



REPUBLIC OF KENYA



KENYA LAW
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**C v Republic (Criminal Appeal E064 of 2023)
[2024] KEHC 9021 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9021 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E064 OF 2023
EM MURIITHI, J
JULY 25, 2024**

BETWEEN

PKC APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence by Hon. S.K
Ngetich PM in Nkubu Criminal S.O No. E018 of 2022 on 26/1/2023)*

JUDGMENT

1. PKC, the appellant herein was charged with the offence of sexual assault contrary to Section 5 (1) (a) (i) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 14th May 2022 within Meru County, he intentionally and unlawfully caused his fingers to penetrate the vagina of AN a child aged 5 years old. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the same date and place, he intentionally and unlawfully touched the vagina of A.N. a child aged 5 years old with his fingers against her will.
2. After full trial, he was convicted of the main charge of sexual assault and sentenced to 10 years imprisonment.

The appeal

3. On appeal, the appellant raised 7 grounds of appeal as follows:
 1. The learned trial magistrate erred in law and fact by failing to take into the period spent in custody pursuant to section 333 (2) of the Criminal Procedure Code.



2. The learned trial magistrate erred in law and fact by relying on uncorroborated and contradicting evidence tendered by the prosecution witnesses.
3. The trial court magistrate erred in law and fact by convicting and sentencing the appellant herein without considering that the evidence tendered before the court was contradictory hence unworthy to a safe conviction.
4. The learned trial magistrate erred in law and fact by failing to note that the burden and standard of proof by the prosecution was not discharged and thus the prosecution case was not proved beyond reasonable doubts as provided for by the law.
5. The trial court magistrate erred in law and fact where he failed to grant the appellant his rights to a fair trial as enshrined under Article 50 (2) of the Kenyan Constitution 2010.
6. The trial court magistrate erred in law and fact where he failed to note that the clinical report was not inclusive.
7. The learned trial magistrate erred in law and fact in disregarding the facts raised in the appellant's defence.

Duty of Court

4. This being a first appeal, the court is duty bound to re-appraise and re-analyse the evidence afresh, draw its own conclusions and make its own independent findings, bearing in mind that it did not have the advantage of seeing the witnesses testify. See *Okeno v R* (1972) EA 32.

Evidence

5. PW1 A.N, after voire dire gave unsworn testimony that she was a PP2 pupil at [Particulars Withheld]. "On Saturday, my mother called me and told me to go to p's house to bring a panga. p is seated there (points a finger of accused). I went to tell p to give me the panga. He refused. He remove my "mvuto" and panty. Mvuto is long trousers. He did this to me on the bid inside his house. He also removed his trouser and remained with underwear. He told me to do "tabia mbaya" but I refused and run out of the house. While inside the house he put his finger here (points at her vagina. I met my father out of the gate. He asked me why I had not brought the panga. I told him p was removing my "mvuto". My father asked me to accompany him to p's house. My father found a panga at p's house and picked it. It was our panga. We went back home and my father told me we would go to police (station). p also kissed me on the cheeks. We also went to Kanyakine hospital with my father."
6. On cross examination, she stated that, "It was you who removed my trousers. It was our panga."
7. PW2 JK testified that, "On 14/5/2022 I recall at 3.30 pm, Ns father came to my house and called my husband. My husband was not there. Then he told me the girl had claimed to be sexually assaulted. He told me to ask her. I then called the girl and interviewed her. He told me she was going to pick a panga from p's house. p put her to lie on his bed then removed her trousers and pants. She told me p kissed her on the cheeks. When I asked if he did something more, she kept silent. Ns father asked me to accompany him so to look for p. While on the way, I saw him carrying milk and I asked if he had done something to the child. He said he had done nothing. When I asked again, he said the girl was complaining that her trousers were too tight and he assisted to loosened it I advised Ns father to take her to hospital, on the next day, Ns father, J asked me to go to police station and record statement which I did. p is my worker. He is before court. (Points at accused)."



