DVK v Republic (Criminal Appeal 102 of 2020)
[2023] KECA 930 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KECA 930 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 102 OF 2020

MSA MAKHANDIA, S OLE KANTAI & GWN MACHARIA, JJA

MAY 26, 2023

BETWEEN

DVK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Machakos (Thuranira Jaden, J.) dated 13th November, 2014 in HC. CR. A. No. 316 of 2013)

JUDGMENT

1. This is a second appeal by the appellant, DVK, who was charged before the Senior Magistrate's Court at Mutomo with the offence of Incest contrary to Section 2 (1) of the *Sexual Offences Act* No. 3 of 2006. It was alleged in the charge sheet that between 11th January, 2013 and 29th August, 2013 at a place named in the charge sheet he caused his penis to penetrate the vagina of "KV", a child aged 13 years who was his daughter. There was an alternative charge of committing an Indecent Act with a child contrary to Section 11 (1) of the said Act. He was tried, convicted and sentenced to imprisonment for life and his first appeal to the High Court of Kenya at Machakos was dismissed in a Judgment delivered by Thuranira Jaden, J. on 13th November, 2014.

2. Being a second appeal our mandate is constrained by Section 361 (1) (a) *Criminal Procedure Code* to consider matters of law only if we find that any are raised in the appeal. We must avoid the temptation of dealing with matters of fact. This mandate has received judicial pronouncements in many cases such as the case *Michael Ngara Paul v Republic* [2021] eKLR where this Court stated of that mandate:

> " Being a second appeal our jurisdiction is limited by Section 361(1) (a) *Criminal Procedure Code* where we are to consider only issues of law if any are raised in the appeal but must not go into a consideration of facts which have been tried by the trial court and re-evaluated on first appeal unless we reach the conclusion that the findings were not backed by evidence

or are based on a misapprehension of the evidence or it is shown that the two courts demonstrably acted on wrong principles in making those findings or the conclusions are perverse – *Chemagong v Republic* [1984] KLR 611."

We revisit facts of the case merely to satisfy ourselves whether the two courts carried their mandate as required in law.

KV", who testified as PW1 on oath, the trial magistrate having found through *voire dire* examination that she understood the nature of an oath, stated that she was 13 years old and was a class 5 pupil at a local school. On 3rd January, 2013 when her mother JM (PW2) had gone to the shops her father, the appellant, summoned her at 5 p.m. and wanted to have sex with her but she refused. He beat her up and then she ran away. She informed her mother upon her return but the mother did nothing. On 11th January, 2013 when her mother was again away the appellant called KV into the house, removed her clothes and proceeded to defile her. He warned her of dire consequences if she reported the incident to her mother or anyone else. He repeated the act on 6th June, 2013 and 29th August, 2013 and on the latter date he placed a panga on her neck threatening that he would kill her. She screamed (it was 3 a.m.) attracting the attention of her mother but the appellant beat his wife. KV reported the incident the following day (30th August, 2013) to her teacher and to Esther Musau (PW3), Chairperson, MWYO a Children's Volunteer group in Mutomo. She was taken to Mutomo Police Station where the matter was reported and she was referred to Mutomo Health Centre where she was examined by a Clinical Officer Daniel Mulwa (PW5) who found the hymen missing. The clinical officer concluded that "KV" had engaged in sexual activity before. He produced P3 form and treatment notes as part of the exhibits in the case."

3. PW2 confirmed that her daughter had informed her of the sexual liaisons she had had with her father and when she would confront the appellant on the issue he would beat her up as he would beat KV.

4. PW3 interviewed the girl who confirmed that the appellant had defiled her on various occasions and threatened and beat her.

5. PC Grace Gicholi (PW4) of Mutomo Police Station received report and charged the appellant. APC James Mwiti (PW6) of Kyatune AP Post was the one who arrested the appellant.

6. Upon being put on his defence the appellant stated in an unsworn statement that he had differences with his daughter who did not respect him; that his wife had accused him of being unfaithful and had framed him. He denied having sex with his daughter.

7. As we have seen the trial court weighed the case from both sides and convicted the appellant.

8. The appellant has raised 4 grounds in the homemade Memorandum of Appeal. He says that the Judge on first appeal erred by relying on uncorroborated and unreliable evidence that could not sustain conviction; that there were gaps in the prosecution case; that a clinical officer is not a competent witness to give evidence in such a case and finally:

" That,both courts give their Judgment on uncorroborated evidence from the prosecution.

Relief.Reprieve where of sort (sic)."

9. It is difficult to understand this final ground.

10. When the appeal came up for hearing before us on a virtual platform on 18th October, 2022 the appellant appeared in person from Kamiti Maximum Prison while the office of Director of Public

Prosecutions was represented by learned State Counsel Miss Margaret Matiru. Both sides had filed written submissions which they fully relied on. We have considered those submissions.

11. The appellant complains that the courts below relied on uncorroborated evidence. That is not true. The case for the prosecution was simple and straightforward. KV testified on oath how her father would summon her and defile her threatening her with dire consequences, even death, if she revealed what her father was doing to her. She informed her mother who would confront the appellant on the issue but he would beat her up. KV finally informed her teacher and an official in a local child protection group and it was confirmed by the clinical officer that the child had been defiled as her hymen was missing.

12. The appellant complains that it was wrong for the courts below to rely on the evidence of a clinical officer in the case. This complaint has no basis as a clinical officer is competent to give such evidence.

13. This Court in the case of *Raphael Kavoi Kiilu v Republic* [2010] eKLR stated of the competence of such an officer to give evidence:

> " The challenge touching on the clinical officer's qualification is in our view taken care of by a scrutiny of the Act governing the affairs of clinical officers bearing in mind that the appellant did not lay any factual basis for his allegation in the first place. Under section 2 of the *Clinical Officers Act (Training, Registration and Licensing) Act* Cap 260 (LoK) a clinical officer means:-
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> "a person who, having successfully undergone a prescribed course of training in an approved training institution, is a holder of a certificate issued by that institution and is registered under the Act. ..."

14. In the latter case of *Martin Nyongesa Wanyonyi v Republic* [2015] eKLR we said:

> " On the next issue that the clinical officer was not competent, the clinical officer Chrisantus Masinde, testified that, after she had examined ZN, he completed and signed the P3 form. In this regard, this Court has stated time and again that a Clinical officer possessed with the requisite qualifications as specified in the *Clinical Officer Act (Training, Registration and Licensing Act* (Cap 260 (Laws of Kenya) is authorized to prepare and sign the P3 form, and in so doing, is also competent to attest to the contents of the medical report produced in court. See *Raphael Kavoi Kiilu v R [2010]* eKLR, *Frappyton Mutuku Ngui v R* [2014] eKLR and *Mutua Kivaya Nthenge vs R* 2014 eKLR.
>
> In the circumstances, we are satisfied that Chrisantus Masinde was competent to complete and testify on the P3 Form, and we find that his testimony was admissible as evidence. This ground lacks merit and as a consequence fails."

15. We dismiss the grounds of appeal and find that the appellant was properly convicted on the evidence and the law. The appeal has no merit and we dismiss it.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR