



REPUBLIC OF KENYA



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**David v Republic (Criminal Appeal 112 of 2017)
[2017] KEHC 1573 (KLR) (24 October 2017) (Judgment)**

Alex Mule David v Republic [2017] eKLR

Neutral citation: [2017] KEHC 1573 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL 112 OF 2017
CM KARIUKI, J
OCTOBER 24, 2017**

BETWEEN

ALEX MULE DAVID APPELLANT

AND

REPUBLIC PROSECUTION

JUDGMENT

1. The Appellant was charged with offence of:-
COUNT I: Defilement Contrary to section 8(1) (2) of the [Sexual Offences Act](#) No.3 of 2006.
2. On the 24th day of July 2012 at [particulars withheld] location, within Makindu County intentionally and unlawfully caused his male genital organ namely penis to penetrate the female genital organ namely vagina of M K a child aged ten (10) years.
3. Alternative Charge: Committing an indecent act with a child contrary to section II (1) of the [Sexual Offence Act](#) No. 3 of 2006.
4. On the 14th day of July 2012 at [particulars withheld] location, within Makindu County, intentionally and unlawfully touched the vagina of M K a child aged ten (10) years with his penis.
5. He pleaded not guilty and the matter was fully heard. He was convicted and sentenced to serve life imprisonment.
6. Being aggrieved by the above verdict, the Appellant lodged an appeal complaining via his grounds namely:-
 - I. That the sentence is harsh.
 - II. That the case was not proved as required by the law.



- III. That no D.N.A test was conducted.
- IV. That Section. 169 (1) C.P.C was violated by the mode of delivery of judgement.
7. Later the Appellant lodged amended supplementary grounds complaining as follows:-
- I. The provisions of article 50 (2) (c) of the Constitution were breached.
- II. There was no prove of the age of the child.
- III. The evidence of PW1 and PW2 were contradictory and uncorroborated hence insufficient in law thus contravention of S. 163(1) (a) Evidence Act Cap 80.
- IV. The case was not proved as required by law.
8. During the hearing, the Appellant submitted:-
9. That the age of the complainant must always be proven. Where it is not proven it is likely that a miscarriage of justice may occur.
10. Commenting on the age of a victim in cases of this nature the Court of Appeal Judges in the case of *Kaingu Elias Kasomo -vs- Republic* held that;
- “The age of the victim in sexual assault cases under the Sexual Offences Act is a critical component; it forms part of the charge which must be proved the same way as penetration in the cases of defilement and rape. It is therefore essential that the same be proven by credible evidence for the sentence to be imposed is largely reliant on the age of the victim.”
11. Further in the case of *Hillary Nyongesa -vs- Republic* Lady Justice Mwilu(as she was then) stated that;
- “Age is a crucial aspect in sexual offences that it has to be conclusively proved.....and this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim.”
12. It is worth noting that the prosecution did not establish the age of the child nor provide any evidence that proved the same. The doctor who examined the complainant did not tender any evidence that gave any light on the issue of age.
13. The prosecution witnesses who included the complainant’s sister did not provide a birth certificate to prove the age of the complainant. It is only at the end of the trial, during judgement, that the Trial Magistrate notes that the complainant was ten years old.
14. That the evidence tendered was faulty and contradictory. In the case of *Peter Kariga Kiune*, Criminal Appeal No. 77 of 1982 the court held that;
- “Where, in any proceedings before any court, a child of tender years is called as 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 in the court’s opinion he is possessed of sufficient intelligence and understands the duty of telling 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.”



15. Further it is important to note the provision of the *Evidence Act* section 124, Cap 80 as regards this matter;

“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.”
16. Concurrent with this view the case of *Gamaldene Abdi Abdiraham And Another -vs- Republic*, [2013] eKLR, the High Court at Garissa set aside a conviction and sentence of the aggrieved appellant upon noting that the trial magistrate failed to conduct a *voire dire* examination of the complainant who at the time of giving evidence was aged 13 years.
17. Agreeing with the decision made in the above case, in the case of Samson Mungai Njenga, the court went on to state;

