AKK v Republic (Criminal Appeal E007 of 2023)
[2024] KEHC 6815 (KLR) (6 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6815 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E007 OF 2023

DKN MAGARE, J

JUNE 6, 2024

BETWEEN

AKK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment in Mukurweini Sexual Offence No. E001 of 2022 delivered on 9th February 2023, and sentence meted out on 15th February, 2023 by Hon. D.N. Bosibori – Senior Resident Magistrate)

JUDGMENT

1. This is an appeal from the conviction and sentence in Mukurweini Sexual Offence No. E001 of 2022. The Appellant was charged that between 1/1/2022 and 14/1/2022 in Mukurweini Sub-county within Nyeri County unlawfully caused his penis to penetrate the vagina of EWM a child aged 9 years.

2. The court conducted voire dire on the minor on 4/3/2022. She was said to be in grade 4. The minor gave unsworn evidence. She was said to be born on 19/6/2022. He knew the Appellant. On 14/1/2022 at a time she could not recall, she went to pick her brother. The Appellant was seated. He pulled the minor by the left hand and took her to his house.

3. The appellant removed the under pants and defiled the minor. He ejaculated and they dressed. The defilement was said to be the 2nd time. On cross examination she stated that she bathes herself. She stated that there were incidents in December 2021 when she was defiled but did not report.

4. She stated that she alerted the mother. She talked of two persons that is A and Kamau. The incidents relate to two people.

5. PW2 HN stated that the accused is a relative, a cousin to the witnesses' husband. He left the complainant with other children. She stated that whenever she goes picking the younger sibling, the

Appellant defiled her and gave the younger child snacks and had threatened to kill the younger child. She stated that Kamau also defiled her. She was not sure if it was true.

6. She went to the police. Tests were done at Mukurweini Hospital. The incident is said to have happened before 1-5/1/2022. She had slept with Kamau on 3 occasions. She stated that they have no grudge against the family. She stated that the OCPD was to delay the arrest. She stated that the first incident was in December 2021. She stated that the minor bathed herself. She stated that the husband's home had many grandmothers. She denied that there was a grudge. She stated that the Appellant's parents talked badly about their family.

7. It was her evidence that she was defiled by Kamau without alerting anyone. Also she was defiled by Amos. She stated that the accused's home is made of bricks not blocks. In re-examination she denied that they had a land dispute. She stated that the complainant can confuse the house as the mother's is made of blocks.

8. PW3 a Clinical Officer examined the minor on 16/1/2022. She was informed that she had been defiled by A and Kamau. No spermatozoa was found. The hymen was not freshly broken. She found that the minor had been defiled. On cross examination she stated that other than inflammation the vagina was normal.

9. She produced the PRC, clinical report and P3. The examined minor was said to be 17 years and accompanied by a 45 year old EW. The PRC showed that the incident occurred in home and bushes. Age indicated was 17 years and 45 years. The birth certificate was produced dated 3/5/2018.

Analysis

10. 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.

11. This was aptly stated in the case of *Peters v 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..."

12. The duty of the first Appellate court remains as set out in 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."

13. The duty of this court is to carry out a retrial. It means the court analyses evidence and comes to its independent decision. Meaning that the Judgment of the court below is only useful when the court is trying to check whether the court took certain safeguards. When faced with dilemma on corroboration, that is when the court analyses what the court below posited on section 124 of the *Evidence Act*. Where the court finds a conflict on findings of fact, the court refers to the court below to ascertain whether there is a concrete reason to differ on facts arrived at by that court. Where the finding of the court is based on no evidence the court is under duty The court of Appeal in *Kiilu & Another –v- Republic* [2005]1KLR 174, stated as hereunder: -

> " An Appellant on first appeal is entitled to expect the evidence as a whole submitted to 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 conclusion. It is not the function of the first appellate Court to merely 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 witnesses.

14. 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] 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] EA 424."

15. 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."

16. 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."

17. 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."

18. 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."

19. For defilement, 3 ingredients should be proved: -

    a. Age

    b. Penetration

    c. The Appellant/Accused is the perpetrator.

20. It is also important to have common sense and regard to ordinary nature of things. Section 60(1) (m) and (o) of the *Evidence Act* also guides decision making. The section provides as follows: -

> " The courts shall take judicial notice of the following facts—
>
> (m) the ordinary course of nature;
>
> (o) all matters of general or local notoriety;

21. The minor should give the guide on what happens as the other witnesses corroborate the evidence. It is not the other way round. In this case, it is the mother who had details. Details going to December 2021. Others going to 1-5 January 2022. The offence was done in Mid-January. Examination, found there was no spermatozoa. This was an old defilement and not for 16/1/2022. The Appellant was not charged with the alleged defilement in 2021.

22. The minors who are alleged to have been given snacks were not called. They had of course nothing to hide, if this happened. Even where they did not see the action, they could have seen the meeting of the duo. Are we real talking of the same examination. The PRC relates to a 17 year old and not a 9 year old. There is also a talk of a 45-year old. No one explained the differences and how the age changed all of a sudden.

23. The state concentrated on proving the age of the Appellant and forgot to prove the age of the minor. The minor who was in court was in grade 4 but the one examined was 17 years. What happened to the true complainant? The P3 was a copy from the PRC. 17 and 45 were the alleged perpetrators.

