JKM v Republic (Criminal Appeal E024 of 2023) [2024] KEHC 6335 (KLR) (3 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6335 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E024 OF 2023

DKN MAGARE, J

JUNE 3, 2024

BETWEEN

JKM .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. This is an appeal from the Original Conviction and Sentence in the Chief Magistrate Court at Mukurweini Law Courts in Criminal Case Number SO E010 of 2022, delivered by Hon. D. N. Bosibori on 30/3/2023.

2. The appellant was charged with defiling her granddaughter T.W.W a girl aged 12 years. This offence was said to have occurred on an unknown date in 2020 around 0000hours EAST when the Appellant intentionally penetrated the Vagina of T.M.W. He was arrested on 3/10/2022 and arraigned in court on 4/10/2022. 5 witnesses were listed to testify.

3. The Appellant was released on bail when one of his sons in law stood surety for him. The matter proceeded before the trial magistrate on 17/10/2022. The court carried out voire dire. Given that the complainant was 14 years then, I do not know the purpose of voire dire since she was not a child of tender years. In the case of Njoki v Republic[1988] eKLR, the court stated as follows regarding who is a child of tender years is: -

> " Taking the two definitions together, a child of tender years seems to us to be a child who is legally immature and incapable of being responsible for own actions. According to section 14 (1) of the Penal Code all children under the age of eight years are said to be immature, are not criminally responsible for any acts or omissions. Such persons can in our view be properly said to be children of tender years. It is therefore our view that section 124 of the *Evidence Act* only applies to children under the age of 8 years upon whose uncorroborated

evidence no conviction can be based. We also believe that other considerations ought to be applicable to children who are not of "tender years".

In the case before us, the complainant was aged about 12 years. He was therefore not a child of "tender years" whose evidence required corroboration as a matter of law. In our view however as he was not over 14 years of age and his evidence still needed corroboration as a matter of practice and the court must caution itself on the dangers of convicting on uncorroborated evidence of such a child (as against a child of tender years) before acting on such evidence.

4. In the case of SCM v JKM [2021] eKLR, the court stated as doth: -

There is also another principle which this court is required to adhere to and that is where the custody of a child of tender years is in issue, such custody should be with the mother of the child unless there are extenuating circumstances. In that regard, in KMM -vs- JIL [2016] eKLR Mungai J held thus:

"….a child of tender years' best interest and welfare are where the legal custody is awarded to the mother barring extenuating circumstances that would prevent the mother from providing protection and care of the child. Case law lends credence to the proposition that in cases of a child of tender years of less than 10 years as defined under Section 2(1) of the *Children Act* 2001, custody is granted to the mother".

5. The children's Act 2022 does not define a child of tender years. However in section 221, it provides as follows: -

" 221.

(1) A person under the age of twelve years shall not be criminally responsible for any act or omission.

(2) A child who commits an offence while under the age of fourteen years shall be presumed not to be capable of differentiating between right and wrong, unless the Court is satisfied on evidence to the contrary.

(3) The provisions of this Part shall apply to a person who reaches the age of eighteen years before proceedings instituted against them pursuant to the provisions of this Act have been concluded."

6. It is therefore my considered view that a child of 10 years was what was considered as a child of tender years. The only question is whether, with the increase of the period of criminal responsibility to 12 years, also increase the years of children of tender years to 12 years. I shall leave this for another day as the complaint was 14 years.

7. It was thus improper to have a 14 year old administered unsworn evidence. From the answers given, she ought to have given sworn testimony or affirmed. Though this question is decisive in character I shall not rely on this point for this case as there are other more poignant points than the question of oath.

8. The minor indicated that she had stayed with Priscilla Wacera for 3 years. This means from 2019 or thereabouts to 2022. She said she does not stay with her mother who stays at youth area in Mukuruweini. She only stayed with her shorty when in class 6. This appears to be a lie since never and a short period cannot be in the same sentence. She stated that the Appellant is her grandfather and he resides with faith Wacera, the complainant's grandmother. She stated that she was born on 26/11/2007.

9. She stated that she went to the Appellant's home in 2020, on a date she could nor remember during Covid-19 period. She was given a bedroom next to the appellant and Faith Wacera. A wall separates the two rooms. After dinner she went to sleep. She could not recall what they ate. She heard someone in her room. The person removed her clothes and defiled her. She stated that she saw the person was the grandfather. She said she was staying with grandparents only. She said the appellant told her not to report the incident. It is not clear whether this was during the incident or afterwards. He did not defile the complainant again. She told no one until when she was in secondary school.

10. The minor was escorted to Mukurweini hospital in September 2022. She was tested for pregnancy and the police were alerted. She stated that she could not recall whether it was April or December. She stated that there is a curtain but a lot of light permeates through. She could not tell whether it was deep or shallow penetration and did not notice anything after the incident.

