



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL APPEAL NO. 25 OF 2012

B K.....APPELLANT

VERSUS

REPUBLIC.....REPUBLIC.

JUDGEMENT

[From the Original Conviction and Sentence in Criminal Case No. 31/2010 in the Senior Principal Magistrate's Court at Kitui – B.M Kimemia (PM) on 8/2/2012].

The appellant herein **B K** was charged and convicted of an offence of *incest by male contrary to Section 20(1) of the Sexual Offences Act. No3 of 2006.*

Particulars were that on the 4th day of August 2010, at about 1.30 pm at *[particulars withheld]* Estate, Kitui Township Location, Kitui District of the Eastern Province, committed an act which caused **penetration** with M.B a girl aged 16 years who to his knowledge was his daughter.

He had also been charged with an alternative charge of **Indecent act** with a child contrary to section 11(1) of the **Sexual Offences Act.No3 of 2006.**

Particulars were that on 4th day of August, 2010, at about 1.30 pm at *[particulars withheld]* Estate, in Kitui Township Location, in Kitui District of Eastern Province, committed an **act of indecency** with M.B a girl **aged 16 years** by touching her private parts namely *vagina, breasts* and *buttocks* using his hands.

The appellant pleaded not guilty on both counts and prosecution called a total of four witnesses to support its case. The appellant gave a sworn defence and called one witness. However at the end of the trial, the learned trial magistrate convicted him on an offence of **incest by a male and sentenced him to life imprisonment.**

The appellant was aggrieved and dissatisfied by the trial magistrate's findings and he filed this appeal. He has challenged both conviction and sentence relying on various grounds. These grounds are laid down on his amended grounds of appeal which he filed in court on the date of hearing this appeal.

These grounds are:-

- i. *That his fundamental rights under Section 72 through 82 of the former Constitution and Article 49 and 50 of Constitution 2010 were violated.*

- ii. *That the charge was incurably defective which occasioned serious prejudice to the appellant.*
- iii. *That the evidence was full of contradictions inconsistencies and was uncorroborated and the trial magistrate erred in relying on it to convict him.*
- iv. *That vital witnesses were not availed which was contrary to Section 146 of the Evidence Act and Section 15 of the Criminal Procedure Code.*

On the date of this appeal the appellant filed his amended grounds of appeal and written submissions which he relied on entirely.

Ms. Kwamboka , the learned **State Counsel**, opposed the appeal. She supported both the conviction and sentence and urged the court to uphold it. She submitted that there was sufficient evidence to prove that the complainant was defiled and she was defiled by the appellant herein who is her father. The complainant was a minor aged 16 years and the P3 form showed that she had been defiled. That the trial magistrate found that prosecution had proved its case beyond a reasonable doubt and she therefore urged the court to uphold both the conviction and sentence.

My duty as a first appellate

court is to analyse and re-evaluate the evidence on record afresh and come up with my own conclusions. However, I have to take into account that I never saw nor heard the witnesses when they testified as the trial court did. I will therefore not comment on their demeanor. In doing this, I am guided by the case **Odhiambo Vs Republic Cr. Appeal No. 280 of 2004 (2005) KRL** where it was held:-

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

The brief summary of this case was; the complainant herein (PW2) who was aged 16 years then and in form three (3) was a daughter of the appellant and PW1 . It was her evidence that on 4/8/2010, she was at home at **[particulars withheld]** Estate which is within Kitui Township . She stated that her mother, PW1 was at the salon and she was in the house in company of her siblings. Then at 1.30 pm her sister, one B took food to their mother at the salon. Her father, the appellant then asked Alice who had visited, to go away so that PW2 could have time to read. After Alice left, PW2 remained in the house with the appellant. Then the appellant sent her to his bedroom to get a book for him and the appellant followed her. The Appellant ordered her to remove her clothes or he would kill her. That PW2 did not scream but she cried out as the appellant was holding a knife up to her.

Thereafter, the appellant removed her biker and pantie and he also removed his trouser. He proceeded to sleep on PW2 and asked her to spread her legs. When PW2 refused, he pulled them apart and he put his penis in her vagina. The appellant then ordered PW2 to go and bath and also wash her clothes. Appellant threw her clothes on the seat. PW2 testified that she did not wash her clothes and also did not bath. At that time, the appellant went away and PW2 went to sleep. When her mother PW1 returned home at 8.00 pm, she asked PW2 why she was asleep PW2 lied to her that she was tired and so did not tell PW1 what had happened as she was afraid.

