



REPUBLIC OF KENYA



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**KKM v Republic (Criminal Appeal 19 of 2015)
[2017] KEHC 8080 (KLR) (6 February 2017) (Judgment)**

Kesi Koi Mwayele v Republic [2017] eKLR

Neutral citation: [2017] KEHC 8080 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL 19 OF 2015
SJ CHITEMBWE, J
FEBRUARY 6, 2017**

BETWEEN

KKM APPELLANT

AND

REPUBLIC RESPONDENT

*(From Original Conviction and Sentence in Criminal Case No. 553 of
2012 of the Chief Magistrate's Court at Malindi – C.M. Nzibe, RM)*

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8 (1) (2) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offence were that the appellant on 11.8.2012 in Gede Location within Kilifi County, intentionally and unlawfully caused his penis to penetrate the vagina of MN a girl aged 3 years and 7 months.
2. The trial court convicted the appellant and sentenced him to life imprisonment. The grounds of appeal as per the amended grounds of appeal are that:
 - (i) The trial court erred in law and fact by admitting the evidence of the analyst without considering that the same was null and void.
 - (ii) The case before the trial court was made up.
 - (iii) The appellant's arrest had no connection with the case and the imposition of life sentence is unsafe.
 - (iv) The prosecution did not prove its case beyond any reasonable doubt.



- (v) The trial court failed to consider the appellant's defence which was reasonable and award him the benefit of doubt
3. The appellant relied on his written submissions. It is submitted that the DNA evidence could not serve any purpose as the witness testified that the blood could not be analysed because it was spoilt. It could not give them a profile and they disposed of it. The analyst then requested for mouth swabs. The samples were taken to Nairobi but they were lost. A second set of mouth swab was taken and it tested positive for human semen. Therefore, the first and second DNA tests could not yield any fruits. It was only the first DNA which could have incriminated him. It took time for the prosecution to complete the investigations. The evidence of the analyst had no foundation.
 4. The onus of proof was on the prosecution to prove its case beyond any reasonable doubt. The blood was not given its blood group. There is no evidence that the appellant committed the offence according to the medical evidence. The sentence of life imprisonment has denied the appellant his right to life. It is further submitted that before the allegations of defilement were made there was disagreement between the appellant and the victim's family. The appellant further contends that it was not possible for a three and a half years old minor to be defiled without bleeding. The doctors who treated the minor at the first instance were not called to testify. A minor cannot be defiled and walk properly from the scene. The trial court mainly relied on the alleged DNA result which could not form the basis of the conviction. There was a miscarriage of justice. There was a land dispute and the appellant denied committing the offence. The appellant's defence was also not considered yet it raised doubt on the prosecution case.
 5. The State opposed the appeal. The victim testified that the appellant defiled her. She identified the appellant as someone well known to her. The other witnesses corroborated that evidence. Treatment notes were produced. The prosecution evidence did establish that the appellant was at the scene and committed the offence. Section 124 of the Evidence Act allows the court to convict the accused if it believes the complainant's evidence.
 6. This is a first appeal and the court has to re-evaluate the evidence adduced before the trial court and make its own conclusion. PW1 was the mother of the complainant. She testified that the complainant was born on 23.2.2009 and was a pre-unit pupil. On 11.8.2012 at about 6.30 pm she was outside her house washing clothes. The appellant who is her uncle appeared with his children. The complainant followed the appellant. The appellant bought potatoes for the complainant as well as for his children. The appellant's children went back home. The appellant was holding the complainant's hand. The appellant told her that he would go with the complainant and would return her. PW1 continued washing her clothes. After about 20 minutes she decided to look for the complainant. When she reached the road she saw the complainant walking with other two children who were holding her. The complainant was walking with her legs apart. The two other children were G and D. The complainant showed her Kshs.10/= which she had in her hand. PW1 asked the complainant where the appellant was. The complainant tried to walk and she told her that she was in pain. PW1 checked her and she saw semen on her legs dripping down. She also noted that her panty was on her thighs and was not properly worn. She called her neighbours who noticed the semen and advised her to take the child to hospital.
 7. It is the evidence of PW1 that she took the complainant to Gede dispensary where she was treated. The matter was then reported at the Watamu police station. The P3 form was issued. The two children who were with the complainant informed her that they found the complainant with the appellant by the road side. The two children saw the appellant giving the complainant Kshs.10/=. The appellant's home is not far from her house. G and D informed her that they saw the appellant coming from a thicket with the complainant.



8. PW2 was the complainant. She gave unsworn evidence. She testified that KKM did bad manners to her. She told her mother. PW1 was scared as she testified. PW3 NK was a class six pupil and a neighbor to PW1. She testified that on 11.8.2012 at about 6.30 pm she was with her brother JV on the road side heading home. They saw PW2 with the appellant. The appellant was holding PW2's hand while smoking cigarette. The appellant gave PW2 Kshs.10/= and told her to go home. They decided to escort PW2 to her home. They took PW2 upto her home and they went to buy potatoes. On their way back they found many people at PW2's home. PW3 had observed that PW2 was walking in a funny way. She saw people checking on PW2. PW2's mother was saying that PW2 had been raped. She told PW1 that they had found PW2 with the appellant. PW1 said that there were somethings coming out of PW2's private parts. PW2 did not tell them anything about what had happened.
9. PW4 PK is a neighbour to PW1. On 11.8.2012 at about 6.00 pm she was at home. She later heard PW1 talking in an alarming tone. PW4 went to check and saw semen flowing down PW2's legs. She advised PW1 to take PW2 to hospital. She heard PW3 informing PW1 that she had seen the complainant with the appellant by the road side. She went with PW1 to Gede dispensary. PW5 Ibrahim Abdulahi is a clinical officer who was based at the Malindi hospital. On 17.8.2012 he filled the P3 form for PW2. PW3 alleged to have been defiled by a person known to her. Vaginal examination showed that there was a tear on the vagina and the hymen was perforated. There was discharge on the vagina. Lab examination noted spermatozoa. A specimen for DNA was taken. PW5 saw the treatment notes for PW3 as well as her birth immunization card which indicate that she was born on 3.2.2009. Blood samples were taken from the appellant.
10. PW6 JV was twelve years old and a class seven pupil. On 11.8.2012 at about 6.30 pm he was with his older sister PW3. They were heading home after vising their aunt. They saw PW2 at a junction with the appellant. He knew the appellant and he was smoking a cigarette. He saw the appellant giving PW2 Kshs.10/=. Normally PW2 walks very fast but on that day she had difficulty in walking. She was walking slowly. They waited until PW2 reached home. They went to buy potatoes. On their way home, they met PW1 who asked them who was with PW2. PW1 was saying that PW2 had been raped. They told PW1 that they had seen the complainant with the appellant.
11. PW7 P.C. Faith Mukiri was stationed at the Wotamu police station. On 12.8.2012 she was at the station at about 8.30 am when she noted on the occurrence book that a defilement case had been reported on the 11.8.2012 at about 6.30 pm. She investigated the case and visited the scene. PW2 took them to the building where she was defiled. It was an unused building. The complainant told them that the appellant had defiled her. PW1 took to her the clothes PW2 was wearing and she also observed that the clothes had semen deposits. She issued a P3 form and recorded witness statements. The appellant was arrested. Exhibits were taken to the government chemist together with blood samples from the appellant. The analyst kept on saying that they needed new samples from the appellant. The complainant knew the appellant. She would normally cry when talking to them.
12. PW8 George Lawrence Oguda is a government analyst based in Mombasa. On 24.1.2013 he received exhibits. He also received other exhibits on 10.7.2013 and 6.9.2013. There was an envelope marked A which contained a dress. There was a second envelop marked B which had a panty. A third envelop contained blood samples and was marked C. The dress and panty had stains. The blood could not be analysed because it was spoilt and they disposed it. They then requested for mucal swabs from the mouth which is the inner skin of the mouth for analysis. They received two mucal swabs for the appellant and the victim on 10.7.2013. The two samples were taken to Nairobi but they got lost. They called for new mucal swabs which they received 6.9.2013 for both the complainant and the appellant. He did DNA test on the dress and the panty and they tested positive for human semen. He found three



