Masha v Republic (Criminal Appeal E024 of 2022)
[2023] KEHC 24146 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24146 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E024 OF 2022

AK NDUNG'U, J

OCTOBER 26, 2023

BETWEEN

SAFARI KAMBI MASHA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Kilifi SPM Sexual Offences Case No E032 of 2020– S.D Sitati, RM)

JUDGMENT

1. The Appellant in this appeal, Safari Kambi Masha was convicted after trial of defilement contrary to section 8(1) as read with section 8 (2) of the *Sexual Offences Act*, No 3 of 2006. On 19/01/2022, the Appellant was sentenced to life imprisonment.

2. The particulars were that on the 23rd day of October 2020 at Ganze Sub-County within Kilifi County caused his genital organ namely penis to penetrate the genital organ namely anus of S K a child aged 9 years.

3. The Appellant appealed to this court challenging the conviction and the sentence vide an amended grounds of appeal filed on 14/06/2023. The conviction and the sentence are being challenged on the following grounds;

    i. That the trial court erred by failing to make a finding before receiving complainant's unsworn evidence that she did not possess sufficient intelligence to justify reception of the evidence.

    ii. The trial court failed to conduct voir dire examination properly and failed to direct herself properly.

    iii. The trial court erred by failing to note that PW4 did not establish that the inflammation and swelling were as a result of penetration.

iv. The court failed to note that what witnesses testified in court was in variance to their recorded statements.

v. That police officer did not testify to corroborate the complainant's claim.

vi. That the court erred by failing to consider his defence.

4. The appeal was canvassed by way of written submissions. In his written submissions, the Appellant argued that the trial court failed to comply with section 19 of *Oaths and Statutory Declaration Act* in that the trial court failed to make a specific finding before receiving the evidence of the complainant that the complainant did not possess sufficient intelligence to justify the reception of evidence and that the complainant did not understand the duty of telling the truth. Further, that the questions that were put across the complainant were not recorded. That the trial court believed the complainant's evidence due to the fact that PW4 testified that the complainant had swellings in her vagina and anus, yet, PW4 did not attribute the said swelling to penetration by the Appellant. That without DNA evidence, there was no cogent evidence to link the Appellant to the commission of the offence. Therefore, the trial court erred convicting him on an offence that was not proved.

5. He submitted that PW3 did not record witness statement with the police though the minor was called as a witness thereby violating the Appellant's right under Article 50(2) of the *Constitution* for he was not informed in advance the evidence PW3 was going to adduce against him. He submitted that the prosecution closed their case without calling the investigating officer hence, the court erred convicting him whereas there was no corroboration of prosecution evidence by the investigating officer. Reliance was placed on the case of *Geoffrey Nguku vs R* CR APP. No. 166 of 1983 where it was held that failure to call the investigating officer leaves the prosecution case unproved. That it is difficult to discern what led the trial court to believe identification was by recognition yet the investigating officer whom he could have asked about the first report was left out.

6. The Respondent supported the conviction and the sentence. The Respondent submissions were in relation to the Appellant's previous grounds of appeal. The Respondent did not respond to the amended grounds of appeal since the Appellant's amended grounds and submissions were filed after the prosecution had filed their submissions. Nevertheless, the Respondent opposed the appeal.

7. This being the first appellate court, it is my duty to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.

8. I have, accordingly read and considered the evidence adduced at the trial court. In my re-evaluation of the evidence, I acknowledge that I neither saw nor heard the witnesses testify, and, in that regard have given due allowance for that. I have had due regard to submissions made in this appeal, the applicable law and case law cited.

9. The Appellant in his submissions raised a preliminary point of law. He claimed that voir dire was not conducted according to the procedure as the trial court failed to ascertain whether the minor possessed sufficient intelligence to justify reception of the evidence and understood the duty of telling the truth. The trial magistrate also failed to record the questions she asked the complainant.

10. From the trial court record, the trial magistrate recorded as follows during voir dire of PW1, the complainant;

'I am S. I am also K.

I go to [Particulars Witheld] Primary School in class 4.

I am a Christian.

