**DON v Republic (Criminal Appeal 309 of 2018)**
**[2022] KECA 120 (KLR) (18 February 2022) (Judgment)**

Neutral citation: [2022] KECA 120 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT ELDORET**

**CRIMINAL APPEAL 309 OF 2018**

**HM OKWENGU, MSA MAKHANDIA & F SICHALE, JJA**

**FEBRUARY 18, 2022**

**BETWEEN**

**DON ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal against the judgment of the High Court of Kenya at Eldoret (O. Sewe, J.) delivered on 15th August 2018 in HC Cr. Appeal No. 119 of 2013)***

**JUDGMENT**

1. The appellant whom we shall refer to as Don (his real name withheld), is before us in a second appeal, following his conviction and sentence in the Principal Magistrate's court at Kapsabet, and the subsequent dismissal of his first appeal before the High Court (Sewe, J).

2. The background to this appeal is that Don was employed as a Chaplain and a form 1 CRE teacher at [Particulars Withheld] Secondary School. On the material day, Linnet (real name withheld), a girl aged 5 years' old, went to Don's one roomed house. Gladys, the school matron cum nurse who was also Don's neighbour, saw slippers outside Don's door. She recognized the slippers as belonging to Linnet. At around 11.00 a.m., M a 16-year-old girl under whose care Linnet had been left, called out for Linnet and heard her respond from Don's house. Later M went to get Linnet from Don's house so that she could come home for lunch. She found Linnet seated on Don's bed. She then took Linnet home.

3. In the evening, Linnet's mother, Christine (real name withheld) came back home. Linnet complained of pain in her vaginal area and upon examining her saw some discharge and noted that Linnet's vagina had bruises. Christine sought help from Gladys, and together they took Linnet to Nandi Hills Hospital. Linnet was then taken to the police station. Upon being questioned, Linnet first mentioned a boy called Anthony as her assailant, then changed and said it was one Omondi, before finally settling

on Don as the person who had sexually assaulted her. The matter was reported to the police, Don arrested and subsequently charged with the offence of defilement.

4. Linnet was examined by Towett, a Clinical Officer, who noted that she had bruises on her labia majora and reddening of the minora, and her hymen was perforated. A high vaginal swab revealed numerous pus cells. The Clinical Officer concluded that Linnet had vulvo vaginitis caused by a penetrating injury from a firm organ.

5. When put on his defence Don gave sworn evidence in which he maintained that the allegations against him were false. He explained that on the material day, Linnet and another child were playing outside his house while he was inside the house cleaning it. He then left his house and went to the school. Two days later, he was called to the principal's office where he found the chief of the location who told him he was required at the police station. When he went to the police station, the OCS called Linnet to his office and asked her to say what happened, and Linnet said that she slept on Don. Don was then arrested and charged. Don maintained that the allegations made against him were false and intended to have him thrown out of the school. Upon considering the evidence, the trial magistrate convicted Don and sentenced him to life imprisonment.

6. Don who was aggrieved appealed to the High Court against his conviction and sentence, contending that: the method used to ascertain Linnet's age was not recognized in law and as such her age was not proved; Linnet was unreliable and could not be believed in her identification of Don as her assailant; no medical evidence was adduced by the prosecution to prove that he was the perpetrator of the offence; his defense was not considered; and he was denied right to fair hearing as he was not accorded legal representation during his trial.

7. In dismissing the appeal, the learned Judge of the first appellate court rejected Don's contention that Linnet's age could only be proved by scientific evidence or the production of a birth certificate. She found that there was credible evidence that Linnet was 5 years old at the time she was sexually assaulted. As regards penetration, the learned Judge found that there was evidence from Linnet supported by that of Christine, Gladys and the clinical officer, which confirmed penetration of Linnet's vagina.

8. On the evidence of identification, the learned Judge found discrepancy in the evidence of Linnet, but noted that the inconsistencies had to be understood within the context of the entire evidence. From this, the Judge deduced that Linnet did not feel free to report the incident to her mother at the first opportunity, and only did so at night because she was in pain; that she did not volunteer the name of the offender to her mother and had to be questioned and cajoled to do so; and that Linnet's evidence implicating Don was corroborated by the evidence of M and Gladys, and therefore Don was properly identified as Linnet's assailant.

9. The learned Judge rejected Don's defence and his allegations of a grudge, holding that the evidence of Linnet was sufficient under section 124 of the *Evidence Act*, to sustain Don's conviction. Finally, the learned Judge found that Don's trial was conducted in a fair manner.

10. In this second appeal, Don has raised seven grounds that we reproduce herein verbatim as follows:

    (i) Penetration was not proved at all.

    (ii) Medical evidence did not support defilement i.e. both vulvo vaginitis and perforated hymen were inconsistent to the facts of the charge.

    (iii) Identification of the accused as a real perpetrator is marred with contrivance and not canvassed (sic) with credible evidence.

(iv) Evidence of the alleged victim was obtained by illegal means, she was beaten to implicate the appellant.

(v) Production of immunization card is not a proper method of establishing age as required under section 8920 (sic) SOA No. 3 of 2006.

(vii) All prosecution facts and every element were shambolic, poor and devoid of merits and not proved on the basis of beyond reasonable doubt as the law requires.

(vii) The sworn evidence of the appellant was rejected without cogent and credible reason for denial."**

11. Both Don and the respondent have filed written submissions in support of the rival positions that they have taken in the appeal. Don compressed his grounds of appeal into two main issues, that is, whether the prosecution proved its case beyond any reasonable doubt and whether his right to a fair trial under Article 50(2)(h) of *the Constitution* was breached. Don noted that the first appellate court had the responsibility of independently and thoroughly evaluating the evidence and that it was the duty of the prosecution to prove the case. He reiterated that the evidence before the trial court was marred with inconsistencies; that the age of Linnet which was a critical ingredient, was never established as the immunization card which was relied upon was not sufficient.

12. Don noted that his identification by Linnet was doubtful because during her first interrogation, she had identified two boys, Anthony and Omondi as the perpetrators of the offence. Don noted that the doctor who actually treated Linnet at Nandi Hills Hospital during her first visit was not called to testify, nor was the discharge from her private parts analysed to rule out the presence of spermatozoa, nor was a DNA test done to provide any nexus with Don. He urged the Court that in the light of such grave contradictions and omissions, the prosecution did not discharge the burden of proof, and he should therefore be set free.

13. The respondent also filed written submissions through a prosecuting counsel Kwame Chacha in which the respondent urged the Court to reject Don's grounds of appeal relating to violation of his right to fair trial, maintaining that Don was given ample opportunity to obtain legal representation, and that his right to fair trial was facilitated rather than infringed; that he initially had an advocate but opted to proceed on his own after the advocate failed to attend court during the defence hearing. The respondent argued that Don was not charged with a capital offence and did not therefore qualify for mandatory legal representation.

14. As regards the age of Linnet, the respondent submitted that the evidence adduced was sufficient under Rule 4 of the Sexual Offences Rules of Court, 2014 that allows the court to take into account a 'birth certificate, any school documents or a baptismal card or similar documents' and that Linnet's child health card which was produced was therefore sufficient. With regard to penetration, the respondent submitted that the evidence of Linnet was corroborated by the evidence of Christine and Gladys, and that under section 124 of the *Evidence Act*, the court could rely on the evidence of Linnet alone. The Court was therefore urged to dismiss the appeal.

15. We have considered this appeal, the record of appeal, submissions made by both parties, and the authorities cited. Taking cognizance that this is a second appeal against Don's conviction and sentence, and that under Section 361 of the Criminal Procedure Code, a second appeal is confined to matters of

law only, we reiterate the duty of this Court as stated in *Adan Muraguri Mungara v Republic [2010] eKLR*:

> "As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."

16. In our view this appeal turns on two main issues of law. This is whether the learned judge properly evaluated the evidence and came to the correct conclusion in regard to proof of penetration, and the age of Linnet; and whether Don was properly identified as the person who violated Linnet.

17. Our perusal of the record of appeal reveal that the first appellate court in its judgment made similar findings of fact as those of the trial court. It behooves us therefore to apply the standard set out in Adan Muraguri Mungara v Republic (supra) and consider whether there is justification to interfere with the concurrent findings of fact that were made by the two lower courts, and whether the decision of the first appellate court should stand.

18. In his appeal, Don sought to demonstrate to this Court that the prosecution was unable to prove that he penetrated the victim. The question is whether the ingredients of the charge of defilement were established. That is whether the victim was a minor; whether there was penetration of her genital organs; and if so, whether the appellant was established to be the person who penetrated the genital organs of the victim.

19. It is apparent to us that this appeal turns on the identification of Don by Linnet, as the perpetrator of the offence. We are perturbed that Linnet first identified Anthony, and then Omondi as the persons who had violated her, and that she only identified Don after being threatened and cajoled by her mother. The learned Judge addressed this in her judgment as follows:

> " 22. It is indubitable (sic) that the complainant did not immediately report the incident to her mother or anyone else until later at about 8.00 p.m. when she complained of pain in her genitalia. The lower court was told by PW2 that upon return from the hospital with the complainant she questioned the complainant about the identity of the offender and the complainant initially mentioned the name of a boy called Anthony and said he lay on her on the grass as they were playing, and that Anthony was summoned to the police station for questioning when again the complainant changed her story and said that she had been defiled by one Omondi. At that point the complainant exasperated mother wanted to beat her whereupon she ran out crying. It was thus the evidence of PW2 that it was only later after PW1 cooled down, that she divulged that she had been defiled by the appellant.
>
> 23. ...
>
> 24. There is no denying that there were discrepancies in the evidence of the complainant, particularly with regard to the critical issue of identification of the offender, as was rightly conceded by Ms. Oduor for the State. However, the apparent inconsistencies in my view have to be understood within the context of the entire evidence adduced in the matter. It is manifest from the evidence adduced before the lower court that the complainant did not feel free enough to report the incident to her mother at the first opportunity and that she only did so later that night because she was in pain. She did not volunteer the name of the offender to her mother and had to be questioned and cajoled to do so. Again this was much later in

terms of time. However, there can be doubt that the complainant's evidence implicating the appellant was well corroborated by PW3 and

20. We find that the evidence was clear that Linnet did not speak the truth when her mother inquired as to what had happened to her. She changed her story twice and only mentioned Don in the third version after she was threatened and cajoled. Although both the trial magistrate and the learned Judge found that Linnet's evidence was credible and sufficient to sustain a conviction under the proviso to section 124 of the *Evidence Act*, we are concerned that Linnet did not speak the truth in the first instance, and that she mentioned two other persons before mentioning Don. The possibility of Linnet not having spoken the truth cannot be ruled out completely.

21. Moreover, the learned Judge believed Linnet spoke the truth because she found her evidence corroborated by the evidence of M, who found Linnet in Don's one roomed house sitting on the bed and also the evidence of Gladys who saw Linnet's slippers outside Don's house. The import of the evidence of M and Gladys was that Linnet was on the material day in Don's house. Don did not deny that Linnet had gone to his house. It was his evidence that children, including Linnet, used to play around his house. We find that the fact of Linnet having been in Don's house provided evidence of opportunity, but was not sufficient on its own to prove that Don had actually violated her. More so, when M who went and got Linnet from Don's house, found her seated on the bed, fully clothed and did not notice anything wrong with her. The house was one roomed and the fact of Linnet sitting on the bed does not mean anything nor can her violation be deduced from it. The evidence of Gladys also only confirms that Linnet was in Don's house but does not confirm anything regarding the alleged violation.

22. In our view the learned Judge misdirected herself in regard to the corroboration of Linnet's evidence. It is apparent that Linnet did not speak the truth to her mother at the first instance as she mentioned two different people, the third name which was that of Don only featured long after the event when clearly not believing Linnet's story regarding Anthony and Omondi, Linnet's mother threatened and cajoled her. If Linnet had lied about Anthony and Omondi what assurance was there that she was speaking the truth about Don? Clearly Linnet's credibility was questionable. In addition, whereas Linnet's evidence in Court may have been consistent, the fact of her having been coached and cajoled on what to say after the event cannot be ruled out.

23. We reiterate what this Court stated in *Paul Etole & another v Republic [2001] eKLR* on the need for caution while receiving all forms of identification evidence:

> "[identification] evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the Court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence."

24. While we do appreciate that in sexual offences the proviso to section 124 of the *Evidence Act* allows the trial court to convict on the evidence of the victim alone, the need for caution in identification evidence is especially essential where the proviso to section 124 of the *Evidence Act* is applied and the court is depending on the evidence of the victim alone. The court must be convinced on the facts before it that the victim has spoken the truth in regard to the identity of the perpetrator and any doubt must be resolved in the appellant's favour.

25. We find that according to the evidence that was before the trial court the circumstances were not appropriate for the application of the proviso to section 124 of the *Evidence Act* as there was a doubt in Linnet's identification of Don because of her initial inconsistency in identifying her assailant as Anthony and Omondi, and this doubt ought to have been resolved in Don's favour. In addition, the two lower courts erred in finding corroboration of Linnet's evidence on the evidence of M and Gladys whose evidence did not confirm Linnet's evidence regarding her alleged violation by Don.

26. For these reasons, we find that the appellant's conviction cannot be supported. Consequently, we allow this appeal, quash the appellant's conviction, set aside the sentence imposed against him and order that the appellant be set free forthwith unless otherwise lawfully held.

Those shall be the orders of the Court.

**DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.**

**HANNAH OKWENGU**

**.....**

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

**.....**

**JUDGE OF APPEAL**

**F. SICHALE**

**.....**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**