Wambui v Republic (Criminal Appeal E001 of 2024)
[2024] KEHC 16838 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KEHC 16838 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E001 OF 2024

DKN MAGARE, J

JULY 12, 2024

BETWEEN

DENNIS KARIUKI WAMBUI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment of the trial court, Hon. D.N. Bosibori (SRM) in Mûkûrwe'inî. SO *No. E011 of 2022* dated 21/12/2023.

2. The Appellant was charged with sexual assault contrary to Section 5(1)(a)(i) as read with Section 5(2) of the *Sexual Offences Act* No. 3 of 2006. There was also an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, 2006.

3. The particulars of the offence were that on 10/10/2022 in Karaba area of Mûkûrwe'inî. Sub-County in Nyeri County jointly with another not before court intentionally and unlawfully used his fingers to penetrate the vagina of WWM, a child aged 15 years.

4. On the alternative charge, the particulars were that on 10/10/2022 in Karaba area of Mûkûrwe'inî. Sub-County in Nyeri County, jointly with another not before court, intentionally and unlawfully touched the vagina of WWM, a child aged 15 years.

5. The accused person was arraigned, and he denied the charges. A plea of not guilty was consequently recorded. The trial court considered the case and rendered Judgment on 21/12/2023. The court found the Appellant guilty on the main charge and convicted him of the offence. The Appellant was also committed to a term of 3 years at the Shimo La Tewa Borstal Institution, which will start running on 23/11/2023.

6. The Appellant, aggrieved, lodged this appeal. The appeal is on conviction and sentence on the ground that the trial court erred in law and fact in finding that the prosecution had proved its case beyond reasonable doubt. Also, that the trial court did not consider mitigation by the Appellant before meting out the sentence that was excessive.

Evidence

7. At trial, PW1 was the medical doctor, Edwin Nganga. He relied on the clinical report dated 11/10/2022. He testified that the complainant's hymen was intact and genitalia normal on examination. He examined the complainant on 11/10/2022. On cross examination, it was his case that there were no injuries noted on the face or arms. No lacerations were observed. No discharge or pus was observed, and based on examination, penetration did not occur.

8. PW2, was the complainant. She testified that she was born on 2/11/2006. It was her evidence that, the perpetrator was her neighbor and was known to her as Dennis Kariuki. She had been sent by her mother to buy Sukuma Wiki on 10/10/2022 at around 6.30 pm. As she returned, the accused, together with one Geoffrey Thuo, both her neighbors, held her hands and touched her breasts, and inserted their hands in her vagina. On cross-examination, she confirmed that the medical doctor confirmed no penetration.

9. PW3 was the complainant's mother. She testified that the complainant was 16 years old and produced the birth certificate. She stated that she sent the complainant to buy her vegetables at Mageka market. Later she heard screams and asked her husband one JM, whether that was her daughter, the complainant, screaming. That she called out, and the complainant responded and, when asked, said that Geoffrey and Thuo, and Dennis Kariuki wanted to rape her. They went to Mûkûrwe'inî. The hospital the next day, the complainant was treated and told she was okay.

10. On cross-examination, she testified that she was going downstream to look for the complainant when she heard the screams. The boys fled when they heard her. They reported the incident to the police the same day.

11. PW4 was the Complainant's father. He testified that they heard a scream. The offenders ran away, but the complainant said they had already touched her and fingered her. They escorted the complainant to Karaba Health Centre.

12. PW5 was the Investigating Officer. She argued that the investigations' results pointed to the Appellant as the offender, and they arrested him. The other offender fled. She confirmed on examination that the medical reports did not confirm penetration.

13. PW6 was James Nyale Mwango. He testified that he was the Civil Registration Officer. He produced a report dated 24/10/22 showing that that the Appellant was a minor born on 31/1/2006.

14. The court considered the testimonies of the prosecution witnesses and placed the Appellant on his defence.

15. The Appellant testified. He testified that he was at home harvesting fodder for the animals on the fateful day. After three days, he was told that the police were looking for him for the defilement of a minor, Whitney. It was his testimony that the charges were trumped up.

Analysis

16. 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, the Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336 posited 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 different.

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] 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."

18. The issue in this case is whether the prosecution proved its case to the required standards. Most oft quoted English decision by Viscount Sankey L.C in the case of *H.L. (E) Woolmington v 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."

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. The complainant testified that she was a minor aged 16 at the time of the alleged sexual assault. The complainant identified the Appellant by recognition. The minor testified that the Appellant was her neighbor and known to her as Dennis Kariuki. She was sent by her mother to buy sukuma wiki on 10/10/2022 at around 6.30 pm. The accused, together with one Geoffrey Thuo, both her neighbors and known to her, held her hands and touched her breasts, and inserted their hands in her vagina in turns. She confirmed that the medical reports ruled out penetration.

23. The medical evidence was inconsistent with the Appellant's guilt. There was no medical evidence showing any physical injuries. The hymen was intact with no evidence of penetration. The medical examination was done barely one day after the alleged offence. The medical evidence is thus not helpful in establishing the offence at hand. The next question is whether the court ought to rely on section 124 of the *Evidence Act* to convict. The said section 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.