I will tell the court the truth.'

Court: PW1 to give unsworn evidence by virtue of her tender age.

11. Section 19 (1) of the *Oaths and Statutory Declaration Act* is the provision under which voir dire examinations are underpinned to determine the child's understanding of the nature of an oath. The provision states:

> " Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the *Criminal Procedure"*

12. The position from the above section is therefore very clear that the trial court has a duty to conduct an inquiry to a child of tender years, referred to as voir dire, with an aim of determining whether the child tendered as a witness before the court first and foremost understands the nature of an oath, whether the answer to this question is positive or negative, the court must satisfy itself that the child is possessed of sufficient intelligence to justify the recognition of the evidence and that he or she also understands the duty of speaking the truth.

13. Was there an error for failure by the trial magistrate to ascertain whether the complainant was possessed of sufficient intelligence to justify the recognition of the evidence? I am guided by the Court of Appeal decision in *Japheth Mwambire Mbitha v Republic* [2019] eKLR where the court held that;

> " In this case, a perusal of the record reveals that prior to receiving the respective testimonies of PW 2 and PW 3, the learned trial magistrate went on an enquiry of whether each of the witnesses understood the meaning of telling the truth and the consequences of lying. Having satisfied herself that the two minors understood the importance of telling the truth, the court went on to record their evidence. No objection was ever raised by the appellant regarding the voir dire examination or the subsequent admission of the minors' testimony. Again, it bears repeating that the purpose of voir dire is to ensure that the minor understands the solemnity of oath and if not, at the very least, the importance of telling the truth. In this case, the record shows that a brief interview was conducted in this regard on each of the two witnesses; to which the two minors even indicated to the court that failure to tell the truth renders a liar ineligible to go to heaven. Having satisfied herself that the two minor witnesses understood the import of speaking the truth in court and the consequences of lying, the trial magistrate then admitted their evidence and from the record, we see no reason to interfere with that finding. The evidence of FO and PW 3 was admitted within the confined of the law on voir dire examination. ....."

14. I am satisfied that the evidence of PW1 was admitted within the confines of the law and that the Appellant was not prejudiced by the omission on the part of the trial court to indicate on record that she found the minor witness intelligent enough. This is because she told the court that she will be truthful which shows that she understood the duty of telling the truth.

15. On the second issue that the trial court failed to record the questions put across PW1 during voir dire, the law is well settled in that regard. The Court of Appeal in *D W M v Republic* [2016] eKLR thus;

> "It is evident from the above that the learned trial magistrate did not reflect in the record the questions put to H.W. during the voir dire administration but reflected her responses to those questions. The need for the administration of voir dire on minor witnesses before reception of their testimonies especially in criminal trials is entrenched in Section 19 of the *Oaths and Statutory Declarations Act* Cap 15 Laws of Kenya. This provision does not of itself provide for the format to be applied in the course of such administration. The format used has basically evolved through case law. In *Sula v Uganda* [2001] 2EA 556 the Supreme Court of Uganda approved two formats. The first one is where the trial court can write down the questions put to the witness and the answer of the witness in the first person in the words spoken by the witness in a dialogue form and then make its conclusion after the dialogue. In the second format the court may omit to record the questions put to the witness but record the answers verbatim in the first person and then make his conclusion thereafter. In *Patrick Kathurima v Republic* Nyeri CRA 137 of 2014 this Court after reviewing case law on the subject observed thus:-
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> > "It is best, though not mandatory, in our context that the questions put and the answers given by the child during voir dire examination be recorded verbatim as opined by the English Court of Appeal in *Regina v Compell* (Times) December 20, 1982 and *Republic v Lalkhan* [1981] 73 CA 190 for the benefit of the appellate court which must satisfy itself on whether that important procedure was properly followed."
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> On account of the above observation this court in the Kathurima case vitiated the prosecution case totally on account of it having been anchored on the minor's contradictory evidence and on that account allowed the appeal in its entirety. There was however no hard and fast rule laid down by this Court in the Kathurima case (supra) that in all cases where voir dire procedure had not been strictly administered the prosecution case stood vitiated. Each case has to depend on its own set of facts and that is why the court observed thus:-
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> > "It is best though not mandatory in our context that the question put and the answers given by the child during the voir dire examination be recorded..."
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> The trial magistrates' failure to reflect on the record the questions put to H.W. during the voir dire examination was not therefore per se fatal to the prosecution case. The sustainability or otherwise of the prosecutions' case solely depended on whether the evidence on which it was anchored met the thresh hold of proof beyond reasonable doubt. (emphasis added)
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> .....
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> In this appeal, in response to a questions put to H.W. during the voir dire examination, she responded that she would answer all questions put to her correctly. She was five (5) years old. Her testimony was coherent. When the appellant stood to cross-examine her she at first broke down. She was stood down for a while. After she composed herself and then took the witness stand again, she was cross-examined at length by the appellant but never faltered in her responses to questions put to her by the appellant. She was coherent. All the answers she gave were sensible. This is a clear indication that H.W was intelligent, she had a good grasp of the events that occurred during the defilement and was obviously truthful in what she