11. On cross examination she stated that she stayed with the step father who was mistreating her. She went to her aunt in 2020. She stated that uncle John stays in the compound but does not stay in the house. Uncle Boke slept in the other room. A witness, who earlier placed only one male in the house, now has 2, uncle Boke. She kept him out of the loop.

12. PW2 Mercy Njenga Karugu was a Clinical Officer. She produced PRC and P3 for the minor. The P3 was prepared on 3rd October 2022. They gave the minor antibiotics and pain killers. This appears to be the cause of antibiotic resistance, reckless prescription of antibiotics. There was no discharge, no infection, and no pain in 2022, why prescribe drugs.

13. It turned out she has an infection in 2022, it was not known whether it was current or an old one. She did not narrow down the cause of the infection. This was crucial as it is unlikely that an infection in 2020 could be active in 2022. The congruency of the infection was not checked to have any transmission to each other. It was not shown whether it was a urinary tract infection or sexually transmitted infection. The relevance of an infection of unknown character, two or three years later is otiose.

14. The prosecution evidence was tenuous. Although the court indicated that there was overwhelming evidence, there was no such evidence. The court applied but misinterpreted the decision in Republic versus Samson Siganga Kibwana [2011] eKLR. The decision was to the effect that there is no room for speculation in criminal matters.

15. The court placed the burden of proof on Appellant to call the teenage boy who was in an adjacent room. There is no such burden. the prosecution has a duty to remove doubts that are created. Had the prosecution shown that the offence occurred, they could not say that the Appellant was the only person with opportunity to do so. This is in line with the position relating to circumstantial evidence. For it to work, it must be inconsistent with the accused'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: -'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."

16. In the case of Francis Charo Opo v Republic [1980]eKLR the court of Appeal (Law, Miller & Potter JJ A) stated as follows: -

> " The appellant was with the complainant on the material afternoon and had the opportunity to commit the offence; he has consistently lied in maintaining otherwise; and we think that these falsehoods give to the proved opportunity a complexion such as to amount in the circumstances of this case to corroboration; see R v Erunasani Sekoni s/o Eria (1947) 14 EACA 74, 76."

17. The complainant did not disclose the presence of another male person in the house. This person also had an opportunity to commit the offence. The problem is when the offence occurred. Defilement is such a consequential matter that it is not possible to forget when it happened. Dates may be missed but not a whole month.

18. The court dwelt in a long time on age. I don't think age is an issue in this Appeal. The main issue is whether, there was penetration, when it happened and for him. The penetration is not even whether it was complete or not. It is whether the offence occurred. Time of occurrence is crucial. It is unknown. The defence witnesses were solid in regard to the presence of the complainant in the Appellant's home.

19. The medical evidence shows that the hymen was broken. That has nothing to do with penetration. The test done 2 years later showed an infection, which meant it was a recent infection which had nothing to do with two years prior. The 2 years hiatus without telling anyone created a lacuna that there is doubt on her recollection. The complainant had a selective memory. Her evidence was not truthful as she had not even done a full disclosure.

20. The evidence needed to be corroborated. It was not. 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."

21. The complainant had not told even a close friend until it was very late. She then proceeded to forget the actual date. Without an actual date or a nearest the complainant created a mongrel of a case that flies on the face of the right to fair trial that is due to the Appellant.

22. Third witness, Rev. Lilian Nduta stated evidence she received in counselling. On cross examination, she indicated that the girl did not disclose that there was an uncle in the house. There appears to have been a dispute over a committee where the Appellant was a member. He was removed by the school principal. The witness did not know the origin of the tiff between the principal and the Appellant. In re-examination she stated she cannot tell if she was truthful or engineered by the principal.

23. Rebecca, PW4 testified that she has worked in the complainant's school for 8 years. They have been counselling children. She was told of the incident in 2022 September and had the same reported.

24. PW5PC Elizabeth testified next. She said that she investigated the case. She stated that she did not investigate the family members. She has not been told of the presence of uncle in the house.

Analysis

25. 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.

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 its 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. Wonders shall never cease. This matter will go down to history as an injustice meted out to a person by the very people who are to protect him. I have read the file many times and hoped to find some scintilla

of evidence that the crime occurred. What I ended up with is a subterfuge, diabolic miasma, reckless prosecution and throwing out all rules that safeguard a fair trial.

33. This case should never have been taken to court as there was no probable cause to file this matter. The prosecution went through the motions of filing a reckless charge without regard to their duty to be fair and to have a prosecution serve the purpose that it ought to serve.

34. The nature of the charge removed from the appellant kinds of defences he could have employed. For example, an alibi defence ought to be very specific and cogent. In this case it was removed. This is because the charge sheet recklessly referred to an indefinite period of 365 days.

35. In In S –v- Sithole 1999 (1) SACR 585 (W) at 590 - it was posited as hereunder:

> " There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken."

36. In this case, the offence is said to have occurred at midnight. However, the month and date are unknown. For an offence of theft, where one steals a known thing, it is safe to deal with unknown dates. In this case this were unknown dates in the year 2020. There is nothing delineating the timelines for purpose of defence.