“The learned Trial Magistrate in arriving at the conviction relied heavily on the evidence of the minor child. On perusing the record I noted that before the evidence of the minor was recorded, the learned trial magistrate did not conduct a *voire dire* to establish whether or not the minor was endowed with sufficient intelligence to understand the nature of an oath to tell the truth.”
18. It is worth noting that PW1 stated that the accused found her at the toilet, raised her skirt removed her panty and proceeded to defile her, she asserted that she thereafter screamed attracting the attention of the public after which the accused fled away.
19. However, PW2 states that she followed PW1 who had earlier headed to the toilet and found the door locked. She proceeded to knock and the appellant came out.
20. This is highly contradictory and it leaves me wondering why the trial magistrate would proceed to convict me based on the contradictory evidence of a child who had not had a *voire dire* conducted.
21. Upon reading the testimony of PW4, who claimed that he took both the appellant and the complainant to the hospital where they were both examined, I find that it fully and without doubt contradicts the evidence of PW3 who stated that he neither got the clothes of PW1 nor examined the appellant.
22. If indeed, PW4 took the appellant and PW1 to the hospital for an examination then why, would PW3 who was at the time the doctor in charge refute the same claim. It is clear that the prosecution witnesses have been coached and are not truthful in their claims.
23. Yet again, assuming that indeed the doctor had examined both the appellant and the complainant, why were the P3 forms not produced before the court? It is not a coincidence that the prosecution while fully understanding the importance of such proof in determining my guilt failed to bring them to court.
24. The State/Respondent via Ms Gitau state counsel responded that the prosecution proved case beyond reasonable doubt. PW1 narrated how Appellant followed her into the toilet and defiled her.
25. Her sister PW2 rescued her from the Appellant. PW2 asked her sister PW1 what happened and she said the Appellant defiled her. The Appellant was caught red handed.
26. In P3 form a doctor examined PW1 and confirmed she (PW1) was defiled. There was evidence of penetration to her (PW1) genitalia.



27. P3 form produced stated the PW1 age which the trial court also observed the child was of tender age.
28. The unsworn defence was an alibi accompanied by mere denial.
29. This being the first Appellate court, it is enjoined to look at the evidence before the trial court afresh, re-evaluate and examine the same and reach its own conclusion whether or not to uphold the conviction of the Appellant.
30. In reaching its decision, the reaching its decision this court has to bear in mind the reaching its decision, the court has bear in mind the fact that it did not have an opportunity of seeing the witnesses as they testified and therefore is not expected to make any findings as to the demeanor of the said witnesses.
31. Finally, this court is expected and mandated to consider the grounds of appeal put forward by the Appellant in reaching its judgment. See *Kinyanjui -vs- R.* (2004) 2KLR P.364. See also Okeno -vs- Republic.

Evidence

32. The prosecution called 4 witnesses to prove its case.
33. PW1 testified that on 24/02/2012 at 7.00 p.m. while she was in the toilet, the accused got in the toilet and “raped her”. PW1 said that the accused whom she identified in court, removed her underpant and removed his also. She said that the accused inserted his penis into her vagina. He made her lean on the wall and did what PW1 called the “bad manners”. She screamed and people went to the toilet. The accused ran away. She was taken to Makindu sub-county hospital where she was examined by the doctor and the P3 form was filled. The matter was reported at Makindu Police Station. She identified the P3 form in court.
34. PW2 testified that on 24/07/2012, she followed PW1 to the toilet and found that the toilet had been locked. The accused opened the toilet and got out. PW1 was also in the toilet. PW2 asked the accused what he was doing with PW1 in the toilet.
35. PW1 told her that the accused had sex with her in the toilet. They took PW1 to hospital for examination after reporting to the police where they were issued with a P3 form.
36. PW2 said that the P3 form was filled by the doctor who examined PW1. On cross examination, PW2 said that PW1 is her sister and the incident took place outside her house in a toilet at 7.00 p.m.
37. PW3 was Dr. Makau, a medical doctor at Makindu Sub-county hospital. He testified that on 25/07/2012, he examined PW1 who alleged to have been defiled by a person known to her. He examined her and noted that her hymen was perforated. He said that she had been defiled.
38. He said that the degree of injury was “harm”. He produced the P3 form as evidence. On cross examination he said PW1 was ten years old at the time of examination. He said that the absence of her hymen indicated that there was penetrative sexual intercourse.
39. PW4 was Corporal Peter Karanka from Makindu Police Station. He testified that on 24/07/2014, PC Ngare informed him that the accused had defiled a child. He visited the scene and found him (PC Ngare) with PW2.
40. He took the accused to the police station. He testified that he took the accused and PW1 to Makindu sub District hospital where they were examined and the P3 from filled by the doctor.
41. The accused was put to his defence whereby he opted to give an unsworn statement. He informed the court that on 24/07/2012 at around 6.00 p.m., he went to Nyekini Bar with is friend Alex Kilonzo



for refreshment. Police later entered the bar in company of PW2 and arrested him without informing him why he was being arrested.

