



**Egesa v Republic (Criminal Appeal E021 of 2023)
[2024] KEHC 16659 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 16659 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL APPEAL E021 OF 2023
JL TAMAR, J
SEPTEMBER 30, 2024**

BETWEEN

EVANS EGESA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgement, conviction and sentence of the learned senior principal magistrate Hon. P. Achieng in sexual offences case no 42 of 2019 delivered on 7th march 2023)

JUDGMENT

1. The appellant herein was initially 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 now Cap 63A laws of Kenya. The charge was later amended to sexual assault contrary to section 5(1) of the sexual offence Act. The particulars of the offence were that on diverse dates between September and 1st November 2019 within Magadi location in kajiado west sub-county within kajiado county, unlawfully used his fingers to penetrate the vagina of NB.
2. In the alternative, the appellant was charged with committing an indecent act with a child contrary to section 11 of the [sexual offences Act](#). The particulars were that on diverse dates between September and November 2019 within Magadi location in kajiado west sub-county, within kajiado county, unlawfully and intentionally touched the vagina of NB a child aged 8 years with his fingers.
3. After the conclusion of the trial, the learned magistrate, satisfied with the evidence tendered by the prosecution, convicted the accused in the alternative count and sentenced him to 10 years imprisonment. It is against this finding that the appellant now appeals to this court on the following grounds;
 - i. That the learned trial magistrate erred in law and in fact when she convicted the appellant solely on the uncorroborated testimony of the complainant, who is a minor.



- ii. That the learned trial magistrate erred in law and in fact when she convicted the appellant on inconsistent, contradictory and hearsay testimony of the prosecution witnesses.
 - iii. That the learned trial magistrate erred in law and in fact by convicting the appellant without considering his defence and the evidence in rebuttal
 - iv. That the learned trial magistrate erred in law and in fact by failing to consider and analyse the testimony of the appellant and the issue raised therein, thus arriving at a conclusion contrary to the law and the weight of the evidence on record
 - v. That the learned trial magistrate erred in law and fact when she failed to take into account the appellant mitigation before sentencing.
 - vi. That the learned trial magistrate erred in law and fact by imposing a maximum sentence, which was unduly harsh and excessive in the circumstances.
4. As a first appellate court I am required to revisit and re-evaluate the evidence afresh, assess the same independently and make my own conclusions bearing in mind the limitations inherent in the appellate process that I neither saw nor heard the witnesses testify, and cannot therefore comment on their demeanour an important aspect in a criminal trial. See *Okeno vs Republic* [1972] E.A 32.
 5. To establish the charges against the appellant, the prosecution called three witnesses whose testimonies are set out herein below albeit in summary. PW1 NB, gave unsworn testimony after the learned magistrate conducted a *voire dire* examination to determine the competency and admissibility of the witness evidence. The court in a *voire dire* examination is required to form an opinion on whether the child of tender years understands the nature of an oath and the duty to speak the truth (see *Johnson Muiruri vs Republic* (1983) klr 445. The witness told the court that she lived in a two bedroomed house with her father, a brother as well as the accused who was brought in to live with them by her father. She stated that while sleeping, the accused went to her bed and did bad manners to her. he told the court that the appellant slept on her. She told him that she will report him to her dad. The accused is said to have cried and sought forgiveness from her. When her father came back from work she told him what had happened. she wrote in a piece of paper, which was produced in court. The paper read, ‘Dad unaona huyu Evans ananifanyia tabia mbaya’. On reading the note, PW2 was startled and wanted to hear more from the child. The witness told her father that as she slept, the accused would touch her private part. He immediately got two nurses from Magadi health facility who talked to the complainant and established that the child was defiled. PW2 reported the matter to the police at Magadi police station and took the victim for examination at the hospital. He told the court that the child refused to be examined. In cross-examination by the accused, the witness told the court that accused used to sleep on the upper deck of a double decker bed and the minor would sleep on the lower deck.
 6. The investigating officer No 117327 PC Joseph Kamiti testified and told the court that he was on duty on 1st of November when PW2 made a report of a defilement incident. He acted, investigated the matter and had the accused who was adversely mentioned arrested and charged in court. The witness told the court that although the child had declined medical examination at Magadi hospital, she was later on, induced to sleep and examination conducted at Nairobi Women Hospital in Ongata Rongai and report indicated that the child was defiled.
 7. The prosecution after failing to secure the attendance of the other witnesses, and the attempt to withdraw the case under section 87(a) of the CPC declined, by the court, closed its case.
 8. In a brief ruling, the court held that a *prima facie* case had been established sufficient enough to require the accused defence.



Defence evidence

9. The appellant gave sworn testimony and denied committing the offence. He told the court that at the time of the alleged incident he was leaving with Bernard Barasa in Magadi area where he was assisting him with house chores as he (Barasa) had no wife. He was on attachment and that Barasa was a neighbour at home in Busia. He told the court that he was arrested while in the house alone and taken to police station where the false allegations were made against him.
10. This then in brief is the evidence by the prosecution and the defence on the basis of which the court is to make a determination on whether the prosecution had proved its case against the appellant beyond reasonable doubt
11. The defence faults the decision of the learned magistrate for the reason that the conviction was based on uncorroborated evidence of a complainant minor. The law is as provided for in the proviso to 124 of the *evidence Act* which is that in a criminal case involving a sexual offence, where the only evidence is that of the alleged victim of the offence, the court shall receive the evidence and proceed to convict the person if for reasons to be recorded in the proceedings, the court is satisfied that the victim is telling the truth. In the instant case, the appellant, relying on the case of PMG VS Republic (2022) and which was not supplied, submitted that the victim's evidence was neither clear nor free from doubts and therefore the court should not have relied on it to found a conviction. The learned magistrate at page 5 of the judgement stated as follows;

‘The evidence points to the fact that the accused would inappropriately touch the complainant. The offence established is therefore the alternative count of committing indecent act with a child. The complainant identified the accused as being the person who committed the offence. They were living in the same house; the accused having been housed by the father of the complainant as he undertook his attachment... the accused was therefore a person well known to the complainant and the offence took place in their house. The accused and the complainant were sleeping in the same bed room which gave the accused the opportunity to commit the offence’ and at page 6 the learned magistrate further stated that; ‘I have no reason to disbelieve the complainant who is very young child and there is nothing to suggest that she had an intention of framing up the accused’

18. It is clear from the above passage that not only did the learned magistrate believe the testimony of the minor, but was also cautious and alive to the law and authorities relating to the uncorroborated evidence of a minor. Further, the record of the lower court proceedings indicated that the accused elected not to ask any questions when offered the opportunity to do that.
19. The appellant second ground of appeal and for which the magistrate is faulted, is that the prosecution evidence was inconsistent, contradictory and hearsay. Inconsistencies and contradictions would normally lead, unless satisfactorily explained, to rejection of the evidence if the contradictions and inconsistencies are so grave and material as to affect the probative value of the evidence. The appellants point to the evidence of PW1 and PW2 as being inconsistent and/or contradictory. That whereas PW1 stated that the appellant lay on her, the father, PW2 stated that the appellant touched the complainant on her private part. The other inconsistency pointed out by the appellant relate to the content of the handwritten note produced as Exhibit1 and also the date of arrest of the appellant, whether it was on 1st November 2019 or 2nd November 2019. Firstly, as regard the content of the note, I do not see any contradictions in its contents that would materially affect its admissibility. Its production as exhibit and the contents thereof was not objected to by the appellant during cross-examination. The date of



arrest, if 1st of November 2019 or 2nd of November 2019 is immaterial in the circumstances of this case. I will deal with the issue whether the appellant lay or touched the complainant substantively shortly.

20. The other grounds whether the trial court failed to consider and analyse the testimony of the appellant and failed to consider his mitigation and imposition of a maximum sentence shall be dealt with together.
21. As pointed out earlier in this judgement, the appellant was convicted and sentenced under section 11(1) of the *sexual offences Act*. The section provides;

‘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’

The Act defines an ‘indecent act’ as act which causes;

Any contact between the genital organs of a person, his or her breast and buttocks with that of another person; or

Exposure or display of any pornographic material to any person against his or her will, but does not include any acts which causes penetration.
22. In R vs Stringer the supreme court of New South Wales, Court of Criminal Appeal as cited in Conrad Mwashashu Mwamidi vs Republic CR Appeal no E037 of 2021 set out the test for indecency as; whether the behaviour was unbecoming or offensive to common propriety or modesty or would offend the ordinary modesty of the average person.
23. In Gitau vs Republic (1983) klr 222, the court held that an assault accompanied by utterances suggestive of sexual intercourse is an indecent assault. The touching for example of the breast or private parts of a female without being accompanied by the utterances suggestive of sexual intercourse is also indecent assault. The test is usually whether the assault was intentional and whether it was indecent. The court further observed that the offence is complete if a female is indecently treated by touching her private parts if even the intention is not sexual intercourse.
24. In Conrad Mwashashu case supra, the court stated that ‘it is manifest that the offence of indecency involves many elements; firstly, where the acts are inherently indecent, like touching the victim’s genitals, anal areas or female breasts or undressing the woman either in private or in public. In such cases it does not matter whether the defendant has an indecent motive. Secondly is where the act is such that an indecent motive is obvious to the reasonable persons. Third is conduct or act that may not be indecent but an indecent motive will make it so’
25. The prosecution contended in evidence that the appellant touched the victims private part using his fingers and also laid on her with a clear intention of committing defilement for which he was initially charged. Both the act of touching the complainant private part using a finger or laying on her constitute acts inherently indecent with sexual connotations and there was therefore no inconsistency or contradictions as contended by the appellant. Both touching and laying on the complainant are indecent acts whether or not the acts are accompanied by sexual intentions. The complainant victim herself told the court that the appellant ‘alinifanyia tabia mbaya’ a euphemism taken and generally accepted by the courts in the context of the sexual offences. See, (IE vs R, HCCR case no 11 of 2016).
26. The appellant challenged the prosecution case arguing that the trial court did not consider the appellant defence and its mitigations and meted out a maximum sentence. It is not true as asserted by the appellant that the trial court did not consider the accused defence. The trial court indeed considered the appellant defence and noted that the same focused on his arrest and a bare denial that he did not commit the offence. This in the trial courts view left the prosecution case unshaken.



27. As regard the maximum sentence imposed by the magistrate court, the supreme court in *REPUBLIC VS JOSHUA GICHUKI MWANGI petition no E018 of 2023* delivered on 12th July 2024, held that the mandatory minimum sentences as prescribed in the *sexual offences Act* are not unconstitutional. The learned magistrate was therefore perfectly within the law to impose the mandatory sentence as provided for by law.
28. Accordingly, I am unable to disturb the conviction and the sentence passed by the trial court and therefore the appeal herein is dismissed.

DATED AND DELIVERED AT KAJIADO THIS 30TH DAY SEPTEMBER 2024

JOHN.T. LOLWATAN

JUDGE

