Marango v Republic (Criminal Appeal 078 of 2023)
[2025] KEHC 1950 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1950 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL 078 OF 2023

AC MRIMA, J

FEBRUARY 13, 2025

BETWEEN

KELVIN MARANGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. T. Omono (RM) in Kitale Chief Magistrate's Court Criminal Case (S.O.) No. E033 of 2023 delivered on 26th October 2023)

JUDGMENT

1. Kelvin Marango , the Appellant herein, was charged with the offence of defilement contrary to Section 8(1) as read with 8(3) of *Sexual Offences Act* No. 3 of 2006 whose particulars were that on the 17th day of February 2023 at around 2100hrs at Trans-Nzoia County, unlawfully and intentionally caused his penis to penetrate the vagina of M.N.J a child aged 14 years.

2. The Appellant also faced the 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 of the alternative charge are that, 17th day of February 2023 at around 2100hrs at Trans-Nzoia County intentionally touched the breasts, vagina of M.N.I a child aged 14 years old with his penis.

3. The Appellant pleaded not guilty on both counts. Six witnesses testified on behalf of the prosecution and upon closure of the case, the trial Court made the finding that a prima facie case had been made against the Appellant. He was put on his defence where he gave sworn testimony. He did not call any witness.

4. At the close of the defence case, the Appellant was found guilty of the offence of defilement and he was convicted. Upon considering the mitigations, the Appellant was sentenced to 10 years imprisonment.

The Appeal:

5. The Appellant was dissatisfied with the conviction and sentence. Through undated Petition of Appeal, he urged that his conviction and sentence be set aside on the following grounds;

    1. That the learned trial magistrate erred in law and in fact by sentencing the Appellant to a term of 10 years imprisonment by relying on the evidence of a single witness without warning herself on the danger of relying on such evidence.

    2. That the learned trial magistrate erred in law and in fact by convicting the Appellant and yet failed to note that this case was full of contradictions and inconsistencies to amount to a safe conviction.

    3. That the learned trial magistrate erred in matters of law and fact by failing to note that the ingredients of defilement were not proved to the required standard.

    4. That the learned trial magistrate erred in law and in fact by disregarding the credible defence given by the appellant.

    5. That the learned trial magistrate erred in law and in fact by sentencing the Appellant to a term of 10 years imprisonment yet failed to note that the same was against Article 27 of *the constitution*.

6. In his written submissions, the Appellant argued that the evidence of the complainant [PW1] and an eye-witness [PW4] were inconsistent and contradictory. He stated that the former testified she was defiled in standing position whereas the latter claimed that he found them in sleeping position.

7. The Appellant further stated that penetration was not proved since the Clinical Officer [PW5] did not indicate whether the Complainant's vaginal walls were normal or broken. It was his case that PW5's observation that the vagina was inflamed with an old torn hymen was not enough to prove penetration.

8. The prosecution challenged the appeal through written submissions dated 13th May 2024. It was its case that it proved the ingredients of age, identity of the perpetrator and penetration to the required standard.

9. On the age, the Respondent submitted that the complainant's own testimony was that she was born on 12th January 2009 and is 14 years old. It further was its case her mother, who testified as PW2 stated that her daughter was 14 years old.

10. On the aspect of penetration, the Respondent submitted that the law does not envisage absolute penetration into the genitalia or the release of spermatozoa or screening of the male organ for the act of penetration to be complete. To that end, the decision in Lang'at Dinyo Domokonyang -vs- Republic (2017) eKLR was relied on.

11. The Respondent referred further to the evidence of the Complainant who stated that the Appellant put his penis into her vagina, a fact it was submitted, was corroborated by the evidence of PW4 an eye witness to the incident who stated that he found the Appellant in the act but fled when he saw them. It was also submitted that PW5 who testified that when he examined the complainant he formed the opinion that the Complainant had been defiled 14 hours before examination.

