



**Wabwire v Republic (Criminal Appeal E078 of 2022)  
[2024] KEHC 11338 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11338 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL APPEAL E078 OF 2022  
AC MRIMA, J  
SEPTEMBER 30, 2024**

**BETWEEN**

**MAURICE BARASA WABWIRE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal arising out of the judgment, conviction and sentence  
of Hon. S.N. Makila (PM) in Kitale Chief Magistrate's Court  
Criminal Case (S.O.) No. 38 of 2020 delivered on 3rd November, 2022)*

**JUDGMENT**

**Background:**

1. Maurice Barasa Wabwire, the Appellant herein, was charged with the offence of Attempted defilement contrary to Section 9(1)(2) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence are that; on 6<sup>th</sup> Day of February 2020 at [particulars withheld] within Trans-Nzoia County intentionally attempted to cause his penis to penetrate the vagina of M.N.B a child aged 16 years.
3. The Appellant faced the alternative charge of an Committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.
4. The particulars are that on 6<sup>th</sup> Day of February 2020 at [particulars withheld] within Trans-Nzoia County intentionally and unlawfully touched the buttocks and breasts of M.N.B a child aged 16 years with his hands.
5. Three witnesses testified on behalf of the Respondent herein. Upon close of its case, the Appellant was placed on his defence.



6. The Appellant was the sole defence witness. He gave unsworn evidence.
7. At the close the trial, the Appellant was found guilty of the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#). He was sentenced to 5 years in imprisonment.

#### **The Appeal:**

8. The Appellant was dissatisfied with the conviction and sentence. Through an undated Amended Petition of Appeal, he urged the following Grounds of appeal;
  1. That the learned Magistrate erred in failing to realize that the evidence of PW1 exonerated I the Appellant from the alleged offence and further the learned magistrate convicted I the Appellant by introducing extraneous issues in its verdict not tendered in evidence.
  2. That the learned Magistrate erred in failing to find that crucial witnesses were not summoned to testify as section 146 and 150 of the Criminal Code was not adhered to thereby prejudicing I the Appellant.
  3. That the learned trial magistrate erred in failing to consider the credible defence put forth by I the Appellant that displaced the prosecution's case.

#### **The Appellant's submissions:**

9. In his written submissions, the Appellant expounded his Grounds of appeal. He argued that the evidence of PW1 and PW2 was unreliable and inconsistent on the basis that the narrative by PW1 that she had her mother's phone did not tally with PW2's evidence that she is the one who was informed of the incident first.
10. While drawing support from the decision in *Mawila Purdist -vs- Republic* 1943 Vol. 947 Pg. 48, on the effect of contradictory evidence, the Appellant submitted further that the inconsistency was also seen in PW1's evidence that on the one hand she claimed that she had gone to the shop to buy airtime and in another, she had gone to buy mandazi.
11. On the aspect of failure to call crucial witnesses, the Appellant submitted that a witness, by the name Carol, who was allegedly informed of the incident just after it happened ought to have been availed before Court to corroborate the evidence of the complainant.
12. On the final ground, the Appellant submitted that his claim of alibi, which displaced reliability of the prosecution's case was not considered by the trial Court.

#### **The Respondent's case:**

13. The Respondent challenged the appeal through written submissions dated 28<sup>th</sup> July 2023.
14. It was its case that, based on the decision in *Mwandikwa Mutisya v R* EA 18 and *Mussa v R* [1962] EA, setting out the test for 'attempt' it had demonstrated the overt action of the Appellant in the case.
15. The Respondent further submitted that the age and identity of the perpetrator, essential ingredients for the offence of attempted defilement, had been proved as per the dictates of Section 9 of the [Sexual Offences Act](#).



## Analysis:

16. 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 v Republic* [1972] EA 74).
17. In Criminal Appeal No. 280 of 2004 *Odhiambo v Republic* [2005] 1 KLR, the Court of Appeal spoke to the role of this Court as hereunder: -  
  
... On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion.
18. In discharging the foregoing duty, this Court ought to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court. It, therefore, must give due allowance in that respect. (See: *Ajode v Republic* [2004] KLR 81).
19. Having carefully appreciated the pleadings and the submissions filed, the only issue that arises for determination is whether the conviction of the offence of indecent act was proved beyond reasonable doubt.
20. This Court will, hence, re-assess and re-analyse the evidence adduced at the trial Court vis-à-vis the applicable law on the charge the Appellant was convicted of.
21. Section 2 of the *Sexual Offences Act* defines the term 'indecent act' as follows: -  
  