- DNA profile on the dress. Ordinarily a human being has two DNA profiles. He found a DNA profile of the appellant on the dress. He prepared his report dated 7.10.2014.
13. PW9 Chief Inspector Michael Donga was the OCS Watamu police station. He obtained an order from the trial court directing him to escort the appellant to Malindi district hospital for purposes of giving out blood samples for DNA purposes. He complied with the order which he received on 3.9.2013 and escorted the samples to the analyst. He also escorted an envelope which contained a dress and a panty to the government analyst.
 14. In his unsworn defence, the appellant testified that he was shocked by the case and by the fact that he was put on his defence he left the matter to the court.
 15. The court has to weigh that evidence and make its own conclusion as to whether the prosecution proved its case beyond reasonable doubt. The evidence on record does not show that any of the witnesses saw the appellant committing the offence. The only direct evidence is that of PW2, the complainant. It is the evidence of PW1 that she saw the appellant on the material day at about 6.30 pm. The two talked about a land transaction involving PW1 and the appellant's brother. According to PW1, the appellant told her that he was going with the complainant and he would return her. PW1 went about her duties washing her clothes.
 16. There is the evidence of PW3. She was thirteen (13) years old. She was with her brother PW6. The totality of the evidence of these two witnesses were that they saw the appellant holding PW2's hand. The time given is around 6.30 pm. The two had left their aunt's place at around 6.30 pm. They saw the appellant whom they knew giving PW2 Kshs.10/= and telling her to go home. The two witnesses observed that PW2 was walking with difficulty. It is evident to me that when the appellant went with PW2 as per the evidence of PW1, he was with PW2 until when PW3 and PW6 saw him holding the child's hand. There is no evidence that the appellant parted with the complainant. It is the evidence of PW7 that the complainant took them to a building that was not being used. The child told them that she was defiled in that building. On his part, the appellant did not tender any evidence. He simply stated that he was shocked by the case. The incident occurred on 11.8.8.2012 and he was put on his defence on 6.1.2015. the defence evidence was taken on 9.3.2015. that was a period of over two years. The appellant was entitled to testify or even keep quiet as that right is enshrined in the Constitution. It was upon the prosecution to prove its case.
 17. The appellant contend that this was a made up case and there was a land dispute. According to PW1, she bought land from the appellant's brother by the name A. The appellant's family wanted to refund the payment of Kshs.20,000/= PW1 had paid as they thought the land had been bought cheaply. That was the only issue. There was no personal dispute between the appellant and PW1. There is also the evidence on record which proves that PW2 was indeed defiled. This cannot be a made up case.
 18. The other grounds of appeal relate to the DNA evidence. It is true that it took too long for the samples to be tested. The samples were at one time lost. PW8 was based in Mombasa and it's not clear why the samples had to be taken to Nairobi. The final report that was produced dated 7.10.2014 was prepared by PW8. Despite the delays in processing the DNA tests, it is clear that the complainant's dress was not lost or interfered with. PW8 managed to generate DNA profiles from a piece of that dress. He noted that it contained human semen. PW2 was only 3 years old and could not have any human semen. That semen matched the mucal swab taken from the appellant's mouth.
 19. From the evidence on record, it is clear to me that the prosecution evidence is grounded on two main grounds. Firstly, the evidence of the three witnesses, PW1, PW3 and PW6. That evidence is corroborated by that of PW5, the clinical officer. He noted that PW2's hymen was perforated. That was a tear on PW2's vagina. Apart from the above evidence, there is the DNA evidence.



20. Given the evidence on record, I do find that the evidence against the appellant is credible. PW3 and PW6 were two independent witnesses who saw the appellant holding the child. That evidence clearly supports the evidence of PW1 that the appellant left with the child. It didn't take long and the child was seen by PW3 and PW6 walking with difficulties. That is not a made up case. The appellant was at the scene and committed the offence. I do agree with the findings of the trial court. The complainant's age was proved as her immunization card was produced as the first exhibit. Even if the court ignores the DNA evidence, there is still sufficient evidence that proved the prosecution case.
21. In the end, I do find that the appeal lacks merit and is hereby disallowed. The sentence of life imprisonment is proper in the circumstances of this case.

DATED AND DELIVERED AT MALINDI THIS 6TH DAY OF FEBRUARY, 2017.

S.J. CHITEMBWE

JUDGE

