



REPUBLIC OF KENYA



**Mohamed v Republic (Criminal Appeal E045 of 2021)  
[2023] KEHC 23572 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23572 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL APPEAL E045 OF 2021  
JN ONYIEGO, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**MOHAMED ABDIRAHIM SHEIKH MOHAMED ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence of Hon. M. Kimani (S.R.M.)  
and delivered on 12.04.2021 in S.O No. E004 of 2020 in SPM's Court at Mandera)*

**JUDGMENT**

1. The appellant herein was charged with the offence of indecent act contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 24.11.2020 within Mandera County intentionally touched the breasts of NSA a child aged 15 years.
2. The prosecution called four witnesses in support of its case. Upon conclusion of the trial, the court found the appellant guilty of the said offence and thereafter sentenced him to fifteen years' imprisonment.
3. The appellant being aggrieved by both the conviction and sentence, filed on 08.06.2021 a petition of appeal on grounds summarized as here below:
  - i. That the learned trial magistrate erred in law and fact in finding that the offence of defilement as outlined in the *Sexual Offences Act* was proven beyond reasonable doubt.
  - ii. That the learned trial magistrate erred in law and fact by considering extraneous issues in convicting and thereafter sentencing him.
  - iii. That the learned trial magistrate erred in law and fact by failing to consider that the sentence imposed on the appellant was manifestly harsh and excessive in all circumstances.



4. The appeal was canvassed by way of written submissions.
5. The appellant submitted that the prosecution did not prove its case to the required standards as the evidence was riddled with contradictions and inconsistencies. That the trial magistrate convicted him without due regard to his defence and further, that the court failed to recognize the fact that this case was as a result of an underlying grudge between the appellant and the complainant's sister whom he was previously in a relationship with. The appellant argued that the sentence that was meted out against him was not commensurate to the offence herein and therefore urged this court to quash his conviction and set aside his sentence.
6. Mr. Kihara for the respondent submitted that the evidence adduced by the respondent was sufficient to convict the appellant as the necessary ingredients were established. That in reference to the sentence, the same was appropriate considering the circumstances of the case herein. Learned counsel urged this court to dismiss the appeal.
7. In considering this appeal, I am conscious of my duty as the first appellate court which is to subject the evidence before the trial court to a fresh evaluation and re-consideration so as to arrive at an independent conclusion and or decision. I am however alive to the fact that the trial court had the advantage of seeing and or listening to the witnesses to be able to assess their general demeanour. See *David Njuguna Wairimu v Republic [2010] eKLR*, where the Court of Appeal explained this duty thus: -

“The duty of the first appellate court is to analyse and 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 appellate 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.”

8. Brief facts of this case are that; on 24.11.2020, PW1, NSA was at a [Particulars Withheld] bus park where her sister used to sell tea. That while there, the appellant went to their hotel at around 10 a.m where he ordered and was served with tea. It was her evidence that after being served with tea, he moved towards her and held her breasts. As she asked him why he was doing so, the appellant responded by abusing her that ‘Nitakutomba bila maji’. That he went ahead to threaten her that he would rape and kill her.
9. She went further to state that, the appellant bragged around while claiming that he could not be arrested by the police. According to her, the appellant appeared like he was intoxicated. Aggrieved by the incident, she reported at Mandera police station and subsequently, the appellant was arrested at the Mandera bus park.
10. PW2, NS corroborated the evidence of Pw1. She testified that on 24.11.2020, at around 10 a.m, she was with her sister(pw1) at her hotel when the appellant arrived and ordered for tea. That the appellant moved closer to where her sister (pw1) was and sat next to her. She stated that she saw the appellant touch and hold pw1's breasts. She further stated that, when her sister asked the appellant why he was doing so, the appellant told her that she was a prostitute.
11. That when she intervened, the appellant called her a prostitute as well and then abused her saying that; ‘Nitakutomba bila maji’. That it took the effort of people in the hotel to move the appellant out of the



hotel. She told the court that she accompanied her sister to the police station where they reported the incident and recorded their statements.