PW2 further testified that on 5/8/2010, she wrote a letter to her mother PW1 and explained to her what had happened. This letter was produced in court as exhibit No.1. The letter was delivered to PW1 by PW2's brother called **K**. When PW1 received the letter, she went to the house and asked PW2 what had happened. PW2 told her (PW1) everything and then PW1 reported the matter to the Police. Subsequently, the appellant was arrested the same day at 9.00 pm by PW4. PW2 was examined by PW3 who produced her P3 form as exhibit 2.

The appellant was later charged with the present offence.

On his part, the appellant herein gave a sworn defence and called one witness. Appellant denied the charge and testified that on 4/8/2010, which was the referendum day, he woke up early and went to vote and thereafter went to work. He testified that later he went home at 5.00 pm. At 7.30 p.m, he called his wife (PW1) who told her she was still at the salon. By 8.30 PW1 had not returned home, and the appellant went to look for her and that is when he met a Police Motor Vehicle. He was arrested and taken to the Police Station where he denied that he had defiled the complainant.

He further testified that he had a problem with his daughter the complainant since 2007 over indiscipline. That she had even run away from school and the appellant was summoned to school. That he was framed up with the present offence by PW1 and PW2. He produced various documents to support his case.

DW2 a teacher at *[particulars withheld]* where, PW2 was a student told the court that appellant was a parent of PW2 who had cleared Form Four in the said school. He testified that PW2 had cases of adolescence indiscipline and at one time on 1/6/2010, after the music festivals, PW2 went missing from school. The Deputy Principal called her parents (appellant) who went to look for her. Then DW2 continued to counsel PW2 after she was allowed back to school. He further testified that PW2 had various indiscipline cases and she had even been spotted at Club Envy at one time. That further the appellant used to go to school often as he was concerned about his daughter.

After the trial at the lower court, the learned trial magistrate found the appellant guilty. He was sentenced to serve life imprisonment and thus this appeal.

I have now carefully reconsidered and analyzed the evidence on record. I have made my own inferences and conclusions. I have also considered the appellant's amended grounds of appeal and his written submissions.

In considering ground No.1 which the appellant submitted that his fundamental and constitutional rights were violated; I make the following findings. The appellant had relied on the case of **Ann Njogu & 5 others Vs Republic, Misc Cr. Appeal No. 551 of 2007**, where the court had held that:-

“ At the tick of the 60th minute of the 24 hour, if they have not been brought before the court, every minute thereafter of their continued detention is an unmitigated illegality as it is a violation of the fundamental and constitutional rights of the appellant”.

The appellant submitted that he was arrested on 5/8/2010 and charged in court on 9/8/2010. From the court's record, that is very true. Appellant submitted that his constitutional rights under section 72 of the old Constitution had been violated. **Section 72(3) (b)** of the old constitution provided as follows:-

3) A person who is arrested or detained

b) upon reasonable suspicion of having committed or being about to commit a criminal offence, and who is not released shall be brought before a Court as soon as is reasonably practicable and where he is not brought before a court within twenty four hours of his arrest or from commencement of his detention , or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before court as soon as is reasonably practical shall rest upon any person alleging that the provisions of this sub section have been complied with”.

The law herein presupposes that the duty of proving that an accused person was brought to court within a reasonable time lies with the person who alleges that the above provision of law was complied with. This duty therefore rested on the prosecution or the investigating officer. The appellant herein did not complain about that violation at the time of plea or trial. He has only raised it during this appeal. In the case of **DOMINIC MUTIE MWALIMU –VS- REPUBLIC (2008) e KLR** , the Court held that:-

“The section further provides that where such a person is not taken to court within either the twenty-

four hours for non-capital offence or fourteen days for capital offence as stipulated by law, then the burden of proving that such a person has been brought to court as soon as is reasonably practicable rests on the person who alleges that the Constitution has been complied with. Thus, where an accused person charged with a non-capital offence brought before the court after twenty-four hours or after fourteen days where he is charged with a capital offence complains that the provisions of the Constitution has not been complied with, the prosecution can still prove that he was brought to court as soon as is reasonably practicable notwithstanding, that he was not brought to court within the time stipulated by the Constitution. In our view, the mere fact that an accused person is brought to court either after the twenty-four hours or the fourteen days, as the case may be, stipulated in the Constitution does not ipso facto prove a breach of the Constitution. The wording of Section 72 (3) above is in our view clear that each case has to be considered on the basis of its peculiar facts and circumstances. In deciding whether there has been a breach of the above provision the Court must act on evidence. Additionally, a careful reading of Section 84 (1) of the Constitution clearly suggests that there has to be an allegation of breach before the Court can be called upon to make a determination of the issue which allegation has to be raised within the earliest opportunity”.

