



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 316 OF 2013

DVK APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the sentence of Hon. S.K. Mutai (Ag. PM) delivered on 21/11/2013 in Mutomo Senior Magistrate's Court Criminal Case No. 31 of 2013)

(Before Hon. B. Thurairaja J)

J U D G M E N T

1. The Appellant, **DVK**, was charged with the offence of incest contrary to **section 20 (1)** of the **Sexual Offences Act No. 3 of 2006**.

The particulars of the offence were that “on diverse dates between 11th January 2013 and 29th August 2013, in **Kitui County**, caused his penis to penetrate the vagina of **KV** a child aged 13 years who to his knowledge is his daughter”.

2. In the alternative, the Appellant was charged with the offence of committing an indecent act with a child contrary to **section 11 (1)** of the **Sexual Offences Act No. 3 of 2006**.”

The particulars of the offence were that “on diverse dates between 11th January 2013 and 29th August 2013 in **Kitui County**, intentionally touched the vagina of **KV** a child aged 13 years with his penis”.

3. When the Appellant was arraigned before the trial court, he pleaded not guilty. The case proceeded to a full hearing.
4. The prosecution called six witnesses. PW1, **KV** the complainant testified that she was 13 years old and in standard 5. She described the Appellant as her father. The complainant narrated to the court how on 11/1/2013 at about 5.00 p.m., while her mother was away at [**Particulars Withheld**] (market), the Appellant called her to the house, undressed her, took her to bed, undressed himself, defiled her then warned her not to tell her mother what had happened.
5. That on 6/6/2013 at about 6.00 p.m, the complainant was at home when the Appellant called her and took her to bed and defiled her while using a condom.
6. That on 29/8/2013, the complainant was at home when the Appellant called her inside the house, removed her clothes and defiled her while behind the door. That during that night the complainant

woke her up, flashed a torch and showed her a *panga* and threatened to kill her and placed the *panga* on her neck. The complainant screamed and the mother came to the scene. The mother (PW2) testified that when she inquired what was happening, the Appellant beat her up and they went back to bed.

7. The mother reported the matter to her family and to PW3, **Esther Musau**, the Chairperson of “**Mywo**” and the area Children’s Volunteer officer. The matter was reported to the Children’s Office and to the police. The Appellant was arrested by PW6, **APC James Mwit**. The complainant was taken to **[particulars withheld]** where the Clinical Officer, PW5 **Daniel Mulwa** confirmed that the complainant had been defiled. The Appellant was subsequently charged.
8. In his defence case, the Appellant gave unsworn evidence. No witnesses were called. It was the Appellant’s evidence that he had differed with the complainant who was disrespectful to him and had been absconding school. That he had also differed with his wife the complainant’s mother who was objected to the Appellant’s decision to subdivide his land between his two wives and build homes for them. The Appellant denied having defiled the complainant and blamed this case on his wife (PW3) who planned the arrest.
9. The trial magistrate was satisfied that the prosecution case was proved beyond any reasonable doubts. The Appellant was convicted and sentenced to life imprisonment.
10. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on grounds that can be summarized as follows:-

- That the prosecution case was not proved beyond any reasonable doubts.
- That the Appellant constitutional fundamental rights were violated by his being held in the police cells for a longer period than that prescribed by the law.
- That the defence case of a frame up due to a grudge was not considered.
- That the burden of proof was shifted to the defence.

11. During the hearing of the appeal, the Appellant opted to rely on his written submissions which I have duly considered.
12. The appeal was opposed by the State. The learned counsel for the State submitted on the sufficiency of the evidence and further submitted that the sentence was within the law.
13. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32**.
14. The analysis of the complainant’s (PW1) evidence shows that the two incidents she has testified about happened in broad daylight at about 5.00 p.m. and at about 6.00 p.m. respectively while she was at home. The complainant gave a detailed account of evidence that left no doubt that she was defiled. The complainant was a big girl who gave her age as thirteen (13) years. The complainant therefore knew what she was talking about being undressed and defiled.
15. The complainant’s evidence is that of recognition of the Appellant who she described as her father. There is therefore no possibility of mistaken identity.
16. The complainant’s evidence that the Appellant is her biological father was corroborated by that of her mother (PW2). The complainant’s evidence in court is consistent with what she told her mother at the material time. According to the mother’s evidence, she had received the report of the defilement from the complainant and when she asked the Appellant about it he beat both mother and daughter. The complainant’s mother further testified that she reported the matter to her own mother and to the area chief but no action was taken.
17. Further corroboration of the complainant’s evidence came from the Children’s Volunteer worker (PW3) who interviewed the complainant (PW1) and her mother (PW2) before making a report to the Children’s office and to the police.
18. The evidence of the Clinical Officer (PW5) confirmed that the complainant had been defiled. The Clinical Officer further testified that the complainant’s hymen was missing.
19. The investigations carried out by PW4 **PC Grace Gicholi** confirmed that a report was made and investigations carried out.
20. The defence by the Appellant concerning the complainant’s (PW1) alleged indiscipline and lack of respect and the alleged grudge with the wife (PW3) as what lead to his being framed up with this case is not convincing. The complainant maintained her evidence during cross-examination and denied having been coached. The wife (PW2) also denied having had a grudge with the

- Appellant and denied having framed him up.
21. The trial magistrate who had the benefit of observing the demeanor of the witnesses believed the complainant's evidence. I have no reasons to differ with the finding of the trial court.
 22. The ground of appeal that the Appellant's Constitutional fundamental rights were beached due to overstay in police custody cannot be dealt with in this appeal. The Appellant's remedy lies in a civil suit. ((See for example **Julius Kamau Mbugua –vs- Republic - Criminal Appeal Nrb. 50 of 2008**).
 23. Having re-evaluated the entire evidence on record, I am satisfied that the Appellant's conviction is based on sound evidence and the sentence is within the law. The only correction of the trial magistrate's judgment is that the conviction ought to be on the main count and not both the main count and the alternative. The complainant also gave her age as 13 years old. Holding a *voire dire* was therefore superfluous.
 24. **Section 19** of the **Statutory Oaths and Declarations Act Cap 15 Laws of Kenya** provides that:

“Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section.”

25. Under **Section 2** of the **Children's Act Cap 141 Laws of Kenya**, a child of tender years is a child of ten years of age and below. (See also **Samson Oginga Ayieyo –vs- Republic – Criminal Appeal 165 of 2006**).
26. The appeal has no merits and is dismissed.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Kitui this 13th day of November 2014.

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B. THURANIRA JADEN

JUDGE