Mwangi v Republic (Criminal Appeal E040 of 2023)
[2024] KEHC 2947 (KLR) (18 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2947 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E040 OF 2023

DKN MAGARE, J

MARCH 18, 2024

BETWEEN

ERICK KIRUNYU MWANGI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. The respondent filed submission on 13/3/2024 stating that the Appellant was charged with Sexual Assault contrary to Section 5 (1) (a) as read with Section 5 (1) (2) of the *Sexual Offences Act*, in that on 12/8/2020 at Mathira Sub East County Nyeri County, unlawfully and unintentionally used his finger to penetrate the anus of a minor MW a child of 5 years.

2. There was an alternative contrary to committing an incident act with a minor. The Appellant pleaded not guilty and was upon years sentence to 20 years in count 2.

3. The prosecution conceded that the court erred in convicting the Appellant but on the main count and on the alternative count. The Appellant concluded that he was charged with defilement later it was changed to sexual assault.

4. The prosecution countered that he was never charged with defilement. They stated that the first appellate court has a duty to re-evaluate evidence as set out in the case of *Okeno vs. Republic* [1972] EA 32 as follows:-

   > " 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 Vs. Republic* [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. Rulwala Vs. Republic* [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."

5. It was their case that three elements were proved that is: -

   i. unlawful Penetration,

   ii. of genital organs

   iii. With any part of the body or another.

6. They stated that the offense was proved from the evidence of PW1 PW2 PW3 and it was the prosecution case that the act was perpetrated by the Appellant. It is their case that the sentence was lawful.

7. They stated that Section 11(1) provides for a sentence not less than 20 years. Therefore 2 years. They stated that the alternative that was to one concurrent reliance was placed on the case of *Patrick Gitonga -vs- Republic* (2020) eKLR where the High Court, Justice (Rtd) HPG Waweru stated as doth: -

   > " 2. The conviction and sentence for the alternative charge are patently illegal and must be set aside. Once a court has convicted on the main count, it cannot also convict on the alternative charge! It is alternative to the main count! That conviction and sentence on the alternative count are hereby set aside for illegality."

8. It was their case that the main count was proved and there should never been a conviction on the alternative count.

9. The Appellant also filed what he called supplementary submissions. He relied on the case of *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* (Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC 2 (KLR) (14 December 2017) (Judgment). These submissions are for another time, another place another offence. I shall not address the same.

10. The Appellant filed submissions guided by Article 50 (2) a of the *constitution*. The court relied on the case of *David Njuguna Wairimu -vs- Republic* (2010) eKLR on the duty of the Appellate court.

11. The Appellant stated that he is a young man and was framed. The medical evidence did not show the offence. The evidence was conflicting. He relied on *Kibangeny Arap Korir v Republic*, [1959] EA 92; the Court of Appeal for Eastern Africa while dealing with a determination of the issue, held that tender years means a child under the age of 14 years.

12. He stated that exhibits indicated normal and there were no injuries. He was surprised that the degree of injury was indicated as harm in the P3.

13. The Appellant testified and gave sworn evidence. He was not cross examined. He made various allegations but none were reported. It is real a sad state of affairs since without testing evidence on cross examination it remains unchallenged.

14. The court found that the evidence of the victim is not contradicted, not contributed and or fabricated as submitted by the accused person.

15. This is the kind of finding that shows bias by the court. The duty of the court is to analyze evidence. In paragraph 16, the court came to a conclusion that the defence was an afterthought. On what evidence the court reached that conclusion, no one will ever know.

16. The court also found that in default there is no need of corroboration. I am perturbed by the reasoning of the court. In the fact of the provisions of Section 124 of the *Evidence Act*, the court set down the minor victim. Section 124 provides as follows: -

> " 124. Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of the alleged 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 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."

17. Therefore, corroboration is necessary unless the court, is satisfied for reasons recorded in writing that the minor is telling the truth. Unfortunately, the the court proceeded as if it was submitting for the prosecution.

18. This therefore leave the court with herculean task of analyzing the evidence without the benefit of hearing the witnesses and the benefit of the impressionably the trial court on witnesses. This also robs the minor of protection under section 124 of the *Evidence Act*.

19. This is the second matter, I am handling from the same Magistrate, where she skipped several procedural safeguards and as a result, gave higher pedestal to the Appellant. The duty of the court was not to deconstruct the defence case but to analyze prosecution evidence in the face of the Defence case. It was the duty of the court to find whether the prosecution had proved the offence.

20. Sadly, in her rant the court failed to make a specific finding on the offence on count one. The only issue the court found was that the Appellant was properly identified and that eyewitnesses proved that he inserted the finger in the anus of the victim.

21. She also found that the minor was touched from behind and that the Appellant inserted his finger in the vagina. To be fair to the prosecution there was no mention of a vagina in the entire testimony. There was no charge for the insertion of the finger in the vagina.

Analysis

22. The minor indicated that in the PRC the Appellant tried to force himself on him but she reported. This was thus an element of attempted defilement for which he was not charged. The complainant indicate the Appellant inserted his finger in the anus. In this case, there was no medical evidence to support the charge of sexual assault.

23. The P3 showed every aspect being normal. The nature complained was indecent assault. The doctor strangely sated the degree of injury was harm. It is this kind of testimony that erodes the credibility of a professional. Expert witnesses are just like other witnesses. The court has to analyses the same with other evidence and comes to a conclusion on the evidence.

24. In the case of [*David Musyimi Ndetei t/a Oasis Mineral Water Company & another v Safepak Ltd*] [2005] eKLR, the court of Appeal stated as doth regarding treatment of expert evidence: -

> What is the probative value of the evidence of Dr. Gachanja as far as the matter before the superior court and this Court is concerned? This Court in [*Pravin Singh Dhalay v. Republic*] Nairobi Criminal Appeal No. 10 of 1997 (unreported) stated:
>
> > "It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of [*Elizabeth Kamene Ndolo v George Matata Ndolo*], Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts: -
> >
> > > "The Evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:
> > >
> > > - "Because this is the evidence of an expert, I believe it."......."
> > >
> > > That, we think, is the proper direction which a court dealing with the opinion of an expert or experts must give itself and the assessors when it is necessary to direct the assessors on such evidence. Of course, where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a court is satisfied on good and cogent grounds(s) that the opinion though it be that of an expert, is not soundly based, then a court is not only entitled but would be under a duty, to reject it"

25. In *Shah and Another vs. Shah and Others* [2003] 1 EA 290 wherein Ombija, J. expressed himself on this issue, inter alia, as follows:

> " One of the special circumstances when witnesses may be called to give evidence of opinion is where the situation involves evidence of expert witness and this is an exception to the general rule that oral evidence must be direct...The expert opinion is however limited to foreign law science or art; including all subjects on which a course of study or experience is necessary to the formation of an opinion and handwriting is one such field...However as a rule of practice, a witness should always be qualified in court before giving his evidence and this is done by asking questions to determine and failure to properly qualify an expert may result in exclusion of his testimony...The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so...If there is a conflict of expert opinion, with experts appearing for both parties, resolution of conflicting evidence or the acceptance of the evidence of one expert in

preference to the opinion of the other, is the responsibility of the court...Properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach its own opinion."

26. In the circumstances, I find that medical evidence was not useful in establishing the offenses charged. It does not mean, however, that the court cannot convict in the absence of such medical evidence. Absent of harm does not, ipso facto mean that the offence was not committed. The case therefore turns entirely on the evidence of the witnesses.

27. The court had already driven the case out of the proviso to section 124 by not finding whether for reasons recorded in writing the minor was telling the truth. It follows that her evidence which had to be corroborated is some material particulars. The minor was unable to testify on the first day. She was able to testify giving unsworn evidence because she could not comprehend the solemnity of oath.

28. The Witness PW3 lied about whether they were smoking or not. He stated that they were lighting fire to cook. PW2 stated that the victim's trouser was loosened. The victim the trousers had been removed. The contradiction relates to what happened. It could be true that different people can perceive something differently or it never happened.

29. This should be contradicted by the unchallenged evidence of the Appellant. I do not understand why the prosecution could not test the Appellant's evidence. Without cross-examination, it is not possible to challenge the Defence evidence.

30. The Appellant stated that he knows he had not inserted his finger on the anus. I am also disturbed by the last part of the evidence by the Appellant. It is record in third person voice, while the testimony was on first person.

31. The Appellant set up an alibi that he was working at Crispy Hotel. The alibi needed to be counter checked. The duty of proof the falsity of an alibi is on the prosecution. The court failed to address the aspect of the alibi. The court concentrated on lack of contradictions. The court is supposed to see wither the offence was proved.

32. In the case of *J M v Republic* [2015] eKLR, Justtice Edward M. Muriithi, stated as doth: -

> " [13] It is cardinal principle that in offering an alibi, an accused does not thereby assume a duty to prove the alibi. See Karanja v. R. 1983) KLR 501. The duty to prove the falsity of the defence and the guilt of the accused and therefore to discharge the alibi remains with the Prosecution. As held in *Kiarie v. R*. (1984) KLR 739, 740:
>
> > "An alibi raise 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 is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable."
>
> (14) However, where the defence of alibi is offered through unsworn statements of the accused the same cannot be taken as raising a reasonable doubt because as held by the Court of Appeal in *May v. R.*, (1981) KLR 129, -
>
> > "An unsworn statement is not, strictly speaking, evidence and the rules of evidence cannot be applied to an unsworn statement. It has no probative value, but it should be considered in relation to the

whole of the evidence. Its potential value is persuasive rather than evidential. For it to have value, it must be supported by the evidence recorded in the case.”

33. The duty to prove the falsity of an alibi lies with the state. In the case of *Republic v Julius M’mario Marungu* [2018] eKLR, Justice RPV Wendoh stated as doth:

> “ The burden always remains on the prosecution to prove its case against the accused beyond reasonable doubt. In the case of *Karanja v Republic* (1983) KLR 501 the court held that the burden of proving the falsity, if at all, of an accused’s defence of alibi lies with the prosecution. The court also held that the court may, in testing the defence of alibi, weigh it against all the evidence adduced to see if the accused’s guilt is established beyond all reasonable doubt and that if an alibi is raised late in the defence, the court should take into account the fact that the alibi defence was put forward at a late stage of the case that it cannot be tested by those responsible for investigation and prevent the suggestion that it is an afterthought.

34. Further, in *Kiarie v Republic* (1984) KLR the Court of Appeal said:

> “ An alibi raises a specific defence and an accused person who puts forward an alibi in answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable..”

35. In the case of *Isaiah Sawala Alias Shady v Republic* [2021] eKLR, *Isaiah Sawala Alias Shady v Republic* [2021] eKLR, Justice H A Omondi as then he was stated as doth: -

> The appellant raised an alibi defence, and the position i the burden of proof once an alibi defence is raised, the burden of proving to the contrary lies with the prosecution and cited extensively from past decisions such as. The Court of Appeal in *Victor Mwendwa Mulinge vs. Republic* [2014] eKLR:
>
> > “It is trite law that the burden of proving falsity, if at all, of an accused’s defence of alibi lies on the prosecution.”
>
> This was also stated in “...in *Ssentale vs. Uganda* [1968] EA 365, 368 [Sir Udo Udoma CJ] ...said that a prisoner who puts forwards an alibi as an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout on the prosecution. We agree, we have ourselves said so on more than one occasion...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.”

36. Without displacing the alibi, I am inclined to find that the prosecution case remained unproved. Consequently, the conviction is unsafe and I proceed to have the same set aside.

37. Before I depart, I wish to point out that courts must maintain sufficient neutrality even in the face of charges That may disgust. The court had a solemn duty to find whether a sexual assault occurred, that is penetration of the victim’s anus by the Appellant's finger.

38. In a blind rage, the court found that there was indeed penetration in the vagina. They were wholly outside the evidence by all parties. The court also disregarded the connection that where the main charge has been proved, then the alternative count cannot be convicted upon.

39. On sentence, the court, unless it finds aggregating circumstances, should not unduly depart from the sentence provided. In this case, sexual assault, provided a minimum sentence of 10 years. There was no evidence of injury or any aggregating circumstances, the Appellant was a first offender.

40. According to the record the Appellant was aged 21 years at the time of conviction. He stated that he has joined fellowship and has been in custody since March. The court justified being in custody for absconding. He then went ahead to sentence him on behalf of other young men who are praying on innocent girls to the extent that parents cannot go on their normal duties since they are worried of their children.

41. This was fettering discretion. The court was not sentencing the Appellant but young men who are praying on girls. It could be useful if the Magistrates handling these matters are provided with wellness packages and counseling. The case clearly overwhelmed the court and as a result she meted out a harsh sentence outside the guidelines.

42. A sentence of 5 years could have sufficed in count one, given that there were no aggravating circumstances. The sentence of 20 years was harsh and is set aside. However, having found that thee alibi and defence were not displaced, it is not the sentence and conviction cannot stand. In the circumstances, I set aside the sentence and conviction and set the Appellant free. I find that both counts were unproved.

43. The court should be served with this judgment.

Order

44. The upshot of the foregoing is that I make the following orders: -

    a. The alibi and defence were not displaced.

    b. The Appeal is allowed. I set aside the conviction and sentence, and in lieu thereof substitute with an order dismissing both counts and the Appellant shall therefore be set free, unless otherwise lawfully held.

    c. The judgment be served upon the Honourable V S Kosget, SRM

DELIVERED, DATED AND SIGNED AT MOMBASA, VIRTUALLY ON THIS 18TH DAY OF MARCH, 2024.

KIZITO MAGARE

JUDGE

Judgment delivered through Microsoft Teams Online Platform.

In the presence of: -

Appellant present

Mr Mwakio for the state

Court Assistant – Milicent/Kimoine