Dzombo v Republic (Criminal Appeal 7 of 2023)
[2024] KEHC 16939 (KLR) (15 March 2024) (Judgment)

Neutral citation: [2024] KEHC 16939 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KWALE

CRIMINAL APPEAL 7 OF 2023

F WANGARI, J

MARCH 15, 2024

BETWEEN

RAJAB CHONDO DZOMBO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal arises from the Judgement of the Trial Court, Hon. S. Ogot Principal Magistrate in Msambweni PMCSO No. E018 of 2021 dated 12th May 2023.)

JUDGMENT

1. This Appeal arises from the Judgement of the Trial Court, Hon. S. Ogot Principal Magistrate in Msambweni PMCSO No. E018 of 2021 dated 12th May 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 27th February 2021 at [Particulars withheld] Village in Mwereni Location of Kwale County intentionally he unlawfully used his fingers to penetrate the vagina of JN, a girl aged 9 years.
4. On the alternative charge, the particulars were that on 27th February 2021 at [Particulars withheld] Village in Mwereni Location of Kwale County intentionally he unlawfully touched the vagina of JN, a girl aged 9 years.
5. The Accused person was arraigned and he denied the charges. A plea of not guilty was consequently recorded.

6. The Trial Court considered the case and rendered the Judgement on 12th May 2023. The Court found the Appellant guilty on the main charge and convicted him of the offence. The Appellant was also sentenced to 10 years imprisonment.

7. The Appellant, aggrieved, lodged this Appeal. The Appeal is substantially 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

8. At trial, PW1, the complainant's mother testified that she had come from a two- day journey and when she arrived home, the complaint was running away from her.

9. It was her case that the complainant was 9 years old. That she told her that while she was away, the day before, the Appellant called the complainant allegedly to see a big snake. That when the complainant went, the Appellant instead commanded the complainant to remove her clothes but she refused and he grabbed her and inserted his fingers into her private part.

10. It was her case that the complainant informed them that the medical report confirmed this fact.

11. PW2 was the minor. It was her case that she was in class two. That the Appellant called her to go and see a snake on 27th February 2021 around 1.00 p.m and when she went there was no snake and instead he pulled her, removed her clothes and inserted his fingers into her vagina and ran away.

12. On cross examination, it was her case that the act was done in the bush in the presence of no one. That she was with her siblings, M and G when the Appellant called her to go and see a snake.

13. PW3 was the Medical Officer. He confirmed that there was a discharge from the vagina and the hymen was absent.

14. PW4 and PW5 were the arresting officer and Investigating Officer respectively. It was their common case that the results of the investigations pointed to the Appellant as offender and they arrested him.

15. The Appellant also testified. He raised a general defence of alibi. That he was away in school at the alleged time of the offence. DW2, the Appellant's father also testified exemplifying the Defence of alibi in advancement of the Appellant's case.

16. Directions were given for filing submissions but I have not seen any filed submissions on the file. Notwithstanding, I will proceed to determine the appeal.

Analysis

17. I have perused the record of proceedings and evidence in the Trial Court. The issue is whether the Trial Court erred in convicting and sentencing the Appellant as she did.

18. 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."

19. In the case of Mbogo and Another vs. 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."

20. I note that the complainant testified that she was a minor aged 9 at the time of the alleged defilement. The Complainant identified the Appellant by recognition.

21. The minor testified that the Appellant called her to see a snake and when she arrived there was no snake. Instead, he asked her to remove her clothes and when she refused and started heading back home, he grabbed her, removed her clothes and inserted his fingers in her genitalia and then ran away. That he also warned her that he would cut her head if she said.

22. Looking at the circumstances surrounding this case, and in the context of criminal law, the criminal intent or mind is crucial to establish before meting out a conviction that is safe.

23. I also note that the evidence of the medical doctor was not consistent with the facts of this case. It was his case that there were no physical injuries on examination and that there was no hymen but there was an old scar. On cross examination, that the hymen was lost a long time ago.

24. The medical examination was done 3 days after the alleged offence. It was crucial to describe the circumstances surrounding the absent hymen and the possible age of the scar and loss of hymen than bluntly using the phrase a long time ago. Suggesting that there was an old scar in my view was not consistent with a 3-day old injury. A conviction has the effect of lawfully denying the accused person's liberty which is a fundamental right and the court must be certain that a case is proved beyond reasonable doubt before arriving at such a verdict as to convict.

25. Section 5(1)(a) (1) and (2) of the *Sexual Offences Act* under which the appellant was convicted provides 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.

26. In the case of John Irungu vs 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."

27. 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 –vs- 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."