24. The section is negatively worded. That is, corroboration is necessary unless the trial court finds that the complainant was truthful for reasons to be recorded. The reason she gave for believing the complainant was that because she spoke in low tones. The court found that there was inconsistency, as stated by the defense; she did not analyze the inconsistencies save to say that it did not go to the root of the offense. This court is thus unable to so agree without analyses. Further, the alleged candidness cannot suffice in the face of inconsistencies. In spite of relying on the decision of *Joseph Kakei Kaswili v R* Criminal Appeal No. 102 of 2015 [2017] eKLR, the court still did not reconcile the inconsistencies.

25. In the case of *Richard Munene v Republic* (2018) eKLR, the Court of Appeal posited as doth in respect to contradictions or inconsistency in the evidence of the prosecution witness:

> Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favor of the accused.
>
> It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.

26. The inconsistencies should always be resolved in favour of an accused. It is only trifling inconsistencies that will be disregarded, even after being resolved in favour of the accused.

27. The court did not analyze as required the medical evidence before her. The offence required corroboration. In absence of this, the court was bound to acquit. I find the judgment of the court rather strange. It is more like prosecution submissions instead of analyzing the evidence before her. This led to miscarriage of justice as the defence was not considered. The defence was of a nature of an alibi defence.

28. When an accused person raises an alibi, the burden of proving the falsity of alibi lies with the prosecution. Failure to displace the alibi, ipso facto means it has succeeded. In the case of *Victor Mwendwa Mulinge v R* [2014] eKLR the Court of Appeal stated as follows:

> The burden of proving the falsity, if at all, of an accused's defence of *alibi* lies on the prosecution; see *Karanja v R* [1983] KLR 501
>
> ..this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.

29. The offence at hand was provided under Section 5(1)(a) (1) and (2) of the *Sexual Offences Act* as follows:

(1) Any person who unlawfully—

(a) penetrates the genital organs of another person with—

(i) any part of the body of another or that person; or

(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

30. The prosecution had a duty to prove that offence. In the case of *John Irungu v Republic* (2016) eKLR, the Court of Appeal expressed itself as hereunder:

> " Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose."

31. In this case, PW2, the Complainant stated that the appellant inserted his fingers in her private parts. This was the first and most crucial report to the court. The importance of the first report was appreciated in *Tekerali s/o Korongozi & 4 Others v Rep* (1952) 19 EACA 259 where it was held that:

> " Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [came] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others."

32. There was no medical evidence of any penetration. There was no corroboration on the occurrence of the offence. The defence evidence was not considered. Without considering defence evidence, the court fell into a fatal and incurable error.

33. Before going further, I note that the court wrote a 10 page ruling on the case to answer. At that stage, the court rejected the defence submissions and found that the prosecution witnesses were credible. This is a road that the court took that is perilous at best and disastrous at worst. The court changed the standards of proof to a strange test. The court stated, "I am unable to find that the offender has no case to answer..." This is not the standard required. At that point, the Appellant was not an offender but an accused person. Secondly it is not a negative test that whether he has no case to answer or not. It should be a positive test that whether he has a case to answer or not.

34. The strangest phenomenon was a waste of judicial time in writing a 96-page sentencing ruling. Such a humongous ruling is neither desirable nor advised. The court also made the finding on the case to answer pursuant to Section 306(2) of the *Criminal Procedure Act*.

35. The Appellant did not have rights under Section 211 explained. It is crucial that in trials before the lower court that section 211 be complied with. In the case of *Leonard Mbobua Mungania v Republic* [2010] eKLR, the court stated as follows:

> Section 211 of the Code requires the trial court to explain to the accused person the substance of the charge, where the Court finds that the prosecution has established adequate to call upon the Accused to his defence.
>
> The provision also requires the trial court to remind the Accused Person of his rights to given sworn testimony and be subjected to cross-examination, or give an unsworn stamen and escape cross- examination, and also the right to call witnesses to testify on his behalf.
>
> The trial court's record does not show any compliance with the said mandatory requirements of Section 211 of the Code. That omission in law constitutes a serious irregularity and renders the trial a nullity. This was realized by Mr. Kimathi, learned State Counsel who readily conceded to the appeal on this ground but asked for a retrial.

36. However, nothing turns on this question, given the mammoth failure to consider the alibi defence given. The court thus erred in finding that the case had been proved beyond reasonable doubt. The Court of Appeal in *Moses Nato Raphael v Republic* [2015] eKLR held as doth regarding proof beyond reasonable doubt:

> " What then amounts to "reasonable doubt"? This issue was addressed by Lord Denning in *Miller v Ministry of Pensions*, [1947] 2 ALL ER 372 where he stated:-
>
> > " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.'"

37. The evidence given in the court fell far below the standards required and as such could not be a basis for a conviction. The right to a fair trial cannot be derogated from. It is not enough to extensively refer to binding precedence. The court must analyze the case before it. It must consider a defence given in an unbiased manner. Where the court has a reason to believe, it is not enough to have an internal conviction. Such reasons must be credible. Speaking in a low tone, is actually evidence of lack of certainly as opposed to evidence of truthfulness. The medical evidence and testimonies differed largely.

38. I find that the conviction is not safe. In the circumstances, I set aside the same. There is no useful purpose to be served in dealing with the issue of sentence. I set the conviction and sentence aside.

39. In the circumstances, the appeal is allowed and the conviction and sentence set aside. The Appellant is set free unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 12TH DAY OF JULY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Wambui for the Appellant

Ms. Sakari for the State

S.Sgt. Moses Otieno present

Appellant – present

Court Assistant – Jedidah