



**Nkonge v Republic (Criminal Appeal E003 of 2024)  
[2024] KEHC 10465 (KLR) (27 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10465 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL APPEAL E003 OF 2024  
LM NJUGUNA, J  
AUGUST 27, 2024**

**BETWEEN**

**KELVIN GITUMA NKONGE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising from the decision of Hon. N. Kabara SRM in Siakago Magistrate's Court Sexual Offence No. E004 of 2023 delivered on 23rd November 2023)*

**JUDGMENT**

1. This is an appeal arising from the abovementioned decision. The appellant has filed petition of appeal dated 04<sup>th</sup> December 2023 seeking that the appeal be allowed, conviction be quashed, 10-years imprisonment be set aside and the appellant be set at liberty. The appeal is premised on the grounds that the learned trial magistrate erred in law and facts by:
  - a. Relying on a narrative riddled with material contradictions and the same failed the test of the truthfulness of the complainant;
  - b. Failing to note that the case was a frame up in order to obtain money from the appellant;
  - c. Failing to consider that the ingredients of the offence of committing an indecent act with a child were not proved to the required standards;
  - d. Rejecting the appellant's water-tight defense without giving cogent reasons;
  - e. Failing to record reasons for believing a single witness contrary to section 124 of the *Evidence Act*; and
  - f. Imposing harsh and excessive sentence upon the appellant.



2. The appellant was charged with 2 counts. The first count was the offence of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars are that on 03<sup>rd</sup> December 2022 in [particulars withheld] Subcounty within Embu County, the appellant intentionally touched the buttocks of PM a child aged 8 years using his hands. The second count was the charge of compelling an indecent act contrary to section 6(a) of the [Sexual Offences Act](#), whose particulars are that on 03<sup>rd</sup> December 2022 in Mbeere South subcounty in Embu County, the appellant, intentionally compelled PM a child aged 8 years to touch his penis against her will, an act which was indecent.
3. The appellant pleaded not guilty to both counts and a plea of not guilty was duly entered. The prosecution called witnesses in support of its case.
4. PW1 was the victim. Following *voire dire*, the court directed that she gives unsworn testimony. She stated that on the material day, she was on her way home when she saw the appellant dancing outside his shop and he called her. That he asked her to follow him into the shop and she did and the appellant gave her his phone so that she could watch videos on the tiktok app. That while in the shop, the appellant touched her buttocks and then held her hand and forced her to touch his penis, against her will. That afterwards, he gave her a soda to drink and then told her to go home. She stated that she went home and told her mother what had happened and she was taken to Kiritiri Health Center and then they went to Gachoka Police Station. On cross-examination, she stated that besides herself and the appellant, there was nobody else. That she told her mother about the incident after 1 week.
5. PW2 was the victim's mother who produced PW1's birth certificate. She stated that one day, PW1 told her never to send her to the appellant's shop because when she was returning from the tailor, she found the appellant dancing outside his shop and he called her to enter. That the appellant followed her and gave her his phone and then he touched her buttocks and made her touch his private parts. That she took her to the health center for examination and then she reported the incident at the police station. That prior to the incident, PW1 had no problem being sent to the appellant's shop. On cross-examination, she stated that PW1 told her that the appellant called her into the shop when there were no customers there.
6. PW3, Judy Ireri, a clinical officer at Kiritiri Health Center stated that she examined PW1 and observed that the hymen was present and the external genitalia was normal. She produced the P3 and PRC forms as evidence indicating that there was no penetration. She stated that the minor was not sexually assaulted.
7. PW4 was PC. Pauline Wawira from Gachoka Police Station who stated that the incident was reported at the station as narrated by PW1 and PW2. That she investigated the case and visited the scene where the appellant was arrested and charged accordingly.
8. At the end of the prosecution's case, the court found that the appellant had a case to answer and he was placed on his defense. However, he opted not to give any defense and awaited the court's judgment.
9. The trial court considered the evidence adduced and found the appellant guilty of both counts. The appellant was sentenced to 10-years imprisonment for the 1<sup>st</sup> count and 5years imprisonment for the 2<sup>nd</sup> count, both sentences running concurrently.
10. This appeal was canvassed by way of written submissions.
11. The appellant, in his submissions, stated that the testimony of PW1 should not be trusted since it does not paint the true picture. He stated that when he gave PW1 his phone to watch videos on the tiktok app, she refused to return it and in the process of him getting his phone back, he pushed her from the



backside, thus upsetting PW1. That when he noticed that she was upset, he offered her a soda which she took and then left. That PW2 owed the appellant Kshs.4,000/= which she did not intend to pay and so she framed him and tried to extort him of a further Kshs.15,000/=. That the minor waited 1 week before telling PW2 about the incident. He stated that the issue was not properly investigated and so the evidence cannot sustain a conviction.

