Kariuki v Republic (Criminal Appeal E048 of 2022)
[2024] KEHC 6375 (KLR) (3 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6375 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E048 OF 2022

DKN MAGARE, J

JUNE 3, 2024

BETWEEN

MICHAEL KARIUKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon.F.Muguongo-SRM dated 23rd August, 2022 in Nyeri Chief Magistrate's Court Sexual Offence Case No. 32 of 2020)

JUDGMENT

1. This is an Appeal from the decision of the Hon. F. Muguongo SRM delivered on 23rd August, 2022. The Appellant was sentenced to 10 years imprisonment. He appealed and set the following grounds of Appeal.

    a. That, the learned trial Magistrate erred in both law and fact in failing to appreciate the fact that the alleged victim in this case clearly demonstrated an incredibly doubtful integrity and whose evidence was and remains doubtful occasioning a serious prejudice.

    b. That, the learned trial Magistrate erred in both law and fact in misdirecting herself that the allegations were proved whilst critical elements of defilement in forceful penile penetration and identity of the alleged perpetrator hence a prejudice.

    c. That, the learned trial Magistrate further erred in both law and fact in not considering that the whole prosecution case was riddled with material discrepancies which were capable of unsettling the verdict hence a prejudice.

    d. That, the learned trial Magistrate further erred in both law and fact in failing to consider the plausible appellant's statement in defence which was not disproved c/s 169 of *Criminal Procedure Code*.

e. That the instant matters proof was below the required standards of proof and therefore capable of impeaching the whole substance of the matter.

f. That since I cannot recall all what transpired during the trial, I kindly seek to be provided with court records to enable me file further grounds of Appeal.

2. The sixth ground was not really ground of Appeal. The appellant was charged for defilement contrary to section 8 (1)(4) of the *Sexual Offences Act*, that on 6th June at Makutano village at about 0830PM in Tetu Sub-county intentionally caused his penis to penetrate the vagina of MNM a child aged 16 years. The year was not indicated in the charge sheet. The Appellant was arrested on 1st July, 2020 and apprehended on 2nd July, 2020.

3. He was charged with an alternative count of indecent assault which is said to have occurred on 6th June, 2020. The Appellant appeared before Hon. J. Macharia on 2nd July, 2020. The matter then proceeded before Hon. Kagendo for approval of the surety.

4. On 18th March 2021, the matter appeared before Hon. F. Muguongo SRM, when PW1 gave sworn evidence. She identified her birth certificate showing she was born on 27th December 2003. She stated she was 17 years old. She stated that she received a call from the Appellant who informed her that that he was at their gate and she went there. The prosecutor applied to have the witness stood down and be remanded at a children home.

5. In the course of the responses, the prosecutor recanted the application and stated that the complainant had agreed to testify properly. The witness started testifying in a different manner, after that she was remanded. The prosecutor made spurious allegations in court that unfortunately went on the record.

6. This resulted into a mention date being converted to a hearing. A mention was converted with a hearing. She stated that the Appellant took her to the forest and removed her clothes. He put his fingers on the vagina. This lasted 2 hours. She stated that she had sex with him as it was her first time. This was reportedly at a road side. She stated that she recorded a statement on 1st July 2020. She stated that she came back at 11 pm.

7. On cross-examination, she stated that she refused to testify but preferred home to police cells. She stated that the statement does not show if it is the grandmother's phone or the Appellant. She stated that she screamed but that statement was not in the statement she made to the police. She stated that the grandmother had mobilized people to look for her. She admitted that she had lied to the grandmother that she had gone to Danu's place.

8. The court convicted the Appellant and sentenced him to ten years imprisonment. This resulted in the Appeal herein.

Analysis

9. 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.

10. 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."

11. 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."

12. 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 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."

13. 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."

14. 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."

15. 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."

16. The first limb is whether the evidence of the occurrence of the offence was corroborated. The minor testified and was threatened with arrest in order to advise her to testify in court. The conduct of arresting a witness to force evidence makes the testimony rotten beyond redemption. Indeed the complainant confirmed that she testified to avoid jail. This is crucial given that she had not refused to testify but was not testifying according to the script. All such evidence is of no probative value. The threat of arrest was used to coerce evidence the prosecution wanted.

