**Nyanjui v Republic (Criminal Appeal 96 of 2021)**
**[2023] KECA 1122 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1122 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CRIMINAL APPEAL 96 OF 2021**

**MSA MAKHANDIA, S OLE KANTAI & PM GACHOKA, JJA**

**SEPTEMBER 22, 2023**

**BETWEEN**

**TONY NJOGU NYANJUI ........................................................................ APPELLANT**

**AND**

**REPUBLIC ......................................................................................... RESPONDENT**

***(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Ngenye-Macharia, J.) dated 11th June, 2019 in HC. CR. A. No. 42 of 2016)***

**JUDGMENT**

1. The appellant, Tony Njogu Nyanjui, was charged before the Chief Magistrates Court at Kibera with the offence of defilement contrary to Section 8(1) as read with Section 8(1) (4) of the *Sexual Offences Act* it being alleged that on 3rd day of June, 2012 at the place named in the charge sheet he intentionally and unlawfully did an act by inserting a male genital organ (penis) into the genital organ of a female namely vagina of EW, aged 17 years, which caused penetration. He was charged in the alternative with the offence of indecent act with a child contrary to Section 11(1) of the said Act it being alleged that at the same place on the said day he intentionally touched the vagina of the said 17 year old girl with his penis. The prosecution called a total of 7 witnesses and the appellant was put on his defence where he gave sworn testimony and called his wife as a witness. The trial court found that the prosecution had proved its case to the required standard. He was convicted and sentenced to an imprisonment term of 14 years, 11 months and 9 days, the trial court deducting 21 days that the appellant had spent in custody. A first appeal to the High Court of Kenya at Nairobi was dismissed in a Judgment by Ngenye-Macharia, J (as she then was) delivered on June 11, 2019.

2. The appellant is before us in this second appeal. Our mandate in a second appeal is circumscribed by Section 361(1) (a) *Criminal Procedure Code* to consider only issues of law if we find that there are any

raised in the appeal. It was held by this Court on that mandate in the case of *Stephen M'Irungi & Another v Republic [1982 – 88] 1 KAR 360*:

> ' Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.'

3. A brief background will assist in determining whether there are issues of law in this appeal calling for our determination.

4. EW (PW1) testified that she was born on October 26, 1999 and was a pupil at a local school. The appellant taught her computer lessons at his home on Sundays. On 3rd June, 2012 she went to his home at 11 am and practiced typing on the keyboard. He instructed her to move to another room where there was a computer and he asked her to sit on him. She did so. According to her:

> ' ... He then pulled my skirt up. He removed my panty. He put an organ. I don't know if it was his organ or a toy organ ...'

She stated in cross-examination:

> ' ... When I went to KNH the doctor told my father that I had been raped. He never inserted his organ in me. I have never used vibration. The issue of rape arose with the doctor when they told my father. My father believed. For me I say no .'

And in re-examination:

> ' ... If he had opened his trouser I would have heard him open the zip. I didn't hear him open the zip ...'

5. The offence of defilement is committed when, under Section 2 of the *Sexual Offences Act* there is penetration which is:

> ' The partial or complete insertion of the genital organs of a person into the genital organs of another person.'

6. EW was clear in her evidence that the appellant had not inserted his penis into her vagina. According to her he could have used something else to touch or penetrate her vagina. The trial magistrate conjured many theories to come to the conclusion that the offence of defilement had been committed, a conclusion that was upheld by the first appellate court.

7. It is the duty of the prosecution to prove its case against an accused person beyond reasonable doubt and if there is a doubt it must be resolved in favour of the accused. This was the holding by the House of Lords in the leading Judgment in that area in the case of *Woolmington v Director of Public Prosecutions [1935] AC 462* where the Court held that the burden of proof in criminal cases is always on the prosecution to prove the defendant's guilt beyond a reasonable doubt. That position and the holding in Woolmington (supra) has been accepted and applied by our Courts for many years.

8. For instance, in the case of *Moses Nato Raphael v Republic [2015] eKLR* this Court referred to the speech by their Lordships in the said case and stated:

> ' The principle of law to the effect that the burden of proof in criminal matters lies with the prosecution is now old hat. There are of course, a few instances where the law provides for the converse, and shifts this duty to the accused, but that is not the case here. This principle is well captured in the time honored English case of Woolmington v DPP (1935) AC 462 where the Court stated:
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> '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 the qualification involving the defence of insanity and 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.'

9. Lord Denning in *Miller v Ministry of Pensions [1947] 2 All ER 372* stated of what amounts to reasonable doubt:

> ' 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 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 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.'

10. This Court in the case of *Simon Mwangi Wambui v Republic [2014] eKLR* stated the duty of the prosecution in criminal cases on burden of proof following Woolmington (supra):

> ' We agree with counsel for the appellant that it is the duty of the prosecution to prove the guilt of an accused person and that if at the end of the whole case there is reasonable doubt created by the evidence given by either the prosecution or the defence as to the guilt of the accused then the prosecution has not made out the case and the accused is entitled to an acquittal. That is the principle that emerges from the House of Lords decision in Woolmington v DPP [1935] All E R 1 to which we were referred.'

11. In the case before the trial court EW was categorical that the appellant had not penetrated her with his penis at all. If in those circumstances the appellant had used another item to touch or penetrate EW's vagina he would be liable for other offences under the Penal Code but it would not satisfy the definition of 'penetration' under the *Sexual Offences Act*. EW having testified that the appellant had not penetrated her either fully or partially with his penis it was wrong for the trial and the High Courts to find that the offence of defilement had been committed or proved. Had the High Court properly re-evaluated the evidence on first appeal, it would have reached a different conclusion and found that the offence had not been proved to the required standard. The conviction of the appellant for the offence of defilement was wrong. We accordingly allow the appeal, quash the conviction and set aside the imposed. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

**DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.**

**ASIKE-MAKHANDIA**

**...............**

**JUDGE OF APPEAL**

**S. ole KANTAI**

**...............**

**JUDGE OF APPEAL**

**M. GACHOKA**

**...............**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**