12. PW3, PM testified that on 24.11.2020, while at the report office OB section, he saw two OB numbers against the appellant; one for threatening and the other for indecent act. He testified that he knew the appellant before by the nick name of 'GOSHE'. That at about 12pm, he saw the appellant in one of the salons within Mandera town and being aware that the he was being looked for, he called his colleagues who assisted in arresting the appellant
13. PW4, Joshua Mwanja testified that he was the investigating officer and that on 24.11.2020, he was at the office at around 2pm when PW1 and PW2 reported the matter at the police station. He stated that he recorded statements from the two sisters and obtained a birth certificate which showed that PW1 was 15 years old. According to him, there was sufficient evidence to prefer the charges in question.
14. On his defence, the appellant testified that it was his first time in court and prayed for forgiveness. He nevertheless denied committing the offence in question and instead alleged that the charges were fabricated as a result of a grudge between him, PW1 and PW2 who were once his girlfriends.
15. I have considered the record of appeal herein, grounds of appeal and submissions by both parties. Issues that arise for determination are; whether the prosecution had proved its case to the required degree and; whether the sentence meted out harsh and manifestly excessive.
16. The offence of committing an Indecent Act with a child is provided for under Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006 as follows: -

“ 11.

- (1) 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.”

17. “indecent act” means an unlawful intentional act which causes-
  - (a) 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. It is trite law that in any criminal proceedings, every element of the offence must be proved beyond reasonable doubt. Needless to say, the burden of proof always lies with the prosecution and the same does not shift. See *Woolmington Vdpp(1935) AC462*.
19. In the instant case, the prosecution evidence is hinged on the evidence of two key witnesses (pw1 and pw2). According to the two witnesses, the appellant went to their hotel on the material day. After ordering tea, he was served. Suddenly, he moved closure to where pw1 was seated and started touching her breasts without her consent. Upon pw1 and pw2 questioning his behavior, the appellant abused them as prostitutes whom he could make love with without water loosely (Ni\*\*\*\* bila maji).
20. The two witnesses knew the appellant before and positively identified him as it was day time. They even named him to the police officers upon reporting the incident. Although the appellant alleged a grudge between him and the two sisters (pw1 and pw2), there was no evidence of such allegation. The two could not mistake him for somebody else. Just like the trial court did, am satisfied that the appellant



did stretch his hand and without any justifiable cause held the breasts of the complainant without her consent hence an indecent act. To that extent, the appeal against conviction is hereby dismissed.

21. The next issue is whether the sentence meted out was excessive. From the sentence meted out, it is outright that the trial court in sentencing referred to the provision of section 11(1) which pronounces the sentence of the said offence and in his discretion proceeded to sentence the appellant as per the law. In the case of *Abamad Abolfathi Mohammed & another v Republic [2018]* e KLR, the Court of Appeal stated;

“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive.”

22. Further to the above, the Court of Appeal in the case of *Joshua Gichuki Mwangi v Republic*, Criminal Appeal No. 84 at Nyeri, where the appellant was charged with the offence of defilement contrary to section 8(1) as read together with section 3 of the SOA, substituted the 20-year sentence with a 15-year sentence to run from the time the trial court imposed its sentence.

23. Section 11(1) of the Sexual Offence 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 (emphasis court).”

24. Notably, the use of the word “liable”, connotes that the trial court has discretion to impose a lesser sentence where the circumstances so dictate. This was the holding in the case of *Daniel Kyalo Muema v Republic [2009]* eKLR where the Court of Appeal stated that the words “shall be liable to” did not in their ordinary meaning require the imposition of the stated penalty but merely expressed the stated penalty which could be imposed at the discretion of the court.

25. Guided by the above decision, a person convicted of the offence of committing an indecent act with a child ‘is liable’, upon conviction to a sentence of ten (10) years imprisonment under Section 11(1) of the *Sexual Offences Act*. As the same does not stipulate a mandatory minimum sentence, the court has discretion to impose a lesser sentence. The trial magistrate in his ruling noted that the appellant is a repeat offender having previously been convicted with the offence of malicious damage to property and as such, sentenced him to serve a period of 15 years’ imprisonment.

26. Taking into account the gravity of the offence and the mitigation on record wherein the appellant sought forgiveness, I am of the view that the sentence of 15 years is excessive. Accordingly, the same is substituted with two years’ imprisonment to be calculated from the time of arrest.

ROA 14 days

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2023.**

.....

**J.N. ONYIEGO**  
**JUDGE**