17. The complainant was a liar. Her evidence was worthless. Without useful evidence, there was nothing to show defilement. The evidence was also not corroborated. Given that she admitted lying, then Section 124 of the *Evidence Act* provides as follows:

> " Notwithstanding the provisions of section 19 of the *oaths and Statutory Declaration Act*, where the evidence of the victim 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 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."

18. In *OKK v Republic* [2021] eKLR the court posited as hereunder: -

> " The strength of the authority in *Mohamed v R* [2008] KLR and *Jacob Odhiambo v R* observed that the court must satisfy the criteria that the victim told the truth and must record the reasons for such believe. In trials of this nature offences of defilement are usually committed in total privacy and secrecy. Even so, the prosecution duty is to prove directly or circumstantially that the victim has been defiled.
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> In the persuasive case from the South African Court in *S v Trainor* [2003] 1 SACR (SCA) the court stated:
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> > " A conspectus of the evidence is required evidence that is reliable should be weighed alongside such as may be found, to be false independently, verifiable evidence, if any should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of the evidence must of necessity be evaluated as most corroborative evidence if any."
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> Similarly, in *Vokere v R* [2014] SCCA 41 Domah J held
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> > " judicial appreciation of evidence is a scientific rationalization of facts in their coherent whole, not a forensic dissection of every detail removed from its coherent whole."

19. The evidence obtained by threatening arrest, cannot be said to be evidence free from intimidation. The threat was never removed. It becomes a fruit of a poisoned tree. All of that evidence disappears as unusable and useless. Evidence must be free from influence both internally and externally.

20. In Daniel Kipyegon Ng'eno above the judge also dealt with the issue of a single witness and had this to say:

> " A similar position was reiterated by the Court of Appeal of Tanzania in *Ahmad Omari v The Republic* Criminal Appeal No. 154 of 2005, Ramadhani C.J, Munuo JA and Mjasiri J.A. Also discussing the same issue, the Court of Appeal of Uganda in *Okwang Peter v Uganda* Criminal Appeal No. 104 of 1999 held as follows: -
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> > " Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect to identification especially when it is known that the conditions favoring correct identification were difficult. In such circumstances what is needed is other evidence, whether it is circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification,

although based on the testimony of a single witness, can safely be accepted as free from possibility of error."

21. The appellant freely admitted to lying to her grandmother. A witness who lies once is a liar. Her evidence is totally useless. Even if she did not admit her story doesn't add up.

22. A person calls from an unknown number to a grandmother's number, it turns out that she happens to take the phone at exactly the said time when the grandmother was snoring. She then walks out at night to have sex with a person she does not know. To make worse she states that she was at Danu's place. Could she also be lying about the Appellant?

23. Dr. Joyce Mackenzie testified that she worked with Dr. William Muriuki who filled the PRC and Rose Wanjiru a Clinical Officer of PGH Nyeri. The P3 form was filled on 29th June, 2020. The appropriate age of the injuries was hours. Hymen had been freshly broken. This freshly broken hymen is the same that was supposed to have been broken on 6th June, 2020.

24. The medical evidence exonerated the Appellant. Though freshly broken there was no spermatozoa. The history was that she had been seen on 7th June 2020. There is nothing fresh from 6th June 2020 to 29th June 2020.

25. On cross-examination, she stated that no treatment had been received before examination. The PRC and P3 had a different story on treatment.

26. PW3 Simon Makara Gwaro testified that he was a former Assistant Chief. He knew the Appellant. He did not witness the crime. He called the Appellant and requested him to see him for defiling a school girl.

27. PW4 was the grandmother. She stated she was living with the complainant and 3 other children. She stated that the complainant was 17 years.

28. I note that the birth certificate was issued slightly 6 months before the offence. It is a useless piece of evidence as far as age is concerned. There is no reason why a birth certificate could frame up with a 17 year old, dated barely 6 months to the date of the offence. There was thus no proof of age. This is the same with the P3. As at 29th June, 2020 the offence was 2 hours old.

29. I do not find that penetration on 6/6 was proved. I presume that 6/6 means 6/6/2020. There was no inflammation of the vagina when the PRC was filed. It had a freshly broken hymen. This was the same report for a P3 filed on 29th June, 2020.

30. The two documents gave a different story. There is someone who is lying. When the evidence is of this nature, then the benefit of doubt is given to the Appellant.

