



REPUBLIC OF KENYA



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**Mariko v Republic (Criminal Appeal 83 of 2019)
[2025] KEHC 1303 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1303 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL 83 OF 2019
AC MRIMA, J
FEBRUARY 28, 2025**

BETWEEN

MARTIN SHIKUKU MARIKO APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. M.N. Osoro (RM) in Kitale Chief Magistrate's Court Criminal Case (S.O.) No. 141 of 2018 delivered on 5th April 2023)

JUDGMENT

Background:

1. Martin Shikuku Mariko, the appellant herein, was charged with the offence of defilement contrary to Section 8(1) as read with 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 27th day of August 2018 within Trans-Nzoia County intentionally cased your penis to penetrate into the vagina of CNJ a child aged 3 years.
2. The Appellant faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of *Sexual Offences Act* whose particulars of the alternative charge are that on the 27th day of August 2018 within Trans-Nzoia County intentionally cased contact between your genital organ namely penis and the genital organ namely vagina of CNJ a child aged 3 years.
3. The Appellant denied the charges and he was tried. Five witnesses testified for the Respondent. The complainant's mother testified as PW1 whereas the complainant testified as PW2. Javan Alaka Ogeti, a member of Nyumba Kumi was PW3. Linus Kigame, a medical officer at Kitale District Hospital was PW4 and No. 92056 PC Mary Omari who was the investigating officer testified as PW5.
4. At the close of the prosecution's case, the Appellant was placed on his defence. He gave unsworn testimony and did not call any witness. Upon considering the whole case, the Learned Trial Magistrate



found the Appellant guilty of the main offence of defilement and was convicted accordingly. He was sentenced to life imprisonment.

The Appeal:

7. The Appellant was dissatisfied with the conviction and sentence. Through undated Grounds of Appeal, the Appellant urged this Court to quash his conviction and to set aside his sentence on the following grounds: -
 1. That I pleaded not guilty at trial
 2. That the learned trial magistrate erred in law and in fact by relying on circumstantial evidence.
 3. That the learned trial magistrate erred in law and in fact by not considering the grave contradictions that arose during the hearing of the case.
 4. That the learned trial magistrate erred in law and in fact by not considering that there were fabrications in the evidence adduced by the prosecution side.
 5. That the learned trial magistrate erred in law and in fact by shifting the burden of proof to the Appellant.
 6. That the learned trial magistrate erred in law and in fact in convicting the appellant without documents from the said school of the minor.
 7. That the learned trial magistrate erred in law and in fact by convicting the Appellant when the age of the minor varied between 3 and 3½ years.
8. In his written submissions, the Appellant stated that justice was not served because he was denied the chance to be examined. He claimed further that no exhibit from the scene of crime, including the mattress as claimed by PW2, was produced in Court, a failure he attributed to the prosecution. He also claimed that the complainant was trained and coached and that PW1 misled the Court by stating that his penis was inserted into the mouth of the complainant.
9. The Appellant further submitted that the complainant's date of birth was not established since there was contradictory evidence. Similarly, it was his case that the testimony by PW1 to the effect that the complainant had sperms all over her body was contradictory since no member of the public saw the minor with such. He submitted that no piece of evidence was availed to the Clinical Officer, including the clothes of the complainant a failure by the prosecution in establishing the occurrence on the defilement.
10. In conclusion, the Appellant submitted that the investigation failed by not recording statements of key witnesses including Emma Nduta, father to the minor, P.C Njiru and that of members of the public. He claimed that the investigation failed to comply with the law and *the Constitution*.

The Respondent's case:

11. The Respondent filed written submissions dated 20th June 2023 in opposing the appeal. It was its case that, based on the decision in Daniel Wambugu Maina -vs- Republic (2018) eKLR, it proved penetration, age and identity of the perpetrator.
12. On the aspect of age, the Respondent submitted that PW5 produced a Clinic Card which proved the age of the complainant. Support to that end was drawn from the decision in Msa Criminal Appeal No. 24 of 2015(UR) Mwalango Chichoro -vs- Republic where it was observed that age can be proved



by documentary evidence such as birth certificate, Baptismal card or by the evidence of the child if he is sufficiently intelligent.

13. Regarding penetration, the Respondent submitted that both the evidence of PW1 and that of PW4 were enough to establish its occurrence. It was its case that the treatment notes and the P3 Form proved penetration.
14. On the limb of identity of the Appellant, the Respondent submitted that PW1's evidence was sufficient. The decision in *Roria -vs- Republic* [1967] EA 583 unreported was relied upon to advance the position that the circumstances were tenable to enable the identification of the appellant. In rebutting the grounds of appeal, the Respondent submitted that there was no circumstantial evidence as claimed by the Appellant but rather, direct evidence.
15. On the ground that there were glaring inconsistencies, the Respondent submitted that according to the decision in *Twehangane Alfred -vs- Uganda*, not every contradiction warrants the rejection of evidence. It was urged that the minor contradiction sought to be ignored unless the Court thinks that they point to a deliberate untruthfulness or they do affect the main substance of the prosecution case.
16. In refuting the ground that the trial magistrate shifted the burden of proof to the Appellant, it was submitted that at no instance did it shift.
17. Finally, on the claim that the Court convicted without exhibits, the Respondent submitted that the alleged exhibits were not material elements to be proved by the prosecution. It urged that the appeal be dismissed and the trial Court's conviction and sentence upheld.

Analysis:

18. This being a first appeal, this Court is duty bound to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See *Okono vs. Republic* [1972] EA 74). While re-assessing the evidence, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in *Ajode v. Republic* [2004] KLR 81.
19. For the prosecution to establish the charge of defilement, it must prove beyond reasonable doubt the following critical ingredients:
 - a. Proof of Penetration;
 - b. Age of the complainant.
 - c. Identification of the perpetrator.
20. I will, therefore, in turn consider the foregoing elements vis-à-vis the evidence presented before the trial Court.

Penetration:

21. MN, the complainant's mother testified PW1. It was her evidence that on 27th August 2018, she left her two children, S and CN, the complainant herein, sunbathing to go to the river to fetch water. On coming back, she found S crying and asked him where the complainant was. She then called her name out to no avail. She entered the house and heard her responding in a distance. She drew the curtain to the bedroom and saw the Appellant on top of the complainant. He was on a mattress on the floor.
22. It was her testimony that he pulled the Appellant off her daughter. He had inserted his penis in her mouth and was she was gagging. She had vomited as a result. She screamed and Emma Nduta, her



- neighbour [not a witness], came and locked the door from outside. It was her evidence that Emma also screamed loudly saying that someone was raping PW1's daughter and shortly, people gathered there. It was her evidence that the complainant was wearing a dress but her underwear was off and had spermatozoa on her neck all over her dress. She stated that she examined the complainant's genitals and found spermatozoa there.
23. The complainant testified as PW2. Voir dire examination revealed that she did not possess sufficient intelligence to know the consequence of taking oath, she therefore gave unsown testimony. When she was given a doll, she pointed to the groin as well as her own and stated that he (while pointing at the Appellant) did 'tabia mbaya' and that her mother found her.
24. Finally, the evidence of PW4, Linus Kigame, the Medical Officer at Kitale District Hospital spoke further to the incidence of penetration. It was his position that upon examining the complainant's private parts, he found a broken hymen, bruised vaginal wall and pus in her urine. PW4 produced treatment notes and the P3 Form. The latter indicated that the complainant's hymen was torn, fresh looking and hyperaemic, conclusive proof the indeed there was penetration.
25. The Appellant claimed that crucial exhibits, among them a mattress and the dress of the complainant were not produced to prove penetration. Section 2 of the [Sexual Offences Act](#) defines penetration as follows.;
- “penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;
26. This position was fortified in Mark Oiruri Mose -vs- R (2013) eKLR when the Court of Appeal stated thus: -
- Many times, the attacker does not fully complete the sexual act during 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 only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.... (emphasis added).
27. Later, the Court of Appeal, then differently constituted, in Erick Onyango Ondeng v. Republic (2014) eKLR held as such on the aspect of penetration: -
- In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.
28. In this case the hymen was ruptured. It is conclusive proof of penetration and it was not necessary that the alleged exhibits to be produced or other witnesses to be called for that ingredient to be proved.
29. In Julius Kalewa Mutunga -vs- Republic [2006] eKLR, the Court of Appeal held 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.
30. The discretion to decide the number of witnesses and the exhibits to be produced resides with the prosecution. With the evidence on record, this Court is satisfied that penetration was proved beyond reasonable doubt.



Age of the complainant:

31. The decision in Msa Criminal Appeal No. 24 of 2015(UR) Mwalango Chichoro -vs Republic is instructive in ascertaining the age of the complainant herein. There is on record the Clinic card which was dated 15th April 2014 and indicated that the complainant was born on 3rd March 2014. A computation of the complainant's age as at 27th August 2018, the date of the offence, indicates that she was 4 years and 5 months.
32. The Appellant's contention that it did not come out clearly as to when the complainant was born for purposes of knowing her age is put to rest by the Clinical card, an exhibit not challenged by the Appellant. This Court, therefore, finds that the age of the complainant was sufficiently proved.

Identification of the perpetrator:

33. The Appellant was found by PW1 in the act. He was lying on top of the complainant. The evidence on identification was hence on recognition. Further to the foregoing, the complainant, notwithstanding her tender age and unsworn testimony pointed at the Appellant as the assailant when she was testifying.
34. Additionally, when Emma Nduta raised alarm at the PW1's home, members of the public, among them, PW3, a member of Nyumba Kumi was drawn to the commotion at PW1's home and saw the Appellant being assaulted by the crowd and being frog matched towards his office. PW3 saw and was able to recognize the Appellant herein.
35. It is noteworthy that the Appellant did not challenge that he was arrested inside PW1's house. The witnesses knew him well and the offence was committed during the day. This Court finds that there were no chances of mistaken identity. There is, therefore, no doubt that the Appellant was positively identified as the perpetrator of the offence.
36. The Appellant was, hence, properly found guilty and convicted.

Sentence:

37. The Appellant was sentenced to life imprisonment. He contended that it was harsh and ought to be otherwise reviewed in the event the appeal on conviction failed. This Court is cognizant of the Supreme Court decision in Petition No. E018 of 2023 Republic -vs- Joshua Gichuki Mwangi. The Learned Judges remarked on sentences in respect to offences under Section 8(2) of the *Sexual Offences Act* and asserted that the sentences must be rendered as they were unless otherwise lawfully overturned. The Apex Court stated as under: -

(66) We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.



38. The Appellant herein was sentenced in line with the dictates of section 8(2) of the *Sexual Offences Act*. The findings of the Supreme Court are succinct and this Court ought not disturb the sentence. The appeal against sentence can only fail.

Disposition:

39. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and subsequently elected into the Judicial Service Commission thereby mostly being away from the station. Apologies galore.

40. In the end, the whole appeal is found and held to be without merit and is hereby dismissed.

41. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2025.

A. C. MRIMA

JUDGE

Judgment delivered virtually in the presence of:

Martin Shikuku Mariko, the Appellant in person.

Mr. Mugun, Learned Prosecutor instructed by the Director of Public Prosecutions for the Respondent/State.

Duke – Court Assistant.

