Munzyu v Republic (Criminal Appeal 93 of 2017)
[2024] KECA 479 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KECA 479 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 93 OF 2017

PO KIAGE, A ALI-ARONI & LA ACHODE, JJA

MAY 9, 2024

BETWEEN

MWIKYA MUNZYU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Machakos (B. Thuranira Jaden, J.) dated 12th June, 2014 in HCCRA NO. 14 OF 2013)

JUDGMENT

1. The appellant was charged with defilement of a girl contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* (SOA). The particulars of the offence were that on 14th of March 2012, at about 6.00 pm in [particulars withheld] within Kitui County, he defiled KJ (minor), a girl aged 9 years, by his penis penetrating her vagina.

2. In the alternative, the prosecution preferred a charge against the appellant of an indecent act with a child contrary to section 11 (1) of the *SOA*.

3. The appellant denied the charges leading to a trial in which the prosecution called 7 witnesses. Evidence was adduced that on 14th March 2012 at around 6.00 pm, PW1, the 9-year-old minor, was at home lighting a lamp when the appellant, who was a neighbour, approached her and told her that she was being called by one Mukendi. The minor refused to go but the appellant pulled her into a bush where he defiled her. She felt pain and screamed. Thereafter, she went home and told her mother what had happened. They reported the matter to the police and she was taken to hospital.

4. The minor's mother, MJ, PW2, testified that on the material day, she had gone to the market and when she went back home, she found the minor missing. She asked the other children where the minor was and they told her that the appellant had taken her to the bush. She followed them to the bush where she

heard the minor screaming. PW2 claimed that as she approached the scene, she saw a person flee. She recalled that she found the minor holding her pantie. The minor disclosed that the appellant had defiled her. PW2 checked her private parts and found that she was bleeding. She reported the matter to the area Assistant Chief and Mutomo Police Station. She then took the minor to the hospital. The minor was first treated at Mutomo Mission Hospital Dispensary then later at Nairobi Women's Hospital where she was admitted for one week. Upon being examined by the doctor, PW2 was informed that the minor had started menstruating. PW2 stated that on the material day in the morning, the appellant had passed by her home and she had given him tea.

5. Dr. Daniel Nguku, a medical officer at Nairobi Women's Hospital, gave evidence as PW3 on behalf of one Dr. Thuo, a medical officer at the same hospital who examined the minor on 16th March 2012. PW3 testified that he was familiar with the handwriting and signature of Dr. Thuo. He indicated that a vaginal examination of the minor revealed that she had a torn and hyperaemic vaginal wall and whitish discharge. The doctor formed an opinion that she was defiled. On cross-examination, PW3 disclosed that Dr. Thuo was still at the hospital.

6. Daniel Mulwa, a clinical officer at Mutomo Heath Centre, gave testimony as PW4. He explained that on 15th March 2012, he filled a P3 form upon examining the minor over an allegation of defilement. The examination revealed that the minor had a tear on the vulva, the vaginal wall was reddish with whitish vaginal discharge, the hymen was missing and a high vaginal swab showed the presence of spermatozoa and red blood cells. PW4 concluded that there was defilement. He produced a photocopy of the P3 form. On 27th July 2012, he was recalled to produce the original copy of the P3 form.

7. Patrick Ngala Mutisya, the Assistant Chief of Kyoani Sub- location testified as PW5. He explained that on 14th March 2012, at 8.00 pm, he was at home when he received a phone call from the mother of the appellant. She reported that her son had been implicated in the defilement of the minor. PW5 went and arrested the appellant and handed him over to the police. No. 2008106949 APC Ann Mwende, PW6, recalled that on 14th March 2012, while on patrol duties with her colleagues, they were instructed by one Corporal Rose Wekesa to accompany the mother of the minor to the hospital. They escorted her and later continued with the patrol.

8. No. 75433 PC Japheth Kidiavai, the investigating officer, gave evidence as PW7. He narrated that on 14th March 2012, while at Mutomo Police Station, some people appeared with the minor and reported that she had been defiled by a person known to her. The minor was escorted to Mutomo Mission Hospital while he proceeded to apprehend the appellant who had been arrested by the area Assistant Chief. They took the appellant to Mutumo Mission Hospital where he was examined. Afterward, the appellant was taken to the police station where he was detained. PW7 testified that on 15th March 2012, when the minor and her mother went to Mutumo Mission Hospital for filling of the P3 form, the doctor refused to fill the form. To him, the doctor had been compromised. They thus took the minor to Mutomo Health Centre for further examination.

9. At the close of the prosecution case, the learned Senior Resident Magistrate (S. K. Mutai) found that the prosecution had established a prima facie case against the appellant and he placed him on his defence.

