



**Damian Mwaruta Mwashigadi v Republic (Criminal Appeal
27 of 2015) [2017] KEHC 6994 (KLR) (23 March 2017) (Judgment)**

Damian Mwaruta Mwashigadi v Republic [2017] eKLR

Neutral citation: [2017] KEHC 6994 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL 27 OF 2015
JN KAMAU, J
MARCH 23, 2017**

BETWEEN

DMM APPELLANT

AND

REPUBLIC RESPONDENT

*(From original conviction and sentence in Criminal Case Number
8 of 2014 in the Senior Resident Magistrate's Court at Wundanyi
delivered by Hon G. M. Gitonga(RM) on 16th January 2015)*

JUDGMENT

Introduction

1. The Appellant herein, DMM, was tried by Hon G.M. Gitonga Resident Magistrate on two (2) Counts. Count I was in respect of the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No 3 of 2006 while Count II related to the offence of incest contrary to Section 20(1) of the Sexual Offences Act. The alternative charge was for committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. He was sentenced to serve life imprisonment for Count I.
2. The particulars were as follows :-

Count I

“On the 28th day of December 2013 at about 3.00 pm at [particulars withheld] Village, Maktau Location within Taita Taveta County, intentionally and unlawfully caused his penis to penetrate the vagina of K K a girl aged 11 years.”



Count II

“On the 28th day of December 2013 at about 3.00 pm at [particulars withheld] Village, Maktau Location within Taita Taveta County, intentionally and unlawfully caused his penis to penetrate the vagina of K K a female person who was to his knowledge his daughter.”

Alternative Charge

“On the 28th day of December 2013 at about 3.00 pm at [particulars withheld] Village, Maktau Location within Taita Taveta County, intentionally and unlawfully touched the vagina of K K a girl aged 11 years old with his penis.”

3. Being dissatisfied with the said judgment, on 20th March 2015, the Appellant filed a Notice of Motion application seeking leave to file an appeal out time. The said application was allowed and the Petition of Appeal deemed as having been duly filed and served. The Grounds of Appeal were as follows:-
 1. That the trial magistrate erred in law and facts by convicting him without considering That no DNA test was carried out which (sic) contrary Section 36(1) of the sexual offence act no. 3 of 2006 (sic).
 2. That the trial magistrate erred in law and facts by not considering the provision of section 109 of the evidence act was not complied with (sic).
 3. That the trial magistrate erred in law and fact by failing to notice That the case was not proved beyond reasonable doubt (sic).
 4. That the learned magistrate erred in law and fact by shifting the burden and proof to him That he was innocent (sic).
 5. That the trial magistrate erred in law and fact by overlooking the gearing section contraction among the witnesses (sic).
4. On 9th November 2016, he filed Written Submissions together with Amended Grounds of Appeal. His Written Submissions in response to the State’s Written Submissions That were dated 29th November 2016 and filed on 30th November 2016 were filed on 7th February 2017. The Amended Grounds of Appeal were as follows:-
 1. That the honourable Resident Magistrate erred in law and fact by finding That the prosecution had established his guilt beyond reasonable doubt to warrant his conviction.
 2. That the learned trial magistrate erred in law and fact by relying on mere evidence of PW IV which was fabrication evidence (sic).
 3. That the honourable trial magistrate erred in law and fact by believing the alleged medical evidence relating to a broken of the hymen and hence penetration (sic).
 4. That the honourable Resident magistrate erred in law and fact by failing to appreciate his defence submission as the truth (sic).
 5. That the trial Resident magistrate erred in law and fact by failing to appreciate his personal and social circumstances in his sentencing.
 6. That the sentence was manifestly excessive in the circumstances.



5. When the matter came up on 7th February 2017, the Appellant and counsel for the State asked this court to rely on their submissions in their entirety. The Judgment herein is therefore based on their respective Written Submissions.

Legal Analysis

6. This being a first appeal, this court analysed and re-evaluated the evidence afresh in line with the holding in the case of *Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR* where the Court of Appeal held That:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself That it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

7. Having considered the said Written Submissions That the parties relied upon, it did appear to this court That the issues That were before it for determination were:-
 - a. Whether or not the Charge Sheet as presented invalidated the charges against the Appellant herein;
 - b. Whether or not the Learned Trial Magistrate conducted a proper *voire dire* examination;
 - c. whether or not the Prosecution had proved its case beyond reasonable doubt;and
 - d. Whether or not the sentence was manifestly excessive in the circumstances of the case herein.
8. This court therefore dealt with the said issues under the following heads.

Proof of the Prosecution Case

Voire Dire Examination

9. The State submitted That the *voire dire* examination That was conducted by the Learned Trial Magistrate was proper and in accordance with Section 19 of the Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya). It stated That this was because the said Learned Trial Magistrate found PW 1 of having been a competent witness after ascertaining That she knew the duty of telling the truth.
10. In his Written Submissions in response to the State’s Written Submissions, the Appellant contended That there was nothing on the court record to demonstrate That PW 1 knew the meaning of taking an oath or an indication of why she was allowed to swear as is required.
11. Appreciably, although the Appellant did not raise the issue of the *voire dire* examination as a ground of appeal, this court nonetheless found it prudent to address the said issue as he submitted on the same in his said Written Submission.
12. A perusal of proceedings shows That the Learned Trial Magistrate conducted a *voire dire* examination and recorded as follows:-

“I attend [particulars withheld] primary school. I am in standard 4. We are in court. I know That I have come to speak about the case. I go to Pentecost Church. We are taught to speak the truth and those who lie shall be burnt.



Court: Child is a competent witness.”

13. As was rightly pointed out by the Appellant, the Learned Trial Magistrate did not enquire from PW 1 whether or not she knew the meaning of taking an oath. The Complainant herein, K K (hereinafter referred to as “PW 1”) proceeded to adduce sworn evidence. This was not a minor irregularity That could easily be wished away as an accused person could be found liable based on the sworn evidence of a child witness.

14. In the case of Johnson Muiruri vs Republic [2013] eKLR, the Court of Appeal rendered itself as follows:-

“We once again wish to draw attention of our courts as to the proper procedure to be followed when children are tendered as witnesses. In Peter Kariga Kiune, Criminal Appeal No 77 of 1982(unreported) we said:

“Where in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination , whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if it is the opinion of the court he is possessed of sufficient intelligence and understands the duty of talking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (sec.19, Oaths and Statutory Declarations Act, cap 15. The Evidence Act (section 124, cap 80). It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so That the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions.”...

15. It was therefore the view of this court That as the *voire dire* examination was fell short of the threshold required, it was unsafe to rely solely on PW 1’e evidence and find the Appellant liable. The State’s submissions That the Learned Trial Magistrate could rely on the proviso of Section 124 of the Evidence Act Cap 80 (Laws of Kenya) on the basis of the aforesaid *voire dire* examination was properly conducted could not therefore hold.

16. The said proviso 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.”

17. As this court was not certain whether PW 1 understood the meaning of taking an oath, bearing in mind the repercussions of relying on such evidence by a child, this court therefore treated her evidence with minimal weight and proceeded to interrogate the evidence That was adduced by PW 1’s mother, O S M (hereinafter referred to as “PW 2”) and the Clinical Officer, Restituta Mghoi (hereinafter referred to as “PW 3”) to establish whether or not the same corroborated her evidence and whether or not it was sufficient to sustain a conviction against the Appellant herein.

18. Save to state That the *voire dire* examination by the Learned Trial Magistrate was not properly conducted, this court did not deem it fit to make a determination That the Appellant’s Appeal was



successful because firstly, he did not raise the issue as a ground of appeal and secondly, PW 1 was not the sole witness in the matter herein. This court could still consider the evidence by the other witnesses to determine whether or not the Prosecution had proven its case to the required standard.

Validity Or Otherwise Of The Charge Sheet

19. Amended Ground of Appeal No 2 of the Appellant's Petition of Appeal was dealt with under this head.
20. The Appellant argued That proper and thorough investigations ought to be carried out to establish how No 91461 PC Clement Kiarahu (hereinafter referred to as "PW 4"), an officer from Mwatate Police Station came to be involved in a matter That was alleged to have occurred in Wundanyi. He stated That the rubber stamp above the signature of the officer from Mwatate was from Wundanyi which was intended to confuse the court That the incident was reported at Wundanyi Police Station.
21. He added That there was further contradiction from the time the matter was reported on 29th December, the date the OB was recorded, the date the statements were taken and the date he was brought to court. He stated That the Learned Trial Magistrate received the Charge Sheet on 30th December 2013 as per his rubber stamp while he was taken to court on 3rd January 2014.
22. It was not clear what the Appellant's line of argument was in his submissions to bring it in line with Amended Ground of Appeal No (2) wherein he had contended That PW 4 had fabricated the charges against him.
23. Be That as it may, this court perused PW 4's evidence and noted That he was the Investigating Officer in the case herein. He testified That he was attached to Mwatate Police Station at the time PW 1 and PW 2 reported the incident herein. It was his evidence That he gave them a P3 Form which was filled at Mwatate Sub-District Hospital and whereafter the Appellant was arrested and charged in court with the present offence.
24. Notably, save for submitting That PW 2 resided at Mwakitau Police Station and the nearest police station being at Mwatate, the State did not address itself to the issue of disparity in the signature and stamping of the Charge Sheet.
25. This court found That the Appellant was correct in his observation stated That although the Officer in Charge of Mwatate Police Station is the one who signed the Charge Sheet Form, it bore a stamp of the Officer-in Charge Wundanyi Police Station. However, he did not show how this disparity occasioned him prejudice.
26. This court took into account the provisions of Section 90(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) That provides as follows:-

“ The validity of proceedings taken in pursuance of a complaint or charge shall not be affected either by a defect in the complaint or charge or by the fact That a summons or warrant was issued without a complaint or charge.”
27. In the absence of any evidence That the Appellant suffered any prejudice due to the aforesaid disparity, this court found and held That such a defect did not affect the validity of the proceedings herein. His arguments That he was taken to court on 3rd January 2014 when the Charge Sheet was stamped on 30th December 2013 also fell by the wayside. In any event, it was not clear to this court what his submission regarding this issue was as he did not point to any violation of his rights.



28. In the premises foregoing, this court found Amended Ground of Appeal No (2) of the Appellant's Petition of Appeal not to have been merited and the same is hereby dismissed.

Evidence by the Witnesses

29. Amended Grounds of Appeal Nos (1), (3) and (4) of the Appellant's Petition of Appeal were dealt with under this head as they were all related.
30. The State submitted That the offence occurred during the day and consequently, PW 1 was able to identify the Appellant as the offender. On the other hand, the Appellant was categorical That it was not in dispute That PW 1 and PW 2 identified and recognised him because they lived in the same Community.
31. It was, however, his contention That the Chief and the officers who arrested him were not called as witnesses, issues he said he had raised during the trial which omission, showed That there was a hidden agenda. He argued That this court ought to call the said witnesses to ensure he gets a fair trial.
32. Further, he said That PW 1's evidence was contradictory. He pointed out That in the statement she recorded with police she had stated That she was at home with her two (2) brothers when he called her inside the house and defiled her but she did not say That he sent the brothers to the shop so That he could defile her.
33. He stated this was different from her testimony in court which was That he sent her two (2) brothers to the shop so That he could defile her. He argued That she never said how much time the brothers took at the shops so as to have come and not known what had transpired.
34. He averred That the charges That were preferred against him were a plan from PW 2 because on the material date, he had sent PW 1 and her two (2) brothers to buy groundnuts. He averred That the Investigating Officer did not find any grudge between him and PW 2, whom he married when she already had PW 1 and ought to have interrogated the two (2) brothers so as to establish the truth.
35. It was his submission That penetration of a twelve (12) year old girl would have been extremely painful necessitating the administration of First Aid which was absent in this case herein and That PW 1 would definitely have notified PW 2 of the alleged incident as it would have been traumatising to her, which she did not do immediately she was allegedly defiled.
36. He also pointed out That PW 3's evidence showed That despite the fact That PW 1's hymen was torn indicative of forceful penetration, there was no discharge of any kind, blood or sexually transmitted disease. He questioned whether the penetration occurred on the same date and if it was really the first time That PW 1 had been penetrated.
37. On its part, the State submitted That PW 1's evidence was credible and consistent with the fact That the Appellant herein defiled her because she said That there was discharge That looked like mucus. It was its contention That it was inconceivable how an eleven (11) year old child would have described the discharge if the incident did not really occur.
38. It was its argument That the Learned Trial Magistrate was therefore correct when he relied on the proviso of Section 124 of the Evidence Act Cap 80 (Laws of Kenya) to believe PW 1's sole evidence. It further argued That despite PW 1's evidence being sufficient to convict the Appellant herein, it was nonetheless strengthened by PW 3 who examined her on 30th December 2013 and observed That the hymen was broken as a result of penetration.



