Njoroge v Republic (Criminal Appeal E022 of 2022)
[2024] KEHC 8615 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8615 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E022 OF 2022

DKN MAGARE, J

JUNE 27, 2024

BETWEEN

PETER MUNGAI NJOROGE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the Lower Court in Mukurweini Criminal Case No. 11 of 2020 delivered on 28th April, 2022 by Hon. D. K. Matutu - PM)

JUDGMENT

1. This is an appeal from the decision of D.K. Matutu from Mukurwe-ini SO No. E011 of 2020 delivered on 28/4/2022. The appellant was tried and convicted to life imprisonment with a right of appeal being given.

2. The appellant was charged with defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars were that on 3/12/2020 at Mukurwe-ini Sub-County within Nyeri County the appellant caused his penis to penetrate the vagina of A.N.G. a child aged 3 years. The charge was filed on 17/12/2020.

3. The appellant was arraigned in court on 17/12/2020. He pleaded not guilty and was released on bond but he remained in custody and quarantine. This took a lot of time until 22/4/2021 when PW1 testified. She stated that she employed the appellant as a watchman for the macadamia at home.

4. She had known him for 2 or 3 years. She was at home but she left the minor with the appellant and one Boke. The minor was her grandchild. The girl had sent for potato chips but did not eat. That evening when she put on pampers the minor stated that she was having pain on the vagina. On inspection she found a wound on the vagina area. She thought that it was due to diapers.

5. They waited for the appellant to come to work on Monday. He came and she gave him work to do and took the minor to the doctor who referred them to the police at Karaba Police Station. The appellant was arrested.

6. She testified that the minor was born on 6/3/2017. She stated that she bathed the child everyday. Initially she thought it was the diapers but when she examined the child she found the minor had been defiled.

7. On cross examination she stated that she did not see blood immediately. She stated that she did not owe the witness 15,000/=. It was her case that she had paid all her dues.

8. She stated that the girl has the wound to date (22/4/2021). This was from the date of the alleged incident on 3/12/2020 – this is 140 days later. She stated that she has no grudge against the appellant but the witness was bitter with the child's parents. She stated that she did not notice early.

9. PW2 PC. July Kafura of Karaba Police Station was the investigating officer. The girl could not remember much of what happened since she could not reportedly express herself. The incident reportedly took place in a room given by the grandmother to the appellant. They stated that it was not unusual for an offence to be committed on 3rd to be discovered on 12th. The witness stated that she was never told about money owed by the grandmother.

10. PW3 gave evidence. She however, maintained that the offence took place on 3/12/2020 when the minor was left with the Appellant. She did not disclose the source of her evidence. Her evidence was hearsay and of no value whatsoever.

11. The minor gave evidence that the appellant put a finger in her 'tanye' in the grandmother's house. On cross examination the minor stated that the father told her that they were to buy her a balloon if she testified.

12. Indeed, the minor had even forgotten what was her evidence. It is crucial that her evidence related to a finger and not any genital organs. Her evidence was also induced with a promise for a balloon as the Appellant had done bad things to her.

13. PW5 – Martha Wanjiku Mugoya was a Clinical Officer. She produced P3 for the minor. On examination, her hymen was broken, no discharge, and she had pus cells. PRC was filled on 14/12/2020. On cross examination she stated the minor was in pain. The minor had an infection.

14. The PRC, indicated wrongly that the girl reported defilement on 3/12/2020. She stated that the assailant had told the victim to remain silent. This did not come out of any witness. Further, the grandmother could not know early. She stated that they found a whitish discharge. This was contrary to earlier evidence that there was no discharge.

15. On being put on the defence the appellant stated that he did not defile the girl. He was arrested for reasons he did not know. He accused the grandmother for framing him when demanding pay for a sum of Kshs. 15,000/=. He stated that the girl was coached. The last part is indeed true as the child admitted that the father told her that the Appellant had done bad things to her.

16. The appellant who is aged and diabetic was then sentenced to life imprisonment, necessitating this appeal. The appellant Set forth the following grounds of Appeal:-

    a. I pleaded not guilty and still stand firm. The lower court magistrate erred in law and facts when sentencing me to Life without bearing in mind that a minor of three years old cannot be said that was defiled and took all that period before being noticed. May this court consider.

b. The trial court erred in law and facts when convicting and rejected my alibi Defence without giving proper reasons of rejection- hence seeking this court's intervention.

c. The trial magistrate erred in law and facts by appreciating the medical reports without putting into account that a minor girl of such an age cannot be said that was, or is defiled by penetration has been noticed, the hymen also is said that got broken and there is no day the alleged victim is seen admitted in any of our health facilities (sic). May the law prevail.

Analysis

17. The duty of the first Appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya - v- 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 differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

18. In the case of *Okeno v Republic* [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

> "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 v. R.*, [1957] E. A. 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. Ruwala v. R.*, [1957] E.A. 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, see *Peters v. Sunday Post*, [1958] E. A. 424."

19. The issue in this case is whether the prosecution proved its case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) *Woolmington v. DPP* [1935] A.C 462 pp 481 , comes in handy in describing the legal burden of proof in criminal matters, that;

> "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 what I have already said as to the defence of insanity and subject also 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."

20. In the case of *R v. Lifchus* {1997}3 SCR 320 the Supreme court of Canada explained the standard of proof as doth:-

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

21. According to *Halsbury's Laws of England*, 4th Edition, Volume 17, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

22. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in *Re Winship* 397 US 358 {1970}, at pages 361-64 stated that:-

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

23. The court has a wide discretion when the child's evidence was believable. Otherwise the evidence needed to be corroborated and it was not. Section 124 of the *Evidence Act* provides as follows: -

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is 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."

24. There was no evidence of penile penetration. Even the child talked about finger penetration, which is a difference offence. The story by PW1 was not adding up. It is not possible to wait until Monday, assign a perpetrator work and then go to hospital, 9 days later. The appellant continued working for 9 days without being suspected. When it was nearing payday for previous months' wages, he became a defiler.

25. I saw the Appellant in court. It is doubtful that he could erect. It is however, not a decisive factor in this matter. He has had diabetes for long as per his indication in court. In any case, no witness placed him on the locus in in quo. His defence that he had not been paid 15,000/- being several months' pay, is more plausible. Why on earth will a father promise a child a balloon if he implicates the Appellant?

26. There are three ingredients for defilement:

    a. Age.

    b. Penile Penetration of the vagina of the complainant.

    c. The perpetrator.

    d. Section 2 of the *Sexual Offence Act*, defines penetration to mean:

        "the partial or complete insertion of the genital organs of a person into the genital organ of another person."

27. The minor indicated that it is a finger that was inserted. The finger could not have caused the infection. There was no evidence linking penile penetration to the minor. Finger penetration deals with a different offence.

28. Even the alternative count relates to use of the penis to penetrate. This was not proved. Once a finger was pointed out there needed to be a remedy. However, in any case, even finger penetration was not proved. The child did not know what happened except what the father told her with a promise of a balloon.

29. What triggered PW1 to change her mind that this was not a diaper rash but a defilement? The prosecution case had gaping holes. The age of the minor is not in dispute the only issue is whether the minor was penetrated and by a penis belonging to the Appellant. In this case, I find that there was no evidence of penetration and in particular by the Appellant. The Appellant was fixed over a wage of Kshs. 15,000/=. They did not even wait for the same to be 30 pieces of silver.

30. In *Boaz Nyanoti Samwel v Republic* [2022] eKLR, Justice Njagi stated as follows:

    "The way to treat contradictions in a case was stated by the Court of Appeal in *Jackson Mwanzia Musembi v Republic* (2017) eKLR where the court cited with approval the

Ugandan case of *Twahangane Alfred – v- Uganda* CR. Appeal No. 139 of 2002 (2003) UGCA,6 where it was held that:

> "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".

31. Where, as in this case the contradictions are not explained, then must be resolved in favour of the Appellant as the Appellant is entitled to the benefit of doubt. The benefit of doubt is so sacrosanct that it is irrelevant on how the court could be viewing the case. Having gut feelings is not plausible or necessary. The court breached the rules regarding presumption of innocence. The Appellant was under no duty to say anything about an offence he knew nothing about. The Appellant stated clearly and succinctly that these were trumped up charges. That was his defence. He stated he was working throughout. PW1 corroborated this. She assigned him work and went to report, to the police station. This must have been a false report. The contradiction in evidence was thus fatal. In *AHM v Republic* Criminal Appeal E043 of 2021) [2022] KEHC 12773 (KLR) (31 August 2022) (Judgment), Justice Mativo stated as follows: -

> " Granted, inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected. The question to be addressed is whether the contradictions mentioned are grave and point to deliberate untruthfulness or whether they affect the substance of the charge. Defining contradictions, the Court of Appeal of Nigeria in David Ojeabuo v Federal Republic of Nigeria stated:-"Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains.

32. In the case of *JMN v Republic* (Criminal Appeal E017 of 2021) [2022] KEHC 279 (KLR) (7 April 2022) (Judgment), the same court posited as hereunder regarding benefit of doubt.

> " 20. To me, the defence raised by the appellant and the complainant's attempt to dissociate herself from the charges, raises reasonable doubts on the prosecution case. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge. This is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right.

21. Ifind that there were reasonable grounds for creating reasonable doubts as to the guilty of the accused. The conviction was supported by very weak evidence and/or it went against the weight of the evidence. Our system of justice is deeply concerned that no person who is innocent of a crime ought to be convicted of it. In order to avoid that, a court must consider all the evidence with great care, especially when it is the only evidence because the law is not so much concerned with the number of witnesses called as with the quality of the testimony given. A guilty verdict is permitted, however, only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the charged crime have been proven and that the evidence irresistibly points to the accused and that the evidence is both truthful and accurate."

33. This case has some considerable difficulties. The minor does not know the date of defilement. How come 3/12/2020 came up? The only evidence related to the defilement was by PW1. She admitted to be bitter with the child's parents not the appellant.

34. For circumstantial evidence to work, it must be inconsistent with the accused's innocence. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, Court had this to say on circumstantial evidence:

> " However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

35. The minor was with Boke and the appellant. Boke saw what happened. The circumstances leading to the occurrence of the alleged offence are still hazy. He/she was not called. The minor maintained it is a finger that was used. This was after the minor was promised balloons. These were two versions of this case. Both are possible but the Appellant's version is more plausible.

36. The court was under duty to consider whether the defence was plausible. It was equally under duty to resolve the contradiction related to the finger and penis. In *Republic v Njoroge & 2 others* (Criminal Case 13 of 2018) [2024] KEHC 3710 (KLR) (5 April 2024) (Judgment) Ngugi, J, as then he was, stated as follows: -

> " Tenth, given the state of Prosecution case as demonstrated above, the bald denials by the 2nd and 3rd Accused Persons in their unsworn statements do not to raise reasonable doubt as defined above. While the Accused Persons are not required to demonstrate that their versions of events are probable; only that their versions of events are reasonably possibly true, when their statements are viewed against the evidence marshalled by the Prosecution, their defences do not meet the test whether there is any reasonable possibility that their versions may be true. See, for example, S v Phallo and Others 1999(2) SACR 558 (SCA). After due and conscientious assessment of the totality of evidence presented in the trial, I have come

> to the ultimate conclusion that the versions of defence presented by the Accused Persons are so improbable that they cannot reasonably possibly be true. (See S v Shackell (4) SA 1 (SCA)). In my view, it is not possible to say that the Accused Persons' versions of events have any reasonable inherent probability that they are true."

37. This cannot be said of the court herein. I find the discrepancies and contradiction so huge that the Appellant had to be given a benefit of doubt. How did the finger, which amounts to sexual assault turn to be a penis.

38. The court treated medical evidence was conclusive, which is not true. If the court believed the minor, then he should have acquitted the Appellant as the minor talked of a finger.

39. Further, medical evidence was useless in the circumstances. It did not accord with even the witnesses' stories. The hymen was freshly broken 11 days later? The P3 noted no discharge but the hymen was freshly broken. We are not given the length of time or even the cause of the injury. The story given to the person filling the P3 is different from the one in which witnesses tendered. The general history is different from the evidence of both the minor and PW1.

40. PW3 repeated the same evidence when filling the PRC. In her testimony she stated she saw no blood. The hymen was freshly broken. She stated that the minor had been left with a Shamba boy. In evidence it was a watchman. They could be same people but there needed to be clarity, in view of presence of another person.

41. However, there was a witness who was in the locus in quo who was not called. Boke, who was not called and no explanation was given for his absence. Section 143 of the *Evidence Act* provides as doth:

> No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

42. However, in cases which are borderline like this one, where Boke can be a suspect, it must be inferred that had he been called his evidence could have been adverse. Failure to call this witness means that a negative reference should be made. The principles to consider in determining the issue of crucial witnesses was dealt with in the leading case of *Bukenya and Others v. Uganda* 1972 EA 549, Lutta Ag. Vice President held:

> 'The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution...
>
> The prosecution's burden in regard to witnesses is to call witnesses who are sufficient to establish a fact. However it is not necessary to call all the people who know something about the case. The issue is whether those called are sufficient to aid the court establish the truth, whether the evidence is favourable to the prosecution or not."

43. In this case a very critical witness was not called. Both the defence evidence and the prosecution are compelling. The evidence of the minor is not believable in view of the promise she was given. This means Section 124 of the *Evidence Act* comes into pay.

44. There was no evidence to corroborate the minor's evidence. The court could not have reasons to believe or disbelieve her. When evidence is neither reliable nor not believable the benefit of doubt goes to the appellant. The nature of the harm done to the minor did not reflect adult penetration. There was no evidence that the appellant had a micro-mini penis to explain the change from a penis to finger.

45. Lastly, the appellant set out an alibi. It was not displaced. The Appellant bore no duty to prove the same. He stated that he was at work all the time. There needed to be evidence that he left his work placed to the house. Definitely Boke could have known that but he was conveniently left out. The Court of Appeal in *Victor Mwendwa Mulinge v. 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 v. 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."

46. I therefore find that the conviction is unsafe. Consequently, I set aside the conviction as the evidence was not corroborated. The sentence was tied to the conviction. It is accordingly set aside.

Order

47. In the circumstances I make the following orders:-

    a. The conviction is unsafe. I allow the appeal, set aside the conviction and set the appellant free unless otherwise lawfully held.

    b. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 27TH DAY OF JUNE, 2024.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms. Lubanga for the State

PC. Eugene Abila of Naivasha Maximum present

Appellant – (admitted)

Court Assistant – Jedidah