



**Maina v Republic (Criminal Appeal E072 of 2023)
[2024] KEHC 3786 (KLR) (16 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3786 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E072 OF 2023
DKN MAGARE, J
APRIL 16, 2024**

BETWEEN

ANDREAS NGIRICHAGA MAINA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgement of the Trial Court, Hon. N.W. Wanja, Resident Magistrate in Othaya PMCSO No. E012 of 2021.
2. The Appellant was charged with defilement contrary to Section 8(1) & (3) of the [Sexual Offences Act](#) No. 3 of 2006. There was also an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#), 2006.
3. The particulars of the offence were that on diverse dated between 9th November 2021 and 29th November 2021, in Nyeri South Subcounty within Nyeri County intentionally and unlawfully caused your penis to penetrate the vagina of AW, a child aged 14 years.
4. The Accused person was arraigned and he denied the charges. A plea of not guilty was consequently recorded.
5. The Trial Court considered the case and rendered the Judgement. The Court found the Appellant guilty and convicted him of the offence. The Appellant was also sentenced to 10 years imprisonment.
6. The Appellant, aggrieved, lodged this Appeal on both sentence and conviction.

Submissions

7. I have not had sight of the Appellant's submissions. He however submitted on section 8(5) of the [Sexual Offences Act](#) in court, briefly.



8. On the part of the Respondent, it was submitted that the conviction and sentence were proper and should be upheld.
9. The Respondent relied on the case of *George Opondo v Republic* (2016) eKLR and submitted that the ingredients of the offence which were age, penetration and identification were well proved beyond reasonable doubt and the conviction was as such safe.
10. It was also submitted that the ingredients of the offence were well proved beyond reasonable doubt. Reliance was placed on the case of *Evans Wanjala Wanyonyi v Republic* (2019) eKLR.
11. They further submitted that in case there was any discrepancy in the prosecution witnesses testimonies, the same could not be said to have gone to the root of disproving the guilt of the Appellant. Reliance was placed on the cases of *Philip Nzaka Watu v Republic* (2016) eKLR as follows:

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.

In *Dickson Elia Nsamba Shapwata & Another v. The Republic*, CR. APP. No. 92 of 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”

12. It was further submitted that the Appellant did not take any steps to ascertain the age of the minor as contemplated under Section 8(6) of the *Sexual Offences Act*.
13. On sentence, it was submitted that 10 years imprisonment was the most appropriate sentence in the circumstances of this case. They relied on Section 8(3) of the *Sexual Offences Act* and on the Sentencing Guidelines. Based on the said authorities, it was submitted that the sentence reflected the seriousness of the offence and was proper.

Analysis

14. I have perused the record of proceedings and evidence in the Trial Court as well as the filed submissions. The issue is whether the Trial Court erred in convicting and sentencing the Appellant as he did.
15. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya - v- Republic* [1957] EA 336 is as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it



may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

16. It was held by the Court of Appeal in *Moses Nato Raphael v. Republic* [2015] eKLR as doth:

“What then amounts to “reasonable doubt”? This issue was addressed by Lord Denning in *Miller v. Ministry of Pensions*, [1947] 2 ALL ER 372 where he stated:-

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

17. In the case of *Okeno v Republic* [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”

Evidence

18. The Appellant was charged on 30/11/2021. He denied the charges. He was ordered release on Kshs. 200,000/= bond. He was not released immediately. He was released in December, 2021.
19. There were examinations that were done on 3/2/2022. The prosecution applied to re-investigate. The court ordered that DNA be done. The minor escaped from home when she was to testify. The parties continued haggling over the appearance of the minor and the DNA report.
20. The court carried out *voire dire* despite finding that the complainant is not a child of tender years. The minor was arrested to testify. She testified and then released to the custody of the parents. The minor stated that her cousin told her to go to the cousin’s boyfriend’s house. She slept in a car wash. She did not go home. She slept there at night. She would hide herself at the river so as not to be found.



21. On 8/11/2021 some rider called her and asked her to go to his house. She did not know the identity of the accused. They did not have sex on 8/11/2021 but did on 9/11/2021. She stated that they had sex till arrest. He had gone to Nairobi. She stated that she had known the accused before he stopped her.
22. This was contradicting her earlier evidence that she did not know the identity of the accused. She stated that from 31/10/2022 to 8/11/2022 she was sleeping at the car wash and eating, using 400/= she had initially. She was not bathing or changing clothes. She had a boyfriend. She stated that she was walking aimlessly. She stated that she lied she was 18 years old. She refused to tell where her parents were since they mistreated her. They were pimping her to men for money.
23. PW2 Thomas Mwangi was a Clinician based in Othaya. He filed a P3 and PRC. The victim indicated that the first incident was on 8/11/2021. The hymen was missing but not indicated as freshly broken.
24. PW3 was a Government Chemist. She produced a report on DNA, condoms. The investigation officer produced condoms and other sanitary pads and tissue. The minor was said to be 15 years. The father testified that the minor was left with grandmother and did not come back home. He stated that the minor had other relationships with other young men and it was settled at the chief's place.
25. The complainant was recalled to identify some goods. PW6 was the mother. She stated that the minor had gone to church but did not come back. She was waited for in vain. She was arrested on 27/11/2021.
26. The Appellant was put on his defence. He testified that he denied the charges. He stated that he met the complainant around midnight. She stopped him and told him that she was stranded. She was clearly dressed. The man took her to his house and she slept on his bed. He slept on the floor. He wanted to buy her food but the shops were closed.
27. She lied to him that parents were dead. She stated she was above 18. He did not pester her over sex. They had sex after agreeing that she is over 18. She stated that she had a boyfriend in Kabati but broke up. She was stranded. All these turned out to be negative.
28. The complaint's father had asked for Kshs. 200,000/=. On cross examination he stated that she lied to him that she was 18. They had agreed that the victim was over 18. The body physic also supported that she was an adult. The minor was mature, had a big body. He introduced her to his relatives.
29. The court convicted him and subsequently sentenced him to 10 years imprisonment. The appellant appealed and set forth the following grounds of Appeal: -
 - i. the learned trial Magistrate erred in fact and in law in passing judgment convicting the appellant when the prosecution had not proved the case by discharging the required burden of proof, thereby occasioning a gross miscarriage of justice.
 - ii. the learned Trial Magistrate erred in fact and in law in dismissing the Appellant's defence under section 8(5) of the *Sexual Offences Act*, thereby occasioning a gross miscarriage of justice.
 - iii. the learned Magistrate erred in law and in fact in convicting the Appellant on the uncorroborated and or insufficiently corroborated evidence of a minor, thereby occasioning a gross miscarriage of justice.
 - iv. the learned Trial Magistrate erred in fact and in law in reaching an erroneous finding from the defence and the evidence of the Appellant as well as his submissions, thereby occasioning a gross miscarriage of justice.
 - v. in any event, the learned Magistrate erred in fact in meting out sentence that was grave and excessive in the circumstance, by failing to consider the mitigating circumstances as



contained in the victim impact assessment report as read with the pre-sentence report, thereby occasioning a gross miscarriage of justice.

30. It will start out with the sentence. The court cannot be faulted in the kind of sentence it meted. If the case was proved the sentence will fit the circumstances. The sentence to that extent cannot be said to be excessive.
31. On the conviction there are 4 grounds of Appeal. The only serious ones were the first 2. The Appellant raised a defence in Section 8(5) of the *Sexual Offences Act*. The defence is a subjective one. It is not whether the court could have believed the complainant was 18 years. It is whether the appellant did or had reason to believe that the complainant was over 18 years.
32. Section 8(5) provides as follows: -
 - (5) It is a defence to a charge under this section if –
 - (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
 - (b) the accused reasonably believed that the child was over the age of eighteen years.
33. The complainant admitted that she lied that she was over 18 years. The duo did not have sex on the first night. The complainant was out at midnight. Clearly dressed. The Appellant took steps to help her and inquire into her age. The Appellant maintained that she was huge bodied. I have perused the proceedings. I have not seen notes to the contrary by the trial court.
34. The size and appearance of the complainant was not contradicted. The minor was found in the streets at night. There was no indication that she was a minor. The appellant took steps to ascertain. He was actively lied to. The complaint also gave contradictory information.
35. Initially, she stated she did not know the Accused. She later stated that the accused was a football player. Could it be that the Appellant was targeted and fell into a trap? The issue of her being pimped by the parents was raised by the complainant herself. This was later confirmed by the father that minor was having sex with other young men.
36. This was not material to the charge. However, of concern is the fact that the matter was settled at the Chief's level. This corroborates the Appellant's contention that he was asked for 200,000/= to drop the case.
37. It is said that a father who should offer protection to a minor is the one offering her for sex to other men. The stress related to that kind of exposure can change appearance. The court cannot believe that the minor was sleeping at the carwash. There was no basis of this. The truth is that she was on duty at night with full knowledge of the parents. They were jolted when she decided to settle, effectively taking away the income earner.
38. The state was unable to displace the postulations of Section 8(5) of the *Sexual Offences Act*. I do not find that the state proved other elements to the fullest extent.
39. The complainant was however an unreliable witness. Though they had sex without protection, 6 used condoms were found. The lies are so blatant that it is unsafe to maintain the conviction. The complainant she lied without any reason whatsoever.



40. It is not true that she lied without a reason. She did so, to avoid rejection by the Appellant for being a minor. Consequently, she misled the Appellant into believing she was an adult, even introducing her to his family. It will be insane to introduce a child as a wife.
41. From the nature of the conduct of the Appellant, I find and hold that the court was wrong in disbelieving him. I am aware that she heard the evidence of the Appellant.
42. The reason was that she was school going. Such even is hearsay. There was no occasion narrated that the complainant said saw the Appellant being told by her friends. It is not proper for someone to lie about her age and hope that the other side is not foolish enough to believe.
43. The defence evidence largely corroborated the complainant's evidence. The appellant was thus not lying. The court relied on the case of *Royton Muriungi Kirimi v Republic* (2020) eKLR, where the court stated: -

“Where the defence is raised, the court will have to consider the defence, the circumstances including the steps which the accused took to ascertain the age of the complainant. When an accused opts to rely on the defence under Section 5 & 6 of *Sexual Offences Act* the evidential burden shifts on that accused person to satisfy the above conditions attached to the defence. He has to demonstrate that, it is the child who deceived him to believe that she was eighteen or over, that he believed that the child was over eighteen years and that when all the circumstances are considered it will lead to the conclusion that the belief on the part of the accused was reasonable. What this provision is stating is that the accused who wishes to rely on the defence must lay that basis during the trial. This would give the prosecution an opportunity to interrogate the defence and an opportunity to respond.”

44. The court summarized the facts well but went off the tangent in paragraph 57 of her judgment. The court was plainly wrong. In each of the 5 findings: -
- i. It was the complainant who said that she knew the Appellant not that the Appellant knew her. There was no mutuality in knowledge.
 - ii. This is the same question if you ask a law student whether they know Lord Denning. Whichever contrary this will be affirmative. Asking Lord Denning the same question (may he rest in peace), will yield drastically opposite results. I need not say more.
 - iii. The court took issue that he did not pester much. Further that parents were not reached. This was empirically incorrect in several ways. Even where 2 clear consenting adults were having sex that will be counted as immoral, no one contacts parent's bullions of adults have had sex without contacting parents. I cannot remember any living soul I knew who contacted parents to consent to illicit sex.
 - iv. The burden that the court placed on the Appellant was out of this world. Further the complainant had already killed her parents figuratively. She stated that she was an orphan. Placing a burden to go reach aunties was simply out of this world. I shudder to imagine the discussion between the father and the Appellant. This may go like this: -

“Accused: I have this daughter of yours, she says she is 20. I want to lay her, please confirm her age.

Complainant's father: She is 19, but ensure you use a condom.

Appellant: I owe you. I will return tomorrow.”



To expect this kind of enquiry is not in the natural order of things. Courts are supposed to have judicial notice of matters of local notoriety and the ordinary course of nature and all matters of general or local notoriety under section 60(1)m and o of the *Evidence Act*. These including seduction and sexual escapades between unmarried persons.

- v. It is the complainant who noted that the Appellant was suspicious. Of course, that is why he enquired. To jail a man for 10 years for enquiring what the law requires him to enquire is not proper. The law does not have a provisions for taking available opportunities to inquire.
 - vi. The defence is absolute once all the elements of:
 - i. Being deceived by the child.
 - ii. There being a reason to believe.
 - iii. The belief being believable.
 - iv. All the circumstances, including any steps the accused person took to ascertain the age of the complainant.
45. In this case the minor stated she was over 18. This is a fact that the court received in evidence. The minor was of a huge physic. These are circumstances making someone believe. I noted the short stature of the Appellant. It cannot be far to see that a person taller and more heavily built is over 18 years.
46. I find that the Appellant took steps to inquire into the age of the complainant. He only met more lies that the ID is at home. There were no parents as she stated she had none. She also admitted to have had a boyfriend, a fact that will give comfort to a successor that this is an old hand. The in or ensured that the man remained deceived at all times. What else was he to do? This is a classic example of the requirements of section 8(5) of the *Sexual Offences Act*.
47. The court was therefore incorrect in not believing a defence that was offered in a cogent manner. The conduct of the Appellant was also consistent with the belief. He took time. He did not have sex immediately till he inquired.
48. I therefore find that the court erred in convicting the Appellant. Consequently, the Appellant's conviction is unsafe and cannot stand. It has to be quashed. The sentence was subject to conviction. Upon setting aside the conviction the sentence has to go to the wayside.

Order

49. In the circumstances of this case, the court makes the following orders: -
- i. I find that the conviction is unsafe. The defence offered was cogent and as such the Respondent failed to prove their case beyond reasonable doubt. Consequently, both the conviction and sentence are set aside. The Appellant is set free unless otherwise lawfully held.
 - ii. The Appellant's name should be deleted from the sexual offender's register.
 - iii. The file is closed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA ON THIS 16TH DAY OF APRIL, 2024.

KIZITO MAGARE



JUDGE

In the presence of:-

Mr. Magua for the Appellant

Mr. Lubanga for the state.

Appellant present at Nyeri Maximum prison

Court Assistant - Brian/Winnie