was telling the court. Both courts below believed H.W. was truthful. We find no justification to interfere with that finding. The appellant's trial was therefore not vitiated by the learned trial magistrate's failure to conduct the voir dire examination of H.W in a particular manner, as asserted by the appellant."

16. It therefore follows that failure to record the questions was not fatal to the prosecution case.

17. Moving on, the main question is whether the charge of defilement was proved to the required standard. It is trite that for the charge of defilement to stand, the Prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator. This is provided for under Section 8(1) of the *Sexual Offences Act* No. 3 2006.

18. Having established the ingredients of the charges, the question that this court should therefore determine is whether those ingredients were proved to the required standard.

19. Proof of age is important in a sexual offense. In *Kaingu Kasomo vs. Republic*, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal stated that:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

20. In the present appeal, it was not in dispute that the complainant was 9 years old. Her birth certificate was produced as Pexhibit1 that indicated her date of birth as 25/02/2011 which means that she was 9.8 years at the time and this remained uncontroverted by the Appellant.

21. What is in dispute is identity and penetration. To prove their case, the prosecution called a total of seven witnesses.

22. PW1, the complainant testified that she was 10 years and in class 4. She stated that on the material day she was in a bush fetching firewood in company of Shukuru and Karisa. Safari Kambi Masha, Babu, the Appellant called her out and she went where he was. He then told her "niachie huko mbele halafu nikupatie mia mbili." She said that the Appellant told her that he wanted "aingize mdudu wake huko mbele." She wanted to run but the Appellant got hold of her, removed her clothes and he undressed. He tried to penetrate to her vagina but failed to penetrate so he penetrated her anus. It was recorded that "..akajaribu huko mbele ikawa haingii akaingiza huko nyuma mdudu wake halafu akanitoa mavi."

23. After the incident, she went to a homestead of Sinaro and reported to her what the Appellant had done. Sinaro informed her husband who informed her mother. Her mother took her to hospital and to the Police Station. She stated that she knew the Appellant. He lived at their home.

24. On cross examination by the Appellant, she stated that Gaja was also there when he called her and she told her friend that the Appellant called her out. On cross examination by the court, she testified that the incident happened at around 5:00pm and when he was defiling her, he pulled her somewhere else. Her friends had already gone home. They left when the Appellant called her.

25. PW2, Sinaro Kaingu Mrungu testified that the Appellant was her neighbour and a relative. She stated that while heading home, she saw the complainant seated by the roadside crying. She asked her what was wrong and the complainant informed her that while fetching firewood, Babu called her and led her to the bush and defiled her. He enticed her with Kshs.200/- but she refused and he then proceeded to force himself on her. Since he could not penetrate her vagina, he applied mkone tree sap and penetrated her anus. She screamed but he threatened to kill her. She told her that he came out with faecal matter.

She called the complainant's mother but could not get hold of her. She then called her husband who informed the complainant's mother. She testified that the complainant led them to the scene where they found the complainant's shoes, underwear and a biker.

