Maina v Republic (Criminal Appeal 15 of 2019) [2023] KEHC 2355 (KLR) (23 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2355 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL 15 OF 2019

FR OLEL, J

MARCH 23, 2023

BETWEEN

PATRICK MURIUKI MAINA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being appeal against judgment conviction and sentence delivered on 18th November 2016 at Baricho SRM's court vide SO case no.1583 of 2015 before Hon E Keago (SPM))

JUDGMENT

Background

1. The appellant herein Patrick Muriuki Maina was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offence Act* no.3 of 2006. The particulars of the offence were that on the 1st day of October 2015 in Kirinyaga West District within Kirinyaga County, intentionally and unlawfully caused your penis to penetrate the vagina of LNI a child aged 16 years.
2. The appellant also faced a second count of committing an indecent with a child contrary to Section 11(1) of the *Sexual Offence Act* no. 3 of 2006. The particulars of the offence were that on 1st day of October 2015 in Kirinyaga District within Kirinyaga County intentionally rubbed his penis against the vagina of LNI a child aged 16 years.
3. The appellant pleaded not guilty. The prosecution called five (5) witnesses and after close of their case the appellant gave sworn evidence. The trial magistrate did consider the evidence tendered and found guilty the appellant of the first count and was sentenced to serve 15 years imprisonment. Being dissatisfied with the judgement, conviction and sentence, the appellant filed this appeal setting out the following amended grounds of appeal.

a. That the trial magistrate erred in both law and fact in proceeding to take and hear evidence from PW 3 yet failed to conduct *voire -dire*

b. That the trial magistrate erred in both law and fact in dismissing appellants claim that he was in custody when the alleged offence is said to have been committed yet the Snr Assistant chief admitted that he had arrested him earlier over other undisclosed offences.

c. That the Hon trial magistrate erred in convicting the appellant on the main charge yet overlooked that the medical evidence was inconclusive and unsafe to base a conviction upon

d. That the Hon trail magistrate erred in law and facts in failing to analyse the adduced evidence by PW3 to find that it was marred by inconsistencies together with an unexplained gap in relation to her whereabouts for three days after her ejection from home by her mother.

e. That the trial magistrate erred in law and facts in overlooking that though the allegation of defilement was recent, the appellant was not examined to ascertain his culpability.

4. In determining this appeal, the court must fully understand its duty as a first appellant court as stated in the case of *Pandya versus Republic* (1957) EA 336 and *Ruwala versus Republic* 1957 EA 570 which is to subject "the evidence as a whole to fresh and exhaustive examination" and for this court to arrive at its own decision on the evidence. It must weigh the evidence presented and draw its own conclusion and it's own findings while making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses.

Facts at trial

5. PW1 Peter Mutungi Gikono was the assistant chief of Kianjege sub location. He recalled that on 2nd October 2015 at about 11.30am he was at Baricho police station when he received a call from on JW a resident of his sub location. The said JW informed him that his granddaughter had been defiled by someone well known to her. The incident had happened on the night of 1st October 2015. He advised the person to come and report the incident at the Baricho police station. After the incident was reported , the witness proceeded to Ndigaru where the accused was doing casual jobs and arrested him

6. The witness further stated that the accused was identified by the complainant and he was someone well known to him. The accused was a neighbour and lived next to the Assistant chief office. The witness also stated that he had earlier arrested him over other offences. In cross examination the assistant chief confirmed that he knew the appellant very well and confirmed having arrested him earlier over other offences. He stated that the report was made on 2nd October 2015 and he arrested the appellant on the same day at noon. The witness was later recalled for cross examination again and reiterated that the incident occurred on 1st October 2015 at night and he arrested the appellant on 2nd October 2015 after a report was made. He also stated that on 1st October 2015 the appellant was not in custody.

7. PW 2 JWN testified that the complainant LNI was his grandchild. On 2nd October 2015 at about 8.30am the complainant came to his home while running towards her grandmother house. He gave her tea and asked her where she had been. The complainant told him that she had been chased away by her mother who was drunk. When she disappeared her mother asked some youth to look for her. She reported that she met one of the youth who was sent to look for her. The said youth took her to a shamba and defiled her. He again took her to his house and defiled her until morning.

8. The witness further testified that the complainant identified the youth who had defiled her as "Karishi". The witness went to report the incident to the sub chief but didn't find him at his office. He called the sub chief who advised that he reports the matter to the police station, where he then went

and reported the incident. After that he took the complainant to hospital. Further the witness testified that the assistant chief said that "karishi", was a person well known to him and was later arrested. The witness also testified that he use dot see the said suspect but he was not a person known to him. He also confirmed that the complainant was his brother's daughter child.

9. In cross examination PW2 testified that the complaint reported that she was defiled by "karishi" and also physically identified the appellant. PW 2 also said he knew the appellant but didn't know his name. He confirmed that the complainant came to his home and narrated to him what had transpired. The witness too was later recalled and confirmed that the incident occurred on1st October 2015 at night and he reported it on 2nd October 2015.

10. PW3 LNI stated that she was a pupil at [Particulars Withheld], class 7 and was 13yrs old (Born in 2002).she stayed with her mother at [Particulars Withheld]. On 28 September 2015 her mother sent her to the river. She delayed coming back and on reaching home, her mother chased her away and told her to go look for her biological mother. She went and stayed with their neighbour, Mama chiku for three day. She then decided to go to her grandmother's place which not far from their home. While enroute at about 7pm she met someone who told her that he had been sent to take her back to her mother's place. He grabbed her and threatened her with a knife took her into farm nearby undressed her and proceeded to defile her. She stated that the appellant removed her trouser, biker and pant before penetrating her vagina with his penis. The appellant then took her to his house and continued to defile her

11. She identified the biker and black red pant as MFI-1 & 2.The witness testified that the appellant defiled her and locked her in the house until morning. She asked to go to the toilet and the appellant allowed her to go outside. She took that opportunity to run upto her grandmother's house, where she found her grandfather and reported what had transpired. She also testified that she had left her blouse at the appellant's house and identified it as MFI-3. While at her grandmother's house, she saw the accused passing by and identified him to her grandfather, who remarked that he knew him. She stated that the person who defiled her is someone who she used to see at the river whenever she went to fetch water.

12. They reported the matter to Baricho police station and she was taken to Baricho health centre where she was treated. She identified the treatment notes, PRC form and P3 form as MFI 4-6. She further identified the knife as MFI-7. She concluded by saying that she could identify the suspect as he took her to his house and was able to see him the next morning. She had also earlier seen him and again saw him after she had escaped.

13. In cross examination the witness stated that she met the appellant at independent church of Kenya and she was not with another boy called Mwangi. She insisted the appellant defiled her at about 8.00pm and that she was telling the truth. She also identified the blouse that was recovered in the appellant's house. In re exam she stated that she was alone at about 7.00pm when she decided to go to her grandmother's house. She was not with any boy and that she had previously seen the appellant at the river. She also stated that she does not know if the appellant and her mother were lovers. She confirmed that the blouse recovered in the house was the same one in court. It had a black lines. PW 3 also identified her immunization card which showed that she was born on 5.5.1999, thus was 16 years old. She had earlier stated that she was born on1.1.2002 but that was because she did not know her exact date of birth and relied on the age of her classmates. The clinic card showed her true age, which was 16 years.

14. PW4 John Ngatia, stated that he was a clinical officer working at Baricho Health centre. The patient was seen at Baricho Health centre on 2.10.2015 and the outpatient no was xxxx/15. She presented a history of having been defiled on 1.10.2015 at 7.00pm. On examination she had normal external genitalia, but had bruises on the labia minora. There was whitish discharge, and the hymen was missing.

The impression of defilement was formed. The patient also had anterior bruises on the neck. The witness produced treatment notes, PRC form and P3 form as P Exhibit 4-6. The appellant did not ask him any question in cross examination.

15. PW5 Sgt Catherine Migwi, testified that she was attached to Baricho police station, crime branch. She recalled that on 2.10.2015, P.W 3 LNI was brought to the police station by her grandfather and reported a defilement case. That she had been chased from home by her mother on 28.9.2015 and that two days later at about 7.30pm as she was going to her grandfather's place she met the accused who threated her and defiled her in the farm and later at his house, while threating her with a knife. In the morning she tricked him that she wanted to go for a call of nature and was allowed to go outside. She took that opportunity to escape and run away to her grandfather's home and reported the incident.

16. PW 5 further stated that she recovered the pant and biker which PW 3 was putting on the material day. The accused was arrested and they visited the scene of the incident and recovered PW 3 blouse on the bed. It had been washed the previous night to remove the mud. On the same room they recovered a knife on the stool which the complainant reported she was threatened with. PW 3 was able to identify the appellant by name and she subsequently charged him in court. She produced all the items previous identified, including the knife and immunization card as Exhibit 1-3 , Exhibit 7-9. In cross examination she confirmed that the incident was reported on 2.10.2015.

17. The appellant was put on his defence and gave sworn evidence. He stated that he comes Kianjanga village and was in boda boda business. On 24.9.2015 he took his motorcycle and proceeded to work until 9.00pm. While on his way back home, he followed the route to the stadium where there was a church. He found six boys and four girls. One of the youth called him and informed him that PW 3 had been taken by another man. Accompanied by the youth he followed them and caught up with them. He asked PW 3 where she was going. PW3 told him that her mother had chased her away. She advised PW3 to go back home. While speaking to PW3 he was called by a third party who was inquiring the labour cost of planting maize , while talking to this third party PW3 run away while still accompanied by the youth.

18. The appellant further stated that he went to PW3 mother house and asked her why she had chased away her child. The mother who was drank said she had told P3 to go look for her biological mother. He thereafter left for his house where he spent the night. The following morning, the youth who wanted assistance in planting maize came and they went to the shamba with him. While on the way they passed by the home of PW3 Grandfather. Later in the day at about 1.00pm the assistant chief came and arrested him, while accompanied by two policemen. He was placed in the cells at Baricho police station and later charged in court on 26.9.2015. He denied defiling the complainant.

19. In cross examination he stated that the mother to PW3 was his lover. He found PW3 on 24.9.2015, by then her mother had not told him to look for her nor was he aware that she was lost. He denied defiling PW3. He reiterated that he was arrested on 25.9.2015 and did not know how her cloths were found in her house. According to the appellant, PW3 was treated on 21.9.2015

20. In his considered judgment the trial magistrate analysed all the facts and convicted the appellant of the offence charged. He was sentenced to fifteen (15) years imprisonment as provided under Section 8(4) of the *Sexual Offences Act* no.3 of 2006.

Submissions

21. The appellant submitted that voire dire was not conducted before PW3 testified and that was fatal to the prosecution, for it was a mandatory requirement that every minor must undergo. The court was duty bound to ascertain if the witness understands the nature and gravity of the oath therein

administered. Thus failure by the court to do so rendered the evidence null and void and of no legal value. Further he submitted that under *sexual offences Act*, it was mandatory to conduct voire – dire before evidence could be taken.

22. The appellant also submitted that by the time he was alleged to have committed the offence he was in police custody and thus could not have been the one who defiled the complainant. He submitted that the court was bound to agree with him that in every society there exists rivalries and enmities, which the court ought to have considered. In this instant PW 2 had confirmed to have arrested him earlier over other offences. He reiterated that he was arrested on 26.9.2015 and not on 2.10.2015 as alleged and therefore could not have been the one who defiled PW3 on 1.10.2015 as he was in custody.

23. The appellant also stated that no spermatozoa was found on PW3 during medical examination. Given that PW3 was alleged that the appellant repeatedly slept with her, there was positive presumption that he must have ejaculated two times, thus spermatozoa ought to have been found by medical evidence if indeed he defiled PW3. Further the appellant also stated that the court should note that the P3 did not indicate any discharge of blood or any sign of fractural entry which means that the absence of the hymen cannot be traced to the alleged time of commission. This corroborates the whereabouts of P3 during the three days when she was lost and her whereabouts could not be accounted for.

24. The final issue raised by the appellant in his submissions is that the evidence presented was shaky and inconsistent. The whereabouts of PW3 for three days was not accounted for, the allegation that PW3 was in the home of Mama chiku was not proved, the medical evidence did not prove that the she had been defiled for the whole night nor was any spermatozoa found in her during medical examination , the appellant was in custody when the incident occurred and finally the issue of his relationship with PW3 mother was not critically examined by court so as not to rule out victimization, which could go a long way to explain how the blouse found its way to the appellants house. The appellant prayed that his appeal be allowed.

25. The state too did file its submission and stated that the conviction was solid and supported by facts provided by the five witnesses who testified. The evidence was not doubtful and the prosecution had discharged its burden of proof and left no gaps that could raise any doubt.

26. They submitted that *voir dire* was not mandatory as the definition of a child under the children's Act was 14 years. They relied on the citation of *Maripetett Loonkok Vs Republic* (2016) eKLR. As to whether the medical evidence was conclusive, the state submitted that the medical evidence present by PW4 John Ngatia Githaiga indeed proved that there was penetration. The medical treatment notes, post rape care form and P3 form adequately proved the same. Further they also submitted that the position in law is that the offence of rape and defilement is proved by way of oral evidence and not necessarily medical evidence. See *AML vrs Republic* (2012) eKLR.

Analysis and Determination

27. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up to its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanor. This court is guided by *Okeno vrs. Republic* (1927)E.A 32 & *Pandya Vs. Republic* (1975) EA 366.

28. Also in *Peter's vrs Sunday Post*(1958) E.A. 424 it was said that it is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.

29. The ingredient's provided for under section 8(1) of the *Sexual Offences Act* No.3 of 2006 and which must be proved for a conviction to ensue are Age of the victim (must be a minor), penetration and proper identification of the perpetrator.(see *George Opondo Olunga Vs. Republic* (2016)eKLR) .

30. The appellant submitted that the trial magistrate erred in law by failing to undertake *voir dire* examination on PW 3 and that rendered her evidence worthless and of no evidential value. While it is true that PW3 did not under go *voir dire* examination. It should be note that voir dire is only essential to enable the court satisfy itself that a child is conscious of the truth. The purpose of *voir dire* was explained in *Johnson Muiruri V Republic* (1983) KLR 445 as follows;

    a. Where in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion on a voir examination, whether the child understands the nature of an oath in which event his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless corroborated by material evidence in support thereof implicating him.

    b. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellant court is able to decide whether this important matter was rightly decided.

    c. When dealing with the taking of oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded so that the cause the court undertook is clearly understood.

    d. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.

    e. The judge is under a duty to record the terms in which he was persuaded and satisfied that a child understands the nature of the oath. The failure to do so is fatal to conviction

29. First and foremost it is quite obvious that PW3 was not a child of tender years. Under the criminal justice system the time honoured threshold for *voir dire* examination is 14 years. PW5 did produce her immunization card (Exhibit 8)which indicated she was born on5.5.1999 thus was 16 years old as at the time defilement incident occurred.

    In *Maripetett Looonkok Vs Republic* (2016) eKLR; It was held that;

    > " ...the definition in the children's act is not of general application; that it was only intended for the protection of the children from criminal responsibility and not as a test of competency to testify. It follows therefor that the time honoured 14 years remain the correct threshold for voir dire examination. It follows form a long list of decision's that voir dire examination on children of tender years must be conducted and that failure to do so does not vitiate the entire prosecution case.

29. The appellant second ground of appeal was that he was in custody when the alleged offence occurred and thus he could not have been the culprit. The appellant in his defence stated that he was arrested on 25.9.2015 and that this was corroborated by the chiefs evidence (PW2) when he stated that;

    > " He is a neighbor to my office. I had arrested him earlier over other offences". He further submitted that he remained in custody until 29.9 2015 and that there were relevant records

which could be availed form Kerugoya prison to prove the same. According to the appellant the defilement happened on 28.9.2015, while the treatment notes were dated 21.9.2015.

29. Unfortunate for the appellant this ground of appeal is weak and has no basis. What he has submitted on and his evidence in court is at variance. He submitted that he was arrested on 26.9.2015 and was released on 29.9.2015 but in court he only testified that he was arrested on25.9.2015. What is alleged in the submissions are not part of the court record. Secondly in court he alleged that the medical treatment notes were dated 21.9.2015. This is not true as the said medical treatment notes bear the date 2.10. 2015. This ground of appeal too lacks merit and is dismissed.

30. The appellant also submitted that the medical evidence was inconclusive and unsafe to base the conviction on. From the evidence on record, PW3 was taken to hospital the following morning after the defilement incident. PW4 John Ngatia Githiga did confirm that she was treated at Baricho Health Centre and on examination she had normal genitalia but observed bruises on the labia Minora, with whitish discharge, the hymen was missing. He formed the medical impression that PW3 was defiled. The said witness produced as Exhibits 4-6 the medical treatment notes, PRC form and P3 form.

31. It is also now trite law that medical evidence is not only way of proving the offence of defilement. The Court in the case of *George Kioji- Vrs- Republic* Criminal Appeal no. 270 of 2022 (unreported) held

> " 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 are accused person can be properly convicted for defilement. The Court can convict if it is satisfied that there is evidence beyond reasonable doubt that defilement was perpetuated by the accused".

29. This position was fortified in the case of *Mark Oirori Moses-Vs-Republic* (2013)eKLR the Court stated that;

> " Many times, the Attacker does not fully complete the sexual act during the 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 on the surface, the ingredients of the offence is demonstrated, and penetration need not be deep inside the girls organ."

29. Therefore , it is not necessary a must that a medical evidence be availed to prove penetration, but as long as there is evidence that there was even partial penetration, only on the surface the ingredients of the offence is demonstrated.

30. In this appeal having reviewed all the evidence presented, it is clear from both the oral medical evidence presented that indeed PW3 was defiled by a person known to her, she ran away at the first opportunity and reported the same to her grandfather. She positively identified the appellant, having spent the whole night at his house and seen his face clearly in the morning. She further identified the appellant to her grandfather while he passed by the grandfather's home. PW3 also was taken to the hospital and the medical evince present conclusively penetration.

31. The final issue raised by the appellant was that PW3 evidence was marred by inconsistencies' together with the unexplained gap to her whereabouts for three days after her ejection form home by her mother. The facts to be proved before court were, age of the complainant, penetration, and identity of the culprit. The prosecution did not need to prove if indeed PW3 was chased from her step mothers home or if indeed she spent three nights at Mama Chiku, or if she was with another man elsewhere. True these facts may raise eyebrows and strong suspicion but in the crux of the matter they do not determine

the ingredients of the offence. The appellant had apple time to cross examine all the witnesses and call his own witnesses to support his case and/or provide an alibi. When he had a chance he did not do so.

32. Having reexamined all the evidence presented, I do find that the appellant appeal has no merit on any of the grounds raised. I do dismiss this appeal.

33. Right of Appeal 14 days.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 23RD DAY OF MARCH 2023.

RAYOLA FRANCIS

JUDGE

In the presence of;

1. Mr. Mimba for state

2. Accused present from Nyeri Prisons