasons recorded, the court believes that she is telling the truth. This is in line with Section 124 of the *Evidence Act*: -

> " 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."

30. The court analyzed the evidence. She found correctly that despite certain doubts, including the fact that she got a birth certificate in 2014, 11 years after birth, there were no serious challenge to the birth certificate.

31. A birth corticated that is gotten many years later, may not be a good evidence. This is because, it has been compulsory under the *Basic Education Act* that a birth certificate be produced on admission to pre-primary. It is therefore not possible to have gone to school without a birth certificate.

32. There was evidence of penetration of the minor. There was however no evidence that the Appellant as the perpetrator. Not that the complainant did not identify him. It is because both the PW1 and PW4 is evidence is not credible. The pregnancy which was 8 weeks on 7/4/2020. This means that penetration was on or around 14/2/2020.

33. In this case the offence was on 28/2/2020. The said penetration cannot be related to the pregnancy. The same penetration cannot be the source of Spermatozoa found on 7/4/2020. There was no charging related to continuation after 28/4/2020. Ordinarily when the investigating officer finds evidence of penetration after 28/2/2020, he charges with .. on diverse dates...."

34. The complainant lied to the court about the pregnancy. The she also lied to the doctor on her situation. It evident that as at 7/4/2020 she was pregnant, she was about 8 weeks pregnant and had male spermatozoa. Unfortunately, seven days before then she had miscarried on 28/3/2020. I had to countercheck the handwritten notes of the court. She writes very well. My worst fears were confirmed. Someone was lying.

35. The conclusion from the foregoing is that either the complainant was lying or the doctor's report is false. I do not know whether, after miscarriage, it is possible to resume coitus within 7 days. independent witnesses be called. This is because, in the natural way of doing things, there is lochia, which I spotting and menses like bleeding for a two to 4 weeks after miscarriage. The investigating officer failed to explain to the court what happened? If someone miscarried, in march, what was the doctor writing about in April. Did he real test? All these doubts are to be resolved in favor of the Appellant.

36. The investigating officer in a Caviler manner stated that their evidence was not necessary without such evidence, whatever happened becomes hearsay. It is inadmissible hearsay.

37. The court was plainly wrong when at paragraph *22* found that taking children out for a treat was evidence of defilement. The other child should have been called on what happened. It is said that he

was not called. This was alos not on the date of the offence. A child of tender years will ordinarily not lie if he saw anything untoward.

38. The evidence of the rented house was not brought. Indeed, the appellant was not found at the locus in quo. The girl was in a tea farm. There was no evidence that the appellant was at the tea farm and where the farm is.The law on the number of witnesses to be called is found in Section 143 of the *Evidence Act*, Cap. 80 which states that:

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

39. The legal principle was affirmed in *Keter v Republic* [2007] EA 135 as follows:

> "... the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond reasonable doubt."

40. In *Julius Kalewa Mutunga v Republic* [2006] eKLR, the Court of Appeal held that:

> "As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive – see *Oloro s/o Daitayi & others v R*. (1950) 23 EACA 493."

41. However, in this case, all these places where the complainant and Appellant were staying were not shown to exist. The father simply came to court with rumours and conjecture. It is either those places do not exist or if the Appellant had rented them, he was not staying with the complainant.

42. The court erred in believing the minor. She was simply not telling the truth. The court shifted the burden of proof to the appellant. The appellant has no duty to disclose his defences during cross examination as held by the Court of Appeal in *Thomas Patrick Gilbert Cholmondeley v Republic* [2008] eKLR, wherein they posited as doth: -

> "We would repeat these sentiments here to emphasize the point that the courts in the country in spite of their perceived previous failures, must now rigorously enforce and enforce against the state the fundamental rights and freedoms of the individual guaranteed by the Constitution. Those rights cannot and must not be allowed to be diluted by purported exercise of inherent powers by judicial officers allowing the state to claim reciprocal privileges. The state is the usual and obvious violator against whom protection is provided in the Constitution and it ought not to be allowed to claim the same privileges. We know the good Book says that in the end of times, the lion shall graze and lie peaceably together with the lamb. But our recent history is still too fresh in our mind and we in the courts must try to keep the lion away from the lamb. In other words there is not and there can be no question of reciprocal rights, or a level playing field or any such theory as between an accused person and the state."

43. The child lied on the date of miscarriage 28/3/2020. The pregnancy was available on 7/4/2020, 8 days after miscarriage. This can only false or the P3 is wrong. Whichever, the case someone is lying. The court failed to discount the admission by PW4 that they had a grudge. The nature of the grudge was such that it can affect the truthfulness of PW1 and PW4. It cannot be discounted that the Appellant was to blame for the separation of the complainant's parents.

44. If the clinical officer is to be believed, the complainant was 8 weeks pregnant on 7/4/2020. This takes the conception date to the week of 10-16 February 2020.

45. The spermatozoa also relates to the sexual escapades of 3/4/2020, 5 days or so after miscarriage for a baby who was still there on 7/4/20o. Both these dates show that the Appellant is not the owner of the sperms or the child. The complainant lied blatantly to the court that she miscarried on 28/3/2020. The clinical officer found the pregnancy on 7/4/2020. Both cannot be saying the truth. The clinical officer had no reason to lie about a pregnancy he found on 7/4/2020.

46. I find that PW4 was a liar per excellence. He lied an axe to ground with the Appellant complainant had stated that she was in Milirungi High School. She was changing to Kimuturi secondary. However, the father say she was not at school and was in the process of admission. The father and daughter did not know the correct facts. This rises doubt.

47. Once witness are lying on basic things, the court is entitled to make a negative inference. A lying witness is totality useless. The complainant contradicted his father and the clinical officer on crucial issues.

48. The Appellant was not given the benefit of doubt. It is not all defilements that result in pregnancies. However, by blaming the Appellant for pregnancy which occurred before the alleged defilement and or spermatozoa more than 6 weeks after sex, the court closed her eyes to a very obvious ie. There was bunny man that was being protected who set up her mother.

49. Further, the complainant lied even where she went to school. On cross examination she attempted to correct this, only for the father to spoil he plans

50. It is true that the appellant was a family friend and there was opportunity to identify him. However, with Mr. Macharia, testing honey from PW4's port, at his Chagrin and with tacit support of the Appellant, it is not far-fetched to conclude that the was framed.

51. The next issue is that the prosecution had a golden opportunity to put the issue of the defilement to bed in view of wide discrepancies of dates, they did not do so. The pregnancy disappeared without a test.

52. Consequently, I find the conviction unsafe. I set the same aside.

53. I therefore set the same aside. On sentence this was a 40-year old. Had the offence been proved, I will have maintained the sentence. However, now that it is connected to the conviction, I set aside both conviction and sentence and set the Appellant free unless otherwise lawfully held.

Orders

54. The appeal is merited. Therefore, make the following orders: -

    a. I set aside the conviction and sentence herein and dismiss the charges in the lower court in respect of count I and the alternative Count. The Appellant's conviction and sentence is set aside. The Appellant shall be released forthwith unless otherwise lawfully held.

    b. The appellant be removed from the Register of Sexual Offenders. The file is closed

DELIVERED, DATED AND SIGNED VIRTUALLY 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 in person

Court Assistant Brian