Kyalo v Republic (Criminal Appeal 14 of 2023)
[2024] KEHC 2180 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEHC 2180 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KWALE

CRIMINAL APPEAL 14 OF 2023

DKN MAGARE, J

FEBRUARY 22, 2024

FORMERLY MOMBASA HIGH COURT CIMIMAL APPEAL NO. E093 OF 2022

BETWEEN

PHILIP KYALO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appeal arises from the Judgement of the Trial Court, Hon. S.A Ogot, Seniro Resident Magistrate in Msambweni SRMCSO No. E041 of 2021 dated 2nd November 2022.
2. The Appellant was charged with the offence of defilement contrary to Section 8(1) (3) of the *Sexual Offences Act*. She was convicted on 22/11/22.
3. The statement of the offence was that on 12/4/2021 at around 2300 hours in Mivumoni location defiled JMM a child aged 12 years.
4. After trial, he was convicted on the offence The grounds of appeal are as doth:-
    i. That the learned trial magistrate erred in law and fact for not appreciating that the prosecution case was not proved beyond reasonable doubt.
    ii. That the learned trial magistrate erred in law and fact by failing to consider that the prosecution party failed to bring sufficient evidence within a reasonable time frame to prove their case beyond reasonable doubt.
    iii. That the learned trial magistrate erred in law and fact for not noticing that the medical evidence wasn't established to corroborate the complainant's evidence.

iv. That the learned trial magistrate erred in law and fact for not considering that crucial witness was not summoned in court.

v. That the learned trial magistrate erred in law and fact for dismissing my defense without any legal basis.

Evidence

5. During trial, the Complainant testified that the Accused is a son of the old man who gave the complainant a phone. The complainant was dragged to the Appellants house. He removed his clothes and defiled her. He finished at midnight when the complainant saw the brother she took off. The Appellant sneaked the complainant out 9/4/2021, it was a Friday. The father of BMW sated that the daughter left the house to urinate and never came back. He stated that he got a call at 11pm.

6. PW3 was the mother. She stated that the daughter sneaked out.

7. They called village elders and PW2. From the evidence it is like the daughter had sneaked out and did not want to be found. Her evidence is not credible. The evidence does not add up. PW4 was a brother. He stated that he arrived home at 10:00 pm and the complainant was missing. He stated that he decided to go to the house of the Appellant. He engaged in some kind of voyeurism. He said he saw the sister entering the house.

8. He stated that he told the father who also had to see what was happening.

9. The PC Martin Odera testified on how the investigations took place. Post Rape Care Report shows that the hymen was not intact but out genitalia were normal. There were no marks on the body. Though the P3 an PRC were filed, the investigations officer produced only a birth certificate dated 8/11/2019. There according to PW6 there was no physical injuries noted. The effect of the medical evidence was inconclusive.

10. The Accused gave evidence. He stated that the charges were false.

11. He stated that he was arrested on 28/8//2020 and he returned home. He lived with his mother. He did not return home till 23/12/2002. One person stole his phone.

12. They slipped the phone back on. He also went into a hearing for the other case. He was surprised to be charged. He stayed at Msambweni for 10 days. He was arrested at home.

13. He denied being Kukumba. He stated that his phone was stolen in December and did not have a phone on arrest. He stated he did not know Josephine Baran. He stated that Raphael stole the Appellant's phone. That was the first time he saw the and when he testified.

The Appellants' Submissions

14. Directions were given for parties to file submissions. I have not seen the submissions of the Appellant.

15. The Respondent filed submissions on 27th November 2023.

16. It was the Prosecution's case that the Trial Court correctly found the Appellant guilty and convicted him as charged.

17. The Respondent submitted that all the ingredients thus age, penetration and identity were proved beyond reasonable doubt. Reliance was placed on the case of *Anjoroni n& Others v Republic* (1980) KLR.

18. It was submitted that there was no minimum number of witnesses to be called. They relied on Section 143 of the *Evidence Act*.

19. The Respondent also cited *Ngugi v Republic* (2022) eKLR to canvass the point that there was not limited number of witnesses to be called in order to prove a fact.

20. I was urged to dismiss the Appeal.

Analysis

21. I have perused the record of proceedings and evidence in the Trial Court as well as the filed submissions. The issue is whether the Trial Court erred in convicting and sentencing the Appellant as he did.