31. PW5 PC Joshua Miano stated that they received a report from PW4. He was the investigating officer. They arrested the Appellant. He stated he had no grudge. He was cross-examined. He stated that the complainant gave her number. He did not call for communication between the Appellant's number and the complainant's number.

32. The number is said to belong to PW3. The communication was crucial. Failure to get evidence related to that communication was crucial. Section 111 of the *Evidence Act* provides as follows: -

> "When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification

to the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him."

33. On being put on defence, the Appellant gave evidence on oath. He denied charges. He stated that he was staying in Makutano-Kiandu with his grandmother operating a play station. He opened his business as usual from 8.00am to 9.00pm. He knew the Appellant but did not know the complainant's grandmother's phone.

34. He stated that his phone number was number 0722xxx508. He stated that he had a friend called Anthony. He stated that several people were looking for her, but were not called. He was of the view that the offence did not occur.

Analysis

35. This is a fairly straight Appeal. Three things that were supposed to be proved were:

    a. Penetration

    b. The perpetrator

    c. The Age

36. Unfortunately, all the three were not proved. The complainant's age is tenuous. This is because the certificate was issued barely 6 months before the alleged crime. The question of penetration was also not proved. There was a freshly broken hymen on 29th June, 2020 when there was another freshly broken one on 7th June, 2020.

37. I find that the court misdirected herself by finding the Appellant guilty. The case was not proved beyond reasonable doubt. I agree with the Appellant the court ignored the rock solid defence. Further by testifying to enable her escape prison she was clearly motivated to lie.

38. The act of forcing testimony soils that testimony. Where a witness is giving testimony that is inconsistent, then the prosecutor should ask the witness to be declared hostile first. However, smoothing a witness is witness tampering which allows this court to toss out her entire evidence.

39. In the case of *Republic v Gibson Kiplangat Bett* [2022] eKLR, Justice Gikonyo stated as follows: -

> Lesiit J in *R. v. Fredrick Ole Leliman & 4 Others*, Nairobi Criminal Case No. 57 of 2016 (2016) eKLR where justice Lesiit stated that: -
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> > "Undermining the criminal justice system includes instances where there is a likelihood that witnesses may be interfered with or intimidated; the likelihood that accused may interfere with the evidence; or may endanger and individual or individuals or the public at large; likelihood the accused may commit other offences. In this instance where such interferences may occur the court has to determine whether the integrity of the criminal process and the evidence may be preserved by attaching stringent terms to the bond or bail term; or whether they may not be guaranteed in which case the court may find that it is necessary to subject the accused to pre-trial detention."

40. Integrity of the criminal process is not required only on bond application but on hearing. An intimidated witness is anathema to good order and delivery of justice. I shall disregard all the evidence of PW1. The rest of the evidence becomes tenuous and untenable. The evidence of PW2 does not deal

with the perpetrator. Though dealing with discrepancies on time, I shall not dwell on the same as they are not material. Such small discrepancies of time cannot be a serious allegation.

41. However, the original deviation had already occurred. Without credible medical evidence and the Complainant there is nothing to go on. In the case of *Daisy Chepkoech v Republic* [2022] eKLR Justice R. Lagat-Korir, posited as hereunder: -

> " 25. In the present case, the only evidence as to whether penetration occurred is that of the victim when he testified that they had sex. In my view this evidence is not cogent enough to sustain a criminal conviction for defilement. It is evidently clear that there is a strong suspicion that the victim and the Appellant were in a relationship, whether intimate or otherwise, and that the said relationship could have materialized into a sexual engagement on the night in question. However, the Court of Appeal already pronounced itself in this regard. Kwach, Lakha and O'Kubasu JJA in the case of *Sawe v Republic* (2003) KLR 364 stated thus:-
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> > " Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

42. The case was not proved to the required standards. There may be reasonable suspicion that the offence may have occurred. Howe they remain just that, suspicions. However, strong suspicions are, they cannot found a claim. It is my hope that the prosecutors will find it befitting to use the proper channels than intimidating a witness.

43. Consequently, the court finds that the Appeal is merited. I allow the same. The sentence is tied to the conviction.

Order

44. The Appeal is merited. I allow the same. I set aside the conviction and sentence and set the Appellant free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED IN OPEN COURT ON THIS 3RD DAY OF JUNE, 2024.

KIZITO MAGARE

JUDGE

In the presence of:-

Kaniu for the Director of Public Prosecutions

Appellant present in person

Court Assistant- Jedidah