10. The appellant gave sworn evidence and called two witnesses. He denied committing the offence and claimed that he had been framed. The appellant, DW1, testified that the minor's mother, PW2, was his lover since the year 2010. He alleged that when he got married in March 2012, PW2 grew angry and threatened to put him in a place where his wife would never find him. DW1 explained that on the material day, he passed by PW2's home, took tea and left for his mother's hotel. While there, one Kisamwa and Muthami visited him. His mother also arrived at 11.00 am. Thereafter he left for his

house in the company of Kisamwa. At 3. pm, they went to Kalaa to meet a certain girl and he left Kisamwa with the girl. The appellant testified that they later met at Kyoani Shopping Centre with Kisamwa and Muthami. At 7.30 pm on the same day, his uncle was called by his mother and informed that PW2 had claimed that he defiled the minor. The appellant's mother also informed him in person about the accusation. Later, he was arrested and taken to Mutomo Mission Hospital where he was examined. He was also taken to the Health Centre where his blood samples were taken for analysis.

11. The mother of the appellant, Serah Peter Munzyu, DW2, corroborated the appellant's allegation that PW2 was his lover and that he would visit her often. She stated that when the appellant got married on 29th December 2011, the relationship between the two ended. DW2 gave testimony that on the material day she sent the appellant to open her hotel and when she arrived at the hotel at 11.00 am, she found him with one MM and Kisamwa Katwa. The appellant and his two allies left for Musumali's place and went back to the hotel at 7.30 pm. At 8.30 pm, PW2 called DW2 and told her that the appellant had defiled her child.

12. Kisamwa Katwa, DW3, testified that he was a relative to the appellant. On the material day, he went to MM's home asking for his company to see a certain girl. They then proceeded to Kyoani Centre where they met the appellant at a shop. DW3 requested the appellant to also escort him to see the girl that she intended to marry. They left the shop at 11.00 am upon the appellant's mother arriving and went to the appellant's home. At 5.00 pm they left the appellant's home and went to the home of the said girl. The appellant and MM left DW3 behind with the girl. They later met up at Kyoani Shopping Centre and went back to the hotel of the appellant's mother. DW3 stated that he was with the appellant at 6.00 pm when it is alleged that he defiled a girl.

13. The trial Magistrate evaluated the evidence tendered and found the appellant guilty on both the main and alternative charges. She proceeded to sentence him to life imprisonment.

14. Aggrieved by the conviction and sentence, the appellant appealed to the High Court. Thuranira, J. (deceased) re-evaluated the evidence on record and delivered judgment on 12th June, 2014 upholding the conviction and sentence meted on the appellant. She, however, corrected the error that had been made by the trial court in convicting the appellant on both charges and, convicted the appellant on the main charge of defilement only.

15. Aggrieved by the decision of the High Court, the appellant preferred the instant appeal raising 8 grounds in an amended memorandum of appeal lodged on 23rd September 2019, by the law firm of Kasyoka & Associates Advocates. The grounds are that the learned Judge erred by;

    a. Failing to find that the medical evidence was wanting

    b. Overlooking the grudge which resulted in the appellant being implicated in the case.

    c. Failing to make a finding on the manifestly inconsistent, contradictory, and uncorroborated evidence of the prosecution.

    d. Failing to find that crucial witnesses did not testify as per section 150 of the *Criminal Procedure Code*.

    e. Failing to find that the burden of proof was transferred to the appellant.

    f. Relying on the evidence of the complainant when she did not understand the meaning of and the nature of an oath.

    g. Upholding the decision of the trial court when the age of the complainant had not been proved.

16. During the hearing of the appeal, learned counsel Mr. Kinara appeared for the appellant while Mr. O. J. Omondi, the learned Senior Assistant Director of Prosecutions, appeared for the state. Both parties had lodged written submissions which they highlighted.

17. Mr. Kinara contended that the prosecution never investigated nor challenged the appellant's alibi defence. We questioned counsel why the *alibi* defence was raised at the defence hearing stage and not earlier. Counsel replied that neither the police nor the prosecution complained that they had been ambushed by the alibi. He added that even if they were so ambushed, there was provision for them to ask for time to investigate it. Counsel cited this Court's decision in *Victor Mwendwa Mulinge Vs. Republic* [2014] eKLR for the proposition that the burden of proving the falsity, if at all, of an accused person's defence of *alibi* lies on the prosecution. Mr. Kinara faulted the learned Judge for failing to re-evaluate the evidence on record including, the fact that in his testimony, the Investigating Officer, PW7, indicated that the minor was first seen at Mutomo Mission Hospital where the doctor refused to fill the P3 form. Moreover, the learned Judge failed to acknowledge the observation that the minor was on her menses before the medical examination was conducted. Counsel contended that the evidence on what transpired at Mutomo Mission Hospital should have raised doubts in the mind of the learned Judge about the entire evidence.