'Indecent act' means any unlawful intentional act which causes-
  - a. any contact between the genital organs of a person, his or her breasts and buttocks with that of another person;
  - b. exposure or display of any pornographic material to any person against his or her will;
22. From the above definition, the ingredients that constitute the offence of committing an indecent act are as follows: -
  - i. Proof of intentional contact between the genital organs, buttocks or breasts of the perpetrator and the victim;
  - ii. Age of the victim; and
  - iii. Identity of the perpetrator
23. In ascertaining whether the above ingredients were proved, a look at the evidence tendered at the trial becomes paramount.
24. The complainant testified as PW1. It was her evidence that she was a Form one student at [particulars withheld] Girls Secondary School and that she was 17 years of age.
25. She also stated that on 6<sup>th</sup> February 2020, [the alleged time of the crime], she was 16 years old. It was her testimony that she had gone to the shop at about 5pm to buy airtime when he met the Appellant there. She stated that the Appellant asked her if her mother was around and insisted that he had interest in her not her mother.
26. The complainant stated further that when she went back home, the Appellant followed her into their house where he started to caress her breasts, buttocks and thighs.



27. It was her evidence that she struggled with him and managed to get out of the house. The Appellant followed her and asked for her mobile phone number for purposes of sending her airtime.
28. The Appellant informed her that since his wife was away, he would be visiting her and vice-versa.
29. The Complainant testified that he declined the Appellants' advances and went to inform her lady neighbour of what had transpired after which they reported the matter to Kitale Police Station.
30. It was her evidence that the Appellant was well known to her as he was their neighbour since she was in Nursery school.
31. In the end, she stated that the Appellant did not undress her.
32. On cross examination, it was her evidence that she had a small child, 1½ years old but she was not married. She stated that the child's father is Protus, a person she had charged but withdrew that case after he agreed to support the child.
33. Carol Nekesa, the complainant's mother, testified as PW2. It was her evidence that their neighbour called her on 6<sup>th</sup> December 2020 at about 7pm and informed her that the Appellant wanted to rape her daughter. It was her evidence that her daughter had reported the incident to her.
34. On cross-examination, PW2 stated that the neighbour who informed her of the incident was not ready to testify.
35. It was her evidence that she reported the incident to a village elder who advised her to report the matter to the Police.
36. No. 234227 PC Irene Wanyonyi, the Investigating Officer, testified as PW3. It was her evidence that when she interrogated the complainant, she stated that the Appellant followed her to her home from the shop and on entering a house, the Appellant caressed her buttocks and breasts and that he wanted to her to be visiting him at home since his wife was away.
37. It was her further evidence that Carol, a neighbour to the complainant, reported the incident but declined to testify against the Appellant.
38. Based on the foregoing, the Appellant was placed on his defence. He gave an unsworn statement without calling any witness.
39. It was his evidence that on the material date, he spent the entire day splitting timber with one Shadrack for his house. He did not meet the complainant on that fateful day or at all.
40. He further stated that the complainant was married and had offered to assist her in rescuing her get back to school.
41. The Appellant urged the trial Court to acquit him.
42. On analysis of the evidence and the law, the Appellant was found guilty of the alternative charge of committing an indecent act with a child.
43. From the totality of the evidence, and having paid due regard to wording of the law, the actions that precipitated the charges against the Appellant, if proved, were deliberate and tallied with the offence of committing an indecent act.
44. The complainant was the only one who alleged that the Appellant committed a wrong against her. She testified before Court and the Learned Magistrate had the following to say on her demeanour: -



.... This Court had the chance to observe the demeanour of the complainant when she gave her testimony. She struck me as truthful as her testimony was coherent and consistent all through even though she was subjected to cross-examination twice, by the accused and later by the defence counsel. Her testimony on what transpired remained firm and consistent.

45. There was no challenge to the above. Therefore, this Court finds no basis to interfere with the finding. It is, hence, the position that the Appellant indeed touched the complainant's breasts, thighs and buttocks. Such actions, without more, connotes commission of the offence the Appellant was convicted of.
46. This Court further notes that there was no challenge to the age of the complainant [which was proved by way of a Certificate of Birth]. As such, the Appellant was properly convicted.
47. The appeal on the conviction cannot, hence, stand.
48. On the sentence, the Appellant was imprisoned for 5 years.
49. Section 11(1) of the *Sexual Offences Act* provides 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.
50. Being cognizant of the recent decision by the Supreme Court of Kenya in *Petition No. E018 of 2023 Republic -vs- Joshua Gichuki Mwangi*, the Appellant was to be sentenced to a minimum of 10 years in prison as provided for in Section 11(1) of the *Sexual Offences Act*.
51. However, since the prosecution did not apply to enhance the sentence, this Court shall not venture into that arena.
52. The appeal on the sentence also fails.

**Disposition:**

53. 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 thereby mostly being away from the station. Apologies galore.
54. Consequently, the following final Orders hereby issue: -
  - a. The Appeal is wholly dismissed.
  - b. The file is hereby marked as CLOSED.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 30TH DAY OF SEPTEMBER, 2024.**

**A. C. MRIMA**

**JUDGE**

Judgment delivered virtually and in the presence of: -



Maurice Barasa Wabwire, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke– Court Assistants.

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