



**Maraga Alias Ibrahim v Republic (Criminal Appeal 33 of 2024)
[2024] KEHC 13384 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13384 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 33 OF 2024
DR KAVEDZA, J
OCTOBER 30, 2024**

BETWEEN

BONIFACE MARAGA ALIAS IBRAHIM APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. Z. Abdul (PM) on 25th April 2024 at Kibera Chief Magistrate's Court Criminal case no. 70 of 2016)

JUDGMENT

1. The appellant was charged and after a full trial convicted for the offence of gang defilement contrary to section 10 of the *Sexual Offences Act*. The appellant was sentenced to serve fifteen (15) years imprisonment.
2. Being aggrieved, he filed the present appeal challenging his conviction and sentence. In the petition of appeal received on 21st May 2024, the appellant raised grounds which have been coalized as follows: He challenged the totality of the prosecution's evidence against which he was convicted. He complained that the ingredients of the offence were not proved. He argued that the trial court failed to consider his defence. In addition, he contended that the sentence imposed was harsh and excessive.
3. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate, and re-analyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that. (See *Okeno v Republic* [1972] EA 32).
4. The prosecution called three (3) witnesses in support of their case. In her sworn testimony, PW1 stated that she was 17 years old, having been born on 26/07/1999, and resided in [particulars Withheld]. On 16/07/2016, around 6 p.m., while returning from her friend I's house, she encountered a group of six boys. One of them, Ibrahim, asked her to accompany him to his house, but she declined. He then



- forcibly grabbed her, pulled her into the house, and locked the door. He then forcefully undressed her and had sex with although. Although she resisted, the appellant threatened to call the other friends to also have sex with her. The appellant then started texting other people. She recalled that when he was done, he went out and closed the door from the outside.
5. Shortly after another boy came in and threatened to beat and kill her if she screamed. He also had sex with her and immediately left immediately after. PW1 testified that, due to the shock, she remained seated on the bed. Shortly after, another boy she knew entered and told her that every girl brought to the house had to undergo the same ordeal. He then slapped her and punched her and also had sex with her.
 6. The boy then closed the door, after which another boy entered. PW1 told this boy that she needed to use the bathroom, and he opened the door, indicating that the toilets were locked and she could use the bathrooms instead. Seizing the opportunity, she stealthily escaped upon noticing a nearby gate. She sought assistance at a nearby salon owned by her mother's friend. Although her mother was unavailable, she managed to contact her father, who sent her brother to pick her up.
 7. On the way home she met with her father who told her to show her the house where she had been sexually assaulted. On reaching there they found 2 young men one being the young boy who opened the door for her. She said that the young boy led them to the appellant's who was then arrested and taken to Langata Police Station. She recalled being later taken to Nairobi Women's Hospital for examination and treatment.
 8. During cross-examination, PW1 stated that she only knew the appellant among all the boys involved. She described how he had grabbed her by the forearm and pulled her towards his house, threatening to beat her if she made any noise. She clarified that the appellant did not cover her mouth but continued to issue threats throughout the ordeal. PW1 noted that she was in the house with the appellant for approximately 10 minutes.
 9. PW 1's testimony did not require corroboration in accordance with the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if the trial magistrate recorded reasons why she believed the victim was telling the truth. Further, I have thoroughly looked at the record and I note that PW1 was consistent in her narration of the series of events. Despite being subjected to rigorous cross-examination by the appellant, her evidence was not shaken on cross-examination.
 10. On additional, corroborating evidence, PW2, GM, residing in the [particulars Withheld], recounted the events of 16 July 2016 at approximately 6:30 PM when he was returning from work. He received a distressing call from his daughter, who informed him that she was being beaten by a group of boys.
 11. In response, he promptly sent his younger son to her aid. He met his daughter and son on their way home and she told him that she had been raped after being dragged to a house. PW1 identified only one boy and led him to the house, where no one was initially present. He then called the Nyumba Kumi Chairman. Upon returning, they found two young men, and PW1 positively identified the boy who had let her out. This young man helped them locate the house of one of the assailants, leading to the appellant's arrest alongside another boy. During cross-examination, PW2 clarified that the Nyumba Kumi chairman, his cousin, reported to village elder Mr. W. PW2 noted that PW1 wore the same trousers presented in court on the day of the incident.
 12. PW3, Peter Wanyama, a medical officer, provided the PRC form for PW1, noting that she was examined on 17/7/2016 after a reported sexual assault on 16/7/2016 by three perpetrators, one of whom she knew. He found no external injuries but observed inflammation and a broken hymen, indicating penetration. The anus showed no tears. Samples were taken for lab tests, revealing pus cells



- in the urine but no signs of HIV or syphilis. During cross-examination, he noted that while PW1's clothing was torn, it was not stained, and he could not confirm if the clothing had been recovered. He stated that no DNA testing was conducted, and no spermatozoa were detected, Accordingly, the prosecution proved that there was intentional and unlawful penetration of the victim's genital organ.
13. In his defence, the appellant contended that material date, he claimed to have been at his mother's shop until around 7:30 pm when his father sent him to buy meat. On his way back, he was confronted and assaulted by three men without explanation. He suggested going to the Langata Police Station, where he was subsequently detained. A girl reported being defiled by six boys, including him. The next day, he was taken to Nairobi Women's Hospital for DNA samples to be taken. DWI alleged he was framed, highlighting existing tensions between his father and the girl's uncle. During cross-examination, he noted that no DNA evidence was presented to support the allegations against him. The trial court considered the defence and found it to be incredible. I have arrived at the same conclusion.
 14. On the age of the victim, the trial court considered the birth certificate on record which indicated that the complainant was born on 26/07/1999. This was conclusive evidence of age. She was therefore 17 years at the time of the incident and therefore a child within the law.
 15. On identification of the appellant, PW1 identified the appellant as Ibrahim. PW2 stated that the appellant was one of the three people who sexually assaulted her. During the duration during which the offence occurred, there was no margin of error and/or mistaken identity. This court finds that the appellant was positively identified as the perpetrator of the offence herein by the consistent, well corroborated, and water-tight testimonies of the prosecution witnesses. The conviction for the offence of gang defilement is therefore affirmed.
 16. On sentence, the appellant was sentenced to 15 years imprisonment. During sentencing, the court considered the pre-sentence report and the appellant's mitigation. The court sentenced the appellant to the minimum sentence provided under the law.
 17. As such, I find that the sentence was proper in light of the supreme court decision in Petition E018 of 2023 *Republic v Joshua Gichuki Mwangi*. In the end, the appeal is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 30TH DAY OF OCTOBER 2024

D. KAVEDZA

JUDGE

In the presence of:-

Appellant Present

Maroro for the Respondent

Achode Court Assistant