Further, the Court of Appeal in JULIUS KAMAU MBUGUA -VS- REPUBLIC (2010) eKLR held that:-

"The rationale for prescribing monetary compensation in Section 72 (6) was that the person having already been unlawfully arrested or detained, such unlawful arrest or detention cannot be undone and hence the breach can only be vindicated by damages. Again, we respectively agree with Emukule J. that breach of Section 72 (3) (b) entitles the aggrieved person to monetary compensation only."

In the instant case, the fact that the appellant was detained at the Police custody for a period of more than 24 hours does not render the trial a nullity. The appellant is at liberty to pursue compensation for damages against the person who allegedly detained him. I consequently overrule the appellant on ground No.1.

The appellant further submitted that the trial at the lower court was a mistrial since the court was not properly constituted during plea taking. He submitted that was against Section 85 (2) of the *Criminal Procedure Code*. He relied on the cases of Joseph Wanjohi Maina & others Vs Republic Cri.No. 236 of 2002 and Abusiro Hussein Kadir Vs Republic Cri. Appeal No. 1232 of 2002 to buttress his point. I have however re-considered the trial court's record on the date of plea taking. The matter was before *E.Juma Osoro, S.R. M*, the prosecutor was Insp. Korir and the court clerk was one Nicholas. The language of the Court was Kikamba/ English. The Court was therefore properly constituted and there was no mistrial. I also overrule that submission.

On ground No.2, the appellant submitted that the charge was defective and that caused prejudice to the appellant. He submitted that the appellant was charged with causing penetration of his penis to PW2 who was a minor allegedly 16 years old. That the law required the court to conduct a Voire dire examination to assess and determine her suitability to give evidence. He relied on the case of John Njabia Mang'ara Vs Republic HCC Appeal No. 323 of 2005.

However, I have noted that the complainant herein was aged 16 years old at the time of the alleged offence. She was not a child of tender age and the trial magistrate was correct in taking her evidence without conducting a Voire dire examination. Even if this Court was to find that there was failure to comply with Section 19 of the Oaths and *Statutory Declaration Act*, the Court could only find that the evidence had been vitiated but that would not render the charge defective as submitted by the appellant.

On the third ground, the appellant submitted that the evidence adduced was inconsistent, contradictory and was uncorroborated and was not safe to base a conviction on it. I have reconsidered the evidence on record. The evidence that linked the appellant to the commission of the offence is that of PW2 and PW3, the clinical officer. The trial magistrate also relied on Exhibit

No.1 produced in court.

It was the evidence of PW2 that on the material day, the appellant sent away her sister called B aged 13 years old. He also asked one Alice to go away and leave PW2 alone in the house to read. However, the appellant stated that at the material time, he was away at work after voting during the referendum. I note that Section 124 of the Evidence Act provides that a trial magistrate can convict an accused person on the evidence of the victim of sexual offence alone (as a single witness) so long as the trial magistrate states the reasons for believing that the said victim was telling the truth. However, that evidence has to be carefully tested and considered and reasons given why the trial magistrate chose to believe the victim.

It is also evident that the the prosecution also does not have to call a plurality of witnesses but vital witnesses are necessary to give credence to the available evidence.

In the instant case, there was mention of B who was sent to take food to PW1. There was also mention of Alice who was allegedly asked by the appellant to leave PW2 alone to read. These two vital witnesses were not called to confirm that indeed at the material time, the appellant was in the said house and he was left alone with PW2. That evidence would have disputed the appellant alibi defence. The appellant herein relied on the case of Juma Ngondia Vs Republic (1982 -1988) KAR 454 where it was held:-

“The prosecution has in general discretion whether to call someone as a witness. If it does not call or summon a vital reliable witnesses without a satisfactory explanation, It runs the risk of the court presuming that the evidence which could be and is not produced would if produced have been unfavorably to the prosecution”.