8. On cross examination, she stated that, “I found you carrying milk. I don’t know how long did the incident take since I was not there.”
9. PW3 JK testified that, “I live in Kinoro. I am a farmer. AN is my daughter. She is 6 years old. I have her birth certificate. She was born on 26/11/2016. Birth Certificate – MFI – 1. On 14/5/2022 I do recall it was Saturday. At 3.00 pm, p came and borrowed a panga. I gave him the panga and told him to return it since I wanted to use. He took sometime so I called my daughter, N and sent her to bring the panga. She took too long and I decided to follow. As I got at the gate, I saw her running back without a panga. I asked why she had not brought the panga. She told me p refused to give her. She told me p had removed her trousers and pants and kissed her on the cheeks. I told her to follow me to p’s house. We returned the compound where p was staying and I asked him why he had not given my daughter the panga. He said the girl just asked for the panga then run away. I asked why he had removed my daughter’s trousers. He denied that there was anything like that. I saw my panga on the ground. I picked it then I went with my daughter to Josephine’s house. I told her to listen to what my daughter was saying. She interviewed her. After that, I went to report at Kinoro police pose. We then took the child to Kanyakine hospital. I have the patient’s record. Plm. f.f.2. P3 was also filled. P3 form – Plmff.3. While at Josephine’s house. I saw accused carrying milk. When we asked again what he did to the child he was defiant.”
10. On cross examination, he stated that, “The panga was mine. You had come to take it from my house. It is not true that it was yours. My daughter came to your house alone. It is not true that there were other children.”
11. PW4 P.C Veronica Muraya attached at Igoji Police station performing general duties testified that, “I recall on 14/5/2022, I received a call from the O/C Kinoro Police Post. He had minuted this case to me. I went and found a young girl with her father. They had already made a report. I took the girl and interviewed her. She told me that one man who was a “shamba boy” working for a neighbor had fallen her to his house and removed her trousers. She also told me the man placed her finger on her private parts and asked her to do “tabia mbaya”. The girl then run away. I took her to Kanyakine District hospital where she was examined and P3 form filled. On 16/5/2022 I went to the home where accused was working. The girl came and identified him she also showed us the house where accused had taken her. She showed us the bed on which the accused had placed her. I arrested the accused and arraigned him in court. The next day. The girl told me the accused kissed her forehead and cheeks before inserting his finger inside her vagina. I established that the girl was aged 5½ years. I was given her birth certificate. Birth certificate – pmfi – 1. I collected the treatment notes and P3 Form (P.mff2 & 3 respectively). At the time we arrested the accused. He was too drunk.”
12. The witness was not cross examined.
13. PW5 Timothy Mberia, a clinical officer from Kanyakine Hospital, testified that, “I have worked as nurse for 10 years after graduating from K.M.T.C with Diploma in clinical medicine and surgery. With me is treatment card and P3 from for AN. The patient complained of sexual abuse by a person known to her on 14/5/2022 at 3.30 PM or thereabouts. She was brought to hospital on 14/5/2022 and P3 form was filled on 16/5/2022. Upon examination, the patient had bruises on labia Minora and the hymen was broken. On lab tests, HIV test was negative, VDRL negative, H.V.S showed no spermatozoa. The observation was suggestion of penetration. I am the one who filled this P3 form. P3 Form – PMFI – 1. The treatment notes were filled by Nelly Mwendwa who is my colleague and I have worked with her for two years. I am conversant with her handwriting. Treatment notes – PMFI. 2.”
14. The witness was not cross examined.



15. When placed on his defence, the appellant gave sworn testimony that, “I live in Maragara and I am a farmer. All the evidence is lies. The child’s parent had a grudge with me and framed this case against him. She just didn’t like me.”
16. On cross examination, he stated that, “On 14/5/2022, it is true that N was sent to pick a panga from my house. It is true that I was alone. It is not true that she stayed for too long. She only took about 3 to 5 minutes in my house. I found her sitting at the veranda as I was coming from the dairy. The panga didn’t belong to her father. J was borrowing a panga from me. The girl did not take the panga. I don’t know that bitterness he had against me.”

Submissions

17. The appellant submitted that justice was not met as he was not offered legal representation by the trial court, pursuant to Article 50 (2) of *the Constitution*. He faulted the trial court for rejecting his defence which contained some reasonable facts to support his acquittal, and cited Sukha Singh S/O Wazir Singh and Others (1939) 6 EACA 145. He faulted the trial court for failing to take into consideration the pre-trial detention during sentencing, and cited Ahamad Abolfathi Mohammed & Another v Republic (2018) eKLR. He urged that there was a hidden agenda instigated by the family of the complainant by instituting a duel that never was. He faulted the investigating officer, PW4 for failing to do any investigations in regards to this incident.
18. The respondent urged that since the offence took place in broad daylight and the victim and her witnesses knew the appellant, the circumstances were favourable for a positive identification, and as such, there was no possibility of mistaken identity. It urged that the defence put forward by the appellant was an afterthought, as the appellant did not cross examine PW3 on the aspect of a grudge. On sentence, it urged that the circumstances of the offence merited the sentence of 10 years imprisonment save that it should commence on 17/5/2022.

Analysis and Determination

19. The issues for determination from the grounds of appeal are whether the offence was proved by consistent and corroborated evidence, whether the appellant’s right to a fair trial was violated and whether the appellant’s defence was considered.

Proof of the offence

20. Section 5 (1) (a) (1) and (2) of the *Sexual Offences Act* provide 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.”



21. The Court of Appeal in *J Irungu v Republic* (2016) eKLR expressed itself thus:

“Sexual Assault on the other hand is provided for in section 5 of the Act. Unlike defilement, which can be committed only against a child, sexual assault can be committed against “any person”. That offence or its punishment is not tied to the age of the victim. The offence is constituted by committing an act which causes penetration of the genital organs of any person by any part of the body of the perpetrator or of any other person or by an object manipulated to achieve penetration. 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. We are satisfied that the offence of sexual assault can be committed against a child. Where for example there is cogent evidence of penetration of a child by the accused person but the age of the child is not proved, the perpetrator may properly be convicted of sexual assault.”