18. Mr. Kinaro argued that there were many inconsistencies in the prosecution case that should have been resolved in favour of the appellant, citing *Richard Munene Vs. Republic* [2018] eKLR. To illustrate, he submitted that while the minor testified that after being defiled nobody found them and she went home and told her mother what had transpired, the evidence of PW2, her mother, was that when she arrived at the scene of crime, she found somebody running away and the complainant holding her pantie. Counsel asserted that there was reasonable doubt whether it was the appellant who defiled the minor considering that he gave sworn evidence which was corroborated, of his whereabouts at the time when the alleged offence happened. Mr. Kinaro urged that the High Court decision be quashed, and the appellant be set free.

10. Mr. Omondi for the respondent opposed the appeal maintaining that the learned Judge was properly guided by principles of law while analysing and re-evaluating the evidence.

20. He dismissed the appellant's contention that the voir dire was not done properly and submitted that failure to conduct a voir dire or its poor administration does not of itself vitiate an entire trial. Counsel cited this Court's decision in *Maripett Loonkomok Vs. Republic* [2016] eKLR where the Court observed that, "not in all cases where voir dire is not administered or is not administered properly the entire trial would be vitiated...that question will depend on the peculiar circumstances and particular facts of each case." Counsel urged that according to section 19(1) of the *Oaths and Statutory Declarations Act*, it is the opinion of the court upon examination of a child of tender years, that determines if the evidence of such a child is to be received under oath, and in the instant case, the trial court was of the opinion that the child was competent to give sworn evidence.

21. The contention that the learned Judge did not evaluate the evidence properly was also rejected. Mr. Omondi was of the view that the learned Judge properly analysed the evidence and considered the defence of alibi which she found to have no probative value. Counsel contended that the *alibi* was raised only at the defence hearing and not during the trial. To counsel, the alibi was advanced as an afterthought. We inquired from counsel why the alibi was not investigated bearing in mind that the appellant raised it under oath and called witnesses to support it.

22. Mr. Omondi's answer was that there was no need to investigate the alibi defence, which was raised belatedly, in view of the evidence of PW1, PW2, and PW3 which placed the appellant at the scene of crime.

23. We probed counsel how it was possible for the 9-year old minor to use the technical term 'defilement' in her evidence and whether the trial Magistrate should not have asked questions that elicited the offence before arriving at the legal term 'defilement'. Further, in view of the doctors' observation that when the minor was taken to hospital she had started her menses, we sought to know whether there was any investigation as to whether the minor's bleeding was as a result of the menses or the defilement. Mr. Omondi responded that according to the minor's testimony, when she was defiled, she suffered a lot of pain and bled. The P3 form was filled two days later when the doctor noticed that she had started her menses. To counsel, the defilement and the on-set of the menses happened at two different times.

24. We inquired why the doctor from Mutumo Mission Hospital, where the minor was first attended to was not called as a witness or charged considering that he refused to fill the P3 form. Counsel indicated that although he was not aware of what may have happened, it was enough that the minor was moved to another hospital where she was examined and the P3 form filled.

25. Mr. Omondi submitted that there was no material contradiction between the evidence of PW1 and PW2. He asserted that the totality of the evidence clearly showed that PW1 started screaming during the incident and her mother proceeded to the scene where she saw her and someone running away. PW1 then informed PW2 that it was the appellant who had defiled her.

26. In a brief reply to the respondent's submissions, Mr. Kinara insisted that the learned Judge did not analyse the evidence on record properly and urged us to re-analyse it.

27. This being a second appeal, the Court restricts itself to consideration of questions of law only by dint of Section 361(1)(a) of the *Criminal Procedure Code*. This was affirmed by the Court in *David Njoroge Macharia Vs. Republic* [2011] eKLR;

> " That being so only matters of law fall for consideration–see section 361 of the *Criminal Procedure Code*. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings - see *Chemagong v. R* [1984] KLR 611."

28. The appellant complains that the prosecution did not dislodge his defence of alibi; there were many inconsistencies in the prosecution case; the voir dire was not properly administered; the age of the minor was not proved, and that the learned judge failed to properly evaluate the evidence on record.

29. To begin with, we note that although the dissatisfaction with the administration of the voir dire and the age of the minor were raised as grounds of the appeal, the appellant's counsel did not address them in his submissions. More importantly, the manner in which the voir dire was conducted was not questioned by the appellant during trial and neither was the age of the minor which is indicated on the P3 form as 9 years. It would seem therefore that there is no proper basis for us to address those grievances.