39. It was emphatic That the fact That PW 1's brother was not called as a witness did not diminish the strength of the Prosecution's case and That his evidence would not even have added any value to the Prosecution's case because he did not witness the alleged defilement. In added That in any event, Section 143 of the Evidence Act did not provide for a particular number of witnesses to prove a fact. The said Section stipulates:-

“That no particular number of witnesses shall in the absence of any provision to the contrary be required to prove any fact.”

40. It was also its contention That the fact That there were no spermatozoa when PW 1 was examined did not diminish the fact That the Appellant committed the offence. It said That spermatozoa could not have been expected because PW 1 was examined after about three (3) days and she must have showered and changed her clothes during That time.

41. It further averred That the Appellant failed to Cross-examine PW 1 and PW 2 with a view to establishing That there was a grudge between him and PW 2 and thus cast doubt on their testimony.

42. Notably, although it placed reliance on the case of *Aml vs Republic* [2012] eKLR That dealt with the issue of medical evidence in sexual offences cases, it did not elucidate its submission on this issue.

43. After carefully analysing the evidence That was adduced in the Trial court, this court noted That from PW 1's testimony, she was at home on 29th December 2013 at about 3.00 pm when the Appellant sent her brothers to the shop and he defiled her. He then brought her water and asked her to wash her vagina. It was her testimony That she informed PW 2 of what transpired the following day because the Appellant was in the house on the material date.

44. PW 2 was not present when the incident occurred. However, she confirmed having taken PW 1 to Kwa Mnengwa dispensary a day after the incident from where they were referred to Mwatate District Hospital. On her part, PW 3 testified That although she did not see any spermatozoa, blood or any form of discharge, she observed That PW 1's hymen had been broken through penetration as was evidenced in the P3 Form That was submitted in court.

45. Accordingly, having analysed the evidence That was adduced in the Trial Court and the Written Submissions That were relied upon by both the Prosecution and the Defence, this court came to the firm conclusion That the Learned Trial Magistrate had arrived at the correct conclusion. He noted That the fact That PW 3 found PW 1's hymen to have been broken was not conclusive proof That it was the Appellant who did it but rather he had taken into account all the factors before arriving at the said conclusion.

46. This court also looked at all the facts in totality and noted That PW 1's and PW 3's corroborated That of PW 1 and wholly concurred with his finding. This court noted That PW 3's observations were also corroborated by the Medical Treatment Notes That showed That PW 1 was seen at Kwa Mnengwa Dispensary and That the general observation was That she was very frightened at the time. A vaginal examination showed That PW 1's labia minora was inflamed and the hymen was broken.

47. The Appellant's evidence, though adduced on oath could not displace the evidence That had been adduced by PW 1, PW 2 and PW 3. His evidence That PW 2 had a grudge against him because he had changed his mind about marrying her was not convincing to this court at all. In fact, the Trial Court found his defence to have been dishonest and a mere denial of the charges That were preferred against him.