26. On cross examination, she testified that the complainant was not bleeding however, her skirt had faeces and her anus was swollen. That the complainant named him as the perpetrator.

27. PW3 was the complainant's mother. She testified that the Appellant was her grandmother's child. On the material day, she had gone for a funeral but she was contacted by PW2's husband who informed her that the complainant was defiled. On her way back home, she found the complainant who appeared frightened. The complainant told her that the Appellant called her and defiled her while in the bush. That the Appellant could not penetrate her vagina but penetrated her anus. At the scene, there was chewed mkone leaves. They recovered shoes, pants and mkone leaves. Complainant's skirt had faeces. She took the complainant to hospital where she was examined. She stated that they lived in the same compound with the Appellant.

28. On cross examination, she testified that when she went back home, the Appellant had already left, that the complainant was oozing faecal matter when she found her.

29. PW4 Shukrani Karisawas a minor and gave unsworn testimony after voir dire examination. He testified that the Appellant was his grandfather and lived in the same homestead with him. He testified that on the material day, they were fetching firewood when the Appellant called the complainant. He told her that he wanted to send her to the shop. The complainant went to where the Appellant was and he led her to a bush. He stated that the complainant told her that the Appellant covered her mouth to prevent her from screaming. When the complainant went to the Appellant, they left and upon returning, they found the complainant's bundle of firewood where they had left it. At home they were informed that the complainant was taken to Ganze and in the morning, he saw the complainant who informed him that the Appellant had covered her mouth and led her to a bush and did bad manners to her.

30. He testified on cross examination that he could not tell why his friends names were missing on his statement. On re-examination, he testified that he heard the Appellant call the complainant from the bush though he did not see him.

31. PW5 was the Clinical Officer who examined the complainant and filled her P3 Form. He testified that upon examination, her outer genetalia was normal but her hymen was broken. She had swelling in the vagina and anus, there were no blood discharge but she had faecal matter in the anus. He produced the P3 Form as Pexhibit 3. He also produced the PRC Form filled by James Lewa who was on transfer as Pexhibit4. According to PRC Form, the physical exam revealed normal outer genitalia, hymen broken, internal vagina and anus had inflammation.

32. The Appellant gave unsworn evidence. He did not call any witness. He testified that on 27/10/2020, he left home at 6:00am for work up to 2:00pm. He saw a motor vehicle at his place of work and three men who alighted from the vehicle told him to follow them to the motor vehicle where he met unknown men who told him that they were police officers and they were there to take him to Police Station. He was taken to police station and was thereafter charged with the said charges. He denied committing the offence.

33. From the prosecution evidence, there is no doubt that indeed the complainant was defiled. Her evidence before the trial court was cogent and consistent. She narrated how the Appellant called her when she was fetching fire wood in company of others. He led her to the bush and requested to have sex with her. She refused and he forced himself upon her. He tried to penetrate her vagina but since it was difficult to penetrate, he penetrated her anus to the extent that when he stopped, he came out

with fecal matter. PW4 confirmed to the court that indeed the Appellant called out the complainant and they left when the complainant went to the Appellant.

34. PW2 and PW3 corroborated the complainant's evidence to the extent that they testified that the complainant was oozing faecal matter when they found her. Her skirt was also soiled with faecal matter. The complainant led them to the scene where they recovered her biker, inner wear, shoes and Mkone leaves that the Appellant used to lubricate his penis.

35. The medical evidence produced by PW4 corroborated the complainant's evidence. The doctor testified that upon examination, he noted inflammation on the anal orifices and vagina and there were particles of stool feces around the anus.

36. The Appellant faulted the medical evidence in that PW4 did not attribute the swelling in the complainant's anus and vagina to penetration by the Appellant. That DNA was not conducted and without DNA evidence, there was therefore no cogent evidence to link the Appellant to the commission of the offence.

37. It is trite law that the fact of rape or defilement is not proved by DNA test but by evidence as it was held in *Fappyton Mutuku Ngui v Republic* [2014] eKLR where the Court of Appeal held that;

> " The appellant's second major ground was that there was no tangible medical evidence adduced to link him with the defilement of PW2. He also argued that a DNA examination was not conducted to link him to the defilement. In our view, such evidence was not necessary and in any event, the trial court found that there was sufficient medical evidence in support of PW2's testimony which was trustworthy as to the person who had defiled her."

In *Aml v Republic* [2012] eKLR (Mombasa), this Court upheld the view that:

> " The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

This was further affirmed in the case of *Kassim Ali v Republic* Cr. App. No. 84 of 2005 (Mombasa) where the court stated:

> " ... [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.
>
> The evidence of the minor witnesses squarely placed the appellant as the one who defiled PW2. It cannot therefore be said that there was no evidence that would link him to the crime. This ground of appeal is therefore baseless and is accordingly rejected."

38. As to identity, the Appellant himself did not dispute the fact that the complainants knew him. The complainant knew the Appellant by his name and his mockery name Babu. She testified that they lived in the same homestead. PW2 testified that the Appellant was a relative and the complainant named him as the person who defiled her. PW3 the complainant's mother also testified that the Appellant was a relative though it was not clear as to what extent the Appellant was related to the complainant's family. PW4 also testified that the Appellant was his grandfather and they lived in the same house and when the Appellant called out the complainant, he heard his voice.

39. The complainant did not name any other person as the perpetrator but the Appellant only. The Appellant in his defence did not state of his whereabout at the time the offence was alleged to have been committed. He only narrated how he was arrested. He however denied committing the offence. From the evidence from the record, there was no doubt that indeed it was the Appellant who defiled the complainant and no one else.

40. The Appellant argued that the prosecution evidence was not sufficient to implicate him since the Investigating Officer did not testify who could have corroborated the prosecution evidence and especially on the first report that was made to the police.

41. My view is that failure to call the Investigating Officer is not fatal in all cases. It will be fatal where the evidence of the Investigating Officer is key in linking the accused to the crime. However, where evidence of other witnesses is sufficient to secure a conviction, failure to avail the Investigating Officer will do no harm to the prosecution case. In our case, the Investigating Officer would only have stated what was reported to him and the steps he/she took to charge the Appellant. He/she would not have added much to the prosecution case.

42. The Court of Appeal in *Kiriungi v Rep* (2009) KLR 638, stated:-

> "...the effect of failure to call police officers involved in a criminal trial, including the investigating officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrate. We have examined the circumstances of this case and we are satisfied that he evidence of the investigating officer and the arresting officer would not have been prejudicial to the prosecution case as it was established beyond doubt that the appellant was involved in the crim with which he was charged."

43. The Appellant further submitted that PW1 testified that PW4 did not record statement with the police whereas PW4 testified in court. That his right under Article 50(2) of the *Constitution* was therefore infringed as he was not informed of the evidence PW4 was to adduce against him. It is true that PW1 stated on cross examination that PW4 did not record statement with the police. PW4 however on exam in chief testified that he remembered what he told the police about the complainant and the Appellant. This shows that indeed PW4 recorded his statement with the police. The Appellant was also supplied with witnesses' statements and he did not object when PW4 took the witness stand if at all he did not have PW4 witness statement.

44. From the foregoing, it therefore follows that the prosecution proved beyond reasonable doubt that the Appellant defiled the complainant.

45. As to the sentence meted, the Appellant was sentenced to life imprisonment as provided for in law. While sentencing the Appellant, the trial court noted among other things that the offence was committed in a beastly manner. It is trite law that sentencing is a discretion of the trial court and an appellate court will not easily interfere with the discretion of the trial court on sentence unless it is shown that in exercising its discretion, the court acted on a wrong principle; failed to take into account relevant matters; took into account irrelevant considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive. (See *Ogolla S/o Owuor v R* {1954} EACA 270).

46. The Appellant did not demonstrate any breach by the court in its exercise of discretion in sentencing. I have no grounds upon which to interfere with the sentence.

47. With the result that the appeal herein lacks merit and is dismissed in its entirety.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 26TH DAY OF OCTOBER 2023.

A.K. NDUNG'U

JUDGE