**DKT v Republic (Criminal Appeal 30 of 2019)**
**[2022] KEHC 11460 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11460 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIVASHA**

**CRIMINAL APPEAL 30 OF 2019**

**GWN MACHARIA, J**

**JULY 27, 2022**

**BETWEEN**

**DKT ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the original conviction and sentence in the Senior Principal Magistrate's Court at Engineer Cr. case No. 25 of 2018 delivered by Hon. R. L. Musiega (RM) on 30th October 2019)***

## JUDGMENT

1. The Appellant, DKT, was charged with attempted defilement of a girl contrary to Section 9(1) as read with Section 9(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the 22nd day of June 2018 at [Particulars Withheld] village within Nyandarua County, he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of EWK, a child aged 3 years old. In the alternative, he was charged with 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 22nd day of June 2018 at [Particulars Withheld] village within Nyandarua County, he intentionally and unlawfully touched the vagina of EWK, a child aged 3, years old with his penis.

2. He pleaded not guilty to the charges. Upon full trial, he was convicted of the main offence of attempted defilement and sentenced to serve ten (10) years imprisonment.Being aggrieved by his conviction and sentence, he preferred the instant appeal.

### Grounds of Appeal

3. The Appellant's appeal is based on the following grounds:

1. Thatthe learned trial magistrate erred in both law and fact by convicting and sentencing the Appellant without following the procedures of amendment of the charge sheet.

2. That the learned trial magistrate erred in both law and fact in failing to appreciate that the prosecution had failed to establish their case to the required standard.

3. Thatthe learned trial magistrate erred in both law and fact by failing to consider the Appellant's alibi defence.

4. Thatthe learned trial magistrate erred in both law and fact in failing to consider the light used by the prosecution witnesses to identify the Appellant.

5. Thatthe learned trial magistrate did not comply with section 124 of the *Evidence Act* in writing his judgment.

6. Thatthe learned trial magistrate erred in both law and fact by convicting the Appellant on the basis of evidence that was full of contradiction, discrepancies, mistakes and errors.

7. Thatthe learned trial magistrate erred in both law and fact by convicting the Appellant on the basis of prosecution exhibits which were not genuine.

**Summary of Evidence**

4. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced by the witnesses before the trial court so as to arrive at its own independent verdict whether or not to uphold the decision of the trial court. In doing so, this court is required to take into account the fact that it neither saw nor heard the witnesses and give due regard for that. (*See Okeno v Republic (1972) EA 32*).

5. The Prosecution's case can be summarized as follows: The complainant PW3, EWK is the biological daughter of the Appellant who married her mother PW1, ENN with two older children.

6. On Thursday, 22nd June, 2018, PW1 was sleeping on her matrimonial bed together with the Appellant and their child PW3 who was three years old then. At around 2.38am, she heard PW3, who was sleeping between her and the Appellant, breathing heavily. She stretched her hand and touched PW3 only to find that she did not have her undergarments yet PW3 had all her clothes on when she had earlier put her to sleep. PW1 woke up and switched on a torch and found the Appellant with his trousers lowered down rubbing PW3's private parts with his hand. PW1 looked at PW3's private part and saw a yellowish discharge. She pulled the child away and asked the Appellant twice what he was doing to PW3. The Appellant told her to keep quite or leave his house. She kept quiet because she had other children sleeping in another room in the house. After that, they slept on different parts of the bed and the lights remained on throughout. The Appellant slept near the headboard while she slept with PW3 on the lower side of the bed.

7. PW1 asked PW3 what had happened and PW3 said "baba" and started crying. The next day the minor asked to go to the toilet to urinate. PW1 put PW3 on the potty to relieve herself and PW3 started crying that she was feeling pain on her private parts. PW1 asked the Appellant once more what he did and he told her to keep quiet then left for work. PW1 called her mother and informed her about the incident. Her mother told her to go and report. She reported the incident at Njambini Police Station.

8. The investigating officer, PW4 PC Rose Mwamburi, of Njabini Police Station took PW3 to Engineer District Hospital for treatment and for filling of P3 Form. PW3 was examined by PW5, Dr. Junius Ntwiga of Engineer District Hospital. On examination, he found that PW3's genitalia was normal,

there were no bruises or lacerations. However, there was hyperemia (reddening) outside the vagina towards the right side. PW5 attributed this to trauma or injury as a result of force. He conducted STI tests and filled both the P3 Form and Post Rape Care Form on 22nd June, 2018. He classified nature of injury as attempted defilement.

9. On 22nd March, 2019, PW2, Anne Wangari Kangethe, the Children's Officer in charge of South Kinangop Sub-county talked to PW3 as she had been appointed as her intermediary by the court. PW3 told her that the Appellant, whom she called W, pushed his fingers and nails in her 'dudu' and also used his 'dudu' to touch her 'dudu' and anus.

10. During trial, PW3 gave an unsworn testimony after a voire dire examination. She stated on the material night, PW1 was sleeping in front of her and the Appellant was sleeping behind her. She went to sleep with her clothes on but they were removed by W who is her father, the Appellant herein. The Appellant touched her kadudu (she pointed between her legs) while she was sleeping and she felt pain.

11. PW4 produced a Birth Notification indicating PW3 was born on 14th May, 2015 as exhibit 1 while PW5 produced the P3 Form and PRC Form as exhibit 2 and 3 respectively.

12. When placed on his defence, the Appellant elected to give a sworn testimony. He stated that on 21st June, 2018, he left home and went to work with a man who was a neighbor and a colleague. They went to Murungaru until 6.00 p.m. He met a lady friend and they left Murungaru for engineer with the lady and the said colleague as the vehicle was not going to Njambini directly. At Engineer, he and the lady excused themselves and he went to buy her a dress at boutique after which the lady invited him to her house. He slept there until the next morning and woke up at 8.30 a.m. He went to Njambini and because he felt guilty, he did some shopping and he gave it to a boda boda rider with some money to take to his wife, PW1. The wife sent him a message at 10.17 a.m on 22nd June, 2018 indicating that she had received the items. He later went home and found PW1 unhappy because he never showed up at home. He had to leave for work. PW1 asked him for salon money and he gave her then left. He later went back home at 9.30 pm. He slept and upon waking up at 6.00 am, PW1 told him that she wanted to go somewhere and asked for money for milk and bread. He told her to pick from the trouser he had the previous night. PW1 left and he remained in bed.

13. He fell asleep and was later woken up by PW4 and three other police officers. They arrested him and took him to Njabini Police Station. He learnt of the offence he was being charged with at the police station. He faulted the investigating officer for not wanting to hear his side of the story. He stated that he could not call the lady he slept with as a witness because he did not want PW1 to learn of the affair. He could not call his colleague because the said colleague sold his timber while he was in jail. He believed PW1 framed him because he told her he would marry another wife. He also raised issues on the credibility of PW3's testimony as her statement was recorded much later on 25th October, 2018.

**Analysis and Determination**

14. The appeal was canvassed through both oral and written submissions. The issues that arise for determination are:

    1. Whether the trial court acquitted the Appellant of the alternative charge.

    2. Whether the charge sheet was unprocedurally amended and the impact thereto.

    3. Whether the prosecution proved the offence of attempted defilement against the Appellant.

    4. Whether the sentence should be set aside.

    Whether the trial court acquitted the Appellant of the alternative charge.

15. The Appellant contended that he was acquitted of the alternative charge of committing an indecent act with a child and thus the offence of attempted defilement cannot stand.

16. In criminal law, an alternative charge is usually included just in case all the elements of the main charge are not proved. It is a fallback charge which the court can convict an accused person for if the main charge fails to stand. For that reason, an accused can only be convicted on either the main or the alternative charge but never both. If the court is satisfied that the main charge has been proven, the alternative charge automatically falls but that does not mean that an accused has been acquitted of the alternative charge. The Appellant's assertion is therefore unmerited.

Whether the charge sheet was unprocedurally amended and the impact thereto.

17. The Appellant also faulted the prosecution for amending the charge sheet without following the prescribed procedure under Section 214 of the Criminal Procedures Code. He asserted that the prosecutor amended the charge sheet without informing either the investigating officer or the court or the accused person.

18. I have looked at the charge sheet. It shows that it was amended on 25th June, 2018, which is the date when the Appellant was presented in court for plea taking, to change the date of the offence from 23rd June, 2018 to 22nd June, 2018. However, the court proceedings do not show that any application was made in that regard or that the Appellant was called to plead to an altered charge.

19. Section 214 (1) of the Criminal Procedure Code provides as follows regarding the procedure for amendment of a charge sheet: -

(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that—

(i) Where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof."

20. In this case, the failure to comply with the procedure under Section 214 above was not fatal as it did not occasion any miscarriage of justice. The amendment did not introduce any fresh elements to the charges that the Appellant was facing. It was also effected before any evidence was taken and so ab initio, the Appellant was well versed with the particulars of the offence. Further, it is clear that the court

proceeded on the basis that the Appellant had pleaded not guilty to the charges of which particulars were part of the charge he had pleaded to. In the premises, this ground of appeal also lacks merit.

Whether the prosecution proved the offence of attempted defilement against the Appellant.

21. The Appellant herein was charged under Section 9(1) and (2) of the *Sexual Offences Act* No. 3 of 2006. The said provision stipulates as follows:

(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years."

22. Section 388 of the Penal Code defines attempt in the following terms:

(1) Where a person intending to commit an offence begins to put his intentions into execution by means adopted to its fulfilment manifests his intentions by some avert act but does not fulfil his intentions to such an extent as to commit the offence, he is deemed to attempt to commit an offence.

(2) It is immaterial except so far as regards punishment whether the offender does all that of necessary on his part for completing the commission of the offence or whether the complete is prevented by circumstances independent of his will or whether he desists of his own motion from further prosecution of his intention.

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."(emphasis added)

23. In Brian Kennedy Odhiambo v Republic [2019] eKLR, Mrima J. stated as follows regarding Section 388 of the Penal Cord:

> " The above section brings out the two main ingredients of an attempted offence; the mens rea which constitutes the intention and the actus reus which constitutes the overt act towards the execution of the intention."

24. From the above, it is clear that to prove attempted defilement, the prosecution must establish three elements namely the age of the victim, the positive identification of the assailant and that the assailant had the mens rea to defile the victim but was prevented from perpetrating the actus reus by whatever reason. On the third element, the prosecution must show the steps taken by the assailant to execute the defilement which did not succeed. These include actions such as indecent touching and an attempt to penetrate the genital organs of the victim, see Boniface Mutisya Kilonzo v Republic [2019] eKLR.

25. The Appellant submitted that the prosecution did not prove the ingredients of attempted defilement. He contended that medical evidence did not prove any attempt to defile PW3 because PW5 stated that her genitalia was found to be normal with no laceration upon examination. Further, he submitted that the prosecution did not establish the lights which were used by PW1 and PW3 to identify him as PW1 testified that at the time of the incident there was no light while PW3 said that there was light. In addition, he urged the court to disregard the Birth Notification tendered in evidence claiming that it was different from the one that was marked for identification by PW1. He claimed that PW1 marked a non-existent document for identification because she told the court that she had not carried the document.

26. I have carefully examined the evidence on record. As regard the age of the child, PW1 testified that PW3 was three years old at the time of the alleged offence. She marked a copy of PW3's Birth Notification number xxxxx for identification and informed the court that she could avail the original if given time. The copy was produced in evidence as exhibit '1' by PW4. The said copy indicates that PW3 was born on 14th May, 2015 which confirms PW1's assertion that PW3 was aged 3 years as at the time of the alleged offence. I am therefore satisfied that the prosecution proved PW3's age to the required standard.

27. On identification, it was not disputed that the Appellant was well known to PW1 and PW3. He was the husband to PW1 and the father to PW3 who was his biological child. This was therefore a case of recognition.

28. The next question is whether the prosecution proved that the Appellant had unsuccessfully attempted to defile PW3. Before I proceed, I find it necessary to point out that during trial, on the application of the prosecution, the trial magistrate declared PW3 a vulnerable witness in accordance with Section 31 of the *Sexual Offences Act* due to her tender age. As a consequence, the trial court appointed PW2 as her intermediary but later allowed PW3 to testify with the assistance of PW1 as her intermediary.

29. The Appellant now faults the trial magistrate for failing to comply with the provisions of Section 124 of the *Evidence Act* in writing his judgment. The said provision allows the court to convict an accused in a sexual offence case on the sole evidence of a victim of the offence if the court is satisfied that the victim is telling the truth and the court has to record reasons for such belief.

30. In the instant case, it is my considered view that Section 124 of the *Evidence Act* was inapplicable because the Appellant was not convicted on the sole evidence of PW3. There were two eye witnesses namely PW3 and her mother, PW1. See Ngugi J. in Benson Waweru Mwithukia v Republic [2018] eKLR. Further, I find relevant guidance in J.K.N. v Republic [2015] eKLR, where Lessit J (as she then was) stated that:

> 25. The operation of section 31 of the SOA seems to form an exception to the application of section 124 of the *Evidence Act*, where the evidence of a child victim of a sexual offence is received through an intermediary...
>
> 26. In the instant case, the complainant gave her evidence by way of affirmation. Hers was not the only evidence relied upon to convict the appellant."

31. Going back to the issue at hand, PW1 and PW3 gave consistent and corroborated testimony that they slept on the same bed with the Appellant on the material night and PW3 went to sleep with her clothes on. PW1 testified that she was woken up by PW3's heavy breathing and when she stretched her hand to touch her, she felt her without her lower clothes. She immediately switched on the light and found the Appellant with his trouser pulled down to his knee touching PW3's private parts. This evidence was corroborated by PW3 who testified that Wagetheng'o, the Appellant herein, was sleeping behind her and he removed her clothes, touched her 'kadudu' and she felt pain. PW3 also confirmed that the light was switched on and he saw the Appellant. The evidence of PW1 and PW3 was corroborated by the medical evidence of PW5 which confirmed that there was hyperemia (reddening) outside PW3's vagina towards the right side. PW3 opined that the reddening was caused by trauma or injury as a result of force.

32. In the court's view, the Appellant's intention to defile PW3 was clearly demonstrated by his removal of the child's lower garment as well the pulling down of his own trouser. Further, the actus reus is demonstrated by way he was indecently touching PW3's private parts. There can be no other logical explanation for such actions except that he was preparing to defile PW3 and had PW1 not intervened in good time, he would have succeeded in defiling her (PW3).

33. The Appellant faulted the trial court for failing to consider his alibi defence as well as the defence of an existing grudge that PW1 held against him because he had told her that he would marry another wife. He maintained that he slept at his lover's house on 21st June, 2018 and went home on 22nd June, 2018. It was also his contention that PW3 stated in court that she testified what her mother told her to say. He argued that it was impossible for him to have committed the offence and especially while on the same bed his wife. On the other hand, learned state counsel submitted that the prosecution proved the offence to the required standard. It was her submission that the Appellant's alibi cannot hold as he did not adduce evidence to support it.

34. I note that the trial court rejected the Appellant's alibi on the grounds that he did not mention the names of the friend and lover that he was allegedly with on the material night and also failed to call them as witnesses.

35. The burden of disproving an alibi always rests with the prosecution. This means that it was not the duty of the Appellant to avail the said people to support his alibi. All that the trial court was expected to do was to consider the alibi alongside the prosecution evidence and determine whether or not it cast any doubt on the same. I have now weighed the alibi against the evidence by the prosecution and I find that it did not shake the watertight evidence by the prosecution. Further, I find that there was no evidence to support the Appellant's allegation of a grudge between him and PW1.

36. Further, the Appellant argued that the exhibits tendered in evidence were not genuine and should all be disregarded. He submitted that the PRC report ought to be rejected in view of the absence of the hospital stamp thereon as well as an indication of the time of examination of PW3. He argued that this was in contravention of Section 77 of the *Evidence Act* and was an indication that PW5 was not qualified to examine PW3. It was also his contention that the source of the P3 Form was unknown because PW4 said it came from Engineer Hospital whereas the document bears a stamp for Njabini Police Station which means it was improperly acquired and thus should be disregarded. The learned state counsel on the other hand disputed the contention that exhibits were not genuine.

37. I reject the Appellant's assertion that PW5 was not qualified to examine PW3 for the reason that the Appellant did not raise the issue during trial. All the same, it is notable that PW5 was a medical doctor who ordinarily carries out such examinations and treatments. The court also rejects the Appellant's contention that the medical evidence was not genuine firstly, because he did not object to the production of the said evidence in the trial court. Indeed, the evidence on record shows that the P3 Form emanated from Njabini Police Station as is done in most cases and that is why it had the stamp for the said police station. The P3 Form was only taken to Engineer District Hospital for filling by the doctor who examined PW3. Further, PW5 swore on oath that whereas the PRC report was not stamped, he filled it with his own handwriting and signed it. There is therefore no reason for this court to discredit the authenticity of the P3 Form and PRC report that were tendered in evidence.

38. Further, the appellant has complained that he was convicted on the basis of evidence that was full of contradiction, discrepancies, mistakes and errors regarding the date and time when the alleged offence was committed. He submitted that PW4 stated that the incident occurred on the morning of 23rd June, 2018 and was reported the same 23rd June, 2018; she also stated that the first report in the occurrence book indicated that the incident occurred on 21st June, 2018 at 0200hours while according PW1 and PW5 the date and the time of the offence was 22nd June, 2018 at 0200hrs. According to the Appellant, these contradictions were so grave that they raise doubt as to whether the offence was actually committed and/or whether PW4 investigated the offence in question.

39. In *Twehangane Alfred v Uganda*: Criminal Appeal No. 139 of 2001, [2003] UGCA, 6, the court held as follows regarding contradictions:

> "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 case."

40. In the instant case, indeed there were contradictions as regards the date of the offence in the first report, the charge sheet and the witness statements. The eye witness, PW1, was categorical that the incident occurred on June 22, 2018 which was a Thursday night. PW4 also confirmed that the incident occurred on 22nd June, 2018 which is the same day that she took PW3 to the hospital as indicated on the PRC report and P3 Form. PW5 also confirmed that he examined PW3 on June 22, 2018. When put to task to explain the contradictions during cross examination, PW4 stated that the contradictions were occasioned by human error. There is nothing to cast doubt on the testimony of PW4 that that was an error on her part. In my considered view therefore, the contradictions were satisfactorily explained and in any event, they did not affect the main substance of the prosecution case, which is whether the Appellant committed the offence.

41. I am therefore satisfied that the prosecution proved the offence of attempted defilement against the appellant beyond any reasonable doubt. The appellant's conviction for the same was therefore sound and is accordingly upheld.

Whether the sentence should be set aside.

42. As regards the sentence, the Appellant was given a chance to tender his mitigation but the trial magistrate noted that he was bound by the minimum mandatory sentence prescribed for the offence under section 9(2) of the *Sexual Offences Act*. In the case of *Philip Mueke Maingi & 5 others v Director of Public Prosecutions & anor*: Machakos HC Petition No. E017 of 2021, Odunga J. recently found that minimum mandatory sentences under the *Sexual Offences Act* are unconstitutional to the extent that they deny trial courts the discretion to consider the peculiar circumstances of each case so as to arrive at an appropriate sentence informed by those circumstances. For that reason, the learned judge held that courts are at liberty to impose the prescribed sentences provided they are not deemed to be the mandatory minimum sentences.

43. The appellant herein was sentenced to ten years imprisonment. Although he was a first offender, the court cannot close its eyes to the negative psychological effect that the incident had on PW3, whose innocence the appellant was supposed to protect being that he was his biological father. In *Edward Gikundi Ndege v Republic* [2021] eKLR, and *Sammy Abiyo Jillo v Republic* [2021] eKLR, appellants who were convicted of attempted defilement had their sentences reduced to 5 years on appeal.

44. The instance case is represented by aggravating factors in that, the minor was the appellant's daughter and the she was too young in age such that had the appellant succeeded in completing the offence of defilement, the resultant effects would have been grave. On these grounds, a stringent sentence is warranted as a deterrence. Accordingly, I set aside the 10 years imposed and substitute them with seven (7) years imprisonment from June 23, 2018 which is the date when he was arrested considering that he remained in remand custody during trial.

45. The upshot is that the appeal succeeds on the sentence only while the conviction is hereby affirmed. It is so ordered.

**DATED AND DELIVERED AT NAIVASHA THIS 27TH DAY OF JULY, 2022**

**.....**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

Appellant in person

Ms Maingi for the Respondent.