



DSM v Republic (Criminal Appeal 3 of 2020) [2023] KECA 818 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 818 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL 3 OF 2020
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA**

JULY 7, 2023

BETWEEN

DSM APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Malindi (Nyakundi, J.) delivered on 23rd December 2019 in High Court Criminal Appeal No. 19 of 2019)

JUDGMENT

1. The appellant, DSM, was charged with, and convicted, for the offence of incest contrary to Section 20(1) of the *Sexual Offences Act* and sentenced on July 17, 2018 to 10 years imprisonment. The particulars of the offence were that on diverse dates between December 28, 2014 and March 31, 2015 in Ganze District within Kilifi County, he caused his genital organ, namely penis, to penetrate the genital organ, namely vagina, of BKM a child aged 16 years who was to his knowledge his stepsister.
2. The appellant's first appeal to the High Court at Malindi was dismissed by R. Nyakundi, J. in a judgment delivered on December 23, 2019.
3. This is his second appeal which, by reason of Section 361(1) of the *Criminal Procedure Code*, must be restricted to matters of law as explained in *Karani v R* (2010) 1 KLR 73 where this court stated that:

“By dint of the provisions of section 361 of the *criminal procedure code*, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as “matters of law”.



4. In his first appeal before the High Court, the appellant had complained that his conviction is not safe as there was no DNA evidence linking him to the child conceived by BKM out of the sexual encounter the subject of the charge. He also complains that his defence was not considered and that the prosecution case was riddled with contradictions.
5. However, before this court, he appears to have no grievance with the conviction. Based on his supplementary grounds of appeal and his written submissions on which he relied entirely during the virtual hearing of the appeal on March 15, 2023, his sole complaint is that the 1st appellate court erred in omitting to consider his pre-conviction custody pursuant to Section 333(2) of the [Criminal Procedure Code](#).
6. Learned Senior Principal Prosecution Counsel Ms. Kambaga in opposing the appeal submitted on the grounds the appellant had urged before the High Court and submitted that the conviction is well founded, that offence of incest was proved as there is no contest that the appellant and the complainant are siblings within the definition in section 22 of the [Sexual Offences Act](#); that DNA evidence was not necessary as the issue was not the question of paternity but whether there was penetration, and that the appellant's defence was duly considered.
7. The facts in brief BKM testified before the trial court that the appellant defiled her on at least two occasions while a third attempt by the appellant to do so was thwarted. She described her relationship with the appellant as "my stepbrother. We share the same father but different mothers." She testified that on December 28, 2014, the appellant, a charcoal dealer, requested her to assist him in filling sacks which she did. Thereafter she rode with him on his motorcycle to a place known as [particulars withheld] and after tying sacks of charcoal, the appellant requested her to accompany him to Soko forest where the appellant claimed to have friend. She agreed. She stated that it was around 2.00 p.m., when they got to the forest but to her bewilderment, she did not see the friend the appellant was supposed to meet. That on alighting from the motorcycle, the appellant told her that he wanted to have sex with her, but she declined. The appellant ignored her pleas and dragged her deep into the forest. She narrated that:

"We got to where some trees were and the accused pushed me down and tied my hands to the trees. He had a rope which...was using to tie the sacks. He tied each of my hand to the tree so that I was unable to free myself. The accused then proceeded to have sex. Before we had sex, the accused undressed me and undressed himself. After he finished having sex with me, he untied me. We left the forest. The accused threatened to kill me if I told anyone of what he had done to me. When I got home, I didn't tell my mother because I was scared."
8. The second incident of defilement, according to BKM, occurred in January 2016 (should be 2015) when on her way home the appellant asked her to accompany him "to take a soda."; that they boarded a motorcycle and after passing a borehole, the appellant asked her to alight; that she attempted to escape but the appellant caught her and pinned her down and had sex with her and threatened to kill her should she tell anyone. After that the appellant dropped her home.
9. She testified further that on another occasion in March 2015, the appellant promised to buy her a blouse and on the way home the appellant detoured to the forest, stopped his motorbike and asked for sex; that she struggled with him and screamed for help and luckily an uncle was near and responded and she left with him; that the uncle then reported the incident to her mother who then confronted her; she then revealed to her mother what had been happening between her and the appellant; that her mother took her to Kilifi District Hospital and on examination it was established that she was pregnant. According to BKM, "the pregnancy belonged to the accused" as she asserted that she had not had sex



with anyone else. At the time of her testimony on December 9, 2015, she had already given birth and the child was two months old.

