Madegwa v Republic (Criminal Appeal E080 of 2021)
[2024] KECA 350 (KLR) (22 March 2024) (Judgment)

Neutral citation: [2024] KECA 350 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL E080 OF 2021

F SICHALE, FA OCHIENG & WK KORIR, JJA

MARCH 22, 2024

BETWEEN

STARICO MADEGWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Eldoret (J. Wakiaga, J.) dated 19th November, 2019 in H.C.CR.A. No. 3 of 2019)

JUDGMENT

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* No. 3 of 2006. After the trial, the appellant was found guilty of the offence. He was convicted and sentenced to life imprisonment.

2. The particulars of the offence were that on 28th March 2015 in Eldoret West District within Uasin Gishu County, the appellant intentionally and unlawfully caused his genital organ (penis), to penetrate the genital organ (anus), of S.N. a girl, aged 10 years.

3. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

4. The prosecution in a bid to advance its case called a total of five witnesses whose testimonies were as follows:

5. PW1 was the complainant. She was 11 years old at the time. She informed the court that the appellant whom she knew as "Baba Madegwa" had done bad manners to her when he called her to watch TV. At the time, the appellant gave his child food and asked the child to go out and play. When the child had left, the appellant started touching her all over the body before removing her clothes and doing bad manners to her in the anus.

6. When her father called her out, the appellant stepped out and told him that the complainant was in his house watching TV. The appellant then told the complainant not to tell anyone what had happened. However, when she went to school, she was in pain and she was sent back home, where she informed her mother of what had happened.

7. PW2 told the court that she left the complainant in the house after cooking her food. When she came back, the complainant was asleep. The following day, the complainant told her that she was having difficulty passing stool, and that "Baba Madesh" had done bad manners to her. She took the complainant to the hospital the following day, where the doctor confirmed that she had been defiled. She told the court that the complainant was born on 7th April 2005. The complainant's mother was deceased and she took her in thereafter.

8. According to PW3, when he came home at around 5:00 pm, he found the house locked. He had looked for the complainant for about an hour before the appellant opened his door at around 6:00 pm and told him that the complainant was in his house watching TV. He wondered why because they had a TV at home. The appellant had a basin with water and a piece of cloth in his hand, which he later came to know had been used to wipe the complainant. The following day complainant went to school looking dull and later came back complaining of difficulty in passing stool. The complainant told them that the appellant had done bad manners to her.

9. PW4 was PC Priscah Chepkoech. She told the court that she had received the report, issued a P3 form, and recorded witness statements.

10. PW5 produced the P3 form and informed the court that there was mild tenderness around the complainant's anus, and also confirmed that the complainant had been penetrated.

11. Put to his defence, the appellant told the court that on 28th March 2015, he was at work. On 30th March 2015, he was in his house with his wife when PW2 and PW3 came and told him that he had defiled the complainant, which he denied. They asked him to consent to pay them costs but he refused. The following day he went to the Central Police Station and reported the matter and he was issued with an OB number. After three (3) days, he was arrested by strangers in his house, taken to the police station, and later he was charged in court.

12. DW2 was the appellant's neighbor. He informed the court that on 3rd April 2015 a group of people went to her plot alleging that the appellant had defiled the complainant. Police officers arrested the appellant. When PW2 told her on 30th March 2015 that the appellant had defiled the complainant, she dismissed her because in November 2014 PW2 had alleged that someone had defiled her daughter. On 28th March 2015, she was with the appellant in the morning, but she did not see him during the day. She saw him again at 6:30 pm.

13. The learned Judge held that the anus constitutes the genital organ as the *Sexual Offences Act* defines genital organs to include the whole or part of the male or female genital organs which includes the anus. Relying on the decisions in John Onzere Kambi v Republic [2013] eKLR and C O O v Republic [2018] eKLR, the learned Judge held that:

> "It is therefore clear that the anus is under the *Sexual Offences Act* a genital organ. It must also be noted that the offence of sodomy under the Penal Code was repealed upon the enactment of the *Sexual Offences Act* so the appellant was lawfully charged with defilement and convicted thereof."

