



REPUBLIC OF KENYA



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**Masongo v Republic (Criminal Appeal E008 of 2023)
[2024] KEHC 6573 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6573 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E008 OF 2023**

WA OKWANY, J

MAY 23, 2024

BETWEEN

HESBON MASONGO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the Judgment of Hon. B. M. Kintai (Mr.)
PM Keroka dated and delivered on 8th December 2021 in the original
Keroka Principal Magistrate's Court Sexual Offence Case No. 2 of 2019)*

JUDGMENT

1. The Appellant herein, Hesbon Masongo Moranga, was charged with the offence of Defilement contrary to Section 8 (1) (3) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on 27th December 2018 at Masaba South Sub-location within Kisii County intentionally and unlawfully caused his penis to penetrate the vagina of EK (particulars withheld) a child aged 14 years.
2. The Appellant herein further faced an alternative charge of Indecent Act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No 3 of 2006. The particulars were that on 27th December 2018 at Masaba South Sub-County within Kisii County intentionally and unlawfully touched the vagina of EK (particulars withheld) a child aged 14 years old with his penis.
3. The Appellant pleaded not guilty to both charges after which the matter was set down for hearing. The prosecution called a total of five witnesses.
4. A summary of the prosecution's case was that PW1, EK (particulars withheld) was on 27th December 2018 in the company of her sister PW2, DB (particulars withheld), at (particulars withheld) area where they met the Appellant. The Appellant is alleged to have lured PW1 to (particulars withheld) where he defiled her outside the house.



5. PW2, DB (particulars withheld), confirmed that they met the Appellant at (particulars withheld) and that PW1 informed her that the Appellant had defiled her.
6. PW3, TM (particulars withheld), the complainant's father, escorted her to the hospital and reported the matter to the police.
7. PW4, Omari George, was the Clinical Officer who examined the complainant following the sexual assault. He noted that the victim sustained a tear on the genitalia and that laboratory tests showed red blood cells and spermatozoa. He produced a duly filled P3 Form and Treatment Notes as P Exhibit 2.
8. PW5, No 101706 PC Opiyo Carolyne, was the Investigating Officer. She recorded witness statements and issued the victim with the P3 Form.
9. At the close of the prosecution's case, the trial court found that the prosecution had established a prima facie case against the Appellant who was then placed on his defence.
10. The Appellant gave a sworn testimony and did not call any witnesses.
11. The Appellant, DW1, testified that he was at his place of work on 1st January 2019 when three men arrested him and took him to Masimba Police Post. He was later taken to Ramasha Police Station before being charged in court. He denied committing the offence and stated that he did not know the victim.
12. At the close of the trial, the trial court found that the prosecution had proved its case against the Appellant to the required standards.
13. The Appellant was subsequently convicted and sentenced to serve twenty (20) years imprisonment.
14. Aggrieved by the conviction and sentence, the Appellant filed the instant appeal and listed the following grounds of appeal in the Petition of Appeal: -
 - a. That the learned trial Magistrate erred both in law and by facts by failing to notice that essential ingredients of the offence charged were insufficient to prove the offence beyond reasonable doubt.
 - b. The learned trial Magistrate erred in law by failing to consider or subject evidence to fresh scrutiny, re-evaluate the same and analyse the evidence as required by the law.
 - c. The learned erred in law and fact to convict the appellant without considering that the prosecution relied on five witnesses whose evidence was not collaborating and such can be traced to the evidence of PW1 and PW2 who were the key witnesses in the trial.
 - d. The learned trial Magistrate erred in law and fact by sentencing the appellant to 20 years imprisonment on inconsistent evidence from all the witnesses presented by the prosecution which evidence cannot even meet the minimum standards of beyond reasonable doubt.
 - e. The learned trial Magistrate erred in law and fact by overlooking and casting a doubt on the testimony of the appellant and yet the same was remarkably comprehensive instead of casting considerable doubts on the strength of the prosecution's case which reasonably lacked consistency.
 - f. That the trial Magistrate faulted both the law and fact by failing to notice that the medical examination that was carried out did not directly link the appellant



to the said offence since they had tampered with critical evidence to shade light on defilement as seen on page 5, line 17 of the PW3's evidence where PW3 testifies that PW1 took a shower and went to the hospital which evidence cannot be wished away and therefore disregards the evidence of PW4 in its testimony.

15. The appeal was canvassed by way of written submissions which I have considered.
16. The Appellant submitted that the prosecution's case was riddled with so many discrepancies and inconsistencies that it could not support a conviction. The Appellant highlighted the inconsistencies between the testimonies presented by the prosecution witnesses and raised questions such as; why PW1 and PW2 parted ways while at the market; why PW1 followed a total stranger to an unknown place; how the Appellant had money belonging to PW2; why PW1 did not disclose the location of the house where she was allegedly defiled; how PW1 was defiled outside the house in broad daylight; who identified the Appellant at the time of the arrest; why the Appellant was not examined to determine if he had indeed defiled the complainant; who identified the Appellant at the time of the arrest; why an identification parade was not conducted. The Appellant referred to the decision in *Kimea v Republic* [2022] eKLR wherein it was held that identification of a suspect in a criminal case must leave no doubt that the suspect was positively identified.
17. The Respondent, on the other hand, submitted that there was ample evidence to support the ingredients of the offence of defilement in respect to the age of the victim and penetration but supported/conceded to the appeal on the ingredient of identification of the Appellant. According to the Respondent, the Appellant was not positively identified for the following reasons: -
 - i. PW1 and PW2 did not know the appellant before hence they met for the first time.
 - ii. It is not known who identified the appellant before he was arrested by members of public as stated by PW5 the investigating officer.
 - iii. None of the members of public who allegedly arrested the appellant testified.
 - iv. No identification parade was conducted after the arrest to enable either PW1 and PW2 identify him.
 - v. PW3, the victim's father testified that PW1 took them to the appellant's house where he was arrested, a fact which was never mentioned by PW1 in her testimony who later confirmed that she was not present during the arrest.
18. The duty of the first appellate court is to reconsider and re-analyze the evidence tendered before the trial court with a view to arriving at its own independent conclusions while bearing in mind the fact that it neither heard nor saw the witnesses testify.

Age

19. It was not disputed that the complainant was aged 14 years at the time that the offence was committed. Indeed, PW1 produced her Birth Certificate which showed that she was born on 1st April 2004. I find that the ingredient of age was proved to the required standards.

Penetration

20. PW1 testified that the Appellant lured her to Matimori where he held her by the collar, undressed her and defiled her. PW4, the Clinical Officer, examined the complainant and found that she had a tear on her genitalia. Laboratory tests conducted on the victim showed red blood cells and spermatozoa.



21. The P3 Form (P Exhibit 2b) indicated that the injury on the victim's genitalia was caused by forceful penetration (penis). I am satisfied that the prosecution proved the penetration ingredient of the offence of defilement.

Identification of the Appellant

22. The gist of this appeal is the issue of the identification of the Appellant as the perpetrator of the offence of defilement. As I have already noted in this judgment, the Respondent conceded to this appeal in as far as the identification of the Appellant as the perpetrator of the offence is concerned. The concession by the Respondent notwithstanding, this court is still under a duty to reconsider the evidence tendered before the trial court and determine if the Appellant was positively identified as the complainant's assailant.
23. PW1 testified as follows on her encounter with the Appellant: -
- “...I followed him to Matimori, he held me by my collar and told me we enter a house, I refused. He then forced me to remove my pants and he had sex with me outside the house. It had rained, he then heard some people talking and so he told me to get into a house, I later told my aunt. I do not know her name and Eunice also told my father and I was taken to hospital. Accused is before court. I had not known him before. It's my sister who identified him.”
24. PW2 testified as follows on her knowledge/identification of the Appellant: -
- “...So I came back on the way at the gate I found PW1. I asked her where she was, she told me that accused took her and defiled her. The following day I took PW1 to hospital. It was my first day to see accused.”
25. PW3, on his part, testified as follows concerning the arrest of the Appellant: -
- “...PW2 had told me PW1 was bleeding from her genitalia. At arrest it was PW1 who took us to accused home. I was not present during arrest.”
26. The Investigating Officer (PW5) testified that the Appellant was arrested by members of the public and taken to Masimba AP Camp before being escorted to Ramasha Police Station. PW5 testified as follows: -
- “...PW1 had seen complainant (sic) on that material day. The complainant identified the accused...”
27. From the above extracts of the testimonies of PW1, PW2, PW3 and PW5, it is clear that the Appellant was a stranger to both PW1 and PW2. While PW1 stated that it was PW2 who identified the Appellant, PW2 stated that it was her first time to see the Appellant. The testimonies of PW1 and PW2 indicate that the Appellant was a stranger to both of them. The question which arises is how the victim was able to take her father (PW3) to the Appellant's home if she did not know him. The other critical question is how members of the public were able to identify and arrest the Appellant as the victim's defiler in the absence of the victim and her sister (PW2) who allegedly interacted with the Appellant on the day of the assault. The next question is, why the police did not conduct an identification parade to enable the victim pick out her assailant so as to rule out the possibility of the Appellant being a victim of mistaken identity.



28. My finding is that the glaring gaps and the unanswered questions that linger over the prosecution's case, when considered alongside the numerous inconsistencies in the prosecution's case which the Appellant highlighted in the submissions, lend credence to the Appellant's argument that he was not positively identified as the perpetrator of the offence.

29. I find that the ingredient/element of identification was not proved to the required standards.

Conclusion

30. Arising from my analysis of the evidence and conclusions on the issues that I have addressed in this judgment, I find that the trial court erred in returning a guilty verdict against the Appellant. I find that the conviction was not safe as it was not supported by the evidence on record.

31. Consequently, I quash the conviction, set aside the sentence imposed on the Appellant herein and direct that he be released from prison forthwith unless he is otherwise lawfully held.

32. It is so ordered. Right of Appeal 14 days.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 23RD DAY OF MAY 2024.

W. A. OKWANY

JUDGE