24. I do not know why the medics will want to spoil a case for an innocent 9 year old child. The medical evidence was soiled beyond redemption. There is no evidence that the 9-year old was examined. Unfortunately, the minor also concentrated in giving details of actions by Kamau and forgot to give any coherent evidence against the Appellant.

25. The Appellant stated that he was 16 years. Instead of age assessment, they went into bringing a myriad of certificates to proof that he was not a minor. The certificates provided related to different people. There was no evidence led on why the certificate for a person born on 5/6/2003 was the one attributed to the Appellant.

26. Given the fact that the parties involved were all minors, it is important that the investigators proceed more with circumspection. The minor was not telling the truth. Unfortunately, witnesses think that if they testify that they agreed, they will be seen in bad light. A minor remains a minor and incapable of consenting. This is the same case here. If the minor who was examined was 17 and the Appellant 16, there was no reason why the Appellant was charged. However, I have seen the confusion relating to the medical evidence. It is not clear which age the complainant was.

27. Secondly, the Appellant was also a minor. The state had a duty to treat him as such.

28. The charge related to a specific date and a child aged a specific age. The medical evidence variance was humongous. The incidents narrated made the perpetrator as one Kamau. It is unknown why he was not charged. It is important that he be charged to restore the minor's sense of justice.

29. Lastly, the Appellant had no burden of proving his age. He stated he was a minor and as such was entitled to examination, in the presence of a children's officer and or a guardian pursuant of section 26 of the children's act. The same provides as follows: -

(6) The competent authorities shall take appropriate measures to facilitate humane treatment and respect for the privacy, legal capacity and inherent human dignity of children deprived of liberty, including children with disabilities.

(7) The detention of a child under this Act or any other written law shall be a matter of last resort and in conformity with Article 53 (f) of the *Constitution*.

(8) A child who is apprehended and detained shall be accorded legal and other assistance by the State as well as contact with his or her family.

30. Several birth certificates were produced. However, there is nothing in them connecting them to the Appellant. At least evidence of parentage could have been led. This wasn't. One of the names is crossed out. The age of both the minor and the Appellant were not proved. It is not that the minors are not capable of committing the offenses but when the age is so close, there is no reason to charge one minor and not the other.

31. There is a duty to dispel the notion that it is the boys and men only who are capable of the offence of defilement. Even if I do believe, which I don't that the Appellant was 19 years and the minor 17 years, the circumstances described by the complainant amount to the narrow line of cases, where the courts find it difficult in faulting the children behaving badly. These are known as Romeo and Juliet case. Justice R. Lagat-Korir in *Yegon v Republic* (Criminal Appeal 4 of 2020) [2022] KEHC 10503 (KLR) (15 June 2022) (Judgment) stated as doth: -

> " There was no evidence that the victim resisted the pulling or that she raised an alarm. Upon reaching the Appellant's house, they had sexual intercourse and then slept until 4.00am when the Appellant woke her up and told her that it was time to go home. As she got out of the Appellant's house, the dogs barked attracting the attention of the Appellant's mother who got out of her house and questioned her. She then said that the Appellant had forced her into his house and had sexual intercourse with her.
>
> 63. The Circumstances above clearly do not suggest force. Rather it raises the possibility that the Appellant and the victim may have had a "Romeo and Juliet" relationship and that the alarm raised and subsequent prosecution only arose because other parties came into the picture."

32. The difficulties I am having is the age of the minor. I am aware that birth certificates are now part of mandatory requirement for schooling in the last 20 or so years. Effectively, getting a birth certificate so close to the occurrence of the offence raises more heat than light. This is so where as a moving target, the minor's age kept sliding from 9 to 16 to 17. It is disheartening to note that case was thrown out on basis of bogus records by the state. How can someone fill a P3 without examining the minor when they have note. Some of this errors call for a specific unit in the office of the Inspector General to have investigators who cannot make such silly mistakes. How can one 9 year old girl be both 17 and 45 years? How qualified was the person filling the P3. Being a major medical document, it leaves the minor exposed without examination.

33. The other aspect is that the minor was straining to get the Appellant into the picture. Her evidence oscillated between the Appellant and Kamau. The court did not distil the evidence to remove doubt on who committed the offence on 15/1/2022. The minor was dealing with a different date between 1/1/2022 to 5/1/2022. However other evidence led to 15/1/2022. It turns out that the complainant was referring to Kamau and Amos interchangeably. This were not persons carrying out gang rape. They were said to have partaken in different times.

34. The defilement on the specific date of 15/1/2022 was not proved. The minor did not also support the said date. Either the minor wanted to help the Appellant or she was forced to lie. In either case her evidence does not add up. It is my sincere hope that the office of the DPP can pick up these lapses and have more pointed investigators and medical personnel and not copy and paste type.

35. In the circumstances I am not satisfied that the state proved its case. The Appeal is accordingly allowed. The conviction is set aside. The Appellant shall be set free unless otherwise lawfully held.

Order

36. The upshot of the foregoing is that I make the following orders: -

    a. The Appeal herein is merited and is accordingly allowed. The conviction and sentence are wholly set aside. The appellant shall be released forthwith unless otherwise lawfully held.

    b. The file is closed

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 6TH DAY OF JUNE 2024.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Muhoho for the Appellant

Ms. Lubanga for the State

Appellant – present

Court Assistant - Jedidah