12. On its part, the respondent submitted that the material elements of the offence were proved beyond reasonable doubt. It relied on the meaning of “indecent act” as provided under section 2 of the *Sexual Offences Act*. It also argued that the testimony of PW1 was sufficient and did not need corroboration as stated under section 124 of the *Evidence Act* and the case of *JWA v. Republic* (2014) eKLR. That the appellant did not present any defense to be considered by the court thus, the trial court did not err in that regard. Reliance was placed on the case of *Republic v. Nicholas Wambogo* (2022) eKLR and stated that the sentences are commensurate with the offences.
13. From a perusal of the petition of appeal and submissions, the issues for determination are as follows:
  - a. Whether the prosecution proved the offences beyond reasonable doubt; and
  - b. Whether the sentences imposed were harsh and excessive.
14. It is the role of the first appellate court to review the evidence at trial and reach its own conclusion. These were the sentiments of the Court of Appeal in the case of *Okeno v. Republic* [1972] EA 32. I agree with the court when it held:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate’s finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

15. The offence of committing an indecent act with a child is provided under the section 11(1) of the *Sexual Offences Act* as follows:

“Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”

16. Similarly, the offence of compelling an indecent act is provided for under section 6 of the *Sexual Offences Act* as follows:

“A person who intentionally and unlawfully compels, induces or causes another person to engage in an indecent act with—

- a. the person compelling, inducing or causing the other person to engage in the act;  
... is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than five years.”



17. In the same breadth, Section 2 of the same Act defines “indecent act” as:

“indecent act’ means an unlawful intentional act which causes –

- a. any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;
- b. exposure or display of any pornographic material to any person against his or her will”

18. PW1 stated that she was returning home from an errand when she saw the appellant dancing outside his shop. That the appellant called her into the shop and he followed her inside then he touched her buttocks. That the appellant gave her his phone to watch videos on the tiktok app and then he took her hand and made her index finger to touch his private parts. PW2 stated that as soon as PW1 told her about the incident, she took her for medical examination and then reported the matter to the police. PW3 established that PW1 had not been sexually assaulted thus the offence satisfies the conditions required to make it an indecent act and compulsion thereof.

19. The standard of proof in criminal cases is settled and that is beyond reasonable doubt. See the case of Miller v. Minister of Pensions (1947) 2 ALL ER 372. The evidence adduced stems from the narration by PW1, the victim. The appellant decries the truthfulness of this evidence and that the trial court did not give its reasons for believing this testimony. The proviso at Section 124 of the Evidence Act provides that the testimony of the victim under the Sexual offences Act does not need to be corroborated so long as the court believes that the witness is telling the truth. It states:

“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

20. In the trial court’s judgment, the learned trial magistrate noted the demeanor of PW1 during her testimony and stated that:

“...it is noteworthy that when giving evidence, the minor suddenly started crying while narrating what the accused did to her. Maybe because she felt uncomfortable and bad recalling how the accused violated her...”.

This concedes that the trial court had the great advantage of seeing the witnesses testifying first-hand at trial. See the case of David Njuguna Wairimu v. Republic (2010) eKLR. It is this advantage that the trial court used in reaching its decision to believe the testimony of the victim, thereby satisfying the requirement under section 124 of the Evidence Act.

21. Having so stated, it is also my view that the testimony of PW1 is believable. Moreover, considering the standard of proof in this case, it is my view that the evidence adduced is sufficient to prove the 2 counts. The appellant, in his submissions, attempted to offer a defense to the effect that PW1 had refused to return his phone and so he pushed her while touching her back. This testimony should have been placed before the trial court and be subjected to cross-examination since the role of this appellate court is to re-examine the evidence adduced at the trial. Such new evidence cannot be raised at this stage, since by so doing, the appellant is stating his evidence at the appeal stage which is untenable. Therefore, I find no error on the part of the trial court in convicting the appellant for both counts.



22. As to whether the sentences imposed are harsh and excessive, I note that the trial court imposed sentences prescribed in the *Sexual offences Act*. The Supreme Court in the recent case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) stated that for as long as the sentences prescribed under section 8 of the *Sexual Offences Act* remain undisturbed/constitutionally sound, the mandatory sentences ought to be applied as prescribed. It stated:

“(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.”

23. With this in mind, the trial court did not err in sentencing the appellant to the statutory prescribed sentences for the 2 counts.

24. In the end, I find that the appeal lacks merit and the same is hereby dismissed.

25. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 27<sup>TH</sup> DAY OF AUGUST, 2024.**

**L. NJUGUNA**

**JUDGE**

..... for the Appellant

..... for the Respondent

