



**Maina v Republic (Criminal Appeal E005 of 2023)
[2024] KEHC 5062 (KLR) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5062 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E005 OF 2023**

MA ODERO, J

MAY 13, 2024

BETWEEN

PETER KARANJA MAINA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Before this court is the Petition of Appeal filed by the Appellant Peter Maina Karanja challenging the conviction and sentence imposed upon him by Hon. V. S. Kosgei, Resident Magistrate.
2. The Hon DPP opposed the appeal.

Background

1. The Appellant was charged with the offence of Defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*, 2016. The particulars of the main charge were that on 25th October, 2019 in Mathira East sub-county unlawfully and intentionally caused his penis to penetrate the vagina of L.W.M a child of 9 years.
3. The Appellant faced an alternative charge, of Committing an Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars were that 25th October 2019 in Mathira East Sub-county unlawfully and intentionally touched the vagina of L.W.M a child of 9 years with his penis.
4. The Appellant entered a plea of 'Not Guilty' to both charges and his trial commenced before the lower court on 25th January, 2021.



The Evidence

5. The Prosecution called five (5) witnesses in support of their case. The complainant LWM underwent a 'Voire dire' examination. She told the court that she was ten (10) years old having been born in the year 2010. The child stated that she is in class 4 at [Particulars Withheld] Primary School.
6. The complainant in her evidence told the court that on 25th October, 2019 at 3.00pm she was on her way to the shop to buy rice. That on the way she decided to stop at the home of the Appellant who was a neighbour to greet the mother of the Appellant. The child stated that she met the Appellant's mother outside the house washing utensils and the Appellant was outside with a basin preparing to wash clothes.
7. The complainant told the court that the Appellant put down his basin of water and carried his to her house. Inside the house the Appellant put her on the bed, removed her clothes and defiled her. He then dressed her up again and gave the child his mobile phone telling her to hide it. The child then went home and did not inform anybody what had occurred.
8. A few days later the child informed her mother that she had been defiled. Her mother reported the incident to the chief. The child was then taken to Karatina Sub-county Hospital where she was examined by a doctor.
9. PW4 Dr Stephen Nderitugave evidence relating to the medical examination that was conducted on the complainant at the Karatina Sub-county Hospital. He stated that upon examination the child was found to have injuries on the labia fold and had a broken hymen.
10. The Defence called two (2) witnesses in support of their case. The Appellant told the court that the complainant's family were his neighbours and lived in the same village about 500 meters from his home.
11. The Appellant testified that on the material day he was away doing farm work. When he returned home he realised that his mobile phone was missing. Upon questioning his mother she informed him that 'Loice' the complainant had passed by their home. The Appellant denies that he ever met the child at all on that date.
12. A few days later on 27th October, 2019, the Appellant met the complainant. He asked her where his phone was and she told him that one "Maina" had taken it. He took the child to the village elder and she still insisted that this 'Maina' had the phone. When Appellant threatened to call the police, the child took them and showed them where she had hidden the mobile phone. Since he had recovered his phone the Appellant decided not to pursue the matter any further.
13. Thereafter on 29th October, 2019 the Appellant was arrested by police on allegations that he had defiled the complainant. He was taken to Karatina Police Station.
14. The Appellant categorically denies that he lured the child to his house and defiled her. He claims that the complainant is a troublesome child who is known to be a thief and that she is also a truant child.
15. DW2 MWM was the Appellant's mother. She told the court that on 25th October, 2019 she and the Appellant went out to work on the family farm. That she stayed in the farm until 1.00pm and then returned home to cook lunch.
16. DW2 told the court that at about 1.00pm the complainant who was their neighbour came to her home to pick Macadamia nuts. Then the child left to go to the shops.
17. Later at 2.00pm the Appellant came back home from the farm. He went to his house and then complained that his mobile phone was missing. DW2 told him that the complainant had visited their



home. That the Appellant went and reported the matter to the village elder. Later the Appellant informed his mother that his mobile phone had been recovered.

18. Two (2) days later the Appellant was arrested on allegations that he had defiled the complainant. Following the hearing of oral evidence both parties filed their written submissions.
19. On 27th January, 2023 the learned trial magistrate delivered her judgment in which he convicted the Appellant on the main charge of Defilement and sentenced him to serve life imprisonment.
20. Being aggrieved by both his conviction and sentence the Appellant filed this Petition of Appeal. The Appel was premised upon the Amended Grounds of Appeal as follows:-
 - “(a) That the learned trial magistrate erred in both law and fact in failing to consider the complainant in this case is untruthful witness her evidence should not be relied on to find conviction. [sic]
 - (b) That the learned trial magistrate erred in law and fact when basing his conviction on reliance on contradictory and uncorroborated evidence tendered by prosecution witnesses. [sic]
 - (c) That the learned trial magistrate erred in law and fact when relying on the medical evidence to find conviction while the same was not proved to the required standard.
 - (d) That the trial court erred in law and fact by overlooking that essential witnesses were not called upon to testify to wit the mother of the complainant and Linet for cross-examination and were never compelled to appear in court to clear the doubt upon the prosecution evidence in contravention of Section 144 and 150 Criminal Procedure Code.
 - (e) That the trial court erred in law and fact in convicting the appellant without giving due weight to the alibi defence and written submissions which were substantial, enough to vindicate him this contravening Section 212 as read with Section 235 of the Criminal procedure Code.

Analysis And Determination

21. I have carefully considered this Petition of Appeal, the record of the trial before the lower court as well as the written submissions filed by both parties.
22. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced and the submissions made in the trial court so as to arrive at its own independent conclusion. In so doing, this court is required to always bear in mind that it neither saw nor heard the witnesses as they testified and must therefore give due allowance in that regard. In the case of *Okeno v Republic* [1972] EA 32 the Court of appeal stated as follows:-

“It is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld.”
23. This court is required to consider whether the offence of Defilement was proved to the required standard in law that is ‘beyond reasonable doubt’
24. The Appellant was convicted of the offence of ‘Defilement.’ Thus it was necessary that the age of the victim be proved. In the case of *Hadson Ali Mwachongo v Republic* [2016] eKLR the court stated as follows:-

“The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by Cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an



essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependant on the age of the victim”

25. The complainant herself was not too sure of her exact age. All she could say is that she was born in the year 2010. PW2 the child’s father told the court that she was born on 27th April, 2010. PW5 PC (W) Caroline Muraya the investigating officer produced in court a copy of the complainant’s birth certificate serial number xxxx (Exhibit ‘1’) which indicates that the child was born 27th April, 2010. This is conclusive proof that at the time of the incident the child was aged nine (9) years old, and was a minor.
26. The next question to be answered is whether the complainant properly identified the Appellant. The complainant told the court that the Appellant’s family were neighbours in their village thus she knew the Appellant well. The Appellant and his mother both confirm that the complainant was the child of their neighbour and they knew her well. In fact the Appellant’s mother told the court that the child often used to come to their home to pick macadamia nuts.
27. The next question is whether the act of defilement (penetration) has been proved and whether it was proved that it was the Appellant who defiled the complainant.
28. The evidence of the complainant was that the Appellant lured her into his house, removed her clothes and defiled her. The complainant was the only witness to the offence as is the case in most sexual offences Section 124 of the *Evidence Act* Cap 80 Laws of Kenya provides that the evidence of a sole witness is sufficient to prove a Sexual offences Section 124, provides as follows:-

“Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15, where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.” [Own emphasis]

29. Since the complainant in this matter was a child of tender years the court rightly conducted a ‘Voire dire’ examination before taking her evidence in line with Section 125 (1) of the *Evidence Act*. The court found that the complainant did not fully understand the nature of an oath and ruled that she gives unsworn evidence. The law therefore required that said unsworn evidence be corroborated. In the case of *Oloo v Republic* [2009] eKLR the court of Appeal held that

“In our view, a corroboration of evidence of a child of tender years is only necessary where such a child gives unsworn evidence.”

30. The Prosecution sought to rely on the medical report to corroborate the testimony of the child that she had been defiled. PW4 Dr. Stephen Nderitu produced the medical report (P3 form) in respect of the examination which was conducted on the complainant.
31. The P3 form indicated that the complainant was found to have injuries on the labia folds and vaginal wall and the hymen was broken. This nature of these injuries on a child so young are indeed an indication that penetration had occurred. Therefore I am satisfied that the fact of penetration was proved.



32. The next question is whether it has been proved beyond reasonable doubt that it was the Appellant who defiled (penetrated) the complainant. Whereas the complainant and the prosecution witnesses indicate that the defilement occurred on 25th October, 2018 the doctor indicated that the injuries noted on the child's private parts were merely hours old. Even under cross-examination the Doctor reiterated.
- “-----Approximate age of injuries indicated hours. It indicated hours Not days.” [Own emphasis]
33. This is a major contradiction in the prosecution case one which in my view cannot be overlooked or merely swept aside as the trial magistrate attempted to do. For a defilement which is alleged to have occurred three (3) days prior to the medical examination the report by the doctor that the injuries were merely hours old amounts to a major inconsistency. I find that the learned trial magistrate did not satisfactorily address this inconsistency in the evidence.
34. In *George Kioji v R - Nyeri Criminal Appeal No. 270 of 2012* (unreported) it was held as follows:
- “Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone if the court believes the victim and records the reasons for such belief.” [own emphasis]
35. In his judgment at Page 15 line 7 the trial magistrate referring to this inconsistency between the medical evidence and the evidence of the complainant stated as follows:-
- “The indication of hours instead of days after the victim was examined on 28th October, 2019 is not fatal to this case.....”
36. With respect I cannot agree with this finding. The finding by a medical doctor that the injuries were hours old would indicate that said injuries were inflicted that same day i.e on 28th October, 2019. This is totally at variance with and contradicts the complainants evidence that she was defiled on 25th October, 2019 which was three (3) days prior. This contradiction /inconsistency remained unexplained.
37. I therefore find that the medical evidence does not properly corroborate the evidence of the minor regarding when the incident of defilement occurred. In the face of such a major contradiction the trial magistrate erred in convicting the Appellant.
38. In his defence the Appellant raised the issue of his mobile phone which went missing on the same day when the complainant visited his home. He claims that upon questioning the minor initially blamed one 'Maina' for taking the phone. However the minor later led, the village elder to where she had hidden the phone.
39. The minor claims that the Appellant gave her the mobile phone and told her to hide it. It's pertinent that the allegation of defilement was only raised on 27th October, 2019 which was after the minor had led authorities to where she had hidden the phone. Therefore the Appellants claim that the allegations of defilement were only raised in order to frame him to cover up the child's theft of his mobile phone cannot in the circumstances be dismissed as out of hand.



40. All in all I find that there remained serious doubt as to whether it was the Appellant who defiled the complainant. That doubt must be settled in favour of the Appellant. My finding is that the charge of defilement was not proved beyond reasonable doubt. In the premises the trial court ought not have convicted the Appellant on the charge of Defilement.

41. Finally this appeal succeeds. The conviction of the Appellant is hereby quashed and his sentence of life imprisonment is set aside. The Appellant is to be set free forthwith unless he is otherwise lawfully held.

DATED IN NYERI THIS 13TH DAY OF MAY, 2024.

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MAUREEN A. ODERO

JUDGE

