



**Mutiso v Republic (Criminal Appeal E013 of 2023)
[2023] KEHC 24838 (KLR) (30 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24838 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E013 OF 2023
FROO OLEL, J
OCTOBER 30, 2023**

BETWEEN

DICKSON MUSYOKA MUTISO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

A. Background

1. The appellant was charged with the offence of sexual assault contrary to Section 5(1) (c)(1) (2) of the *sexual offences Act*. The particulars of the offences were that on the 1st day of August 2019, in Mwala sub county within Machakos County he unlawfully used his fingers to penetrate the vagina of AMK a child aged 3 years.
2. On the alternative charge, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *sexual offences act*. The particulars of the offence were that on the 1st day of August 2019 in Mwala sub location within Machakos county, he intentionally and unlawfully touched the vagina of AMK with his fingers.
3. At the trial, the prosecution called five witnesses in support of their case, while the appellant also testified and called one witness to support his case. The trial magistrate did consider all the evidence adduced and found the appellant guilty of the offence of sexual assault. She convicted him and sentenced him to serve 10 years imprisonment. The appellant being wholly aggrieved by the said judgement did prefer this appeal and raised seven grounds of appeal;
 - a. That the learned magistrate in fact and in law erred by proceedings with the hearing of the case before the accused person had been served with statements and exhibits relied on by the prosecution.



- b. The learned magistrate in fact and in law erred by not fully satisfying herself on the date when the sexual assault happened.
- c. The learned magistrate misdirected herself in fact and in law by failing to appreciate and adduce the post rape care form (RRC) as required in law.
- d. The learned magistrate misdirected herself in fact and in law in failing to grant the accused person sufficient time to avail all his witnesses before the honourable court to testify on his behalf.
- e. The learned magistrate misdirected herself in fact and in law by failing to appreciate the contradictory testimonies of the prosecution witnesses specifically the minor's medical physical condition.
- f. The learned magistrate misdirected herself in fact and in law by failing to satisfy herself at voir dire that the minor fully understood the facts surrounding the proceedings in the law.
- g. The sentence herein was manifestly harsh and excessive.

B. Brief Facts

4. PW1 OMK testified that on 01.08.2019 at about 4.00pm the minor herein AMK came home from school carrying guavas and said she had been given the same by the appellant. As she interacted with the child, while washing her, she told PW1 that she felt pain in her private part. Further she told PW1 that the appellant had called her to his house, removed her clothes and touched her inappropriately, by putting his fingers in her. The following morning, she took the child to Vyulya dispensary and was referred to Masii level 4 hospital. she later reported the incident to the police. She further stated that the minor was her grandchild while the appellant was her neighbour and they were in good books with him.
5. In cross examination, PW1 stated that she knew something was wrong when she was washing the minor and she complained that her vagina was painful. The child had accused the appellant of inserting his finger in her private part. After the child had informed her of the incident, she did ask the appellant, if indeed he had given the child guavas and he had admitted doing so. she reported the incident to the police the following day since it was at night and further, took the child to Vyulya dispensary but the child was not treated. she went to Masii level 4 hospital five (5) days later. The child would go to school as normal and she was being transported using a motor cycle.
6. PW2 AMK underwent voire dire examination and was found to be too young to comprehend court proceedings, though she could communicate and gave unsworn evidence. She stated that she was a PPI student at [Particulars Withheld] Township school and had met the appellant on a certain evening as she came from school. He called her to his house, removed her panty and touched her vagina using his fingers (minor showing her fingers rubbing against her vagina). He then gave her 3 guavas and told her to go home. After she reached home she informed PW1 of what had transpired and was later taken to hospital.
7. In cross examination PW2 stated that the appellant gave her three (3) guavas which she shared with M, P and J. She alleged that there had been incident when the appellant had beaten her up before and she had told PW1. This had happened on three occasions but when pressed the minor could not answer as to why the accused beat her. She reiterated that the appellant had given her guava and she saw M and M pass by. They told her to go with them.



