Mareche v Republic (Criminal Appeal E036 of 2023)
[2025] KEHC 9162 (KLR) (30 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9162 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E036 OF 2023

DK KEMEI, J

JUNE 30, 2025

BETWEEN

PETER YIEWA MARECHE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of Hon. S.W. Mathenge (SRM) delivered on 25/07/2023 in Bondo SPM's Court Sexual Offences Case No. E061 of 2021)

JUDGMENT

1. The Appellant herein, Peter Yiewa Mareche, was charged with an offence of defilement contrary to section 8[1] as read with section 8[3] of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 6th day of October 2021 at [particulars withheld] village, Bondo township location in Bondo Sub County within Siaya County, intentionally and unlawfully caused his penis to penetrate the vagina of M.A.O. a child aged 13 years.

2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11[1] of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the 6th day of October 2021 at [particulars withheld] village, Bondo township location in Bondo Sub County within Siaya County, intentionally touched the vagina of M.A.O a child aged 13 years with his penis.

3. The Appellant denied the charges and the matter proceeded to full trial where the Respondent called four witnesses in support of its case. The Appellant was subsequently found guilty of the main charge, convicted and sentenced to fifteen years' imprisonment.

4. Aggrieved by the said conviction and sentence, the Appellant filed his Petition of Appeal dated 27/8/2023 wherein he raised the following grounds of appeal:

i. That the trial magistrate erred in law and in fact in failing to appreciate the import of section 83 of the *Evidence Act* as regards the presumption of Appellant's birth certificate as sufficient proof of age.

ii. The Appellant's birth certificate having been confirmed as authentic by the Registrar of births and deaths [a government officer] the trial court was not open to ignore his evidence as to the authenticity of the same.

iii. The trial magistrate erred in law and in fact in failing to appreciate that the Appellant herein was thus a minor for purposes of proceedings before the trial court.

iv. The trial magistrate having failed to appreciate that the Appellant was a minor, the court erred in failing to ensure that the Appellant was entitled to legal representation in violation of the Appellant's rights under the Children's Act and *the Constitution* of Kenya, 2010.

v. That the trial magistrate erred in law and in fact in failing to appreciate that there was no sufficient evidence to sustain a conviction against the Appellant.

vi. That the trial magistrate erred in law and in fact in failing to appreciate that the Complainant's evidence was not sufficiently corroborated given that the court relied on the evidence of a single witness.

vii. That the trial magistrate erred in law and in fact in failing to appreciate that the medical evidence as adduced before the court was insufficient to prove penile penetration of the Complainant and /or the charges therein.

viii. That the trial magistrate erred in law and in fact in failing to consider that the prosecution had not proved their case beyond reasonable doubt.

ix. That the trial magistrate erred in law and in fact in failing to appreciate that the Complainant having been examined seven days after the alleged incident, there was no medical report that would support and/or corroborate the fact of defilement and thus any circumstances and medical finding was thus substantially hearsay.

x. Given the fact that the Appellant was unrepresented, the trial magistrate erred in law and in fact by allowing non-makers of documents to present evidence without permitting and or informing the Appellant of the implication and import of evidence likely to be adduced thus exposing the Appellant to a prejudicial trial.

xi. That the trial magistrate erred in law and in fact in failing to appreciate that the prosecution's evidence was inconsistent and contradictory to sustain a conviction.

xii. That the trial magistrate erred in law and in fact in failing to consider the Appellant's defence.

xiii. That the trial magistrate erred in law and in fact in failing to consider the Appellant's mitigation

xiv. That the trial magistrate erred in law in imposing a manifestly harsh sentence upon the Appellant.

5. The Appellant thus prayed that the appeal be allowed, conviction and the sentence be set aside and he be acquitted.

6. This being a first appeal, this Court must reconsider and re-evaluate the evidence adduced before the trial Court so as to arrive at its independent finding and conclusion as to whether or not to uphold the decision of the trial court. [See Okeno v Republic [1972] EA 32. In doing so, 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 make due allowance in that regard as was held in Ajode v Republic [2004] KLR 81.

7. The facts of the case are as follows. On 6th October 2021 at about 1100hours M.A.O.(PW1) aged 15 years old was heading to her home when on the way she met the Appellant who convinced her to go with him to his house in [particulars withheld]. That at the Appellants house, she washed his clothes, made tea then made dinner. That the Appellant informed her that she would spend the night with him and that she agreed. That during the night, he informed her that he would marry her after she was done with schooling. That the Appellant then asked her to remove her clothes as he removed his, then he took his penis and inserted it inside her vagina and defiled her. That the next morning the Appellant took her to her home and went away. At home, the Complainant was taken by her mother R.A. to the children's office where she was interrogated then taken to the police. At the police station, No. 112661 PC Obare Winston (PW4) issued her with a P3 form and escorted them to Bondo Sub County Hospital where she was examined and the P3 form filled and which was produced as P Exhibit 1 by Dr Daniel Wanjovu Juma (PW3) who confirmed that there was penile penetration and hence there was defilement. The doctor upon being cross-examined by the Appellant stated that the treatment card belonging to the Appellant indicated that he was aged 24 years old.

8. No.112661 Pc Winston Obare (PW4) testified that he received the complainant and issued a P3 form and escorted her and her mother to hospital for examination. That the Appellant was later arrested and he too escorted to hospital where he was examined. He produced the age assessment of both the complainant and Appellant as exhibits 3 and 4 respectively.

9. The trial court later ruled that the Respondent had established a prima facie case against the Appellant who was subsequently placed on his defense. He opted to tender an unsworn statement.

10. Peter Yiewa Mareche (DW1) testified that he did not know what was going on. That the village elder who had a land tussle with his father arrested him and took him to the police station. That he stayed at the police station for three days and was later informed that he had defiled a girl. That he was later taken to court and then to prison. He maintained that the charges were false.

11. The appeal was canvassed by way of written submissions. It is only the Appellant who complied.

12. The Appellant submitted that he was discriminated against by the trial magistrate from the onset. That at page 9 of the Record of Appeal, the investigating officer confirmed that the birth certificate of the Appellant was issued in Bondo and that the same was genuine and that a pro bono advocate was then appointed for him. That what happened 15 days later that caused the trial magistrate to render the Appellant an adult, is what the Appellant did not understand. He submitted further that the age assessments are also based on estimations and that most of them place the margin of error to be between 2-4 years and not months as alleged.

13. Further, the Appellant submitted that upon the discharge of the Pro bono advocate that had been appointed, the trial magistrate went ahead with the trial without informing the Appellant of his rights to legal representation of his own choice as provided under Article 50[2][g] of *the Constitution*. The Appellant submitted that this was prejudicial and a direct intention to weaken the defence, making it repugnant to Article 25 [c] of *the Constitution*. He submitted that the action was administratively unfair and that it gave undue advantage to the prosecution over the defence. Reliance was placed in

the case of Kenga Hisa v Republic [2020]eKLR in approving the case of Pett v Greyland Racing Association[1968] 2ALL ER 545 that on his own:

> " it is not every man who has the ability to defend himself on his own. He cannot bring out the points on his own favour or the weakness on the other side. He may be tongue tied, nervous or confused, or wanting intelligence. He cannot examine or cross examine witnesses. We see it every day. A Magistrate says to a man "you can ask any question you like" whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone who can speak for him; and who is better than a lawyer, who has been trained for the task."

14. Based on the foregoing, the Appellant submitted that the most honorable action by this court will be to give an acquittal or worse order for a re-trial where he will have an opportunity to properly defend himself.

15. The Appellant likewise submitted that at page 28 line 8 of the Record of appeal where PW4 stated that "pregnancy test was positive" The DPP then stated : "I pray to follow up on the D.N.A. if indeed the complainant was pregnant" That this would have shown adherence to section 36 of the Sexual offence Act and the outcome would have either directly implicated the Appellant if it positively matched his DNA and there would then be no need for other evidence of proof; if it did not match then it would lead to his acquittal. The DNA was never followed up and that there was no further explanation offered by the prosecution for not availing it and that the court likewise went silent on it. He submitted that the same may have had a link on section 124 of the *evidence Act*.

16. The Appellant submitted on the circumstances of the case, that if at all the act occurred then it was the making of the Complainant (PW1) as she stated thus:

> " I recall on 6/10/2021. My mum wanted to go to church, she left. I went to the neighbours, then the neighbours wanted to leave. I decided to go home. On my way, I met peter, he told me to go home and i agreed"
>
> What was it burning her that could not let her have peace in her mother's house? What was it that made her so desperate only to long for other people's company? Together with the Appellant, she claimed that they went to his house then the appellant informed her that she was leaving for Bondo and this was about 1100 Am. Why didn't she leave then as she had left the neighbours place when they were leaving? The Appellant submitted that PW1 not only stayed but also made herself comfortable engaging herself in extra errands and that he quoted: "He left, I washed clothes." He continued that when the Appellant came back at 2.00pm he sent her to buy milk and bread and thereafter she voluntarily made tea. This statement then followed: "In the evening he told me I would spend there. He told me he would take me home the next day. He bought food. I cooked and we ate. We went to sleep..." That PW1 further stated: "we had done it many times. He was my boyfriend. It was not the first time we were having sexual intercourse"

The Appellant submitted that it seemed like the Complainant did not have an issue with him as she was simply enjoying herself in the relationship. He relied on the case of Martin Charo v Republic Malindi Criminal Appeal number 32 of 2015.

17. Lastly, the Appellant finally added that it can be easily concluded that it is immoral for one to have sex with a child below the age of 18 years. However, where the same child under 18 years who is protected

by the law opts to go into men's houses for sex and then goes back home, why should the court conclude that such a person was defiled?

18. I have considered the record of appeal and the submissions filed. I find that the issue for determination is whether the Respondent proved the charge against the Appellant beyond reasonable doubt.

19. The offence of defilement requires certain essential ingredients to be proved namely, the age of the complainant, penetration and the identity of the perpetrator.

20. As regards the aspect of age, the complainant (PW1) testified that she was 15 years old. She identified the age assessment report which was produced as Exhibit 3. The age assessment report placed her age at 15 years. The same was corroborated by her mother (PW2) and the investigation officer (PW4) who produced the age assessment report. Hence, the complainant was a child within the meaning of section 2 of the *Children Act* and thus below the age of 18 years old. The aspect of age in a defilement case is very crucial as it determines the sentence to be imposed upon conviction. I find that the Respondent proved this ingredient beyond reasonable doubt.

21. As regards the aspect of penetration, section 2 of the *Sexual Offences Act* defines it as the partial or complete insertion of the genital organs of a person into the genital organs of another person. The complainant (PW1) testified that she went to the Appellant's house at about 1100 AM when the Appellant informed her that he was headed to Bondo and that she opted to remain at the Appellant's house and make herself comfortable. That the Appellant returned from Bondo and that they spent the day together until nightfall when they went to sleep. That it is that night that the Appellant caused his penis to penetrate her vagina. She further confirmed that the Appellant had been her boyfriend, with whom they had been engaging in sexual intercourse in the past. The complainant was examined for sexually transmitted diseases and pregnancy. That VDRL turned negative while the pregnancy test turned positive. The doctor, therefore, confirmed that there was indeed penetration of the complainant's genitalia. The P3 form and treatment notes were produced as exhibits. Iam satisfied that the ingredient of penetration was proved by the Respondent beyond any reasonable doubt.

22. As regards the aspect of identification of the Appellant as the perpetrator, it was the evidence of the complainant that she had visited the house of the Appellant on the material date and that he allowed her to remain behind as he went to Bondo town and that he later returned and that they had dinner and later retired to sleep whereupon the Appellant inserted his penis into her vagina and that he escorted her home the following day. The Appellant in his defence, denied involvement and maintained that it was the instigation of the clan elder who had a land tussle with his father. Iam unable to believe the Appellant's assertions in that the complainant and her family were different from that of the clan elder. The Appellant had already known about the case and had heard the evidence of the Respondent before tendering his defence evidence. I find that it is highly unlikely that the complainant and her family could have the Appellant charged yet there was no evidence of family disputes in the past. The complainant stated that the Appellant was her boyfriend for a long time. That being the position, it is impossible that the complainant could have been mistaken about the identity of the person who had defiled her. In fact, she stated that the Appellant had promised to marry her as his wife after she completed school. I find the Appellant's defence evidence did not shake that of the Respondent, which was quite overwhelming against him and proved beyond any reasonable doubt.

23. It is noted that the Appellant in his grounds of appeal has contended that the trial court failed to acknowledge that he was a minor at the time of the proceedings and further faulted the trial court for disallowing the birth certificate presented by the Registrar of Birth and accepting the evidence of the doctor's age assessment report. Indeed, the Appellant, prior to the hearing of the matter, presented his birth certificate serial number 5735400 which indicated the date of birth as 23/12/2004 implying

that he was aged 17 years at the time of the incident. The trial court later summoned an official from the registry of births and deaths to shed light on the matter. Duncan Mochama stated inter alia; that the birth certificate in question was a late registration after the mother of the Appellant made the application; that he is not an expert in age assessments and that they rely on documents presented to their office; that due to the fact that the issue is on late registration, it is difficult to authenticate documents and that the better option is to call for expert opinion as they do not have mechanisms to authenticate the documents presented to them. The Appellant was sent for an age assessment at Siaya County Referral Hospital and was examined by Mirriam Mumbe who stated that she examined the Appellant's teeth and noted that the wisdom teeth had erupted and that an X-ray revealed that he was estimated to be 21 years of age. That she gave the margin of error of a few months. The learned trial magistrate was convinced by the report of the doctor on the age of the Appellant as more credible as compared to the birth certificate and noted that the Appellant actually appeared as an adult when he took plea and that the issue of his age was brought out by himself forcing the trial court to establish the authenticity of the document and ruled that the Appellant was an adult. It is instructive that the Appellant did not appeal against the finding of the trial court dated 28/10/2022 and that he duly participated in the trial thereafter until conclusion. That being the position, the Appellant's contention that his rights of being a child were violated not convincing. It is further noted that upon the finding by the doctor regarding the Appellant's age, his learned counsel opted out from representing him as he had now been confirmed to be an adult. Hence, the Appellant was an adult throughout the trial. I find this ground of appeal devoid of any merit.

24. The Appellant in his grounds of appeal and submissions has maintained that the complainant had conducted herself as an adult and thus the trial court ought to have given him the benefit of doubt. It is instructive that the Appellant in his defence stated that he did not know anything about the girl who was allegedly defiled and went ahead to claim that the instigation was by the clan elder, who had a land dispute with his father. There is nowhere that the Appellant raised any issue regarding having met the complainant and how she appeared to him and further did not raise any defence under section 8[5] and [6] of the *Sexual Offences Act* to enable the trial court consider the same. The Appellant's attempt to raise it in this appeal is rather late in the day. In any event, even if the complainant indicated that she had willingly visited the Appellant in his house, the fact remains that she did not have capacity to consent to the said sexual intercourse by virtue of being a minor and thus the same could not aid the Appellant's case. I find this ground of appeal to be devoid of any merit.

25. From the foregoing analysis, the finding on conviction by the learned trial magistrate was quite sound and must be upheld.

26. As regards sentence, section 8[3] of the *Sexual Offences Act* provides that a person who commits an offence of defilement with a child aged between twelve and fifteen years shall upon conviction be sentenced to a sentence of not less than twenty years. It is noted that the Appellant was ordered to serve a sentence of fifteen [15] years' imprisonment. It is also noted that the Respondent did not file a notice of enhancement of sentence and therefore i see no reason to enhance it. The Appellant managed to post bail upon taking plea and therefore he was out on bond pending the trial and thus the sentence shall commence from the date of conviction. I find the sentence imposed by the trial court is the minimum possible in law.

27. In the result, it is my finding that the appeal is devoid of merit. The same is dismissed. The conviction and sentence of the trial court is upheld.

Orders accordingly.

DATED AND DELIVERED AT SIAYA THIS 30TH DAY JUNE, 2025

D.KEMEI

JUDGE

In the presence of:

Peter Yiewa Mareche.....Appellant

M/s Kerubo .....for Respondent

Okumu.....Court Assistant