



REPUBLIC OF KENYA



KENYA LAW
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**Maina v Republic (Criminal Appeal E024 of 2021)
[2023] KEHC 17394 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17394 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E024 OF 2021**

M MUYA, J

MAY 11, 2023

BETWEEN

DAVID WACHIRA MAINA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. David Maina hereinafter referred to as the appellant was convicted and sentenced to twenty years imprisonment for the offence of defilement c/s 8 (2) of the *Sexual Offences Act* No.3 of 2006.
2. The particulars were that on the diverse dates between 20th September 2020 and 10th December 2022 in Laikipia East Sub-County, within Laikipia County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of SKK a child aged 15 years old.
3. Being dissatisfied with both the conviction and sentence, the appellant has preferred this appeal on the following grounds:-
 1. That the learned trial magistrate erred in both law and in fact in relying on contradictory and inconsistent evidence.
 2. That the learned trial magistrate erred in both law and fact in convicting the appellant in the absence of sufficient medical evidence
 3. That the learned trial magistrate erred in both law and in fact by failing to consider the evidence adduced by the defence.

Brief facts

4. This is a clear case of elopement. The appellant eloped with the complainant on the 20th day of September, 2020 and proceeded to stay together as husband and wife in Laikipia till the date of arrest



which was on 11th December, 2020. It was complainant evidence that during that span of time they had sexual intercourse almost every day.

Duty of the first appellate court

5. It is the duty of the first appellate court to reconsider and evaluate afresh the evidence adduced before the lower court so as to come to its own conclusions bearing in mind that it did not have the opportunity to observe the demeanor of the witnesses.

Okeno v.R (1972) EA 32 *Njoroge versus Republic* (1987) ‘ eKLR (9),and *Kiilu & Another Versus Republic* (2005) eKLR 174

Issues for determination

- 6.
1. Age of the complainant
 2. Penetration
 3. Identification of the attacker.

Age

7. The Complainant herself testified that according to her birth Certificate she was born on 20th May 2005 she had informed the court that she was 14 years old. The trial magistrate at paragraph 14 found that the complainant was aged 15 years.

At the time of the commission of the offence. The offence the appellant faced was that of defilement contrary to Section 8(1) as read with section 8 (2) of the Sexual Offence Act.

8. Section 8 of the Act defines defilement thus :-
- (1) A Person who commits an act which causes penetration with a child is guilty of an offence termed defilement
 - (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
 - (3) A person who commits an offence of defilement with a child aged between twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

From the foregoing, it’s patently clear that the appellant ought not to have been charged under Section 8 (1) as read with Section 8(2) of the [Sexual Offences Act](#). The prosecution has conceded this far but urges the court to find that the mistake is curable under Section 382 of the [Criminal Procedure Code](#) which provides:-

“subject to the provisions herein before contained, no finding sentence or order passed by court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error omission or irregularity in the complaint, summons, warrant charge, proclamation, order, Judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission, irregularity has occasioned a failure of justice.



Provided that in determining whether an error omission or irregularity has occasioned a failure of justice, the court shall have regard to the question whether the objection could and should have been raised at an earlier stage of the proceedings”

10. A perusal of the learned magistrates Judgment at Paragraph 30 she clearly indicated that she found the appellant guilty contrary to Section 8 (1) as read with Section 8 (3) of the [Sexual Offences Act](#) and proceeded to Sentence the appellant to twenty years imprisonment.
11. In the circumstances of this case the error did not occasion a failure of Justice as the Appellant was convicted and sentenced under the correct Section of the [Sexual Offences Act](#).

The error was excusable under Section 382 of the Criminal Procedure Code.

Penetration

12. Section 2 of the [Sexual Offences Act](#) defines penetration thus:-

“The Partial or Complete insertion of the genital organs of a person into the genital organs of another person.”

S. 2 defines genital organs to include, “the whole or part of male or female genital organ and for the purposes of this Act includes the anus.”

13. The complainant was presented to PW4 (Thomas Mwangi) a Clinical Officer for examination. It was observed that she had an old broken hymen.
14. The Complainant (PW1) testified to have been friends with the appellant from the month of September 2020 after meeting him at a barber shop, in Othaya where he was working. On 20th September, 2020. She eloped with the appellant and they went to stay together as man and wife at a place known as Ngaringuru.

In Laikipia. They first cohabited in his brother’s room. After two weeks, they proceeded to the appellant’s home where they met the mother where they cohabited in his house till 11th December 2020 when her father in the company of police went and arrested the appellant. It was the complainant’s evidence that they had sexual intercourse with the appellant nearly every day for the duration she was staying with the appellant. Police had taken photographs of the appellant’s house, the bed they were using to sleep on and her bag. The complainant was able to identify these photographs

15. The evidence of the Complainant as to penetration appears very cogent and there is no need for corroboration.

The learned trial magistrate did observe that she did comply with the provisions of Section 124 of the [evidence Act](#). That the minor gave clear consistent evidence. “I am satisfied that penetration was proved”

Identification of the perpetrator

16. In his unsworn evidence the appellant did testify to have met the complainant on 7th day of December 2020 at Ngaringiro where he had taken his phone for charging. At the time the complainant was in the company of Mama Wangari a neighbor. Mama Wangari requested him to give her his phone to make a call which he agreed to. She asked him his name and he gave her and she left.



Three days later the area chief and police went to his house and said that they were looking for the Appellant, they took photographs of a house which was not his. He was arrested and taken to Othaya Police Station and later charged.

17. The Complainant did explain in details of how she left her home while in the company of the appellant who was her friend and how they cohabited together first in the house of his brother and later in his parents homestead.

There cannot be, by any stretch of imagination the raising of raise the possibility of mistaken identity. The appellant himself does not deny having met the complainant, though, he contests the circumstances in which they met.

Conclusion

18. This case was proved beyond reasonable doubt. The conviction was safe and the sentence was legal.

I find no good reason to interfere on both.

The appeal has no merit and it is disallowed.

JUDGEMENT READ DELIVERED AND SIGNED IN OPEN COURT THIS 11TH OF DAY MAY 2023.

HON. JUSTICE MARTIN M. MUYA

JUDGE

In the presence of:

In person: Appellant

Mwai : Respondent

Court Assistant: Kinyua

30 days R/A