22. 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 different.

23. In the case of *Mbogo and Another v Shah* [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

24. The Appellant was charged with defilement contrary to Section 8(1) & (3) of the *Sexual Offences Act* No. 3 of 2006.

25. At trial, I note that PW1, the minor testified that she knew the Appellant. She further testified that the she used to see the Appellant at the Mzee's house and had in fact seen him for years.

26. I also note that the Complainant's testimony that the Appellant kept calling her using the phone he had given her and she refused until the fateful day when she agreed and he pulled her to his home where he committed the act.

27. It was her case that the Appellant committed the unlawful act on her at 9:00 p.m but she could see him because the Appellant had a lit torch at the time of the act.

28. On cross examination, she testified that the Appellant forced her into his house.

29. PW2, the Complainant's father also testified that the Complainant was his last born. He produced the birth certificate. It was his case that they noticed that the Complainant was not in the house on the

fateful night and later realized that she was at the Appellant's house when their son followed and saw her inside the house.

30. That the Appellant's visited him twice in an attempt to resolve the dispute out of court.

31. PW3 was the Complainant's mother. She testified that the Complainant left for the Appellant at night without her knowledge.

32. It was her case on cross examination that she did nit know the Appellant prior to the offence.

33. PW4 testified that he was brother to the Complainant. That the Appellant used to follow up on the Complainant.

34. PW5 was the Investigating Officer. He testified that the results of the investigations pointed to the Appellant as offender and they arrested him.

35. PW 6 was the Medical Doctor. It was her case on cross examination that the hymen was not intact meaning she had sex.

36. Further, that she could not tell the frequency of sex.

37. The Appellant also testified. It was his case that Raphael stole his phone. That he was just framed in the charges of defilement as he never committed it.

38. On my reevaluation of the testimonies and evidence, Indeed, the evidence of PW4 corroborates the defence evidence. I was surprised that Raphael could know that the Appellant was giving potatoes to the complainant when he had not seen them at the river. It was clear from cross examination that both the complainant and PW4 were lying. It was unclear why the complainant could be given a phone by the Appellant's father. The Appellant raised the issue of his stolen phone earlier enough.

39. Therefore, it is my considered view that PW4 gave some cock and bull story. This court cannot be dubbed into believing such inconsistencies on the part of a witness. It is such conduct on the part of a witness that Odunga J (as he then was), alluded to in the case of *Kioko Peter v Kisakwa Ndolo Kingóku* [2019] eKLR while referring to the reasoning of Madan J, (as he then was) in the case of *N v N* [1991] KLR 685. The Learned Judge lamented as follows:

> Parties and Counsel ought to give the courts some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or no iota of truth. It is these kinds of allegations that Madan, J (as he then was) had in mind when in *N v N* [1991] KLR 685 when he expressed himself in the following terms:
>
> > "I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted."

40. In my view, the prosecution evidence was tenuous at best and the evidence was not credible. In the circumstances I set aside the conviction. There was no proof of the offence. The evidence is unsafe. Consequently, I set aside the conviction.

41. On sentence the court sentenced the Appellant 18 years and 6 months.

42. In any case the sentence should be proportional. The Court of Appeal in the case of *Thomas Mwambu Wenyi – vs- Republic* (2017) eKLR stated as follows: -

> "A sentence imposed on an accused person must be commensurate with the blame worthiness of the offender and hat the court should look at the facts and circumstances of the case in its entirety before settling for any given sentence".

43. Had the conviction been proved, 10 years could have been sufficient. The court did not take into consideration mitigation. It also ignored medical evidence. In the circumstances, I allow the Appeal, I set aside the conviction and sentence and order that he be released forthwith, unless otherwise lawfully held.

Determination

44. I make the following final Orders:

    i. The Appeal is allowed on both conviction and sentence.

    ii. The conviction and sentence are set aside.

    iii. The Accused person is set at liberty unless otherwise lawfully withheld.

DELIVERED, DATED AND SIGNED AT MOMBASA, VIRTUALLY ON THIS 22ND DAY OF FEBRUARY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Appellant present

Miss Nyawinda for the state

Court Assistant - Brian