Chuma v Republic (Criminal Appeal E029 of 2023)
[2024] KEHC 6606 (KLR) (5 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6606 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E029 OF 2023

DKN MAGARE, J

JUNE 5, 2024

BETWEEN

JOSEPH KARABA CHUMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction by Hon. V. S. Kosgei -SRM dated 26th April, 2023 in Karatina Principal Magistrate's Court at Karatina – Sexual Offence Case No. 20 of 2019)

JUDGMENT

1. This is an appeal from the decision of the Honourable V.S. Kosgei – SRM given in Karatina SO No. 20 of 2019 given on 26/4/2023. The sentence was meted out on 15/5/2023. The appellant filed a Petition of Appeal and raised 9 grounds of appeal, namely:

    a. That the learned trial magistrate erred in law and in fact in convicting the accused person on evidence that did not meet the threshold required.

    b. That the learned trial magistrate erred in law and in fact in failing to appreciate the age of the complainant and the veracity of the voir dire evidence by such a witness to warrant the conviction of the appellant.

    c. The learned trial magistrate erred in law and in fact in failing to embrace the standard of proof required in criminal matters and more particularly sexual offence occasioning a miscarriage of justice.

    d. The learned trial magistrate erred in law and in fact in ignoring the precaution standard with dealing with minors as witnesses. A miscarriage of justice was occasioned.

e. The learned trial magistrate erred in law and in fact by failing to take the full tenor and effect of the evidence by the defense witnesses during hearing to satisfy itself against the complainant's evidence. A miscarriage of justice was occasioned.

f. The learned trial magistrate erred in law and in fact in failing to fully construct the environment and happenings of the alleged offence. A miscarriage of justice was occasioned.

g. The learned trial magistrate erred in law and in fact in meting out the sentence meted out which sentence was harsh and excessive in the circumstances. A miscarriage of justice was occasioned.

h. The learned trial magistrate erred in law and in fact in finding the appellant guilty of the offence he had been charged with without sufficient proof. A miscarriage of justice was occasioned.

i. The learned trial magistrate erred in law and in fact in failing to consider the defense of the Appellant. A miscarriage of justice was occasioned.

2. The Appellant had been charged with sexual assault on CD a minor aged 5 years using a finger on 11/8/2019 in Mathori East Sub-county within Nyeri County.

3. PW1 was S.K.W who stated that she lived in Karia and was in PP2. She gave unsworn evidence. The minor stated that she was sitting in the sitting room. The appellant called her and slept on her. He removed panties and inserted a finger. This was in the sitting room while they were watching TV. She said there was no one else in the room except the Appellant's wife who was the kitchen cooking.

4. She said she saw blood but did not tell anyone. According to her, the Appellant inserted a finger several times but did not know that she could scream in the circumstances. She was with G, M, J, M, A, K, N and everyone was in the same room. I don't know which evidence to believe. The minor appeared determined to tell the truth but something was derailing her.

5. On cross examination she stated that they were many children in the room- A total of 9 children. They were playing on and with each each other. Alvin was said to be the oldest. Two of the Appellant's children were present. Including DW2, a girl aged 18 years.

6. She stated that other children did not see the thing that happened. She stated she went to the latrine and saw the blood. The blood was not on the clothes. She went to sleep alone in one bedroom between the Appellant and his wife. He stated that the Appellant told her that if he said anything, he was to kill her. She said that nobody heard as children were shouting.

7. PW2 was the mother. She stated that they had gone to her sister's place, that is, the home of the Appellant. The wife is her sister. She left the daughter with other children. She went to pick the child at 7 am and took her to her grandmother. She was told that the Appellant inserted his finger in the vagina of the complainant when the wife was cooking.

8. The child was allegedly threatened. The children were all there in the room. Sandra is said to be in class 8 and Mwai had completed school.

9. PC. Halima Sadia Haji based in Karatina was assigned the case. She stated that the Appellant married her sister but they never met. She denied asking for Kshs.250,000/=.

10. PW3 Halima Sadia Haji was the investigating officer. She took the child to hospital on 17/8/2019. She was to be examined on 15/8/2019 but was told to report first. The assault was said to have joccurred on 15/8/2019. The Appellant and his family were never interrogated. She stated that the mother had washed her before the examination.

11. The doctor testified that a PRC was filled by Dr. Maryanne who resigned. The PRC was for a child born on 5/3/2004. Though the PRC shows 5/3/2014 PW3 was recalled to produce a birth certificate.

12. When put on his defence, he stated that they had a get together which ended at 6 pm. People left except the children. He came back at 7.30 pm after escorting visitors. The wife and daughter were home. He was given food and went to sleep. The complainant was sleeping with the daughter. The mother came for her the following day. There were no issues.

13. The police called on 12/8/2024. The Appellant called for a discussion but the mother to the complainant asked for Kshs.250,000. On cross examination he stated that the complainant was with other children. She stated on cross examination they had moved to have the land by their father but he had no issued with the same.

14. The daughter testified as DW2 that they were in a get together in their house. there were many guests. All adults left at 6 pm escorted by her father. At 7.30 pm their father came back and went to sleep. The complainant and the witness went to sleep while some slept on a sofa. The complainant did not have a complaint. She was not cross-examined. The effect of not being cross examined is that the evidence remained unrebutted.

15. The court, in what she called careful analysis of the record found the appellant guilty and sentenced him to serve 30 years imprisonment.

Analysis

16. 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."

17. 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."

18. 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."

19. 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."

20. 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."

21. 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."

22. This matter turns on the believability of witnesses. The evidence of Sandrah, DW2 was cogent and I have no doubt that her evidence reflects what happened. One of the things the court looks at, is the nature of things. The minor was clearly confused. Either she was truly assaulted or she was badly coached.

23. It is the duty of the court to look at common sense. The alleged incident is said to have taken place in a sitting room full of children, 9 of them. At least G was sitting on top of the complainant. The TV was on. The minor knew that none saw what happened. At least the children should have been called to testify on what happened. At least 11 people were in the House, 10 of whom were in the sitting room. Why were the other children not called?

24. First she said she was alone, secondly she was with G. Thirdly, everyone was in the room. The TV was on. There is always a glow on the TV. It is not believable that the Appellant could do what is said to have been done in the presence of the children. The child was in the presence of other children, including his own teenage girl and adult boy.

25. Secondly, the child stated that she did not know that she could scream. Screaming is reflex action. It does not need to be known. It is a natural reaction to pain. I do not believe her evidence for once. There was no evidence to place the Appellant on his defence.

26. This then goes to the question of the burden of proof. The term burden of proof draws from the Latin Phrase Onus Probandi and when we talk of burden we sometimes talk of onus. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to Phipson on the *Law of Evidence*, the term 'burden of proof' has two distinct meanings:

    1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.

    2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.

27. In this matter, the sitting room was full of children aged from below 5 up to over 18, including DW2. The conduct of the child was not consistent with guilty of the Appellant. The evidence of the child was not corroborated. Section 124 of the *Evidence Act* provides 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."

28. The court misdirected itself that it is not mandated to look at corroborating evidence and find and write down reasons for the believe in the truth. Even discounting confusion expected of the child, her evidence was too incoherent and too unbelievable to be true. I do not believe the Appellant was mad enough to insert her finger into the vagina of a 5 year old in a sitting room full of children including her daughter without someone noticing.

29. The court must be aware that the hymen was partially broken and nothing was noted including any tears. For a 5-year old, even a finger, is enough to cause inflammation especially if done several times as posited in this case. The blood did not cause any infection and I do not see the P3 as proving penetration.

30. Without evidence of penetration or actus reus, it is not necessary to go into the aspect of the minor's age, which of course was proven. There was no evidence that the perpetrator was the Appellant in the circumstances given.

31. There were I note with concern that the court made adverse remarks to the Surety. Bribery allegations should be reported to be investigate. Courts should never have adverse findings in sentencing part as they condemn parties unheard. It is a cardinal principle of natural justice that none should be condemned unheard.

32. Consequently any reference to Ephraim Kaguni is expunged from the record. He was not heard before his name was adversely mentioned during sentencing. The cardinal principle of Audi alterum paterm must as a corollary be respected at all times.

33. In the circumstances, I find the Appeal merited and allow it.

Orders

34. in the end, I make the following orders: -

    a. The appeal succeeds, and the finding on conviction and sentence is set aside. The charge in Karatina SO 20 of 2019 is set aside. The same are quashed.

    b. The appellant is released forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT NYERI ON THIS 5TH DAY OF JUNE, 2024.

KIZITO MAGARE

JUDGE

In the presence of:-

Muhuhu for the Appellant

Miss. Lunya for the State

Court Assistant - Jedidah