14. The learned Judge further held that the age of the complainant had been proved through the health card and the P3 form which stated that she was 10 years old. The complainant had also testified on her age, which was corroborated by PW2 and PW3.

15. The learned Judge also held that penetration had been proved through the evidence of PW4 who confirmed that there was mild tenderness around the anus with healing lacerations and that this evidence corroborated the complainant's testimony that the appellant had done bad manners to her anus.

16. Consequently, the learned Judge was satisfied that all the elements of defilement had been proved beyond reasonable doubt.

17. The learned Judge held that the appellant was the complainant's neighbor, whom she identified as "Baba Madegwa" and also identified his son as "Kababa". The appellant had confirmed his son's name in his defence. PW3 found the complainant in the appellant's house, and the appellant did not deny being with the complainant. DW2 corroborated the evidence of PW2 and PW3 that the complainant named the appellant as the perpetrator. Citing the case of Muganga Chilejo Saha v Republic [2017] eKLR, the learned Judge stated that:

> " The complainant was clear from the records that the appellant did bad manners to her anus."

18. The learned Judge found the inconsistencies of when the complainant went to school, when she was defiled, and whether the appellant had a son or a daughter to be minor, and they did not go to the root of the prosecution case. Reliance was placed on the decision in Richard Munene v Republic [2018] eKLR.

19. The learned Judge held that the appellant's alibi defence which was corroborated by DW2 was displaced by the evidence of the complainant who at her age was very clear as to what the appellant had done to her. PW3 also displaced the alibi defence by putting the appellant and the complainant together in his house when the appellant confirmed that the complainant was in the house watching TV.

20. The learned Judge found no fault with the trial court's determination on voire dire and stated thus:

> " The trial court in conformity with the law warned herself of the danger of convicting the appellant on the evidence of the minor who having found to be a child of tender age was not subjected to voire dire."

21. Consequently, the learned Judge was satisfied that the appellant's conviction was safe and found no merit in the appeal against conviction and sentence. The appeal was dismissed and the trial court's finding was affirmed.

22. Dissatisfied with the judgment, the appellant lodged this appeal in which he raised eight (8) grounds to wit that, the learned Judge erred by;

> " a) failing to find that there was no evidence of penetration.
>
> b. holding that there was defilement without any evidence to support the same.
>
> c. failing to find that the prosecution evidence was utterly inconsistent, contradictory, and unreliable in form, material, and substance, especially regarding the evidence of all the prosecution witnesses.

d. failing to find that there was crucial evidence of eyewitnesses who were not called by the prosecution to testify.

e. failing to hold that the evidence of the complainant was not corroborated by PW3 and PW5.

f. disregarding the appellant's and DW2's evidence which was clear that there was no defilement, and that PW2 and PW3 were using the complainant as bait to fix the appellant to extort money.

g. holding that the complainant's age was properly established contrary to the evidence on record.

h. failing to consider the supplementary petition of appeal dated 16th May 2019 and relying on the grounds of appeal dated 31st December 2018."

23. When the appeal came up for hearing on 4th December 2023, Mr.Miyienda, learned counsel appeared for the appellant, while Ms. Gachau learned prosecution counsel was present for the respondent. Counsel relied on their respective written submissions.

24. Mr. Miyienda submitted that anal penetration is not defilement.

In any event, the P3 form does not mention penetration of the anus. It refers to lacerations. Counsel for the appellant submitted that the anus does not constitute the genital organs. He pointed out that the P3 form did not expressly state that there was penetration. It merely stated that there was mild tenderness. He was of the view that there was no defilement at all.

25. Counsel was of the view that the complainant's evidence was not corroborated as provided for under Section 124 of the *Sexual Offences Act*.

26. The appellant submitted that there was a plausible inference that the evidence of the witnesses who had not been called to testify would have been adverse to the prosecution case.

