Case Number:	Criminal Appeal E007 of 2021
Date Delivered:	30 Mar 2022
Case Class:	Criminal
Court:	High Court at Kisumu
Case Action:	Ruling
Judge:	Jacqueline Nancy Kamau
Citation:	DOO v Republic [2022] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	Hon C. L. Yalwala (SPM)
County:	Kisumu
Docket Number:	-
History Docket Number:	Criminal Case No 33 of 2018
Case Outcome:	Appeal ordered
History County:	Kisumu
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO E007 OF 2021

DOO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon C. L. Yalwala (SPM) delivered at Maseno in Senior Principal Magistrate's Court in Criminal Case No 33 of 2018 on 11th March 2021)

RULING

1. The Appellant herein was charged with the offence of incest contrary to Section 20(1) as read with Section 22(1) of the Sexual Offences Act No 3 of 2006. He had also been charged with an alternative offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. He was tried and convicted on the main charge by Hon C. L. Yalwala, Senior Principal Magistrate who sentenced him to serve twenty (20) years imprisonment.

2. Being dissatisfied with the said Judgement, on 24th March 2021, the Appellant lodged an Appeal herein. His Petition of Appeal was dated 17th March 2021 and filed on 24th March 2021. He relied on (7) grounds of appeal.

3. His Written Submissions were dated and filed on 8th October 2021 while those of the State were dated 8th November 2021 and filed on 9th November 2021. This court therefore reserved the Judgment herein.

4. However, at the time of writing the decision, this court noted that at the time the child, PA(hereinafter referred to as "PW 1") was first examined on 29th June 2018, she was found to have been pregnant with a history of defilement. There was no other witness who was called to testify that the Appellant defiled her. However, after analysing the evidence, the Trial Court nonetheless found the Appellant to have had defiled her as he believed her version of what transpired.

5. The Trial Court was well within its mandate and power to do so as the proviso to Section 124 of the Evidence Act Cap 80 (Laws of Kenya) stipulates that:-

"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

6. Having said so, Section 358 (1) of the Criminal Procedure Code (Laws of Kenya) empowers the High Court hearing an appeal from the subordinate court to call for additional evidence to be taken to assist it in coming to a just determination of a matter before it.

7. The said Section 358(1) of the Criminal Procedure Code states as follows:-

"In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court."

8. As was held in the case of **Elgood vs Regina [1968] EA at page 274**, new and/or additional evidence must be one that was not available at the time of trial or that it was relevant to the matter before the appellate court and was of interest or that the same would influence or impact the result of the verdict.

9. Notably, Section 36 of the Sexual Offences Act Cap 62A (Laws of Kenya) states that:-

"Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may(emphasis court)**direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.**

10. In the case of **Laban Mutua v Republic [2016] eKLR**, the Court of Appeal held that whereas DNA testing pursuant to S**ection 36** of the Sexual Offences Act was not a mandatory requirement, where a person had been charged with committing a sexual offence, **the court could** (emphasis court) direct that appropriate sample be taken from the accused for purposes of scientific testing including a DNA test, in order to gather evidence and to ascertain whether or not the accused committed the sexual offence he had been accused of. This is a discretionary power of the appellate court.

11. It was apparent from the Judgment of the Trial Court that it considered the evidence of the Clinical Officer, Mercy Achieng Jacodoh (hereinafter referred to as "PW 4") that PW 1 was pregnant at the time she was examined. Notably, it would not have been possible to determine with certainty whose child PW 1 was carrying at the time of the trial as she was pregnant at the time. However, it is now four (4) years since the incident occurred and PW 1 must have borne a child. Scientific evidence could go a long way in assisting this court establish whether or not the Appellant herein was linked to her pregnancy considering that PW 1 was taken to the hospital more than a month after the alleged defilement by the Appellant herein to rule out that PW 1 did not have sexual relations with someone else having been emphatic that it was the Appellant who defiled her.

12. The Appellant herein was sentenced to serve twenty (20) years imprisonment for an offence he avers he did not commit. A sentence of twenty (20) years is not one to be taken lightly as it could lead to a deprivation of the Appellant's liberty for a considerable lengthy of time. Since there was no other evidence that was adduced during trial to show that PW 1 had had sexual relations with any other person other than the Appellant herein, the only one thing that could conclusively determine whether or not he was the one responsible was DNA testing as the same would be largely be free from human error.

13. The DNA results were relevant for the just determination of the Appeal herein as they would have an impact on this court's decision and they could not have been obtained during trial. This is indeed a deserving case where this court can invoke its powers under Section 358 of the Criminal Procedure Code with a view to ascertaining whether or not the Appellant committed the offence he had been charged with as a DNA test can dispose of this appeal based on scientific evidence.

14. In the case of **James Mwamba Mwandoe vs Republic [2016] eKLR**, this very court allowed additional evidence to be taken by way of DNA samples being presented on appeal because there was a possibility of the outcome of DNA testing impacting on the verdict of the lower court therein which could have led to the acquittal of the appellant therein.

DISPOSITION

15. The final decision as to whether or not it ought to quash the conviction and set aside the sentence that was meted upon the Appellant by the Trial Court or whether it should affirm the conviction and sentence has been put on hold pending the DNA testing of the Appellant, PW 1 and the child who may have been born out of the said union.

16. In this regard, this court hereby directs that this matter be mentioned on 18th May 2022 for the Respondent to trace the whereabouts of PW 1 with a view to establishing if she gave birth to a baby and if so, for the court to give directions on the taking of samples of the Appellant, PW 1 and the child if any for purposes of DNA testing and/or for further orders and/or directions.

17. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF MARCH 2022

J. KAMAU

JUDGE