12. As regards the identity of the perpetrator, the Respondent submitted that the Complainant conclusively identified the Appellant in court since she knew him as a neighbour and as such there was no danger of mistaken identity.

13. The decision in Roria -vs Republic [1967] EA was referred to where it was observed that the circumstances were tenable to enable the complainant identify and recognize the Appellant. It was its case that the prosecution led cogent and overwhelming evidence that proved all the elements of the offence of defilement. The Respondent submitted that there were no contradictions, incredibility and inconsistencies in prosecution witnesses and even if there were any, they were not substantial to the extent of affecting the conviction.

Analysis:

14. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono vs. Republic [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in Ajode v. Republic [2004] KLR 81.

15. Having carefully perused the record, this Court is now called upon to determine whether the offence of defilement was committed, and if so, whether by the Appellant. At this point, it is imperative to state that six witnesses testified in support of the prosecution's case. They were the complainant [PW1], the complainant's mother [PW2], the complainant's father [PW3], EJ who was an eye-witness [PW4], the Clinical officer [PW5] and the investigating officer as PW6.

16. In discharging its calling as an appellate Court, this Court will consider the three settled components of the offence of defilement as established by law and settled judicial precedents. The prosecution must prove the age of the victim, penetration and identity of the perpetrator. A look at each in seriatim follows.

Age of the complainant:

17. PW1 testified that she was born on 12th January 2009 and was 14 years old. Her mother, PW2, also stated that PW1 was 14 years of age. The Investigating Officer, PW6, produced the complainant's Birth Certificate as an exhibit which indicated that the complainant was born on 12th January 2009. As of 17th February 2023, the alleged date of the offence, the complainant was concededly 14 years of age.

18. The foregoing is fortified by the decision in Mwalango Chichoro -vs- Republic where it was observed that the proof of age is established by documentary evidence such as birth certificate, baptism card or by evidence of the child if the child is sufficiently intelligent. The complainant was, therefore, a minor in law.

Penetration:

19. The Appellant was charged under the *Sexual Offences Act* wherein the term 'penetration' is defined in Section 2 as follows: -

> "penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

20. Buttressing the above, in Mark Oiruri Mose vs R (2013) eKLR, the Court of Appeal stated thus: -

> .... Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of

the offence is demonstrated, and penetration need not be deep inside the girl's organ.... (emphasis added).

21. Later the Court of Appeal, differently constituted, in Erick Onyango Ondeng -vs- Republic (2014) eKLR held as such on the aspect of penetration: -

> .... In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.

22. Turning to the evidence, the complainant after being subjected to voir dire examination stated that on 17th February at 2023 about 2000hrs, she went to the latrine outside when the Appellant grabbed her and told her that she would kill her if she screams.

23. She stated that the Appellant took her to the shamba, covered her mouth with a sweater, removed his trouser and forcefully removed her trouser and put his penis in her vagina. She stated that Appellant has sex with her in a standing position and suddenly her brother arrived at the scene and the Appellant ran away.

24. EJ, the Complainant's brother testified as PW3. It was his evidence that when PW2 could not find the complainant, he was asked to look for her and went around their farm. He then found her sister having sex with the Appellant in their farm in a sleeping position and when immediately he saw them, the Appellant fled.

25. Pater Masake, the Clinical Officer Kitale County hospital testified as PW5. He stated that the complainant was taken to the facility on 18th February 2023, examined her and found that she had not bathed and that her underpants were stained. He further found that her external genitalia were normal but inflamed, her hymen torn and old looking. He formed the opinion that PW1 had engaged in a sexual intercourse.

26. PW5 produced the treatment notes and the P3 form as exhibits. The P3 form reveals that the Complainant underwear had watery/mucoid stains in between her legs. The witness saw that the hymen was torn at 3 and 9 o'clock and was old looking.

27. Therefore, the totality of the evidence adduced by PW1, PW3 and PW5 considered along the thread of decisions referred to hereinbefore, leads to an irrefutable finding that penetration was proved beyond reasonable doubt.

Identity of the perpetrator:

28. The Complainant stated that she knew the Appellant. She stated the Appellant used to hang around her mother's business premises/kibanda which was within their compound. PW2, PW3 and PW4 corroborated that evidence by PW1.

29. The complainant reiterated how the perpetrator took her hostage and it was the same person who was also identified by PW4 while in the act. PW4 stated that when he found the Appellant in the act and recognized him using the flashlight, the Appellant ran away and he rescued her sister.

30. This is a case of recognition. The assailant was well known to PW1 and PW4. They met almost every day. PW4 used a flashlight to identify the assailant and saw him running away. Both PW1 and PW4 gave the name of the assailant to their parents and the police.

31. This case rests on identification by way of recognition. In giving guidance on how the issue of recognition ought to be distinguished from that of identification of a stranger, the Court of Appeal in Peter Musau Mwanzia vs. Republic (2008) eKLR, Court stated as follows: -

> We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.

32. In R -vs- Turnbull & Others (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court had the following to say on recognition: -

> Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

33. Further, the Court of Appeal in upholding the evidence of recognition at night in Douglas Muthanwa Ntoribi vs Republic (2014) eKLR held as follows: -

> On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -
>
> "I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."
>
> The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."

34. Again, the Court of Appeal in Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (unreported) had this to say on the evidence of recognition at night: -

> We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."

35. The above Courts in essence emphasized on witnesses laying sound basis for recognizing alleged assailants. A Court must, therefore, be satisfied that the evidence on recognition is watertight so as not to cause an injustice to an innocent accused.

36. Having considered the evidence within the above legal parameters, this Court is satisfied that the Appellant was correctly identified by recognition as the perpetrator and that the trial Court's finding was not in error.

37. The foregoing, therefore, rests the appeal on conviction. The Appellant was correctly found guilty and convicted.

Sentence:

38. The Appellant vehemently opposed the sentence of 10 years imprisonment imposed on him. Before the trial Court sentenced the Appellant, it considered the Pre-sentence report prepared by the Probation Department. This Court has equally interrogated it. The Appellant was aged 18 years at the time he committed the offence. He lost his father in 2019 and that he was later abandoned by his mother while still a minor. The Appellant has since been living on his own. The Appellant's attitude as observed by the report shows that he is not in touch with reality as to the gravity of the offence he committed. That explains his absolute lack of empathy and remorse for his actions. His cavalier attitude towards an orderly society that protects everyone including young girls' innocence cannot be left unchecked and unrehabilitated. It must be recalled that the complainant on the other hand is struggling to come to terms with her low self-esteem and the stigma occasioned by the defilement.

39. In such a scenario, a Court has to strike a balance between the need for the Appellant to be punished for his action, on one hand, and the need for reformation, on the other. The trial Court considered all the foregoing and exercised discretion by handing down 10 years imprisonment. Whereas the sentence under Section 8(3) of the *Sexual Offences Act* was to be a minimum of 20 years imprisonment, the legal jurisprudence then prevailing allowed a Court to exercise discretion in sentencing. However, even though that position has now changed, this Court was not moved for enhancement of the sentence imposed. This Court shall, therefore, not interfere with the sentence.

40. The appeal on sentence is equally disallowed.

Disposition:

41. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and subsequently elected into the Judicial Service Commission thereby mostly being away from the station. Apologies galore.

42. In the end, the whole appeal is found and hereby held to be without merit in its entirety and is hereby dismissed.

43. It is so ordered.

DELIVERED , DATED AND SIGNED AT NAIROBI THIS 13 TH DAY OF FEBRUARY, 2025.

A. C. MRIMA

JUDGE

Judgment delivered virtually in the presence of:

Kelvin Marango , the Appellant.

Mr. Mugun, Learned Prosecutor instructed by the Director of Public Prosecutions for the Respondent/State.

Chemosop/Duke – Court Assistants.