22. The complainant testified that:

“On Saturday, my mother called me and told me to go to p’s house to bring a panga. p is seated there (points a finger of accused). I went to tell p to give me the panga. He refused. He remove my “mvuto” and panty. Mvuto is long trousers. He did this to me on the bid inside his house. He also removed his trouser and remained with underwear. He told me to do “tabia mbaya” but I refused and run out of the house. While inside the house he put his finger here (points at her vagina.”

She affirmed on cross examination that it was the appellat who had removed her trousers.

23. When PW2 interrogated the appellat, he stated that:

“The girl was complaining that her trousers were too tight and he assisted to loosen it.”

24. PW3 testified that he sent his daughter, the complainant to fetch a panga from the appellat’s house, but when she took too long to return, he decided to follow her. As he got to the appellat’s gate, he saw the complainant running back without the panga. Upon inquiry, he learnt that the appellat had refused to give the complainant the panga and that he had removed her trousers, pants and kissed her on the cheeks.

25. PW5 testified that when the complainant was examined, she had bruises on labia Minora and the hymen was broken. On lab tests, HIV test was negative, VDRL negative, H.V.S showed no spermatozoa and the observation was suggestion of penetration.

26. When placed on his defence, the appellat insisted that he had been framed by the complainant’s parents. On cross examination, he admitted that, “On 14/5/2022, it is true that N was sent to pick a panga from my house. It is true that I was alone.”

27. There is no doubt the appellat was well known to the complainant, as he was employed by PW2. PW5 and the medical documents produced in court proved that there was penetration of the complainant’s genitalia.

28. This court finds that it was the appellat who penetrated the genitalia of the complainant, then aged 5 years, with his finger.



Right to fair trial

29. The appellant urged that justice was not met as he was not offered legal representation by the trial court, pursuant to Article 50 (2) of *the Constitution*. Article 50(2) (g) (h) of *the Constitution* provides that:

“(2) Every accused person has the right to a fair trial, which includes the right— (g) to choose, and be represented by, an advocate, and to be informed of this right promptly; (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”

30. The appellant fully participated in the trial and even cross examined some of the prosecution witnesses. In *N. M. T alias Aunty v R* (2019) eKLR, the court (A.C Mrima J.) stated as follows:-

“That being the record, the question which now begs an answer is what entails the right as provided in Article 50(2)(g) of *the Constitution*. The reading of the said provision avails that an accused person must be promptly informed of the right to choose to be represented by an Advocate. When one is called upon to make a choice it must mean that the person has been availed with options upon which he/she may exercise his/her discretion. The right to choose an Advocate of one’s choice as embodied in Article 50(2)(g) of *the Constitution* therefore means that for an accused person to exercise that right he/she must be certainly told of the right to legal representation by an Advocate of one’s choice and any other attendant information be availed accordingly to be able to make a choice on whether he/she requires any legal representation. The right under Article 50(2)(g) of *the Constitution* must be distinguished from the right under Article 50(2)(h) of *the Constitution* given that in many instances the rights under Article 50(2)(g) and (h) of *the Constitution* are dealt with contemporaneously. The right under Article 50(2)(h) of *the Constitution* on one hand places a duty on the State to assign an Advocate to an accused person at its own expense if substantial injustice will otherwise result. The right under Article 50(2)(g) of *the Constitution* on the other hand deals with informing an accused person of his/her right to be represented by an Advocate of one’s choice further to giving necessary information to the accused person and calling him/her to make a choice on his/her legal representation. Put differently, the right under Article 50(2)(h) of *the Constitution* deals with instances where the State must assign an Advocate to an accused person. Suffice to say that the right to a fair trial under Article 50 of *the Constitution* is among those rights that cannot be limited in any way whatsoever courtesy of Article 25 of *the Constitution*.”

31. This court finds that, although the appellant was neither informed of his right to legal representation, nor assigned an advocate to represent him at the state expense, that failure did not vitiate the whole trial, as it has not been established that any prejudice or miscarriage of justice was occasioned to him.

Appellant’s defence

32. The defence raised by the appellant was that he had been framed by the complainant’s parents due to a grudge. That defence was belatedly raised during defence hearing and none of the prosecution witnesses was cross examined on it.

33. In the circumstances, this court is compelled to find, as urged by the respondent, that the appellant’s defence was an afterthought, as the appellant did not cross examine the complainant and her father, PW3 on the existence of a grudge.



Orders

34. Accordingly, for the reasons set out above, the Court finds that the appellant's appeal is without merit and it is dismissed.
35. The Court notes, however, that the appellant was in custody the entire trial period of eight (8) months from his arrest on 16/5/2022 to 26/1/2023 when he was sentenced. In view of the provisions of section 333(2) of the Criminal Procedure Code, the pre-trial duration of eight (8) months shall be taken into account, and consequently, there shall be an order that appellant's sentence of imprisonment for 10 years shall commence on 16/5/2022.

Order accordingly.

DATED AND DELIVERED ON THIS 25TH DAY OF JULY 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Mr. Masila for DPP.