37. In Kiarie – v- Republic [1984] KLR, the Court of Appeal proffered as doth:

> " An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable......"

38. In the position of the Appellant, how will he raise alibi for the period of 1 year. There could also be a negative Alibi. In the evidence of the mother, the minor only started going in 2021 to their home. The occasions they came to the Appellant's home they slept together. The negative alibi is equally an alibi. As example the minor was in a boarding school and sometimes at the auntie's place. Had a date been given, we could have traced the movements of the minor. Without a date or a definite period, the charge was defective and breached the Appellant's right to fair trial.

39. Article 50 (1) and (2) of *the Constitution* provides as hereunder: -

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right-

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it; (c) to have adequate time and facilities to prepare a defence;

(d) to a public trial before a court established under this Constitution;

(e) to have the trial begin and conclude without unreasonable delay;

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(i) to remain silent, and not to testify during the proceedings;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence;

40. How will the defence pick an alibi. If he states that on 11/8/2020 or 28/2/2020, I was in Kisumu, what was the efficacy of such evidence when there are 364 other days. It will also act against self-incrimination as that will mean he knows the date. He could not have known the date unless he was the perpetrator.

41. To make matters worse the Appellant was charged 2 years or three years, after the alleged offence, depending on whether the offence occurred on 1/1/2020 or 31/12/2020. How can anyone defend himself of such a wide offence. To contextualize the falsity of the charge, it was alleged that she wrote certain letters which initiated the charge. I have not seen the said letters. When the letters are in the possession of the prosecution case, but they do not produce them.

42. The party, in this case the prosecution, who has custody or is in control of evidence and fails or refuses to tender or produce, the court is entitled to make the adverse inference that if such evidence was produced, it would be adverse to the prosecution. Once such an inference is made, the benefit of doubt shall be given to the Appellant.

43. Secondly, there was a person alleged to be in the house, other than the Appellant and his wife. This was said to be an uncle. Such an uncle can equally commit the same offence. He was not called to state what he heard. The minor alleged that he saw the grandfather through a leso. She appeared to have a recollection of what happened.

44. In the case of Republic v Thomas Onyango Ogedi [2020] eKLR, Justice, Kiarie Waweru Kiarie, was of the view that failure to call witnesses, an adverse inference should be made. By stating:

> "Failure to adduce such crucial evidence may only lead to an inference that had it been adduced, it could have been adverse to the prosecution case. In the case of Bukenya vs Uganda [1972] EA 549, (Lutta Ag. Vice President) held:
>
> The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."

45. However, the complainant's mother stated that she was sleeping with her children, in all occasions she went home. Attempts were made to show that she may not have been at home all the time during the day. That may be however why the charge relates to midnight.

46. The complainant was also not a usual resident of the home in which this offence is said to have occurred. Surely she should be able to remember even the month that the offence occurred. I will not even go into identification. The same was hazy at best. However, the prosecution did not even reach a civil level of a balance of probability.

47. All factors considered, it is more likely than not that the incident is a figment of the complainant's imagination. It is more likely than not that she fabricated the story for the sake of securing financial support from PW3. Who is a more worth sacrifice than the loving grandfather who had hitherto been paying fees.

48. In the case of Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September 2017) (Judgment) (with dissent - JB Ojwang & NS Ndungu, SCJJ), the supreme court stated as follows: -

62. The common law concept of burden of proof (onus probandi) is a question of law which can be described as the duty which lies on one or the other of the parties either to establish a case or to establish the facts upon a particular issue. On this sole important issue, the law is clear that he who alleges must 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."

49. In this matter, I do not find any evidence of commission of the offence. Though submissions were written, they have been subsumed in the judgment herein.

50. The court finds that the charge sheet was fatally defective and affected the Appellant's right to fair trial. The magistrate misdirected herself in failing to comply with mandatory dictates of section 124 of the *evidence Act*.

51. I need not deal with the sentence save to say that there were no circumstances warranting enhancement of sentence to 30 years. The court simply descended into the arena and forgot to be a neutral arbiter.

This means that there is a clarion call for the courts to be continuously debriefed in view of the harrowing nature of the case they deal with. In the end result the conviction is unsafe and the offence is not disclosed in law.

52. The occurrence of the offence was not proved. In the circumstances I allow the Appeal and set aside the conviction

ORDER

53. I make the following orders: -

    i. The appeal is merited. I accordingly allow the Appeal, set aside the conviction, dismiss the charge in the lower court as baseless and order that the Appellant be released forth unless otherwise lawfully held.

54. This file is closed.

DELIVERED, DATED and SIGNED at NYERI on this 3rd day of June 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Appellant present

John Muhuu for the Appellant

Kaniu for the Respondent

Court Assistant- Jedidah

Page 8 | 8 *NYERI HCCRA NO. E024 OF 2023*