27. The appellant also submitted that the age of the complainant was not determined because the court was not told whether or not the complainant's mother died immediately after she gave birth to her.

28. Opposing the appeal, the respondent relied on the case of Kaingo v Republic [1982] KLR 213 in submitting that this was a second appeal and as such this court will not normally interfere with concurrent findings on matters of fact by the two courts below unless such findings were based on no evidence, or were a misapprehension of the evidence, or that the courts below are shown to have acted on the wrong principles in making the findings.

29. The respondent pointed out that the *Sexual Offences Act* defines genital organs to include the whole or part of the male or female genital organs and for the purpose of the Act, includes the anus. Therefore, under the *Sexual Offences Act*, the anus is a genital organ. In the circumstances, the appellant was lawfully charged with defilement. Furthermore, PW5 testified that on examination of the complainant, the findings were consistent with defilement.

30. The respondent submitted that Section 143 of the *Evidence Act* does not require a particular number of witnesses to be called to prove any fact. The respondent also relied on the cases of Bukenya & Others v Uganda [1972] EA 549, Keter v Republic [2007] 1, and Benjamin Mbugua v Republic [2011] eKLR to buttress this submission.

31. Citing the case of Richard Munene v Republic, (supra), the respondent pointed out that the inconsistencies in the prosecution case were minor and did not go to the root of the case.

32. The respondents submitted that the age of the complainant was proved through the health card and the P3 form which indicated that the complainant was 10 years old. The complainant stated that she was 11 years old at the time of giving her testimony,which evidence was corroborated by the evidence of PW2 and PW3. The respondent relied on the case of Joseph Kiet Seet v Republic [2014] eKLR in support of this submission.

33. Citing the case of Johnson Muiruri v Republic [1983] KLR 445,the respondent submitted that the purpose of voire dire is to satisfy the court that the child understands what is before it to enable the receiving of the child's evidence. Similarly, Section 2 of the Children's Act defines a child of tender years to mean "a child under the age of 10 years".

34. Be that as it may, even though voire dire was not conducted, the trial court did not form and express the opinion that the complainant understood the nature of the proceedings and could give sworn testimony. The complainant narrated what had transpired to her. The appellant was not prejudiced as he was given the opportunity to cross-examine her.

35. This is a second appeal. Section 361(1) of the Criminal Procedure Code enjoins us to consider only questions of law. In the case of Karani v Republic [2010] 1 KLR 73 the court stated thus:

> " This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

36. We have carefully considered the record of appeal, the written submissions by both parties, the authorities cited, and the law. The issues for determination are whether or not the ingredients of the offence of defilement were proved beyond reasonable doubt, and whether or not we should interfere with the sentence of life imprisonment meted against the appellant.

37. Section 8(1) of the *Sexual Offences Act* provides that:

> " A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

38. Under the *Sexual Offences Act*, the elements of the offence of defilement are: the victim must be a minor; there must be penetration of the genital organ, but such penetration need not be complete or absolute. Partial penetration will suffice; and the identity of the perpetrator must be established. For the offence of defilement to be established, the prosecution must prove each of the above ingredients. In the case of Charles Karani v Republic, Criminal Appeal No. 72 of 2013, the court stated that:

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

39. It is trite that the onus of proof of the age of the complainant resides with the prosecution. Under Section 8(1) of the *Sexual Offences Act*, a person is deemed to have committed defilement if he or she

does an act that causes penetration with a child. Under Section 2(1) of the *Sexual Offences Act*, the definition of a child is the one assigned in the *Children Act*. This entails any human being of less than 18 years.

40. In the case of Kaingu Elias Kasomo v Republic, Criminal Appeal No. 504 of 2010, the court emphasized the importance of proving the age of the victim of defilement, as the sentence imposed upon conviction depends on the victim's age.

41. In the circumstances, the two courts below accepted the child health card and the P3 form which indicated that the complainant was 10 years old, as sufficient proof of the complainant's age. In the case of Francis Omuron v Uganda,Cr. Appeal No. 2 of 2000, the Court of Appeal of Uganda held that:

> "In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parent or guardian, and by observation and common sense."

42. PW2 and PW3 who were the complainant's guardians also corroborated the evidence of the complainant that she was 10 years old. PW2 told the court that the complainant was born on 7th April 2005. In the case of Richard Wahome Chege v Republic, Criminal Appeal No 61 of 2014, the court held that:

> " On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 [the doctor] who examined the complainant, and the complainant herself."

43. In the circumstances, we find that the age of the complainant was proven beyond reasonable doubt.

44. Section 2 of the *Sexual Offences Act* provides that:

> " genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus;"

45. Section 2 of the *Sexual Offences Act* states that:

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;"

46. PW5 was categorical that there was mild tenderness around the anus with healing lacerations and that the history was consistent with defilement. The learned Judge held that the evidence of PW5 corroborated the complainant's testimony that the appellant had done bad manners to her anus. From the foregoing, we find that the element of penetration was proved by the prosecution beyond reasonable doubt.

47. Although the issue of identification was not in contention, it is common ground that the appellant was a neighbor to the complainant, PW2, and PW3. The complainant referred to the appellant as "Baba Madegwa". The appellant had told PW3 that the complainant was in his house watching TV on the material day. PW3 had also gone to collect keys from the appellant indicating that they had a good neighborly relationship. The appellant also confirmed in his defence that he had a son called "Kababa"

whom the complainant had told the court was sent away by the appellant before the incident took place.

48. This to our minds, is satisfactory proof that the appellant was well known to the said witnesses. The risk of mistaken identity was non-existent. It follows, therefore, that this was a case founded upon recognition as opposed to identification by a stranger. In the case of Anjononi & others v Republic [1976 - 1980] KLR 1566, the court held that:

> "...when it comes to identification, the recognition of an assailant is satisfactory, more assuring, and more reliable than the identification of a stranger because it depends upon personal knowledge of the assailant in some form or other."

49. In the circumstances, we find that the appellant was positively identified through recognition by the prosecution witnesses.

50. In the case of Erick Onyango Odeng' v Republic [2014] eKLR the court cited with approval the Ugandan Court of Appeal case of Twehangane Alfred v Uganda, Criminal Appeal No. 139 of 2001, [2003] UGCA, 6 in which it was held that:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."

51. In the circumstances, we find that the alleged inconsistencies in the prosecution case were satisfactorily explained; the inconsistencies did not go to the root of the prosecution case.

52. As regards voire dire, the complainant narrated what had happened to her in the appellant's hands. The appellant was not prejudiced, as he was allowed to cross-examine her. It is trite that corroboration is no longer necessary as a matter of law, in sexual offences where the victim is a minor and has been found sufficiently intelligent to testify for the prosecution. In the case of Mohamed v Republic [2006] 2 KLR 138, the court held that:

> "It is now settled that the courts shall no longer be hamstrung by requirements of corroboration when the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."

53. Similarly, in the case of JWA v Republic [2014] eKLR, the court stated thus:

> "We note that the appellant was charged with a sexual offence and the proviso to section 124 of the *Evidence Act*, clearly states that corroboration is not mandatory. The trial court having conducted a voire dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate."

54. It is common ground that voire dire was not conducted in this case. From the record, we note that the trial court warned itself of the dangers of convicting the appellant on the evidence of the minor who being a child of tender age was not subjected to a voire dire examination. The learned Judge found it satisfactory that the trial court had warned itself of the dangers of convicting the appellant on the evidence of the complainant.

55. Section 19(1) of the Oaths and Statutory Declaration Act on the evidence of children of tender years provides that:

> "(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.
>
> (2) If any child whose evidence is received under subsection (1) willfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment."

56. In the case of Maripett Loonkomok v Republic [2015] eKLR, the court held that:

> "Section 19 of the *Oaths and Statutory Declarations Act* is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth..."

57. It is trite that the purpose of conducting a voir dire examination is for the court to satisfy itself that the child of tender years understands the nature of the oath. If the child does not understand the nature of the oath, his/her evidence may be received, though not given upon oath, if, in the opinion of the court the child possesses sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

58. The court in Maripett Loonkomok v Republic, (supra) addressed itself on the issue of voire dire as follows:

> "It follows from a long line of decisions that voire dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this court recently found that; "In appropriate cases where voire dire is not conducted, but there is sufficient independent evidence to support the charge ... the court may still be able to uphold the conviction."

59. It follows therefore that the only way a trial court can determine if a child of tender years understands the nature of an oath or is intelligent enough so as to be able to give unsworn testimony is by conducting

a voir dire examination and asking particular questions aimed at establishing that fact. In the present appeal, the record of the trial court does not show that voir dire examination was conducted in the manner envisaged under the law. However, we find that as it was determined in Maripett Loonkomok v Republic, (supra), even though a voir dire examination was not conducted, there was sufficient evidence to support the charge.

60. We find that the evidence of the complainant was corroborated by the medical evidence of PW5. Furthermore, the trial court had the occasion to see the complainant testify, and also observe her demeanor, and was able to satisfy itself with the complainant's evidence. In the circumstances, we find that the evidence of PW2, PW3, PW4, and PW5 independently established that the complainant was indeed defiled as she had reported.

61. On the issue of witnesses, it is trite that in criminal matters, the prosecution has to make available to the court all the relevant evidence to aid the court in making a proper determination. However, there is no legal requirement in law on the number of witnesses who ought to be called to prove a fact. Section 143 of the *Evidence Act* provides that:

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

62. In the case of Julius Kalewa Mutunga v Republic, Criminal Appeal No. 32 of 2005, the court stated that:

> "As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion, unless, for example, it is shown that the prosecution was influenced by some oblique motive."

63. Similarly, in the case of Keter v Republic [2007] 1EA 135, the court held that:

> "The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witness fail to testify and the hitherto adduced evidence turns out to be insufficient, only then shall the court draw an adverse interference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."

64. Also, in the case of Benjamin Mbugua Gitau v Republic [2011] eKLR, the court expressed itself thus:

> "This court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see section 143 of the *Evidence Act* Cap 80 laws of Kenya. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys."

65. Accordingly, there is no merit in the contention that the prosecution failed to call some crucial witnesses.

66. In the result, we find that all the ingredients of the offence of defilement were proved beyond a reasonable doubt. The complainant was a child, she was defiled by the appellant. From the foregoing, we have absolutely no doubt that the appellant's conviction was safe.

67. As regards the sentence meted against the appellant, Section 8(2) of the *Sexual Offences Act* provides that:

> " 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."

68. In the case of Christopher Ochieng v Republic [2018] eKLR it was stated thus:

> "In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. ..... Needless to say, pursuant to the Supreme Court's decision in Francis Karioko Muruatetu & another v Republic (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court."

69. In our view, what renders a sentence unconstitutional is the fact that the prescribed mandatory sentence completely precludes the Court from exercising any discretion, regardless of whether or not the circumstances so require.

70. The current jurisprudence on the issue of mandatory sentences is that it is unconstitutional, as it deprives the court of the mandate to exercise its discretion in such a manner as to do justice in a way that imposes a sentence that is appropriate to the circumstances of the particular case which is at hand.

71. In the light of the current jurisprudence on sentencing, and after giving due consideration to the circumstances in which the offence was committed, we are persuaded that the appropriate sentence in the circumstances is 30 years imprisonment.

72. Accordingly, we uphold the appellant's conviction. However, we set aside the sentence of life imprisonment and substitute it with a sentence of 30 years' imprisonment. The said sentence shall run from the date when the appellant was first convicted.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 22ND DAY OF MARCH, 2024.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR