DK & another v Office of the Director of Public Prosecution (Criminal Appeal E028 & E029 of 2021 (Consolidated)) [2023] KEHC 19402 (KLR) (30 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19402 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E028 & E029 OF 2021 (CONSOLIDATED)

PJO OTIENO, J

JUNE 30, 2023

BETWEEN

DK .... 1ST APPELLANT

JM .... 2ND APPELLANT

AND

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION .... RESPONDENT

(Being appeals from the conviction and sentencing of Hon. Eric Malesi (PM) in Kakamega CM'S Court SO Case No. 63 of 2020)

JUDGMENT

1. The appellants were arraigned before the Chief Magistrate at Kakamega in Sexual Offences Case No. 63 of 2020 charged with two counts. The first count was the offence of gang defilement contrary to section 10 of the *Sexual Offences Act* No. 3 of 2006 whose particulars were given to be that on the 20th day of May, 2020 at Kakamega East Sub County within Kakamega County, the 1st Appellant in association with the 2nd Appellant and another, intentionally caused his penis to penetrate the vagina of L.M a child aged 14 years.

2. In the alternative, the Appellants were charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on the 20th day of May, 2020 at Kakamega East Sub County within Kakamega County, the 1st appellant in association the 2nd appellant and another intentionally touched the vagina of L.M a child aged 14 years.

3. In the second count the appellants were charged with the offence of compelling an indecent act contrary to section 6(b) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 20th day of May, 2020 at Kakamega East Sub County within Kakamega County, the 2nd

appellant and another intentionally and unlawfully compelled L.M to engage in an indecent act with the 1st appellant.

4. To prove its case, the prosecution called a total of four (4) witnesses. PW1, the victim, was subjected to voire dire examination and upon the court being satisfied on her ability to tell truth, she testified that she was a class six pupil at [particulars Withheld] Primary School. That on 20/5/2020 at about 6:30 pm she was at the posho mill when she decided to go buy potato chips. She had Kshs. 70/- with her and she wanted chips worth Kshs. 30/-. After she bought the chips from the 3rd accused, who is not a party to this appeal, he asked her to follow him for her balance. She followed him to the 2nd appellants house where she found the 1st appellant. She was hesitant to get into the house and the 3rd accused dragged her in and locked the door. She narrated how the 3rd accused made her lie down, the 1st appellant then took off her trousers and the 3rd accused grabbed her on the neck and mouth and inserted his penis in her vagina. After he was done, the 3rd accused removed his clothes and inserted his penis in her vagina. She bled from her vagina, was in pain and when she tried to scream they grabbed her and covered her mouth and she lost consciousness. The gang then took her and threw her at the fence of one Deno's home who then took her to her home. She told her grandmother what had happened and she was taken to Shamakubu Health Centre and later to Kakamega County General Hospital by an ambulance where she was treated though is yet to heal since she feels pain when urinating. She explained that it was the 2nd appellant who locked the door before she was defiled by the 1st appellant and the 3rd accused. Her birth certificate was produced as PEXH 1, the black trouser she had worn as PEXH 2 and a white and pink panty which she had work and had blood stains was produced as PEXH 3.

5. On cross examination by the 1st appellant she said that she did not scream because she was held by the neck and her mouth covered with his hands.

6. On cross examination by the 2nd appellant she stated that she knew him very well as he was a son to his grandfather and refuted claims that she had been coerced to say what she had said.

7. On cross examination by the 3rd accused she stated that she had found him and the 2nd appellant at the place where he sells chips.

8. PW2, a clinical officer from Matungu Sub-County Hospital testified that she attended to the complainant in 20/5/2020 at the Kakamega County General Hospital and that they were forced to take her to theater to repair her private parts since her vaginal wall and cervix had raptured. The complainant was admitted for two weeks and thereafter they continued to see her as an outpatient. She indicated that the complainant was yet to fully heal.

9. On cross examination by the 1st appellant she indicated that she did not examine him.

10. On cross examination by the 2nd appellant she indicated that it was not possible to establish how many perpetrators were involved and on cross examination by the 3rd accused she stated that there were no injuries on other parts of the body and that the notable injuries reached the cervix.

11. PW3, grandmother to the victim gave evidence that she knew the appellants and the 3rd accused person and that on 20/5/2020 she returned home from 'chama' at about 6:30PM but did not find the complainant home. She was told that she had gone to buy chips. After sometime she went to the where the chips were sold and asked the 2nd appellant, who sells the chips if he had seen the complainant and he denied prompting her to inform the complainant's father. The complainant then returned home, bleeding through her trousers and was crying. She narrated to her what had happened and the place it had happened. They went to the 2nd appellant's house where they found his bedsheet had blood. The blood stained sheet was produced as PMExh 7. She thereafter took the complainant to hospital.

12. On cross examination by the 1st appellant she stated that she knew him as he assisted in the 2nd appellant's posho mill.

13. On cross examination by the 2nd appellant she indicated that he was a son to his in law and that on the day of the incident he came out with a panga to stop them from entering his house.

14. It was the testimony of PW4, No. 106368, attached at the Shinyalu police station and the investigating officer, that she was informed by the OCS of the arrest of the 2nd appellant and the 3rd accused. She then proceeded to the scene of crime where the 2nd appellant's father led her to his house where she noticed blood stains on the floor. She lifted the mattress and found a pink sheet with blood stains. She then visited the complainant in hospital on 23/5/2021 who narrated to her the events that had taken place.

15. Her evidence marked the close of the prosecution case and the court ruled that a prima facie case had been established and the accused persons was put on Defence.

16. In resisting the charges, each of the three accused persons gave own evidence. While the 1st appellant, DK gave unsworn statement, 2nd accused offers sworn statement.

17. In his unsworn statement, DK, the 1st appellant and DW1, stated that he was a form 2 student at [particulars withheld] Secondary School and that on 20/5/2020 he had visited his step mother who stays in Ikungu to help with household chores. He denied being at the scene with the complainant.

18. In the sworn statement of JM, the 2nd appellant and DW2, he stated that on 20/5/2020 he spent his day at the posho mill where technicians were repairing it. At 6PM he accompanied the technicians and on returning he encountered PW2 asking about the whereabouts of PW1 to which he responded he did not know. He claimed that he spent the night in his house and was later arrested by the police alongside the 3rd accused.

19. On cross examination he stated that he lived at his father's household and that the 1st appellant assisted him to bring stock to his shop while the 3rd accused kept potatoes in his house.

20. DW3, the 3rd accused at trial, in a sworn statement testified that he sells mandazis in the morning and chips in the evening and that on 20/5/2020 in the evening the mother to his child came to his place of business to collect money for their child's shoes and she then saw her off at about 7PM. The 2nd appellant then called him and he headed back to his shop where he found him with a man and a few minutes later a crowd armed with crude weapons demanded for the person who sells chips on allegations that he had defiled PW1. He ran away to a plantation and later in the evening he joined the 2nd appellant at his house where they were arrested.

21. On cross examination he refuted claims that he took PW1 to the 2nd appellants house and covered her mouth.

22. Judgment was subsequently delivered and the all the three accused persons were convicted with the offense of gang rape. The 2nd count alleging the offense of compelling an indecent Act was dismissed. All the three were sentenced to serve an imprisonment term of 15 years.

23. Dissatisfied with the judgment of the trial court, the appellants lodged two petitions of appeal dated 25th August, 2021 premised on the following grounds: -

    a) That the learned trial magistrate grossly erred in both law and facts in presiding over a trial without considering that I was not served with all witness statements even after requesting for it which really contravened article 50(2)(b)(j) of *the Constitution* of Kenya, 2010.

b) That the learned trial magistrate erred in both law and facts by presiding over a trial and finding penetration proved even in the wake of uncorroborated, inconsistent, forfeited and inadequate evidence.

c) That the learned trial magistrate grossly erred in both law and facts in presiding over a trial and subsequently sentenced to harsh sentence without considering that I was not subjected to medical corresponding investigation as background under section 36(2) of the *Sexual Offences Act* No. 3 of 2006.

d) That the learned trial magistrate grossly erred in both law and facts in imposing a harsh sentence on me without taking into account the time spent in custody/remand s requires by the law under section 333(2) of the CPC.

e) That the learned trial magistrate grossly erred in both law and facts in rejecting my defence without proper evaluation.

f) That the learned trial magistrate grossly erred in both law and facts in presiding over a trial without considering that I was a layman who deserves to be represented by an advocate which really offended article 50(2)(g)(h) of *the Constitution* of Kenya 2010."

24. By way of a supplementary grounds of appeal, the 1st appellant adds that he was convicted on a defective charge sheet, he was not properly identified and that the sentence of 15 years is harsh. After admission, the court directed that the appeal be canvassed by way of written submissions to which directive the parties have filed their respective submissions.