28. In my mind, upon scrutiny of the evidence and testimonies in the Trial Court, I am left with a reasonable doubt how the Appellant called the Complainant from her two other siblings to go and see a snake, removed the clothes of the complainant instead, inserted his fingers into her private part and run away after or while warning that he would cut her head should she report.

29. This account suggests events that must have occurred hurriedly within a short span of time. What is the criminal motivation? I think the Prosecution ought to have done more to prove sexual assault on the 9-year-old. Coupled with the uncertainties in the medical evidence, I do not think the prosecution proved its case to the required standard and to warrant the conviction.

30. It was held by the Court of Appeal in Moses Nato Raphael vs. Republic [2015] eKLR as follows:

> " 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:-
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> > '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."

31. Similarly, it was the prosecution's case that the hymen was broken a long time ago. The scars were also old. 3-day scar as in this case cannot be said to be old. In fact, it was barely 2 days and not 3 days stated in medical evidence because the incident allegedly occurred on 27th February 2021 and the complainant was taken to the medical facility and examination done on 1st March 2021.

32. Even if so said, an estimate of recency is crucial to dispel doubt. In any event, the mere fact that the hymen is broken does not conclusively prove penetration unless there is evidence that the breaking of the hymen was caused by the act of the accused person. As appreciated by the Court of Appeal in P.K.W v Republic [2012] eKLR:

> " 15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified" Is hymen only ruptured by sexual intercourse"
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> 16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that the absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury, and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be natural tearing of the hymen. See the Canadian case of The Queen Vs Manual Vincent Quintanilla, 1999 ABQB 769.
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> 17. In this case the doctor who examined the complainant child was not asked whether or not the rupture of her hymen was as a result of sexual intercourse or any other factor. As we have pointed out the complainant child aged only six behaved normally after the alleged defilement. That together with her mother's behavior, issues that the two lower courts do not seem to have addressed their minds to, has raised doubt in our minds as to the guilt of the appellant. In other words, the concurrent findings of the two lower courts are not fully supported by the evidence on record. Consequently, we have no option but to give the appellant the benefit of doubt.
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> 18. Taking all these factors into account, especially the fact that the Appellant had a sour relationship with the child's mother, we believe the evidence of DW2 that the child confessed she was cajoled by her mother to lie against the Appellant. We therefore allow this appeal, quash the conviction and set aside the sentence of life imprisonment. We direct that the Appellant be set free forthwith, unless otherwise lawfully held."

33. I also note the testimony of PW1 that the complainant informed her that the Appellant called the complainant near the cemetery which was at the complainant's home to see a big snake only to remove her clothes and insert his fingers to her private parts.

34. On the part of the complainant, she testified on cross examination that the Appellant did the unlawful act in the bushes (vichaka). I therefore take particularity in the inconsistencies in the medical evidence and the actual place where the alleged criminal activity took place as fundamental to establishing the root of guilty or innocence of the Appellant.

35. In Philip Nzaka Watu vs. Republic [2016] eKLR, the Court of Appeal held that:

> "The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

36. In Dickson Elia Nsamba Shapwata & Another vs. The Republic, Cr. App. No. 92 of 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows:

> "In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

37. In Erick Onyango Ondeng' vs. Republic [2014] eKLR, the Court of Appeal held that:

> "The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The priM duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (See OKENO VS REPUBLIC (1972) EA 32). It is in the above context that this Court has said time and again that it will defer to and respect findings of fact by the trial court as affirmed by the first appellate court after due re-evaluation and analysis, because the second appellate court operates from the distinct advantage of not having seen or heard the witnesses. This Court will therefore not interfere with findings of fact by the two courts below unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, the courts below were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

38. As was noted in Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

39. In Joseph Maina Mwangi vs. Republic *CA No. 73 of 1992* (Nairobi) Tunoi, Lakha & Bosire JJA held: -

> "In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the *Criminal Procedure Code*, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

40. Therefore, in my overall re-evaluation of the evidence, I am unable to agree with the Trial Court that that prosecution proved penetration of the minor beyond reasonable doubt.

41. Having found that the conviction was not proper, I do not think it will serve any purpose to delve into the issues on sentence. I set the conviction and sentence aside.

42. In the circumstances, the Appeal is allowed and the conviction and sentence set aside. The Appellant is set free unless otherwise lawfully withheld.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 15TH DAY OF MARCH, 2024.

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F. WANGARI

JUDGE

In the presence of: -

M/S Mwaura S.C for the State

Appellant P.I.P

Barile, Court Assistant