



REPUBLIC OF KENYA



KENYA LAW
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**DK v Republic (Criminal Appeal E129 of 2021)
[2022] KEHC 407 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 407 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E129 OF 2021
TW CHERERE, J
APRIL 28, 2022**

BETWEEN

DK APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the conviction and sentence in Criminal Case S.O No.39 of 2018 in the PrincipalMagistrate’s Court at Tigania by Hon. P.M.Wechuli (SRM) on 12.11.2020)

JUDGMENT

The charge

- 1) DK (Appellant) has filed this appeal against sentence and conviction on a charge of sexual assault contrary to section 5(1)(a) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006 (the Act).The offence was allegedly committed on 21st October, 2018 by inserting fingers to penetrate the vagina of PN a child aged 4 years.

Prosecution case

- 2) The prosecution called a total of five (5) witnesses in support of its case. The prosecution case as narrated by PN the complainant is that she was with Appellant at Karimi’s home when he did bad manners to her vagina an incident she later reported to her mother.She identified Appellant by his name DK who he said was son of her big father. PW2 JK was washing the complainant on 21.10.2018 when she started crying and informed her that Appellant had pricked her vagina with his fingers. On the same day, Appellant was arrested by PW4 Peter Kithera, assistant chief Rei Sub-Location and was handed over to police. On the same date, complainant was examined PW5 Geoffrey Muthomi a clinical officer who found that she had a torn hymen as shown on the P3 form PEXH.2. The complaint was investigated by PW2 Santa Karia and Appellant was subsequently charged.



Defence case

- 3) When the prosecution closed its case, Appellant was informed of the options available to defend himself under section 211 of the *Criminal Procedure Code* (Chapter 75 of the Laws of Kenya) which include the right to remain silent. Appellant exercised his right guaranteed under Article 50 of the Constitution to remain silent.
- 4) In a judgment dated on 12.11.2020, Appellant was convicted and sentenced to 10 years' imprisonment.

The appeal

- 5) Aggrieved by this decision, the Appellant lodged the instant appeal. From the amended grounds of appeal and written submissions Appellant raises the following grounds:
 1. He was not identified as the assailant
 2. He was convicted on the evidence of a single witness
 3. Key witnesses did not testify
 4. The time spent in custody was not considered

Analysis and Determination

- 6) I have carefully considered the appeal in the light of the evidence on record, the grounds of appeal and submissions filed on behalf of the Appellant and the State. Over and above the grounds of appeal, I shall also consider whether the prosecution proved the charge of sexual assault.

Is there evidence of sexual assault on the complainant

- 7) Section 5. (1) of the Act that Appellant was convicted under provides as follows:

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.
- 8) Complainant testified that Appellant did bad manners to her by inserting his fingers in her vagina. The clinical officer noted that the Complainant's hymen was torn. From the foregoing, I find that the trial court rightly found that the Prosecution had proved beyond any reasonable doubt that there was evidence of penetration which is defined by Section 2 of the Act as partial or complete entry into the genital organ of another person.



Crucial witnesses did not testify

- 9) In *Bukenya & Others. v. Uganda* (1972) EA 594, it was held that the prosecution is duty bound to make available witnesses necessary to establish the truth even if the evidence may be inconsistent with the prosecution's case.
- 10) The *Evidence Act*, Chapter 80, Laws of Kenya provides at Section 143 That:

“No particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact.”
- 11) This position was restated in *Julius Kalewa Mutunga vs Republic Criminal Appeal No. 31 of 2005*, where the Court of Appeal held,

“...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”
- 12) There is no evidence that complainant's grandmother and Kirimi witnessed the commission of the offence. Their evidence was therefore not crucial to the prosecution case and failure to call them does not weaken the prosecution case.

Evidence of a single identifying witness

- 13) I will tie this ground to the ground on identification of the Appellant. The only witness to the incident is the complainant. Concerning identification of the Appellant, the court reveals that Appellant was identified by his name which left no doubt in the kind of the court that Appellant was not a stranger to the complainant and could not have been mistaken for someone else. (See *Anjononi & Others v Republic* [1980] KLR 57.
- 14) As a general rule of evidence embodied in Section 124 of the Evidence Act, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section makes an exception in sexual offences and provides as follows:

“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.
- 15) From the totality of the evidence on record, I find that the trial court's conclusion that Appellant had been identified as the assailant and that complainant was truthful was well founded.
- 16) The penalty for indecent assault is found under section 5 (1) of the Act which provides that:

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

17) Appellant having been found guilty, he was lawfully sentenced to serve 10 years' imprisonment.

18) Section 333(2) of the Criminal Procedure Code provides that:

(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

19) It is worthy to note that the Appellant was in custody throughout the trial having been arrested on 21st October, 2018.

20) From the foregoing, the Appeal fails except that the 10-year sentence imposed on the Appellant shall commence from 21st October, 2018 when he was arrested.

DELIVERED AT MERU THIS 28TH DAY OF APRIL 2022

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Appellant - Present in person

For the State - Ms. Mwaniki