10. Under cross examination by the appellant, she stated that as the appellant was her older brother, she would agree to go wherever he sent her and maintained the child was sired by the appellant. She stated she had a boy friend called N who used to bother her but she never had sex with him.
11. The complainant's mother VMN(PW2) in her testimony stated that the appellant, her step son, picked the complainant from her home on 28th December 2014 apparently to assist him to collect firewood and on returning home in the evening, PW1 looked fine; that she noticed in March 2015 that PW1 appeared bigger and also kept to herself and she suspected her daughter was pregnant; that on enquiring from her, PW1 confirmed that she was pregnant and that the pregnancy belonged to the accused. Thereupon, PW2 informed PW1's head teacher who referred them to the Bamba Police Station where they reported the matter and were advised to go to the hospital; and that they went to Kilifi District Hospital where PW1 was examined. The appellant was later arrested by the police.
12. Under cross examination by the appellant, PW2 stated that the appellant had said he would assist in payment of school fees for PW1 and it was on that basis she had allowed her daughter, PW1, to be escorting him to collect firewood and that PW1 had informed her of the incident on December 28, 2014 when he had left with her to collect firewood.
13. Police Constable Peter Odhiambo (PW3), who at the material time was attached to Bamba Police Station, stated that upon the matter being reported at the police station on 13th May 2015, the complainant was referred to hospital where she was found to have been three months pregnant. A P3 form was filled out and the appellant arrested on 14th June 2015. He produced the complainant's health card.
14. Dr. Aslaam Ahmed (PW4) of Kilifi County Hospital produced the P3 Form on behalf of Dr. Bushra who had examined the complainant based on which it was established that the complainant was not a virgin and was five months pregnant.
15. In his defence, the appellant stated that he is a charcoal dealer and that police officers went to his workplace on 13th June 2015 and arrested him and subsequently charged him with the offence. He stated that the complainant had a boyfriend and never used to sleep in the house; that she had become truant, and he tried to counsel her without success; that he once had to rescue her from her boyfriend and take her home but tables turned and he was charged with the offence.
16. Satisfied that the prosecution had proved its case to the required standard beyond reasonable doubt, the trial court, as already indicated, convicted the appellant. The High Court reviewed the evidence and concurred with the trial court. Although it is not our duty as a second appellate court to re-evaluate the evidence, it is our view that the charge was established to the required standard. With regard to the complaint that there was no DNA evidence to support the conviction, section 36 of the *Sexual Offences Act* provides that where a person is charged with committing an offence under the Act, the court may direct that an appropriate sample, including a DNA test, to be taken for purpose of forensic and other scientific testing in order to gather evidence and to ascertain whether or not the accused person committed an offence.



17. In the case of *Robert Murungi Mumbi v Republic* Criminal Appeal No. 52 of 2014 this Court stated, regarding Section 36 of the *Sexual Offences Act*, that:

“Clearly that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical evidence on DNA evidence is not the only evidence by which commission of a sexual offence may be proved.”

18. Further, in *AML v Republic* (2012) eKLR the Court stated that “the fact of rape or defilement is not proved by DNA test but by way of evidence” and in the case of *Kassim Ali v Republic* Criminal Appeal No 84 of 2005, the Court stated that:

“The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence”.

19. There is no merit therefore in the appellant’s complaint that the conviction lacked basis on account of absence of DNA evidence.

20. As regards the complaint that there were discrepancies in the prosecution evidence, this complaint was interrogated by the High Court which correctly concluded that accounts of recollections of facts by different persons who witness the same event are unlikely to be the same in every particular. We discern no misdirection.

21. As regards the complaint that his defence was not considered, the record shows that both courts below did consider the appellant’s defence and concluded that the prosecution evidence displaced it. The learned Judge of the High Court expressed that the evidence of PW1 was sound and watertight and safe to convict the appellant. The Judge expressed that whereas the evidence of PW1 did not require corroboration, it was corroborated by PW2. The appellant has not demonstrated that the concurrent findings by the two courts below were arrived at without evidence and consequently we have no basis for interfering with the conviction. See *Karingo v R* [1982] 213.

22. As regards the claim that the pre-conviction custody period was not considered, the record shows that on October 23, 2015, the appellant was granted bond and on two subsequent occasions warrants for his arrest were issued but later lifted. In the circumstances his grievance in that regard is misplaced.

23. All in all, there is no merit in this appeal. It is accordingly dismissed.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JULY 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.



Signed

DEPUTY REGISTRAR