8. PW3 Mary Munyiva Mutua testified that she was a clinical officer stationed at Masii health centre and held a diploma in clinical studies and surgery from KMTC. She had examined the complainant (OP no.xxxx/xx) and the allegations were that she had been defiled by someone when enroute going home from school. The perpetrator was identified as a neighbour who had enticed the minor using guava fruit and put his fingers on her vagina. She examined the minor on 01.08.2019. She had no visible injuries on her body. The external genitalia was normal, hymen was broken not fresh and there was discharge noted in small amount. She produced the P3 form, treatment notes and lab results as Exhibits P1-P3. The appellant did not ask the respondent any question.
9. PW4 FN stated that she was a ECD teach at [Particulars Withheld] township primary school. On 26.07.2019 in the morning as she was going to school, she met PW1 and PW2. PW1 called her and told her something had happened to PW2. As she was washing PW2 she had complained that her private part was paining. She talked to PW2 who told her that on 25.07.2019 after she had left school and was going home, the appellant had called her to his homestead and wanted to give him guava. They entered his house, he put her on the bed, removed her innerwear and inserted his fingers inside her vagina. When she felt pain he gave her other guavas and told her to go home. She took PW2 to school and advised PW1 to go back home prepare and escort PW2 to hospital. PW2 was walking legs apart and crying because she felt pain in her private parts.
10. PW4 further testified that she checked the vagina of PW2 and noticed that it was reddish with scratch marks visible in her opening. Later PW1 came and took PW2 to hospital and she was called to record her witness statement. The appellant was a person known to her. In cross examination the witness stated that she had advised PW1 to take PW2 to hospital. She informed about the incident on a Friday and did not know when PW2 was taken to hospital. Her evidence was based on what PW2 narrated to her.
11. PW5 PC Dennis Oloo stated that a report was made at the police station on 01.08.2019 by PW1, though the complainant was the minor PW2. she complained of having been defiled by the accused person who was a known neighbour. The appellant had called her while she came from school. Once inside his house, he took her to the room removed her clothes and inserted his fingers into her vagina. She felt pain and the appellant gave her guava to entice her not to report the incident. While at home later in the evening she reported the incident to her mother who examined her and noticed that the vagina was swollen and appeared reddish. In cross examination PW5 stated that the incident occurred on 28.07.2019 and was reported on 01.08. 2019. He did not know of any previous incident where the appellant had been accused of assaulting PW2 over disciplinary issues.
12. The appellant was placed on his defence and opted to give sworn evidence. He stated that he did not sexually assault PW2 and believed that it was PW1 who probably assaulted her. PW2 had come to his home after school and he gave her guava to eat. She played and left for their home. One week later he was arrested. The child had gone to school for a whole week before being taken to hospital and he believed that the case against him was a fabrication.
13. DW2 Susan Mueni Muthika testified that the appellant was her brother in law. On the material day she was at home cooking at 1.00pm when PW2 came by her home. It was routine for PW2 to pass by her home to and from school. PW2 sat on a chair outside the house and she gave her water and guava (mapera). In the process she asked for three more ‘mapera’ for her grandmother, her aunty and her uncle and later left for their home.
14. After a while the appellant was arrested. She and her husband followed up on this issue and were informed of what had transpired by PW1 and PW4. In cross examination DW2 insisted that she is the one who gave PW2 water to drink and guavas and that DW1, the appellant was not present on the



material day. In re-examination she reiterated that the accused had a good reputation though widowed and she had never seen him with a woman or girl child. The appellant was not with the minor on the material day and the minor was in good moods.

15. The trial court considered the evidence adduced and convicted the appellant of the offence of sexual assault and sentenced him to serve 10 years imprisonment.

C . Submissions

Appellant's submissions

16. The appellant through his legal counsel did submit that the trial was not conducted in line with the dictates of *the constitution* of Kenya 2010 especially Article 50(2)(j)(k). The appellant was not informed in advance of the evidence the prosecution intended to rely on and the said evidence was never supplied to him. This fact was born out of the proceedings and was a fatal omission which rendered the trial conducted to be unfair. Reliance was placed on Joseph Ndungu Kagiri versus Republic (2016).
17. Secondly the trial court failed to comply with provision of section 200 of the Criminal Procedure Code which was a mandatory requirement. Hon. H.M Mbatia (PM) took over the matter from Hon. K Kenei (RM) and did proceed to hear the last defence witness and wrote the final judgment. She did not inform the appellant of his right to re-summon witnesses and also of his right as to whether he was comfortable with the matter proceeding from where it had reached without recalling witnesses. The failure to comply with Section 200 was fatal to the prosecution case and the court had to uphold this appeal on the said technicality. Reliance was placed on Antony Musee Matinga versus Republic and Ndegwa versus Republic.
18. Further it was the appellant's contention that the prosecution failed to prove that indeed the offence of sexual assault was committed as the witnesses offered inconsistent evidence. PW2 was allegedly assaulted on various days and a close look at the medical book of Masii medical centre indicated that PW2 was treated for a cough on 31st July 2019. This was after the alleged sexual assault is alleged to have occurred on 25th July 2019. Then on 1st August 2019, PW2 was returned to hospital and this time round treated for sexual assault allegedly occasioned by the appellant. The learned trial magistrate was faulted for not ascertaining when the actual sexual assault occurred and thereby arrived at a wrong decision.
19. The appellant also challenged the evidence of PW2 and stated that it was not supported by other direct or indirect corroborating evidence and the court reliance on the said evidence contradicted provision of Section 124 of the *evidence Act*. Reliance was placed on I.N.M versus Republic (2017) eKLR. David Waeru Githii versus Republic (2019) eKLR and Langat Dinyo Domokonyang versus Republic (2017)KLR, LM versus Republic (2020) eKLR and Hadson Ali Mwachongo versus Republic (2016) eKLR.
20. The appellant did pray that his appeal be allowed and both his conviction and sentence be quashed and set aside.

Respondent's submissions

21. The Respondent did oppose this appeal and made oral submission. The appellant on 02.12.2019 did indicate to court that he was ready to proceed with the hearing of the matter and on 24.01.2020 the matter proceeded on the premise that the witness statements had been supplied to the appellant. The appellant on the trial date also did not raise any further objection with regard with the issue of not being supplied by the witness statements and had to be deemed to be satisfied.



22. With regard to failure of the court to give the appellant ample time to call his witness, the evidence on record showed that after he had testified, the appellant was allowed to call his witness (DW2) and was therefore not prejudiced in any manner during trial. The court and by extension the prosecution thus did comply with dictates of the provisions of Article 50(2) of *the constitution* of Kenya 2010 and the first ground of appeal did not have any basis.
23. As regards the exact date of the offence, the same was indicated in the charge sheet and the trial court was satisfied that the offence occurred on 01.08.2019. The mix up of the said date was not fatal as it was clarified. On the issue of PRC form, its non-availability was not fatal as the P3 form was produced and it established the fact that the minor had been sexual assaulted.
24. The Respondent did pray for this appeal to be dismissed.

B. Analysis and Determination

25. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up to its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanor. This court is guided by *Okeno Vs. Republic (1927)E.A 32 & Pandya Vs. Republic (1975) EA 366*.
26. Also in *Peter's vrs Sunday Post(1958) E.A. 424* it was said that it is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.
27. The only two issue which arise in this appeal are; what is the consequence of the trial magistrate failing to observe provisions of Section 200 of the criminal procedure code, which is mandatory and if indeed the prosecution did prove their case beyond reasonable doubt.

A. Failure to comply with Section 200 of the criminal procedure code.

28. Section 200 of the criminal procedure code does provide that;

200(1) Subject to sub section (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may:-

- a. Deliver a judgment that has been written and signed but not delivered by his predecessor; or
 - b. Where judgment has not been written and signed by his predecessor, act on the evidence recorded by the predecessor, or re summon the witnesses and recommence the trial.
2.
 3. Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re summoned and re heard and the succeeding magistrate shall inform the accused person of that right.



4. Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the high court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a retrial
29. This trial was conducted by Hon K Kenei (R.M) who took the evidence of all the witnesses except DW2 he reserved a date for judgment but proceeded on transfer before delivering the said judgment. On 13.03.2023 the matter was placed before Hon H.M. Mbatia (P.M). Initially she directed that the file be placed before Hon Kenei (R.M) for delivery of judgment but the appellant did inform court that he had a witness. The said magistrate proceeded to take the evidence of DW2 and eventually wrote the judgment now appealed against. From the proceedings it is clear that provisions of section 200 of the criminal procedure code were not complied with.
30. As much as it is practically possible it is highly desirable that the trial magistrate or judge must hear the case to conclusion and ultimately render judgement for the simple reason that as the final arbiter, he/she will be in a position to weigh the evidence taken together with his or her observation of the demeanour of witnesses. This was succinctly explained by this Court in *Ndegwa v. R (1985) KLR 535* where Madan, (as he then was) Kneller and Nyarangi, JJ.A said that:-
- “It could also be argued that the statutory and time-honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanour and credibility of witnesses. It has been and will be so in other cases that will follow. In this case, however, the second magistrate did not himself see and hear all the prosecution witnesses even though he said that he carefully “observed” the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanour of all the witnesses in the case. A fatal vacuum in this case in our opinion.for these reasons we have stated, in our view the trial was unsatisfactory.”
31. The learned Judges in *Ndegwa (supra)* emphasised that the court in applying the provisions of section 200 must ensure the accused person is not prejudiced. They said:
- “...No rule of natural justice, no rule of statutory protection, no rule of evidence and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration....”
32. Failure to comply with section 200(3) of the criminal procedure code may also be fatal to the proceedings as noted by Judge Dulu in *Antony Musee Matinge Vs Republic* where he did state ;
- “The above provisions of law are couched in mandatory terms. It is the accused person and not the advocate who must be informed by the court of the right to re summon witnesses. He is also the person to state whether or not the case should proceed without recalling witnesses. It is not his advocate to do so on his behalf. In our present case, there is no record that he elected not to recall witnesses. His advocate could not respond for him. The response has to be that of the accused. The omission by the trial court was fatal to the proceedings. Therefore, the appeal has to succeed on this technicality.
33. This appeal could have been determined on the basis of lack of compliance with Section 200 (3) of the criminal procedure code, but the said section must be read together with Section 200(4) thereof which



provided that the appellate court can order for release of the appellant or order for a retrial depending on the level of prejudice the appellant may suffer. To determine the level of prejudice the court has to delve into the evidence presented, the length of time the trial took, period in custody if any, easy of recalling all witnesses, the appellants rights as enshrined under Article 50(2) of *the constitution* of Kenya 2010 and overall prudent use of judicial time and resources.

34. The court will reconsider the issue of retrial after reviewing the evidence herein.
- B. Was the prosecution case conclusively proved beyond Reasonable doubt.
35. The offence of sexual assault is created by Section 5 of the sexual offense Act which provides that;
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 hygiene 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 persons body, is guilty of the offence of sexual assault.
36. The court of Appeal in the case of John Irungu Vs Republic (2016) eklr did pronounce itself on the essential ingredients of the offence of sexual assault as follows;
- “ 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.”
37. According to PW1, PW2, PW3 and PW5, this incident occurred on 01.08.2019 within the appellants house. He is alleged to have enticed the minor PW2 to his house, removed her cloths, placed her on his bed and proceeded to insert his finger inside her vagina. She felt pain, and in order to buy her silence, the appellant gave PW2 guava and allowed her to go home. When she was being bathed by PW1 later in the evening, she complained of pain in her private part and disclosed to PW1 what had happened.
38. PW4 on the other hand disclosed that PW1 informed her of this incident on 26.07.2019 in the morning and indicated it has occurred the previous evening. For good measure it was her testimony that the minor was walking with legs apart and crying that she felt pain in her private part. She checked PW2 vagina and indeed confirmed that it was reddish and had scratch marks which were visible. PW5 also alleged that PW1 examined PW2 and observed that the vagina was swollen and appeared reddish.
39. Unfortunately for the prosecution the evidence presented as against the appellant had major contradiction and portrayed the witnesses as being insincere and thus not reliable. The Exhibits produced being the P3 form, medical treatment notes and Laboratory reports did not indicate that the minor had any injury to her genitalia. PW3 did not note any swelling on the genitalia, the vagina being reddish nor did the minor have any scratch marks on any area around her genitalia. PW1 who was the



- minor grandmother also never observed the same and clearly PW4 and PW5 evidence with respect to that allegation must be taken with a pinch of salt.
40. Secondly the minor never testified to the fact that the appellant inserted his finger into her vagina. Her testimony was that, “He touched me (points at her vagina) and used his fingers on me. (minor shows her fingers rubbing against her vagina) He then gave me guavas and told me to go home.” The P3 form produced as Exhibit 1 also did confirm that the minor’s external genitalia was normal and had no bruises. Hymen was broken but not freshly so. There was therefore no evidence of penetration at all and the trial magistrate erred in so finding. At best the evidence indicated a case of indecent assault.
 41. The final piece of evidence which also exonerated the appellant are the P3 form (Exhibit 1), and medical treatment notes (Exhibit 2). PW4 testified that she was told of this incident on 26.07.2019 and it had occurred the previous evening. That is to mean on 25.07.2019. This is confirmed by PW1 who in cross examination testified that she took the minor to Masii hospital five days later. The P3 form also incidentally confirms this fact that the incident occurred on 25.08.2019.
 42. Though PW1 alleges that she initially took the minor to Vyula dispensary first, there was no independent evidence to confirm this as a fact. The first medical entry in the medical treatment note from Masii hospital (Exhibit 2) was on 31.07.2019 and it indicates that PW2 was treated for running nose and cough. The following day PW2 went back for treatment and that is when she sought treatment for what was claimed to be sexual assault. The simple question which arises is why did PW1 not raise the issue of PW2 being sexually assaulted when she first took the minor for treatment on 31.07. 2019, yet this incident happened on 25.07.2019 and it was a fact within her knowledge.
 43. The evidence presented herein cannot found a conviction. In the case of *Ndungu Kimanyi v Republic* [1979] KLR 282 this Court said:-

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”
 44. The prosecution evidence was doubtful and had major inconsistencies which cannot be overlooked. There is also no independent corroborative evidence which is reliable to support PW2 evidence and the benefit of doubt must be given to the appellant.

D.Conclusion

45. The evidence adduced herein was at shaky and could under the circumstances sustain the conviction of the appellant. Having so found it would be unjust and unfair to refer this matter back for re trial on the basis for non-compliance with section 200 of the criminal procedure code. Such orders would gravely infringe on the appellants right to fair trial as envisaged under Article 50(2) of *the constitution* of Kenya 2010.
46. The upshot is that this appeal upheld. The conviction and sentence of the Appellant on 03.04.2023 by Honourable H.M Mbatia (P.M) in MACHAKOS CMC (S.O) NO 17W of 2017 is hereby quashed and is set aside. The appellant shall be released forthwith unless otherwise lawfully held.
47. It is so ordered.
48. Judgement accordingly



JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF OCTOBER 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 30th day of October,2023.

In the presence of;

Appellant

.....For O.D.P.P

.....Court Assistant

