



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CRIMINAL APPEAL NO. 6 OF 2018**

**DOO ALIAS R.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in S.O.A case No.100 of 2016 of the Chief Magistrate's Court at Busia by Hon. G.N Wakahiu-Chief Magistrate)*

**JUDGMENT**

1. **DOO alias R**, the appellant herein, was convicted for the offence of incest contrary to section 20 (1) of the Sexual Offences Act No. 3 of 2006.

2. The particulars of the offence were that on the night of 12<sup>th</sup> and 13<sup>th</sup> October 2016 at [particular withheld] sub-location of **Chakol** Division of **Busia** County being a male person caused his penis to penetrate the vagina of **M.A.O**, a female person who was to his knowledge his daughter.

3. The appellant was sentenced to life imprisonment. He has appealed against both conviction and sentence.

4. The appellant was in person. He raised the following grounds of appeal:

- a) That the trial magistrate erred in law and in fact by disregarding that his rights were grossly violated.
- b) That the trial magistrate erred in law and in fact by meting out a harsh sentence.
- c) That the trial magistrate erred in law and in fact by relying on hearsay and contradicting evidence by the prosecution witnesses.
- d) That the trial magistrate erred in law and in fact by failing to consider the defence.

5. The state opposed the appeal through Ms. Ngari, learned counsel.

6. The facts of the prosecution case were briefly as follows:

On 12<sup>th</sup> June 2016, the appellant summoned the complainant from the kitchen to the main house. When she reached where he was, he fondled her breast before leading her to the bedroom where he defiled her for about five minutes while her mother slept in the sitting room. This was the first time. On the second occasion he called her behind the kitchen where he again defiled her. This was on 13<sup>th</sup> July 2016. When her father went on a journey, she informed her mother what had transpired. The appellant was arrested and charged.

7. The appellant in his defence contended that he was falsely framed in the offence after he beat her for beating his orphaned niece.

8. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will therefore be guided by the celebrated case of **Okeno vs. Republic [1972] E.A 32**.

9. After the close of the prosecution case, and the court is satisfied that a prima facie case has been established against the accused, the court will comply with the provisions of section 211 of the Criminal Procedure Code. It provides as follows:

**(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).**

**(2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses.**

When I look at the record, I find that the learned trial magistrate did not comply with this section. This is a gross violation of the rights of the accused. This amounts to a mistrial for it vitiates the entire process of trial.

10. There are very many contradictions in the prosecution case and it would add no value for me to order a retrial.

11. According to the evidence of **M.A.O**, the complainant herein and who testified as PW1, the appellant defiled her twice. The first instance was 12<sup>th</sup> June 2016 in her parents' bedroom while her mother was sleeping in the sitting room. After she had responded to the call by the appellant, he started by fondling her breasts before leading her to the bedroom where he defiled her. Abnormal as it appears, she did not tell the court if she resisted his action of fondling her. We may excuse her for she was only twelve years and probably did not know how to react. However, we cannot excuse her when she alleges that he laid her down, removed her underpants and proceeded to remove his pair of trousers. Again, we may forgive her for probably she was struck by extreme fear to be in a position to react. She cannot be excused when she did not raise any alarm or scream while she was being defiled. It is common knowledge that a twelve years old girl cannot tolerate the penetration into her genitalia by an adult man. The cry would have been involuntary and would have attracted her mother who was in the next room. This alone ought to have raised a red flag in the mind of the learned trial magistrate.

12. The second alleged instance of defilement by the appellant was on 13<sup>th</sup> July 2016 at about 9 p.m. This was behind the kitchen. This time she did not talk of any pain but her narration of the defilement was as it was as normal an act as breathing. Her mother was at home and like the first instance she did not inform her. This she claimed that after he had finished, he warned her not to tell anybody.

13. The date of the alleged offence on the charge sheet is given as the night of 12<sup>th</sup> and 13<sup>th</sup> October 2016. There was no attempt to reconcile this obvious contradiction. This cannot be wished away. The appellant had been called to answer charges concerning the alleged defilement on the night of 12<sup>th</sup> and 13<sup>th</sup> October 2016. The date of 13<sup>th</sup> July 2016 featured during the evidence only. The trial magistrate ought to have noticed that this shifting of goals without amending the charge sheet was prejudicial to the appellant.

14. One is persuaded to believe the appellant when he claims that he was framed up. The treatment book while referring to the incident of the night of 12<sup>th</sup> and 13<sup>th</sup> October 2016, took some history of the alleged offence as follows:

**The incidence (sic) happened by the house of her grandma at around 0100 hrs on the night of 12<sup>th</sup> /13<sup>th</sup> Oct.2016.**

This was further contradiction in the prosecution case which was not reconciled in any way.

15. IN (PW3) is the mother of the complainant. She testified that on 3<sup>rd</sup> October 2016 the complainant reported that she was tired of her father bothering her. She said that she informed her that the appellant had taken her behind the kitchen and defiled her. Though she did not say when this was done, it appears to be either on that day or earlier. She said that she saw the child's pants that were blood stained. They were however not taken to the investigating officer.

16. The obvious contradictions in the evidence of **MAO** and her mother (PW3) dents their credibility to an extent that no reasonable tribunal would believe them. The court of Appeal in **Ndungu Kimanyi vs. Republic [1979] KLR 283**, held:

**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.**

17. The medical evidence was that one of the reasons that the clinical officer concluded that there was defilement was the absence of the hymen. Though in his testimony in court Nathan Mbwabi Kennedy (PW4) said the hymen was fresh (I assume he meant freshly perforated) in the clinical notes that were produced, all he recorded was "gaping hymenal introitus". If we go by his version in court that the perforation was fresh on 19<sup>th</sup> October 2016, then we cannot rule out possible manipulation of the same so as to falsely frame up the appellant.

18. The medical evidence by Nathan Mbwabi Kennedy (PW4) introduced the issue anal sexual intercourse as well. This is curious for the complainant testified that she was defiled through her vagina. She never testified of anal sexual intercourse and it was not clear what could have caused the bruises observed in the anal area.

19. The absence of hymen per se is not prove of penetration. In the case of **P. K.W VS REPUBLIC [2012] eKLR Maraga & Rawal JJA** observed as follows at paragraphs 15 &16:

15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified" Is hymen only ruptured by sexual intercourse"

16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of *The Queen vs. Manuel Vincent Quintanila* [1999] AB QB 769.

In the instant case, given the many irreconcilable contradictions, deliberate manipulation cannot be ruled out.

20. When an accused person gives an alibi defence, the trial court has a duty to evaluate it together with the evidence on record even if it is introduced for the first time while the accused is defending himself. It is only after evaluation that the trial court can dismiss it. The learned trial magistrate relied on *Karanja vs. Republic* (1983) KLR 501. He however did not apply the case to test the alibi. This is what he said:

**This court finds that he was trying to give a defence of alibi while nothing of the sort was suggested anywhere else at the trial. It therefore means that his defence is an afterthought tailored to explain himself.**

With respect to the learned trial magistrate this is not the envisaged evaluation. In the case of *KIARIE VS REPUBLIC* [1984] KLR where the Court of Appeal held:

**An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The Judge had erred in accepting the trial Magistrate's finding on the alibi because the finding was not supported by any reasons.**

21. Having evaluated the evidence on record, I find that it will be an exercise in futility to order a retrial. There is simply no evidence on which a conviction can be founded on. I quash the conviction, set aside the sentence and set the appellant free unless if otherwise lawfully held.

**DELIVERED and SIGNED at BUSIA this 28<sup>th</sup> Day of March, 2019**

**KIARIE WAWERU KIARIE**

**JUDGE**