42. He said that on 26/07/2012 he was charged with this offence. He mixed his defence with submissions. In submissions he said that PW1 and PW2 are sisters and therefore should not be believed and that no independent witnesses went to the scene although PW1 and PW2 say that they screamed.
43. He said that PW2 was his erstwhile girlfriend and that she later fell in love with one PC Simon Ngari. He said that the investigations by the police were shoddy because they were conducted by two investigation officers.
44. He also said that the medical report (P3 form) should not be considered because he was not examined. He also said that the prosecution had withdrawn his case under section 97(A) but the trial court found no evidence of such withdrawal.
45. After going through the evidence on record and the submissions, I find the issues are:-
 - a. Whether there was prove beyond reasonable doubt?
 - b. Whether Appellant rights under Article 50 (2) were violated?
 - c. Whether Section 16.9(1) CPC was breached?

Analysis

46. The offence of defilement is defined in section 8(1) of the Sexual Offences Act which states;

“A person who commits and act which caused penetration with a child is guilty of an offence termed defilement.”

“Indecent Act” is defined in section 2 of the Sexual Offences Act to mean; “any unlawful intentional act which causes;

Any contact between the genital organs of a person, his or her breasts and buttocks with that of another person.

Exposure or display of any phonographic material to any person against his or her will.....”
47. PW1 was 10 years old as at 25/07/2012(see p3 form and doctors testimony), she is therefore a child. She testified that the accused followed her to the toilet and removed her underpants. The accused removed his underpants too and inserted his penis into her vagina.
48. PW2 testimony is that she followed PW1 to the toilet and found it locked. The accused opened the toilet and PW2 saw PW1 in the toilet. She asked the accused what he was doing with PW1 in the toilet. The accused did not answer her.
49. PW1 said that the accused had defiled her. PW3, the medical doctor examined PW1 and found that her hymen was perforated. On cross examination, he said that PW1 was 10 years old and her hymen was absent. He said that the perforation of the hymen indicates that PW1 was engaged in penetrative sex.
50. PW4 was the investigation officer. He said that the offence was reported to him by his fellow police officer. They arrested the accused and issued PW1 with a P3 form which was filled by PW3.
51. The accused’s unsworn statement is to the effect that he was arrested while having refreshment in a bar. He says that the charge sheet is defective since it does not name the investigation officer, but failure to name the investigation officer in the charge sheet is not fatal to the prosecution case.



52. His submission that there was no public response after PW1 screamed and therefore he did not defile PW1 is not convincing.
53. The accused said that PW2 was his erstwhile lover and that she later fell in love with PC Ngari. He did not adduce any evidence to prove this but even if it is true that PW2 was his former lover that was no licence for him to defile PW1.
54. The P3 form does not show that the accused was examined by the doctor. In fact he was not examined. This is a serious omission. Male suspects should be presented to the doctor for examination as soon as possible so that they can also be examined and the P3 form completed at the relevant parts.
55. Having said that, I do not think that failure to examine a male accused is fatal to the prosecution case. In short, all the submissions by the accused cannot stand for the above reasons.
56. His unsworn defence does not absolve him at all as it explains how he was arrested.
57. I am not unmindful that there is no burden of proof on an accused person. It is always the duty of the prosecution to prove the case beyond reasonable doubt.
58. In this case PW1's evidence that it is the accused who defiled her in a toilet is corroborated by PW2 who found the accused and PW1 in the toilet.
59. It is further corroborated by PW3 (the doctor) who concluded in the P3 form (P. Exhibit 1) that PW1 was defiled.
60. The prosecution witnesses were found by trial court to be forthright and were not shaken at all in cross examination and that the court had no reason to doubt any of the prosecution witnesses.
61. The court believed that they were speaking the truth when they testified in court.
62. On complaint that the Appellant right under Article 50(2) of the constitution, the court notes that the Appellant never raised the same during trial nor did he complain of inability to proceed with the matter.
63. He actively participated in the proceedings. He does not specify the rights in Article 50(2) A-N which were violated.
64. But even if the same was violated, the same could be remedied in another forum by way of compensation. See the case of Appeal of Mbugua.
65. On complaint that the trial court did not comply with the provisions of Section 169, CPC, the court finds that the said provisions provides in summary – The trial court is to show point of determination and reasons for determination.
66. The court also is to specify offence, section of law and sentence imposed and in case of acquittal the court has to state offence and state accused to be set at liberty.
67. The court has perused the judgement of the trial court and finds that same complied with the aforesaid provisions. It set out issues for determination and the reason for its decision. It also set out the offence, the law and the sentence imposed.
68. However, even if the same was not complied with the court in Machakos HCRA 96/2014, held that if the evidence on record is satisfactory that the accused committed the offence charged the conviction is to be upheld irrespective of non compliance with Section 169 CPC by the trial court.



69. I have perused the evidence on record and the submissions and I arrive at a conclusion that the appeal has no merit and thus the court makes the following orders:-

The appeal is dismissed, conviction affirmed and sentence confirmed.

SIGNED, DATED AND DELIVERED THIS 24TH DAY OF OCTOBER, 2017.

C. KARIUKI

JUDGE

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