



REPUBLIC OF KENYA



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**DOO v Republic (Criminal Appeal E007 of 2021)
[2022] KEHC 16683 (KLR) (19 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16683 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E007 OF 2021
JN KAMAU, J
DECEMBER 19, 2022**

BETWEEN

DOO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon C. L. Yalwala (SPM) delivered at Maseno in Senior Principal Magistrate's Court in Criminal Case No 33 of 2018 on 11th March 2021)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of incest contrary to Section 20(1) as read with Section 22(1) of the *Sexual Offences Act* No 3 of 2006. He had also been charged with an alternative offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The Learned Trial Magistrate, Hon C. L. Yalwala, Senior Principal Magistrate tried and convicted him on the main charge and sentenced him to serve twenty (20) years imprisonment.
2. Being dissatisfied with the said Judgement, on 24th March 2021, the Appellant lodged an Appeal herein. His Petition of Appeal was dated 17th March 2021 and filed on 24th March 2021. He set out seven (7) grounds of appeal challenging both conviction and sentence.
3. His Written Submissions were dated and filed on 8th October 2021 while those of the Respondent were dated 8th November 2021 and filed on 9th November 2021.
4. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.



Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
7. Having looked at the said Grounds of Appeal, his Written Submissions and those of the Respondent, this court determined that the issues that had been placed before it for determination were as follows:-
 - a. Whether or not the Prosecution proved its case beyond reasonable doubt.
 - b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant by the Trial Court was lawful and/ or warranted.
8. The court dealt with the two (2) issues under the following distinct and separate heads.

I. Proof Of Prosecution's Case

9. Grounds of Appeal Nos (1), (2), (3), (4), (5) and (7) of the Petition of Appeal were dealt with together under this head as they were all related.

A. Relationship between the Appellant and the Complainant

10. The Appellant did not submit on his relationship with the Complainant (hereinafter referred to as "PW 1"). On its part, the Respondent submitted that PW 1's testimony that the Appellant was her father was corroborated by her mother, CA (hereinafter referred to as "PW 2") and the Appellant herein. It added that the Birth Certificate also indicated that the Appellant was PW 1's father.
11. This court was persuaded to find and hold that as the issue of the relationship between the Appellant and PW 1 was not contested, he was for all purposes and intents, PW 1's father.

B. Age

12. The Appellant did not also submit on the issue of PW 1's age. On the other hand, the Respondent submitted that PW 1 was aged fourteen (14) years at the time she was defiled as was corroborated by her mother PW 2 who testified that PW 1 was born on 10th December 2004 as was evidenced by Birth Certificate.
13. It was PW 1's testimony that she was fourteen (14) years of age at the time of the incident. This was corroborated by PW 2 and the Birth Certificate. As the offence was said to have occurred in the month of May 2018, PW 1 was therefore aged thirteen and a half (13 ½) years at the material time.
14. This court found and held that the Learned Trial Magistrate correctly determined PW 1's age as thirteen (13) and a half (1/2) years when the incident occurred. This court was thus persuaded that for all purposes and intent, PW 1 was a child and her age was proved.



C. Identification And Penetration

15. These two (2) issues were intertwined and hence the court dealt with them under this head.
16. The Appellant placed reliance on the cases of *R v Turnbull & Others* (1973) 3 ALL ER 549 and *Wamunga v Republic* (1989) KLR 426 where the common thread in the aforesaid cases was that where the only evidence against a defendant was evidence of identification or recognition, a trial court was enjoined to examine such evidence carefully to be satisfied that the circumstances of identification were favourable and free from possibility of error before it could safely make it the basis of conviction.
17. He further argued that PW 1's testimony was full of contradictions as regards the recognition and/or identification of the alleged perpetrator. He submitted that PW 1 initially testified that the incident took place at night and that she lit the lamp to see who it was and recognised that it was him only to later deny that there was no light in the kitchen and that no one lit the lamp in the kitchen. He further contended that although she said that there was electricity from the main house which lit up the whole compound, she had testified that she used the lamp to walk to the kitchen. It was his averment that there was no sufficient light for anyone to see hence the need for the tin lamp.
18. He added that PW 1 also changed the place she had said that she recognised him as her perpetrator from because initially she had said that she had recognised him inside the kitchen but changed her testimony that she recognised him to the place to the door of the main house (sic).
19. He faulted the Prosecution for having failed to call PW 1's brother as a witness as she was sleeping with her at the kitchen when the incident was said to have taken place. He pointed out that he was aged thirteen (13) years at the material time and was thus a crucial witness.
20. He submitted that VW (hereinafter referred to as "PW 5") did not record his statement and did not give a reason why she did not do the same. He argued that the only inference that could be made was that he was going to give a different testimony of what had transpired being that PW 1 would sneak out to attend disco matanga and to which she had been punished before (sic).
21. He further submitted that she told the police that she was defiled on three (3) consecutive days and further that despite denying that she had been beaten for attending disco matanga, PW 2 had confirmed that she had indeed beaten her for attending disco matanga.
22. He also contended that the evidence of the date of the last incident never arose during PW 1's testimony but that the same was contained in the P3 Form. It was his argument that where a person had been defiled a day before examination, that evidence ought to have come out clearly during the examination-in-chief. He further pointed out that the P3 Form indicated the injuries of having been weeks and not days.
23. He also contended that MAJ (hereinafter referred to as "PW 4") said that the defilement occurred on 28th June 2018 while PW 5 spoke of the defilement having been in May 2018.
24. He wondered what became of PW 1's pregnancy despite PW 4 testifying one (1) year after the alleged incident and questioned why DNA was never taken to establish if indeed he was the father to her child.
25. On its part, the Respondent submitted that PW 1 stated in her testimony that the Appellant was her father and they had been staying together since she was young which was corroborated by PW 2's evidence. It argued that the Appellant was a person that PW 1 stayed with all her life and therefore she could positively identify him. It added that PW 1 pointed at the Appellant in court as the person who defiled her and therefore positively identified him.



26. It was also its submission that there was proof of penetration as PW 1 had a broken hymen and her vaginal opening was wider than for her age. It pointed out that there was a whitish foul smelling discharge and the pregnancy test was positive. It submitted that penetration was proven by medical evidence and corroboration as highlighted in *Charles Wamukoya v Republic* Criminal Appeal No 72 of 2013. (eKLR citation not given).
27. PW1 testified that on the material date she was defiled by the Appellant after he left the main house where he used to sleep with PW 2 and came to the kitchen where she and her younger brother slept. She said that he opened the latch of the kitchen that used to be closed from the inside and slept on her. She said that she knew it was the Appellant who had slept on her because she stood up after the incident and followed him at the door to the kitchen which slightly faced the door to the main house. Her evidence was that she saw able to see that it was him because there were electric lights on the main house.
28. When she was cross-examined, she said that she did not recognise him when he was in the house but only did so when he went outside. She further stated that there was no light in the kitchen house. It was her further evidence that the Appellant defiled her twice and then left and that he came back a second time. She added that he returned at night a week later. She explained that she wrote about her ordeal and put it in a box at school whereafter JOL (hereinafter referred to as “PW 3”), a teacher at [Particulars Withheld] Primary School where she schooled, called her and she told him everything.
29. On further cross-examination, she said that the Appellant defiled her twice and that she spoke out on the second occasion. She also said that she told Mama Odongo after the first incident. She said that she told Mama Odongo to tell PW 2 that the Appellant wanted to sleep with her, an assertion that she also made during her examination-in-chief.
30. PW 2’s testimony was that the Police told her that PW 1 was defiled by the Appellant herein. On being cross-examined, she stated that PW 1 never told her that the Appellant had defiled her.
31. PW 3 testified that there was a box which children wrote and put papers therein expressing their feelings. He recalled that on 29th June 2018, they found many letters on the aforesaid box but one caught their interest. He said that the said letter had the author’s name and she had alleged that she was being defiled by her own father but the people she had confided in were not intervening.
32. PW 3 was a Clinical Officer at Chulaimbo Hospital. She testified that she filled the P3 Form. She stated that PW 1 had told her that she had been defiled by the Appellant on three (3) occasions and that when she wanted to scream, he threatened her. Upon examining her, she did not find any visible tears or redness but her vaginal opening was wider for her age suggesting that she had been defiled. There was also a whitish foul smelling discharge. Although all the other tests turned negative, her pregnancy test was positive.
33. PW 5 was the Investigating Officer based at the Maseno Police Station Gender Desk at the time of the alleged incident. In her cross-examination, she stated that PW 1 informed her that the Appellant defiled her several times. She confirmed that PW 1 used to sleep in the same room with her younger brother but that she did not record his statement. She added that she visited PW 1’s home.
34. Notably, PW 1 testified that the Appellant defiled her on different dates. She definitely would have been able to recognise him as the perpetrator. The question of the Appellant’s identification did not therefore concern this court too much as both PW 1 and the Appellant were known to each other. However, the question of whether or not the Appellant defiled her was a different matter altogether.
35. Right at the outset, this court noted that there were several contradictions in PW 1’s evidence. She also appeared not to have been completely honest when answering some questions. The fact that she lied



- that she had never been beaten for attending a disco matanga when she had in fact been beaten by PW 2 for attending the disco matanga led this court to treat her evidence with caution.
36. She also spoke of the latch to the kitchen door having been from inside. It was not clear how the Appellant herein opened the door to the kitchen. The Prosecution did not interrogate this assertion further to explain how he opened the latch that was inside the kitchen. It would have assisted this court if it was explained whether there was an opening where someone could put their hand in so as to reach the latch to open the door to the kitchen from inside. This evidence did not therefore appear consistent.
37. Whereas the proviso to Section 124 of the *Evidence Act Cap 80* (Laws of Kenya) gives a trial court leeway to rely on the evidence of a single witness, there must be some other evidence that can corroborate the evidence of such single witness especially where the evidence was not clear cut. There was nothing that was led to show that PW 1's brother was a child of tender years who could not testify. This court also found the Prosecution's case to have been greatly weakened for failure to have called him to testify because PW 1 testified that they were sleeping on the same mattress on the material date. The failure by the Prosecution to call PW 1's brother led this court to question exactly what transpired on the material nights.
38. This court also noted that the letter PW 3 referred to as having been written by PW 1 was not tendered in evidence. It was not clear why this very important piece of evidence was not produced as it could also have made the Prosecution's case cogent by showing the triggering of the events.
39. Going further, this court noted that PW 1 testified that the Appellant defiled her a second time a week later. Notably, the Charge Sheet indicated that the alleged defilement occurred on diverse dates in the month of May 2018. This was corroborated by PW 5. The two (2) incidents therefore occurred in May 2018. The court could not comment on whether the defilement occurred on consecutive dates or not as it did not see the Statements that were recorded by the Police. Suffice it to state that PW 1 had testified that the incident happened during Easter time which normally falls in either March or April and never in June of any given year.
40. There was a lacuna as to whether PW 1 was defiled by the Appellant on 28th June 2018 as she told PW 3. This evidence was so material that she ought to have presented it to the court. Indeed, there was need to remove doubt from the mind of this court that PW 1 could not have been defiled by any other person between May 2018 and June 2018 other than by the Appellant herein.
41. There was nothing to show that the Appellant was responsible for the breaking of her hymen more so because she sought treatment on 29th June 2018. Further, there was no medical evidence that linked him to the foul discharge that she had at the time she was examined. Nothing stopped PW 5 from having him examined to connect him to the said foul discharge to strengthen the Prosecution's case.
42. This court found that the P3 Form was silent on the length of PW 1's pregnancy. Be that as it may, this court noted that PW 1 testified on 29th November 2018 which was six (6) months from the date of the alleged incident. If the pregnancy was uneventful, PW 1 should have given birth in February 2019. The court appreciates that the Appellant was under no obligation to submit himself for DNA testing as that would have amounted to giving self-incriminating evidence, if at all.
43. It was for that reason that pursuant to its powers under Section 358(1) of the *Criminal Procedure Code Cap 75* (Laws of Kenya) to obtain additional evidence, in its Ruling of 30th March 2022, this court directed the Appellant, PW 1 and the child born out of the alleged union to undergo a DNA. This court gave the Respondent sufficient time to trace PW 1 and her child to undergo the DNA and gave a last and final adjournment to the Respondent on 18th May 2022. As the time of reserving the decision herein, PW 1 had not been availed. There was no explanation as to what efforts had been made to trace



her. In this regard, this court inferred a negative reference on failure of PW 1 and her child, if any to be availed for a DNA test at this appellate stage.

44. The Appellant adduced sworn evidence. He was under no obligation to adduce any evidence. The onus was on the Prosecution to prove its case.
45. Notably, Section 108 of the *Evidence Act* Cap 80 (Laws of Kenya) provides that:-

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
46. Further, Section 109 of the *Evidence Act* stipulates that:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
47. While the court could not state with certainty that the Appellant did not commit the offence, taking into account the contradictions, inconsistencies, gaps and ambiguity in the evidence that was adduced by the Prosecution, this court came to the firm conclusion that the Prosecution did not prove its case to the required standard, which in criminal cases, is proof beyond reasonable doubt.
48. The penalty to be suffered by convicts of sexual offences is quite stiff. A court must therefore be satisfied that a person who has been charged with a sexual offence is truly guilty as charged. If doubt has been created in the mind of the court, it is better to acquit a person even where he may have been guilty rather than convict an innocent person on suppositions and presumptions.
49. Article 29 of the *Constitution* of Kenya, 2010 provides that every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause
50. In the circumstances foregoing, this court found and held that Grounds of Appeal Nos (1), (2), (3), (4), (5) and (7) of the Petition of Appeal were merited and the same be and are hereby allowed.

II. Sentence

51. Grounds of Appeal No (6) of the Petition of Appeal was dealt with under this head.
52. Section 20 (1) provides as follows:

“Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years.

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.”
53. In the event the Prosecution would have proven its case, the imprisonment of twenty (20) years was lawful as the Learned Trial Magistrate could still have sentenced the Appellant to life imprisonment as PW 1 was aged thirteen (13) and a half (1/2) years as at the time of the alleged incident and was his daughter.



54. In view of this court's finding that the Prosecution had not proved its case beyond reasonable doubt, Ground of Appeal No (6) of the Petition of Appeal was rendered moot.

Disposition

55. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 24th March 2021 was merited and the same be and is hereby allowed. The Appellant's conviction and sentence be and are hereby set aside and/or vacated as they were unsafe.

56. It is hereby directed that the Appellant be and is hereby released from custody forthwith unless he be held for any other lawful cause.

57. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF DECEMBER 2022

J. KAMAU

JUDGE