30. The appellant further contends that although he raised a defence of alibi on oath, which was corroborated by two witnesses, the prosecution did not investigate it, nor did they challenge it. We note that the alibi issue was not raised on the grounds of appeal. However, the appellant's counsel argued it substantively in his submissions and so we deem it appropriate to examine it. In his defence, the appellant claimed that on the material day his mother sent him to open her hotel. While there, one Kisamwa and one Muthami visited him. Upon his mother arriving at 11.00 am those friends and he left for his house. The appellant stated that at 5.30 pm, they escorted Kisamwa to a place known as Kalaa for him to meet his girlfriend and later returned to his mother's hotel. DW2, his mother, confirmed

the alibi defence as did DW3 who recalled that he was with the appellant on the date in question, at 6.00pm, when the incident is alleged to have happened. The respondent contested the alibi defence arguing that it was only raised at the defence hearing as an afterthought. It was submitted that in any event, the evidence of PW1, PW2, and PW3 placed the appellant at the scene of crime.

31. In its judgment, the trial court made no mention of the alibi and dismissed the appellant's defence as a mere denial of committing the offence and stated thus;

> " Likewise, I do find the defence put forward by the accused is wanting and unconvincing. The accused merely denied committing the offences he was charged with. I find no basis on the accused assertion that he was framed up by PW2 who used to be his lover. Moreover, the evidence of DW2 and DW3 are also mere denials which does not contradict the prosecution's case. In the circumstances, I find that the defence as it stands does not challenge the prosecution's case which I find strong and credible."

32. The learned judge considered the *alibi* briefly as follows;

> " DW3 Kisamwa Katwa testified that he was with the Appellant on the material day up to 6.00pm. The offence herein is said to have taken place at about 6.00pm. DW3 did not know if the Appellant defiled the girl. The evidence of DW3 is therefore of no probative value."

33. An *alibi* goes to the identification of the appellant as the perpetrator of the offence, which is one of the elements for the offence with which the appellant was charged with. In the circumstances, we think, although the *alibi* was raised at the defence hearing stage, the prosecution should have made an effort to disprove it especially because the appellant made it on oath and it was supported by two witnesses. We agree with the sentiments of the High Court in *Argut Vs. Republic Of Kenya* (Criminal Appeal 205 of 2017) [2023] KEHC 2690 (KLR), that even where an *alibi* is supposedly raised late in the day, the prosecution has to take steps to dislodge it. The court expressed itself thus;

> 74. It is evident that the Appellant first raised his alibi defence during defence hearing. However, it is manifest that at no time did the Prosecution seek to avail itself of the benefits of Section 309 of the *Criminal Procedure Code*, which provides that:
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> > " 'If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.'
> >
> > [...]
>
> 76. Yes, there are authorities about the time an accused person can raise an alibi. However the letter of the law states that the moment an accused person raises an alibi the prosecution can seek an adjournment to go and bring evidence to challenge it. That is what the law says. My view is that it is upon the prosecution to take advantage of that provision of the law and seek to dislodge the alibi. Whether it is too late in the say (sic) can only emerge when the prosecution has sought to dislodge the alibi as provided for by the law. The law recognises that until an accused person is put to his defence he does not have to say anything about his case. So did the Appellant's alibi defence create doubt in the ppara 3. rosecution's case? I say so."

34. This Court was of a similar opinion in *Joseph Waiguru Wang'ombe Vs. Republic* [1980] eKLR, where it observed;

> " The defence of *alibi* was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in Court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible."

35. In *Erick Otieno Meda Vs. Republic* [2019] eKLR, the Court was of the considered view that where there is a reasonable possibility that the accused's alibi could be true, then he ought to be given a benefit of the doubt. The Court rendered itself thus;

> " There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt. In the case of *Kiarie -v- Republic* [1984] KLR, this Court stated:
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> > " 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 '"

36. We think the foregoing analysis casts doubt as to whether the appellant committed the offence he was charged with. We say so bearing in mind the not unfounded criticism by the appellant that the learned Judge failed to re-evaluate the evidence on record appropriately. The appellant argues that the learned Judge disregarded the evidence of the Investigating Officer to the effect that when the minor was first seen at Mutomo Mission Hospital, the doctor refused to fill the P3 form. Moreover, the learned Judge failed to acknowledge the testimony by the mother of the minor, PW2, in cross-examination to the extent that the doctor told her that the minor was in her menstruation cycle. While the trial court did not analyse the said grievances, the learned Judge identified them but did not make a determination on them. We are of the considered view that the fact that the minor was reported to be in her menses when she was first taken to hospital calls into question whether she was bleeding due to her menses or the incident of defilement, more so because the doctor who first examined her refused to fill the P3 form, a curiosity that remained unexplained. These doubts have surely to be resolved in favour of the appellant.

37. In conclusion, we find that the identification of the appellant as the perpetrator of the alleged offence was not proved beyond reasonable doubt and the conviction based on it is unsafe. Accordingly, we allow the appeal, quash the conviction, and set aside the life sentence meted upon the appellant. The appellant be and is hereby set forth at liberty unless otherwise lawfully held.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY, 2024.

P. O. KIAGE

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR