Maina v Republic (Criminal Appeal E036 of 2022)
[2024] KEHC 2948 (KLR) (Crim) (19 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2948 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E036 OF 2022

LN MUTENDE, J

MARCH 19, 2024

BETWEEN

GIDRAPH MAINA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal arising from the original conviction and sentence in Sexual Offences Case No. 100 of 2019 in the Chief Magistrates' Court Makadara, by Hon. Kivuti – SRM on 22nd February, 2022)

JUDGMENT

1. Gidraph Maina, the Appellant, was charged with the offence of Defilement Contrary to Section 8(2) of the *Sexual Offences Act*. The particulars of the offence being that on the 21st day of April, 2019 at Industrial area within Nairobi County intentionally and unlawfully caused his penis to penetrate the anus of N.K a child aged 6 years old.

2. In the alternative he faced a charge of committing an Indecent Act with a minor contrary to Section 11(1) of the *Sexual Offences Act*. Particulars were that on the said date at the said place he intentionally and unlawfully committed an Indecent Act with N.K a child aged six (6) years by touching her private parts namely anus.

3. He was taken through full trial, convicted for the main count and sentenced to serve life imprisonment.

4. Aggrieved, he proffered an appeal on grounds that: The court erred in law in convicting the appellant on a flawed trial; the appellant's right to counsel was not explained to him; the voire dire evidence was not within the law; there was failure to disclose the language used to record the evidence of PW1; Section 200 of the Criminal Procedure Code was not explained to him; the court erred in law and

fact by disregarding vital evidence; that the court failed to consider the evidence objectively; the court did not inquire whether the visual identification was positive and credible; evidence of key witnesses was incredible; the case had substantial contradictions, inconsistencies and discrepancies; and, that the court erred in rejecting his plausible defence statement.

5. Briefly, facts of the case were that PW2 BM, the mother of the victim left her with her two siblings under watch of their neighbor, PW4 June Kamene, as she attended to some Chama business in the neighbourhood. PW4 left them going to purchase vegetables and on her way back she saw the appellant coming from the house of PW2. Soon thereafter PW2 returned home to find PW 1 who reported that she had been molested by the appellant. She raised an alarm and members of public crowded and wanted to assault the appellant. He was rescued by PW3 the assistant secretary Nyumba Kumi initiative and escorted to Mukuru kwa Rueben Police Post. In the meantime the complainant was taken to Mathare Medecins Sans Frontieres (MSF) medical facility, where she was examined, treated and a Post Rape Care Form filled in that regard. Hence the case.

6. Upon being put on his defence, the appellant stated that on the 20th April, 2019, having received a call from a friend, he went to meet him within Mukuru kwa Rueben area. His friend wanted to buy a set of sofa seats. Having paid for it his wife went home as he remained with his friend Daniel Kibe. They went to watch football at a bar then he went out to get a charger from his house and encountered the complainant's mother washing clothes next to his door. She greeted him, entered the house and borrowed from him a basin that he gave. She offered to wash for him clothes but he gave a pair of socks and shoes to be cleaned instead, then he left going back to the bar. He returned to the house at 1:00 pm and they had issues concerning payment. That on returning, the complainant's mother entered his house and sat on the sofa seat and demanded for Ksh 300/= for the job which he did not have. She asked him to have sex with her as an alternative means of payment but he declined and the complainant's mother started murmuring and swore that he would pay her at all costs. The accused left his house and joined Kibe at the club until 5:00 pm. He returned later to find the complainant's mother still demanding for payment, he told her to be patient but she started screaming claiming that he had defiled her child. That the neighbours who asked her to calm down called the complainant who denied knowing him. Other neighbours went to the scene and forced him back to the house and locked him inside. He was taken to Mukuru Police Post where he was locked up.

7. The appeal was disposed through written submissions. The appellant contends that he was not informed of his right to legal representation at the inception of the trial and had a further right to Probono Counsel. That the court attempted to rectify this gap on 24th May, 2019 when the hearing had commenced but the court's action was unprocedural and an afterthought.

8. That voire dire examination conducted was not complacent to the strict requirement of Section 19 of the Statutory Oaths and declaration Act, as the court failed to inquire into the victims intelligence and whether she understood the purpose of telling the truth.

9. That the trial court did not indicate the language used during the evidence of the complainant. That it was not sufficient to indicate the interpretation as in English/Kiswahili, he argues that this was a vague presentation of the record and it cannot be known if the appellant participated in the trial.

10. On Section 200 of the Criminal Procedure Code, the appellant submits that there is no record that he was informed of his right to recall witnesses when the new magistrate took over. The appellant contends that he was prejudiced and that this flaw was substantial enough to overturn the conviction. That he was only asked if the matter should start denovo and he ignorantly agreed to have the matter proceed from where it reached. He urges that he had a right to recall the witnesses and refers court to decision in Bob Ayub vs R 106 (2009) eklr by the court of appeal.

11. The appellant submits that the charges were not proved, the court did not interrogate whether visual identification was positive and credible, that the case turned on single witness evidence and required care before conviction as per the decision in the case of Roria vs R (1967) EA 583 ..

12. That penetration was not proved; the weapon used to cause the injuries and the degree of the injury was not recorded on the P3 form; and, the age of the injuries was not indicated implying that the victim was never assaulted as alleged.

13. That evidence contradicted the charges and that these gaps make the charge sheet defective. That the nature of offence was not disclosed and the conviction was not safe.

14. This is a first appellate court which is duty bound to interrogate the record of the trial court, to reassess the evidence and to come up with its own conclusions so as to consider whether the conviction was safe. The court should warn itself that it never saw the witnesses during the evidence. In David Njuguna Wairimu vs Republic (2010) eklr the Court of Appeal stated that:

> " The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

15. The appellant contends that the right to counsel was violated. An accused right to counsel is an integral part of his right under Article 50(2)(h) and (g) of *the Constitution* as read with Section 43 of the *Legal Aid Act* place a duty on the court to advice or explain the right to the accused, depending on the circumstances of the case appoint a probono counsel to represent him. Section 43 provides that:

> (1) A court before which an unrepresented accused person is presented shall —
>
> a. Promptly inform the accused of his or her right to legal representation;
>
> b. If substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and
>
> c. Inform the Service to provide legal aid to the accused person

16. In this case, there is no doubt that the appellant was not represented. The gravity of the offence and the likelihood that he would be sentenced to life imprisonment required the court to be proactive during plea taking and at all times of the proceedings.

17. The appellant also argues that he also deserved representation at the expense of the state. The provisions of Section 46 of the *Legal Aid Act* guide the court on the instances where the State sponsored legal representation would be considered. Article 50 (2) (h) of *the Constitution* sets the threshold on this issue, providing that counsel would only be appointed by the state, "if substantial injustice would otherwise result."

18. In the case of Langat Dinyo Domokonyang -vs- Republic [2017] KLR, which is persuasive, the High Court found that the charge of defilement, although undeniably serious, is not one of unusual complexity in the response and defence to which necessarily requires legal representation by counsel. The sentence of life imprisonment is not an "injustice" within the meaning of the Article but a penalty upon a finding of guilty. No exceptional difficulty in defending a charge of defilement was shown or detected or was detectable by the court in this case where the accused was certified mentally fit to plead and therefore stand trial.

19. In Thomas Alugha Ndegwa vs Republic; C.A. No. 2 of 2004, the Supreme Court stated that the right is not limited to capital offences but it is open ended and that the interests of justice in criminal matters should be determined by considering the seriousness of the offence as well as the severity of the sentence.

20. That, it is upon the Judge or magistrate in considering what would meet the interests of justice to establish whether public justice would suffer if legal aid is not provided to an accused.

21. The question is whether such breach or delay in advising him of the available right caused substantial prejudice warranting the court to set aside the conviction. I find the delay having not been prejudicial since the appellant had actively engaged the case and understood the proceedings. Further the appellant who was aware of his rights was at liberty to have appointed counsel now that he knew of his rights, that option was not denied.

22. On whether he deserved State sponsored representation, the record is clear that the appellant was able to understand the charges and he also cross-examined witnesses and finally presented a coherent defence, and ably challenged documentary evidence presented such that the likelihood of substantial prejudice resulting was not apparent.

23. As to whether evidence was recorded in a language understood by the appellant, the requirement is that the charges must be read out in a language that is understood by the accused. The appellant does not challenge the language used during plea taking when he first came to court. Instead the appellant refers to PW1's evidence and claims that the court did not record the language used. Further that his right to interpretation was also violated.

24. The record is clear that the plea and further proceedings were taken in the language of the court. It is in this language that the appellant was able to cross examine the minor twice and he also cross examined other witnesses. He advised court of his option to give unsworn defence and in the same language narrated his defence to the court, he stated during the defence that he understood the charges. Having been accorded services of an interpreter, there is no doubt that he followed proceedings.

25. As to whether Section 200 of the CPC was complied with and whether the appellant exercised his right to recall witnesses; the matter was first heard by Honorable Suter. It was later determined by Honorable Kivuti who had taken over the case on 8th November, 2021. On that date the prosecution informed the court that the matter was part heard. The record shows that the provisions of Section 200 of the CPC were explained in Kiswahili language and the appellant's response was that the case should proceed from where it reached.

26. The appellant did not apply for recalling of witnesses on 8th November, 2021 but he had earlier applied to recall PW1 and PW2 before the previous magistrate. His ground for recalling the two was that he had not sufficiently prepared. The application was opposed by the prosecution on grounds that PW1 was agitated when she had testified and that the application was made after 3 years. The court agreed with the prosecution and noted that the accused had enough time, the court also noted that there was a danger that the child had lost memory of the events. That finding was within the law since the right

to recall is not automatic it may be declined where the accused does not lay sufficient ground. PW1 was already cross examined twice and the accused had to give sufficient reason to recall the 6 year old victim.

27. The application to recall PW2 was allowed and the Investigating Officer was to be summoned to advice court on her availability. On 23rd August, 2021 the Investigating Officer told court that it would be difficult and it would cause delay to avail PW2, and, the court directed that the accused proceeds with the evidence of the Investigating Officer.

28. From those proceedings it is clear that Section 200 of the CPC was explained to the appellant on 8th November, 2021 when Honorable Kivuti replaced the previous magistrate, it is assumed that the entire explanation captured his right to recall witnesses. He cannot claim ignorance since he had applied for further cross examination of witnesses on a previous date, this was before Section 200 of the CPC came to play.

29. The requirement that the judicial officer complies with Section 200(3) of the CPC was met. The issue would be whether he was prejudiced and if the breach went to the root of the conviction. Here, a party must be vigilant to urge his rights at the earliest opportunity.

    In criminal practice violations must be raised at the trial court to enable appropriate response and resolution.

30. In the case of Francis Macharia Gichangi & 3 Others V R. Cr. Appl. No. 11 of 2004, the Court of Appeal stated that it is to be reasonably expected that an Accused person who claims that his rights have been violated will at the very least raise the issue with the trial court. The appellant herein never raised any issue regarding violation of his rights with the trial court.

    That right was finally lost once judgment was delivered.

31. Regarding the contention whether the voire dire examination was compliant, Section 19 of the *Oaths and Statutory Declarations Act* provides that:

> 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 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 ...

32. The Court of Appeal in Johnson Muiruri -vs-. R [1983] KLR 445, held as follows regarding the evidence of a child of tender years:

> "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 voire dire examination, whether the child understands the nature of an oath in which (case) his sworn evidence may be received. If the court is not so satisfied, his unsworn 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 it is corroborated by material evidence in support thereof implicating him."

33. There is no dispute that the victim was a minor of tender age and that voire dire examination was carried out.

34. The appellant contention is that the court went ahead to take her unsworn evidence despite having taken her through voire dire. The purpose of voire dire is to test the competence of the witness to give sworn evidence, the court sets out to test if the child is possessed of sufficient intelligence and understands the duty of speaking the truth.

35. The court has two options. The assumption that every voire dire examination should lead to giving of sworn evidence is misinformed. Once the court notes that the child does not possess requisite intelligence and more important, that she does not appreciate the importance of telling the truth and what an oath means, the court should settle for unsworn evidence. That decision is discretionary and can only be impugned where there is ground that the court's decision was perverse.

36. The child was of tender age and slow in processing questions, similarly she did not understand what testifying on oath was. There was no prejudice since the appellant cross examined her and all other witnesses lined up by the prosecution.

37. The appellant complains that the offence was not proved beyond doubt. Section 8(1) of the *Sexual Offences Act* provides that:

> 1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

38. The offence is proved where the evidence tendered shows beyond doubt that: The victim was a child; there was an act of penetration, and, that the individual was positively identified as the perpetrator.

39. The victim's age was proved to be 6 years old .The child health card and PW2's testimony were sufficient to establish age. The court also found that the child was of tender age and could not give sworn evidence. Other medical records also corroborated the evidence on her age. The allegation that the P3 Form was the only solid evidence to prove age is unfounded.

40. On penetration, the case of Bassita Hussein -vs- Uganda, Supreme Court Criminal Appeal No. 35 of 1995, set out the principle that:

> a. "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims own evidence and corroborated by medical evidence or other evidence."

41. PW1 testified how the assailant gained forceful access into the house and inserted his penile organ on the child's anal opening causing injuries that she sustained. She pointed at the exact area that the act occurred to the court, as she had narrated the incident to her mother. The medical records adduced by PW3 showed that her anal opening was raptured and that this seriously affected the anal muscle.

42. PW2's evidence and the PRC corroborate the fact that she was unable to sit due to pain and this was immediately after the molestation. The failure to indicate the weapon used and the nature and age of the injuries on the P3 Form would not affect the charge.

43. There is no indication that the P3 Form was fabricated as alleged. The P3 Form was filled and signed by the same clinical officer who examined the minor at the hospital immediately after the incident.

44. On whether she identified her assailant, PW1 identified the appellant herein as Maina during further cross examination. From her evidence, the appellant was a neighbour and his house was on the upper side of the plot. The minor stated that she had recently been to his house. PW2 stated that they had recently moved to the plot and that they were a couple of days old. That the child knew the appellant

name from another child. PW3 and PW4 also lived within the plot area and they both knew the appellant as Maina.

45. The appellant case is that the identification was by a single witness and that the court should have tested the evidence before convicting him. He further urges that the offence took place at night. However, PW1's evidence was that it was in the evening and the light was still on. Although she did not tell the court which light she was referring to, PW4 testified that she saw the appellant come from PW2's house as soon as she heard screams. Circumstantial evidence having corroborated that of the victim, this was not evidence of a single witness.

46. In this case, PW4's testimony demonstrates that after seeing the accused come from the house the two were able to have a conversation where the appellant abused her. PW2 also went to the appellant house after being notified of the incidence, neighbors gathered and PW3 also identified the accused at the scene . The evidence shows that the events occurred within the same time and were not too remote from the time the complainant was molested.

47. The totality of the evidence on identification proves that the appellant was known to the minor and the neighbour's who identified him, therefore, an identification parade was not necessary since the child had recently seen her assailant and he was arrested instantly.

48. On the question of contradictions and inconsistencies the court's duty is to interrogate the inconsistencies and determine whether they affect the charges. In Dickson Nsamba Shapwata & Another -vs- Republic, Cr. App. No. 92 of 2007, the Court of Appeal stated as follows:

> " In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

49. The fact that the other children did not hear the minor scream during the act, the fact that PW2 denied knowing the appellant while PW4 alluded to this fact, the fact that the Investigating Officer referred to an attempted defilement do not cast doubt on the corroborated evidence proving that the appellant was placed on the scene and further the act of defilement occurred.

50. In his defence, the appellant did not tell the court of his whereabouts on 21st April, 2019 when the offence occurred. PW1 and PW4 particularly placed him at the scene where the defilement occurred. As regards his claim that the child's mother had a vendetta against him and that she threatened him after he declined her sexual advances, PW2 was not cross examined on this issue.

51. The appeal is against both the conviction and sentence. The charges referred to defilement of a minor aged 6 years old and were brought under Section 8(2) of the *Sexual Offences Act* that provide for life imprisonment. The difficulty is that the uncertainty of the life sentence period does not meet the objectives of sentencing such that the accused does not know the end period of his incarceration and he does not have any hope of reconciliation.

52. Emerging jurisprudence has seen mandatory minimum sentence set aside and definite sentences imposed, the legality of minimum mandatory sentence having been questioned.

53. In Marindany -vs- Republic (Criminal Appeal 27 of 2015) [2023] KECA 450 (KLR) (14 April 2023) the Court of Appeal set aside life imprisonment where the appellant was convicted on his own plea for defiling a 7 year old girl. The Court of Appeal sentenced him to 30 years imprisonment. The appellant was 26 years at the time of offence. The court directed that the sentence runs from the date of conviction by the trial court.

54. On the issue of time spent in custody having not been considered, Section 333(2) of the Criminal Procedure Code provides that:

> (2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

55. That provision of the law applies in mandatory terms and it is the accused person's entitlement. The court is required to state that it considered the period spent in remand and it must further deduct that period from the sentence meted out. This was stated in the case of Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR where the Court of Appeal delivered itself thus:

> " The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person..."

56. The appellant has been in custody and ought to benefit from the provisions of Section 333(2) of the Criminal Procedure Code.

57. The upshot of the above is that, I affirm the conviction, but set aside the sentence meted out which I substitute with thirty (30) years imprisonment. The sentence shall run from the date of arrest, the 21st March, 2019.

58. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY

THROUGH MICROSOFT TEAMS AT NAIROBI,

THIS 19TH DAY OF MARCH, 2024.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Appellant

Mr. Mongare for ODPP

Court Assistants – Asin & Gladys