48. As the State had rightly observed, PW 1's evidence was corroborated by PW 3 and the Medical evidence That was adduced in court. Finding of spermatozoa was not material. In any event, the Appellant had asked PW 1 to wash her vagina immediately after he defiled her.
49. The State was also right in his submission That there is no legal requirement That a particular number of witnesses must be called to prove a fact. The fact That PW 1's brothers were not called to testify as to whether or not they went to the shops was inconsequential because it would not have been conclusive proof That the Appellant defiled PW 1. The bottom line is just like PW 2, they did not see the Appellant defile PW 1. It was therefore not necessary for the Prosecution to have called them as witnesses.
50. Additionally, it is not a requirement That all witnesses must be called to testify to prove a particular issue. The discretion lies on the Prosecution on who it will call as its witnesses. The Prosecution was under no obligation to call the Chief or the persons who arrested the Appellant on the material date as the witnesses it had called were enough to sustain a charge against him. This court cannot call additional evidence at this appellate stage if the evidence That was adduced was sufficient to have sustained the charge against the Appellant herein.
51. This court had due regard to Section 109 of the Evidence Act That stipulates as follows:-
- “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.”
52. The Prosecution did not shift burden to the Appellant. Rather, it proved its case to the required standard, which was proof beyond reasonable doubt. This court found That the Prosecution had provided evidence That was cogent, consistent and credible to sustain a conviction against the Appellant herein.
53. This court, however, wishes to point out That in the event PW 1's evidence would not have been corroborated as aforesaid, this court would have considered ordering a re-trial as it was apparent That an offence had been committed.
54. In the premises foregoing, Amended Grounds of Appeal Nos (1), (3) and (4) were not merited and the same are hereby dismissed.

Sentence

55. Amended Ground of Appeal Nos (5) and (6) of the Petition of Appeal were dealt with under this head.
56. The Appellant submitted That the sentence That was meted upon him was manifestly excessive considering That PW 1's Birth Certificate showed That she was aged eleven (11) years and eight (8) months at the time of the alleged offence. He asked this court to round up her age to twelve (12) years because she had already passed the half way mark of six (6) months thus bringing down his sentence to twenty (20) years as opposed to life imprisonment in the event he was to be found guilty of the offence he had been charged with.
57. On the issue of sentencing, the State submitted That PW 1's determined the sentence That would have been meted upon the Appellant and the Learned Trial Magistrate acted within the provisions of the



law. It referred this court to the provisions of Section 8(2) of the Sexual Offences Act That stipulates as follows:-

“ A person who commits an act of defilement with a child aged 11 years or less shall upon conviction be sentenced to life imprisonment.”

58. Appreciably, the penalty set out in Section 8 of the Sexual Offences Act is determined by the age of a victim. There is no basis in law for rounding off the age of a victim to the nearest complete figure in sexual offences under Section 8 of the Sexual Offences Act so That an offender can benefit from a lower sentence.
59. Where a victim is aged between eleven (11) and twelve (12) years, That child shall be treated as being eleven (11) years for purposes of sentencing under Section 8(2) of the Sexual Offences Act. So long as the child has not attained the next birthday age, the sentence shall be based on the current birthday age. The same reasoning obtains for the penalty under Section 8(3) and 8(4) of the Sexual Offences Act.
60. The Trial Court’s hands were therefore tied as the law provides one (1) sentence, a fact That was correctly elucidated by the Learned Trial Magistrate. This court also reiterates the same position. Its hands are tied and it cannot exercise its discretion to mete out any other sentence other than the one which is provided under Section 8(2) of the Sexual Offences Act.
61. In the circumstances foregoing, Amended Grounds of Appeal Nos (5) and (6) of the Petition of Appeal were not merited and the same are hereby dismissed.

Disposition

62. As the Appellant’s guilt was unequivocal, this court found That he had not advanced any sufficient reason to persuade it to interfere with the decision of the Learned Trial Magistrate. The court hereby declines to quash the conviction and/or set aside the sentence That was meted upon the Appellant by the Trial Court as the same was lawful and fitting and instead affirms the said sentence That was imposed on him.
63. The upshot of this court’s judgment, therefore, was That the Appellant’s Appeal filed on 20th March 2015 was not merited and the same is hereby dismissed.
64. It is so ordered.

DATED AND DELIVERED AT VOI THIS 23RD DAY OF MARCH 2017

J. KAMAU

JUDGE

In the presence of:-

Damian Mwaruta Mwashigadi..... Appellant

Miss Anyumba.....for State