Parties' Submissions

25. The appellants identify and address five issues in the submissions. That scheme however abandons the complaint that the witness statements were never supplied to them.

26. The first contention is that the charge sheet was defective in that the two had been charged with the offence of defilement contrary to section 10 of the *Sexual Offences Act* No. 3 of 2006 while the trial magistrate in his judgment at page 1 paragraph 11-12 indicated that the accused persons were jointly charges with gang defilement contrary to section 8(1) as read with section 10 of the *sexual Offences Act* No. 3 of 20016. They claim that they were charged with the section that spelt out the sentence instead of the one that spelled out the offence thus making duplicity of the charge.

27. On the merits, it is claimed that penetration was not proved against the 1st appellant and the way the particulars of the charge were framed indicate that only the 2nd appellant penetrated the complainant.

28. On the second issue of identification, it is argued that there was no identification by the complainant as to those who defiled her and therefore that the conviction was erroneous and ought to be set aside.

29. The third issue was identified as the proof against an accomplice to the commission of the offence to which it is contended that in terms of the decision of the court in R vs Clarkson &Carrol 1971, mere presence was insignificant without actual encouragement and intention to encourage. It is thus submitted that the evidence of the complainant does not associate him with the crime committed by the other two accused persons in his house in his absence.

30. On the fourth issue regarding proof of penetration against the appellants, the decision in Dominic Ochieng Odoyo & another v Republic [2015] eKLR was cited and relied on to set out the ingredients of the offence of gang defilement in the following fashion;

> " The key ingredients of the offence of Gang Rape include the following:
>
> a. Proof of rape or defilement;
>
> b. Proof that the assailant was in association with another or other persons in committing the offence of rape or defilement or that the assailant did not per se commit the offence of rape or defilement, but with common intent, was in the company of another or others who committed the offence."

31. The appellants contend that the evidence adduced did not prove that they were in the company of those who raped the complainant in the manner described.

32. The fifth issue is that the mandatory sentence against them was too harsh for which reason the Court of Appeal decision in Wanjema v Republic (1971) EA 403 was cited for the proposition that an appellate court can interfere with the sentence of a trial court where it overlooked some material factors. To the appellants, that the evidence at trial did not identify then as the perpetrators of the offence was a material matter the court needed to take into account but failed to do so. The court decision of the court said of when the appellate court would disturb the sentence: -

> " ...a sentence must in the end, however depend upon the facts of a particular case...An Appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstance of the case..."

33. For the respondent, the 7 grounds in the petition of appeal were addressed seriatim. On the first ground that witness statements were denied even after request, the prosecution submit that there is nothing on the record to show that the appellants ever requested for witness statements.

34. On the second ground that alleging inconsistent and inadequate evidence, the respondent submits that the element of penetration was proved by the evidence of the victim, her mother and clinician who examined the complainant and stated that the victim's vagina and cervix walls had raptured.

35. On the third ground that the sentence meted was harsh, it is argued that the same was modest and within the law. The prosecution considers the sentence lenient and urges for an enhancement to life term due to debilitating damage that was occasioned to the victim necessitating surgery.

36. On the other grounds regarding the age of the victim, the identification of the assailant the fact of penetration and whether the defense evidence was duly considered, the prosecution asserts that the age of the complainant was proved through the production of a birth certificate, penetration by way of evidence of PW1 and 2. The trial court is vindicated to have considered the evidence of the appellants by noting that defence of alibi came too late in the day and that the duty to appoint a legal counsel lay at the door step of the appellants.

Issues for Determination

37. This court has considered the grounds of appeal, the proceedings of the lower court and the submissions by the parties and discerns the following three issues to stand out for determination: -

a. Whether the appellants were charged, convicted and sentenced on a defective charge sheet?

b. Whether the elements of victim's age, penetration and identification, as irreducible ingredients for the offence of gang defilement was proved against the appellants?

c. Whether the sentence meted on the appellants was harsh and excessive?

d. Whether the sentencing against the Appellant ought to have taken into account the time spent by the Appellant in remand?

e. Whether the appellants were denied witness statements and legal representation and the effect of such denial on the trial?

f. Whether the appellants' defence was considered by the trial court?

Analysis

Whether the appellants were charged, convicted and sentenced on a defective charge sheet

38. The submission of the appellants that that they were charged with the offence of defilement contrary to section 10 of the *Sexual Offences Act* No. 3 of 2006 while the trial magistrate in his judgment alluded to them being jointly charges with gang defilement contrary to section 8(1) as read with section 10 of the *sexual Offences Act* No. 3 of 20016 may not be the reason to upset the conviction. Even the claim that the charge was duplex on the basis that the section cited only set out the sentence instead of the one that spelled out the offence is not born out by the record.

39. The test of whether a charge sheet is fatally defective goes to the substance rather than form. This was the position of the court of appeal in Benard Ombuna vs. Republic [2019] eKLR where it was held: -

> " In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

40. Of critical importance is whether the appellants understood the charges facing them as observed by the court of appeal in Isaac Nyoro Kimita & another vs. R [2014] eKLR where it was held: -

> " In this case we are dealing with an alleged defective charge on account of how it was framed. We, therefore, need to decide whether or not the allegation in the particulars of the charge that the appellants "jointly" defiled the complainant, made the charge fatally defective. To determine this issue, what, in our view, is of crucial importance is whether or not the use of that term in any way prejudiced the appellants. In other words, did each appellant appreciate the charge against him or was either of them confused by the inclusion of the term "jointly" in the particulars of the charge."

41. A perusal of the proceedings at the trial court show that count I properly framed the offence as gang rape contrary to section 10 of the Act. in the document there is no allusion to section 8 or the word defilement. There are equally no comments by the court at page one as alleged. The court considers the complaint to be the product of an error emanating from copied and adopted submissions from a different file.

42. Having reviewed the file exhaustively, the court finds the charge sheet to have been keenly and neatly drawn and to be free from any element of duplicity.

43. Ii is of note by the court that section 10 of the Act creates the offense pf gang rape or defilement. The court considers all ingredients of both rape and defilement to be the same the only differentiation comes when the age of the victim is taken into account. Accordingly, even though the charge was crafted as rape when the victim was aged 14 did not prejudice any of the appellant in any way.

Whether the element of penetration as an element of the offence of gang rape was proved.

44. 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. It was the evidence of PW2, the clinical officer, in corroboration of the evidence of PW1, that the complainant's vaginal wall and cervix had ruptured a sign of forceful penetration. There is no doubt that penetration occurred but the question is, did the appellants commit the act of penetration?

45. Penetration under the Act, being an element of sexual offence, can be proved by the evidence of the victim alone without the need for corroboration in terms of section 124 of the *Evidence Act*, Cap 80.

46. It was the evidence of the complainant that the 1st appellant took off her trousers, grabbed her on the neck and mouth and then; penetrated me with his penis in my vagina. After the 1st accused was done with his turn, the 3rd repeated the same act. When she was examined, the complainant had visible injuries as recorded in the PRC form. This court, like the trial court, finds that the penetration of the victim by the 1st and 3rd accused was sufficiently proved beyond reasonable doubt and the perpetrators were properly recognized by the complainant. The participation of the two constitute them into aging and there all the ingredients of the offence of gang rape were proved to the requisite standards. The court finds no reason to fault the trial court in its verdict of conviction of the two.

47. What of the 2nd accused!? In the evidence of the complainant, she found the 2nd accused in the house with Pw3 and that it was accused 2 who locked the house from outside while accused 1 and 3 defiled her. It is therefore the courts finding that even though penetration by 2nd accused was not proved, the fact that he made his house available to two adult men with a minor inside and even locked the door from outside falls within the definition of gang defilement. In Francis Matonda Ogeto v Republic [2019] eKLR when interpreting the subject provision, it was held: -

> "Under Section 10 of the *Sexual Offences Act*, the ingredients of gang rape are: rape or defilement under the Act; committed in association with others; or committed in the company of another or others who commit the offence of rape or defilement with common intention. It is therefore clear that defilement which is committed in association with others or with common intention notwithstanding the fact that the accused may not have defiled the victim amounts to gang rape according to the said section. It therefore matters not whether the offence was rape or defilement as long as the conditions under section 10 are found to exist."

Whether the sentence meted on the appellants was harsh

48. It is thus the holding of the court that by conduct, the 2nd accused had same intention with accused 1 and 3, when he accommodated both in the house with the minor and locked the door from outside. The court finds his explanation that he locked the door without knowledge that there were people inside to be incapable of belief.

49. On sentence, Section 10 of the *Sexual Offences Act* No. 3 of 2006 prescribes an imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life if convicted of the offence of gang rape.

50. In this particular instance the trial magistrate meted the minimum sentence as provided under the act and for that reason I find it within the law and in no way harsh or excessive.

Whether the sentencing against the Appellant ought to have taken into account the time spent by the Appellant in remand

51. The proviso to Section 333(2) of the Criminal Procedure Code requires and mandates that the court sentencing an accused person takes into account and factors in the sentence, time spent by the accused person in custody prior to the sentencing. The Judiciary Sentencing Policy Guidelines under clauses 7.10 and 7.11 the court of its obligation under the law.

52. Every court passing a sentence of imprisonment is thus under a duty to factor in by literary subtracting the period already serve pending trial. In this particular instance, the appellants were granted bond the same day the plea was taken and remained on such terms during trial. The provisions of section333(2) thus does not afford them a benefit hence it was aptly legal, sound and appropriate for the trial court to order that the sentences run from the date it was imposed.

Whether the appellants afforded fair hearing by being availed witness statements and legal representation?

54. The proceedings of the trial court do not capture if the appellants requested for a copy of the witness statements or if they were availed with the same. Fair trial demands that an accused is armed with witness statements to enable him or her cross examine effectively and prepare for a defence. While the right to get the basis of the accusations in advance is inalienable and incapable of limitation, being a critical component of fair hearing, rights also come with obligations. It was also the duty of the applicant to ask for the statement. They did not from the records and it has been demonstrated that a prejudice was occasioned to the trial. It is however, the courts view that going forward and to meet the constitutional demand for fair hearing, every trial court should, as a duty ensure that on the date a hearing date is fixed, the accused or his counsel leaves the court having confirmed receipt of the witness statements as well as any documentary exhibits intended for use by the prosecution at the trial.

55. On the other hand, the right to legal representation is not inherent in the accused but call upon him to pursue and protect. It is thus a requirement under section 36(3) of the *Legal Aid Act*, that an accused person satisfies the court that he is unable to meet his legal expenses before the court can appoint counsel for him at the expense of the state. The court views the position to be that an accused demonstrates the need and qualification to legal aid before he is afforded the same. For an appellate court, it would be a matter of record whether or not a demonstration was made by the accused before the trial court. The record here is silent and the court finds that without demonstration, the accused chose to self-represent and should not be heard to change position this late. In coming to this conclusion, the court is guided by the opinion of the Court in Charles Maina Gitonga -vs- Republic (2018) eKLR where the court said: -

> " ...legal representation is not an inherent right available to an accused person under Article 50 of *the Constitution* or any provisions of the Repealed Constitution and that under Section 36(3) of the *Legal Aid Act* No. 6 of 2016, an accused person has to first establish that he was unable to meet the expenses of his trial"

Whether the appellants were entitled to legal representation and its effect on the trial

56. Section 50(2)(h) of *the Constitution* of Kenya, 2010 provides that every accused person has the right to have an advocate assigned to him or her by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

57. The court of appeal in David Njoroge Macharia v Republic [2011] eKLR defined substantial injustice as follows: -

> " State funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense. Substantial injustice is not defined under *the Constitution*, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.
>
> We are of the considered view that in addition to situations where „substantial injustice would otherwise result.? persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided."

58. The offence of gang defilement is not a capital offence and therefore the appellants were not entitled to legal aid from the state. They were at liberty to elect a legal counsel of their choice. However, I do believe that courts do have an obligation to communicate to accused persons and inform them that they can seek legal representation of their choice if they wish to.

Whether the appellants' defence was considered by the trial court

59. A perusal of the judgment of the trial court shows that the evidence of the appellants was fully considered. The trial court record what the accused said in the following words:

> " The 1st accused gave a defence that he was not present near where the offence was committed when the said offence was committed. The accused may be pleading alibi…this defence should be raised at the earliest opportunity…he is raising it late in the day leaving us to make a conclusion that he is cooking the same up.
>
> …the 2nd accused denied committing the offence in count one…this weighed against the evidence ii have analysed above, which I consider overwhelming against the 2nd accused as to prove the 2nd accused penetrated with his penis the vagina of PW1."

60. I thus find that the evidence of the appellants was not only considered by the trial court but that the court weighed same against that by the prosecution and chose to believe that by the prosecution.

61. Accordingly, for the reasons set out above, I find that this appeal is bereft of merit and is thus dismissed.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF JUNE 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Appellants in person

Ms. Chala for the Respondent

Court Assistant: Polycap