In the present case, the two witnesses were not called to give credence to PW2’s evidence. I will not hesitate to find that there evidence would have been unfavorable to the prosecution. I also refer to the case of Nganga Vs Republic (1981) KLR 483 , where the Court held that,

“It is the trite law that when prosecution fails to call a material witness, they do so at their own risk. An adverse inference will be drawn that the evidence of that material witness if called would be adverse to the prosecution”.

Pw2 had also alleged that she was defiled during the day. It was in a plot at **Kunda Kindu Estate**. There was no evidence from any of the neighbors in the said estate to confirm that they saw the appellant at the said home at that particular time. PW2 also testified that the appellant ordered her to wash the clothes she was wearing during the ordeal but she refused to wash them. The said clothes were not produced as exhibits in court.

Prosecution also alleged that the complainant’s **urinalysis** and the appellants’ **urine test** showed that both had **pus cells** in their urine. However, PW2 had admitted that she was not a virgin and her hymen had been broken earlier on. The appellant and DW1 testified that PW2 had cases of indiscipline in school and she had even written D Exhibit No.3 to beg for forgiveness and also promised that she would stop being indiscipline in school. PW1 also admitted that PW2 and appellant had quarrels over PW2 indiscipline in school. That being the case, it was evident that PW2 was sexually active. Then she might have gotten the pus cells through a previous sexual encounter and not necessary from the appellant. The pus cells were not matched through a **DNA test** to confirm that they were of the same composition. Presence of pus – cells in both urine of PW2 and appellant was not sufficient to prove that appellant had sexual encounter with PW2 herein (complainant).

PW2 further testified that she wrote the letter **Exhibit 1** and gave it to her brother **K** to deliver to her mother PW1. The said **K** was not a witness. I have also considered the said letter exhibit 1 . In the said letter, PW2 alleged that:-

“Jana aliniambia niende huko bedroom nikamtafutie Katiba, halafu akanifuata na kisu akaniambia

either nitoe hizo nguo au kifo na pia hata akisikia atanikatakatia mbwa".

The above statement did not in itself clearly show that the appellant forced the complainant herein to have sex with her. There is no indication that PW2 was defiled. It is not very clear from the letter whether PW2 was defiled by the appellant who was her father or not.

In criminal cases especially where the sentence is high as in this case, prosecution has a duty to prove its case beyond a reasonable doubt.

I rely on the case quoted by the appellant, ***Charles Kibara Muraya Vs Republic, Criminal Appeal No. 330/87 at Nyeri***, where the court held that:-

"The more serious the charge, the heavier the burden of proof on the prosecution".

Having re-evaluated the evidence on record, I find it not consistent, vital witnesses were left out and the available evidence was not sufficient to prove case beyond a reasonable doubt.

It was evident that the appellant had a difficult time with his daughter PW2 who had indiscipline cases as per the evidence of DW1, her school teacher. DW1 testified that appellant was very concerned with his daughter, PW2 and used to appear in school many times. The trial magistrate should have interrogated and considered that aspect further before relying wholly on the evidence of PW2.

Having considered the whole evidence on record, I find that the trial magistrate failed to consider the appellant's defence and especially the evidence of DW1 on indiscipline cases by PW2. The complainant herein had all the reasons to frame up her father. The school Principal was supposed to be a prosecution witness and she failed to turn up. For the interest of justice, the learned trial magistrate should have applied the provision of **Section 150 of the Criminal Procedure Code** to summon her to court so that she could shed more light on the relationship between PW2 and her father, the appellant herein. I will rely on the case of ***Bukenya Vs Uganda (1968) EA*** where the court held that:-

- a. **The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.**
- b. **The Court has the right and duty to call the witness whose evidence appears essential to the just decision of the case.**
- c. **When the evidence called is barely adequate, the court may infer that evidence of uncalled witness would have tendered to be adverse to the prosecution"**.

Having now carefully considered the evidence on record, I have come to my conclusion and have drawn my own inferences. I find that prosecution herein did not prove case beyond a reasonable doubt. The appellant's defence was not considered. I therefore find that the appellant's appeal has merit and I subsequently allow it for the above stated reasons. I proceed to quash the conviction and set aside the sentence.

The appellant to be released forthwith unless he is otherwise lawfully held.

The appeal succeeds.

L. N. GACHERU

NVI.

Dated, Signed and delivered at **MACHAKOS** this 18th day of February 2014

B. T. JADEN

