Marina v Republic (Criminal Appeal E132 of 2021)
[2023] KEHC 460 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEHC 460 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E132 OF 2021

EM MURIITHI, J

JANUARY 26, 2023

BETWEEN

FRANCIS KARINGURI MARINA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. A.G Munene SPM in Maua Criminal Case No. 44 of 2018 on 25/5/2021)

JUDGMENT

Introduction

1. The appellant, Francis Karinguri Marina was charged with the offence of defilement contrary to Section 8 (1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on diverse dates between June 13, 2018 and July 2018 in Igembe South District within Meru County, he intentionally caused his penis to penetrate the vagina of HM a child aged 9 years old. He faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006. The particulars were that on the same date and place, he intentionally touched the buttocks, breasts, anus and vagina of H.M a child aged 9 years old with his penis against her will.

2. He denied the charges but upon full trial, he was convicted on the main charge of defilement and sentenced to imprisonment for 30 years.

The Appeal

3. Dissatisfied with the conviction and sentence, the appellant lodged this appeal principally on sufficiency of evidence and set out 5 grounds of appeal as follows;

a. The learned trial magistrate erred in law and fact by convicting and sentencing the appellant to serve 30 years imprisonment despite the medical report not supporting the ingredients of defilement, since the complainant was examined after one and half months.

b. The learned trial magistrate erred in law and fact by failing to note that there were contradictions on the evidence adduced by prosecution witnesses.

c. The learned trial magistrate erred in law and fact by failing to note that the key witnesses were not called.

d. It is my humble beg to you honorable judge to consider section 333(2) of the *Criminal Procedure Code*- pretrial detention period.

e. The learned trial magistrate erred in law and fact in failing to consider the appellant's defence.

Duty of Court

4. This being a first appeal, the court is duty bound to re-appraise and re-analyse the evidence afresh, draw its own conclusions and make its own independent findings, bearing in mind that it did not have the advantage of seeing the witnesses testify. See *Okeno v R* (1972) EA 32.

The Evidence

5. PW1 S, the complainant's grandmother, testified that:

> "Between June 13, 2018 - July 2018 H came bending one time. I had sent her to Kioro Kiamati. I asked her what was the problem. She told one Francis had beaten her. That she removed her pant and lay on her. That the said person unbuckled her belt, that he lay on her. That the said person started doing bad things to her. I checked her private i.e her vagina and I noticed the vagina was not in order. I took her skirts, it had blood stains. I asked her for her pants she said the said person threw them away. I went to the centre to investigate the issue and one MM told me that she heard screams and when she went to where the screams were from she found Francis on top of the child. She told the said Francis to rise up but Francis took a stone and chased away the said M. The said M ran away. H ran away on the other direction. H ran and fell behind her mother's house. I called M and she told me that the child got into problems. She told me she saw Francis with her own eyes. I went to sub-chief at Kairoti. He told us to go and get the child. I got a police officer called Peris. We went with Peris took the child and took the child to Dr. Mutuma based at Kangeta. He examined the child. The police i.e Peris was still present. I took the medical notes and P3 was later filled by the doctor. I made a report at Kangeta Police Post. The subchief Karuti give me a letter and accused was arrested. The child was in a skirt. I took the skirt to the police. The police took the photos of the skirt. The photo of the skirt is before the court. 1. Photo- MF - 1 2. P3 – MFI - 2(a) 3. Lab Investigation - MFI 2(b) 4. Outpatient card MFI - 2(c). H was 9 years then but she is 10 years. The clinic card is before the court. 5. Clinic card- MFI – 3. I knew the accused. He is from the village I was born in. The mother of H is not of very sound mind. I stay with the child."

6. On cross examination, she said:

> "I had sent the kid on June 13, 2018. The scene of the crime was inside the land in a bushy area. As per what I was told the child screamed and M went. The child ran away when you were chasing M with a stone and stick. You threatened to assault M and she ran away. M

informed the mother of the child that the child got into problems. We took the child to hospital. I took the child to hospital the following day. I only took the child to hospital. It took time before you were arrested."

7. PW2, the complainant after voire dire gave sworn testimony that she was at standard 2 pupil at [Particulars Withheld].

> " On June 13, 2018 she did bad things to me. I was collecting firewood. I was in [Particulars Withheld] village. It was in the morning. I was alone collecting firewood. My mother had sent me to collect firewood. Accused came took me he carried me. He then put me down in the shamba of a person called Tabitha. He removed his trouser. I was in a biker and a skirt. He removed both the biker and the skirt. He lay on me and touch me (points at the private area). He also touched me using (she points to her private area and his private area). I felt pain when he lay on me. I screamed. He penetrated something inside me. I felt pain. I screamed. MM came. She asked him whether she was beating me. The accused rose up. I then ran away and also M ran away. Accused also shouted and he went to his wife. I went home. I went to my mother's home. I then later went to my grandmother. I slept. I went to school. I was given a note and I went to hospital. I went to Mpoleni. I later went to Mutuma's hospital. I was examined by the doctor. I was given medication. The doctor said I did not get any disease. We went with the grandmother alone. I later went home. I did not go to police station but I saw a police at the police station that is where we passed by. Accused was arrested by Karoti the subchief. He layed on me several times about time on the same day. I knew him before the incident. He is known as Francis. I got to know his name after the incident. Accused used to live in Kiuloni. The picture shows my skirt. Accused in the dock is the one who did what I explained to court."

8. On cross examination, she said:

> " I know you. I know the village you live in. you placed me on your shoulders. It is you who removed my clothes. You pulled down my skirt and biker. You made me lie down. I screamed. M found you on top of me. M ran away screamed. I was able to run away. I ran and went home. I told my mother what had happened but she did not take me to hospital. I went to hospital after 3 days. My grandmother took me to hospital. I was examined by the doctor. I was given medicine. We had gone to police before I was taken to hospital."

9. PW3 MW, testified that:

> " I know the accused. He is from the same village as myself. On June 13, 2018 I heard screams. I was looking for firewood. I had gone to get firewood from the nearby bushes not very far away from my home. It was about 10:00 am. I went to where the screams were coming from. I got the minor (H and Francis). The accused was on top of H. They sat down when they saw me. The child rose up. The accused in the dock got a stick which he had and wanted to hit me I ran away and also the child i.e H ran away. I went collected my firewood and informed her mother. I told the mother of H what I saw. I went back to activities. I went to Kangeta and also told police what I saw. The child did not have clothes when I saw her but she put her clothes when she saw me. She was in a skirt and a small trouser."

10. On cross examination, she said:

> " I heard screams. I found you on top of the child. You placed your hand on the neck of the child when you saw me. You wanted to assault me, I ran away. There was no house which was near. I got shocked and ran away. We ran away different. The child was screaming. I informed the mother of then child after I saw the incident. I later also called the grandmother to follow up whether she was taken to hospital."

11. PW4 Gerald Mutuma, a clinician, filled the complainant's P3 form on August 3, 2018. On examination, the complainant's clothes were not blood stained, soiled or torn. The complainant's external genital was normal, no tears were noted, the hymen was missing, there was a whitish discharge, no blood stains and a dry wound was noted. The complainant had not received any treatment prior to the examination, the probable type of weapon was blunt, the approximate age of the injuries was about 1½ months and he classified the degree of injury as grievous harm. He produced the complainant's P3 form, medical notes, lab results, the outpatient card and the health clinical card as exhibits in court.

12. On cross examination, he stated that he did not examine the appellant, as he was not brought in for examination. He did not refer the patient to a government facility, as one could be examined in a registered facility.

13. PW5 Inspector Denis Ngima from Kangeta Police Post, the investigating officer herein, said he took the complainant to the hospital where she was treated and examined by the doctor who confirmed that she had been defiled. The complainant later brought her skirt which was torn and with dirt stains. The appellant was arrested by the area Chief on 10/8/2020 and brought to court. The complainant told him that she had gone to look for firewood at the farm of her auntie namely M when the appellant requested to have sex with her. He produced the complainant's notification card and the torn skirt as exhibits in court. Although he did not know the appellant before, he identified him in the dock. On cross examination, he said:

> " The minor confirmed the incident and her auntie called M. There was no neighbour who witnessed. I visited the scene. It is the auntie who is nearest to the scene. The minor is from [Particulars Withheld] village. You live about 2 km from the scene. The parents of the minor are of unsound mind. The minor took long before being taken to hospital. The girl did not report immediately. You were not taken for examination."

14. In his sworn defence, the appellant, DW1 testified that:

> " I am aware of the charges. I have been fixed with the charge herein. It was said that will sit down with the complainant's mother. Complainant was made without my knowledge. Subject told me that a report against me. He told me there was a letter warrant of arrest by Kathure. I told the subject was at peace with myself and I will not escape. He told me he had to arrest me so that I can explain myself before a court of law. At the AP Camp where I was taken, I told them I did not know about the allegations. The complainant, guardian and his sister had conspired to fix me with the sister. I was later charged in court. I pleaded not guilty. The complainant guardian had a dispute with my father. In 2016 my father died and as a result of his death they can started seeking for someone who they could fix."

15. On cross examination, he stated that, "the sub-Chief was aware of the dispute. Subchief is not a witness. I don't have any documents to show the dispute. I know the victim well."

16. DW2 Kabiru M'Iremba, testified that, "Family have a had a land dispute since 2016 with Kathure." On cross examination, he stated that:

> " This is a land dispute. I am aware the issue is about defilement herein. The other party want him to be jailed. It is the mother of the complainant who had a land dispute with the accused. The minor has no land."

17. DW3 Cyrus Kalulu, testified that, "I am not conversant with the defilement case but I am aware the accused has a land dispute with one Kathure case. I am not aware where Gathure is coming in this case because I am only aware of the land dispute."

Submissions

18. The appellant urged that the fact that the complainant was examined 1½ months after the incident took place was proof that penetration was not proved, because broken hymen alone is not proof of defilement, and relied on *Republic v Jacob Mutegi* (2020) eKLR, *Philip Nzaka Wastu v Republic* (2006) eKLR, *Stephen Nguli Mulili v Republic* (2014) eKLR, *DPP v Woolmington* (1935) UKHL 1, *Festus Mukati Murwa v R* (2013) eKLR and *Miller v Ministry of Pensions* (1947) 2 All ER 372. He cited various contradictions in the prosecution's case and faulted the prosecution for failing to call the area chief, as a witness, and relied on *Edwin Wafula Keya v Republic* (2005) eKLR. He faulted the trial court for failing to take into consideration the period spent in custody during trial under section 333 (2) of the Criminal Procedure Code and the Judiciary Sentencing Policy Guidelines. He beseeched the court to exercise its powers under Article 23 (1) of the *Constitution* to correct a patently unjust decision, to subjecting the appellant to serve a clearly unlawful or legally excessive sentence. He faulted the trial court for dismissing his defence without giving cogent reasons, and enjoined the court to re-evaluate, re-assess and re-examine the whole testimonies tendered by the prosecution witness in order to arrive at its own verdict. He prayed for the appeal to be allowed, the conviction to be quashed and the sentence to be set aside.

19. The Respondent urged that it proved all the three elements of defilement as set out in George Opondo Olunga v Republic (2016) eKLR beyond reasonable doubt. It concluded that the appeal should be dismissed in its entirety and the conviction and the sentence be upheld, because they were lawful. It also relied on Kaingu Elias Kasomo v Republic (2010) eKLR, *Joseph Kiet Seet v Republic* (2014) eKLR, *Francis Omuroni v Uganda* Court of Appeal Criminal Appeal No 2 of 2000 and Anjononi & others v Republic (1989) KLR in support of its submissions.

Analysis and Determination

20. The issues for determination from the grounds of appeal are (a) whether the ingredients of the offence of defilement were proved beyond reasonable doubt with consistent evidence; (b) whether key witnesses were not called; (c) whether the appellant's defence was considered; and (d) whether the offence in the main charge or alternative charge was proved.

Appellant's defence

21. The appellant belatedly raised the defence that he was framed by the complainant and her family due to existence of a land dispute. The same was duly analyzed by the trial court when it ruled that:

> " No reasonable explanation was offered by the defence on why the minor and PW3 would implicate him. Though he cited a land dispute, the court analysed the same and found that the defence did not establish the said land dispute. The status and the parties involved in

the alleged dispute were not established, infact the accused stated that it is his father and the grandmother to the victim who were involved. No documents were availed to prove the said dispute. PW3 was not party to the alleged dispute. She is the material witness in this case, neither was PW2 the minor herein. The issue of the said dispute was not put to the said grandmother who gave evidence as PW1."

Vital witnesses

22. The witness who ought to have been called to testify, who according to the appellant, was vital, was the area chief. The role played by the said witness was only to arrest the appellant and take him to the police station. This court finds that the prosecution lined up enough and crucial witnesses in support of its case, and the failure to call the said area chief was not fatal.

Proof of the offence

23. The key ingredients of the offence of defilement are proof of the age of the complainant, proof of penetration and proof that the person before court was the perpetrator of the offence.

Age of child victim

24. On age, PW5 produced the complainant's notification card which showed that she was aged 9 years, having been born on 1/9/2008. The complainant herself testified that she was aged 9 years at the time of the incident, and her testimony was corroborated by PW1, her grandmother.

Penetration

25. The next element is penetration which is defined under Section 2 of the Act to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

26. On penetration, PW2 testified that:

> "...I was alone collecting firewood...Accused came took me he carried me. He then put me down in the shamba of a person called Tabitha. He removed his trouser. I was in a biker and a skirt. He removed both the biker and the skirt. He lay on me and touch me (points at the private area). He also touched me using (she points to her private area and his private area). I felt pain when he lay on me. I screamed. He penetrated something inside me. I felt pain. I screamed. MM came...He layed on me several times about time on the same day."

27. Although it is clear from the complainant's testimony that the appellant did touch her private parts, it is not clear whether the same was done with his penis or something else.

28. When PW4 testified, he stated that the complainant was examined 1½ months after the incident and nothing of significance was noted save for the broken hymen, a dry wound and a whitish discharge. This court concurs with the appellant that a broken hymen is not proof of defilement, as was held by the Court of Appeal in *PKW v Republic* [2012] eKLR, that:

> "Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences, we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than

sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback ride, bicycle riding and gymnastics, there can also be natural tearing of the hymen."

29. PW1's testimony was a recount of what she had been told by PW2. The testimony of the eye witness in this case, PW3 was of little help as she stated that:

> " On June 13, 2018 I heard screams. I was looking for firewood...I went to where the screams were coming from. I got the minor (H and Francis). The accused was on top of H. They sat down when they saw me. The child rose up."

On cross examination, she stated that, "I found you on top of the child. You placed your hand on the neck of the child when you saw me."

30. It is therefore this court's finding that penetration was not proved beyond reasonable doubt.

31. The identity of the appellant is not in doubt, as he was well known to PW1 and PW3 prior to the incident. PW1 testified that "I knew the accused. He is from the village I was born in." PW3 stated that, "I know the accused. He is from the same village as myself." It came out clearly from the evidence that the alleged offence took place in broad day light, and therefore the circumstances for recognition were favourable.

32. PW2 and PW5 identified the appellant in the dock as the perpetrator of the offence.

Alternative charge of indecent act

33. In this case, age and the identity of the appellant were proved beyond reasonable doubt. Since penetration was not proved beyond reasonable doubt, the charge of defilement, which requires proof of penetration is hereby set aside.

34. The evidence on record discloses the offence of indecent act contrary to section 11 (1) of the *Sexual Offences Act* as charged in the Alternative charge. The offence of indecent act with a child provides as follows:

> " 11.
>
> (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years"

And "indecent act" was by the Amendment of Act No.6/2009 defined, so far as relevant, as follows:

> " "indecent act" means any unlawful intentional act which causes-
>
> a. any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration...."

35. In this case penetration was not proved.

ORDERS

36. Accordingly, for the reasons set out above, the appellant's conviction is hereby quashed and substituted with conviction for the alternative charge of indecent act with a child contrary to Section 11 of the *Sexual Offences Act*.

37. The appellant's sentence of imprisonment for 30 years is set aside and substituted with a sentence of ten (10) years imprisonment, which is the minimum for the offence of indecent act with a child under section 11(1) of the *Sexual Offences Act*..

38. The pre-trial detention period between August 13, 2018, when the appellant was arrested and May 14, 2019 when he was admitted to bail, will be deducted from the appellant's 10 year prison term.

Order accordingly.

DATED AND DELIVERED THIS 26TH DAY OF JANUARY 2023.

EDWARD M MURIITHI

JUDGE

Appearances:

Appellant in Person.

Mr. Masila Principal Prosecution Counsel for DPP.