



REPUBLIC OF KENYA



KENYA LAW
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**Njuguna v Republic (Criminal Appeal E089 of 2021)
[2022] KEHC 12912 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12912 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E089 OF 2021**

**A. ONG'INJO, J
JULY 29, 2022**

BETWEEN

MOSES KAHIO NJUGUNA APPELLANT

AND

REPUBLIC RESPONDENT

*((An appeal from the judgment of Hon. Christine Kemuma Aukia,
Resident Magistrate, delivered on 31st January 2020 in Kwale
Principal Magistrate's Court Sexual Offences Case No. 68 of 2019))*

JUDGMENT

1. The appellant Moses Kahio Njuguna was charged with the offence of Sexual assault contrary to section 5(1)(a) and 5(20) of the [Sexual Offences Act](#) No. 3 of 2006.
2. Particulars were that Moses Kahio Njuguna on the 2nd day of June 2019 at [particulars withheld] Village, [Particulars Withheld] Location in Kwale County within Coast Region intentionally caused his finger to penetrate the vagina of ENK a child aged 9 years.
3. In the alternative the Appellant was charged with the offence of indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No. 3 of 2016.
4. Upon consideration of the evidence of prosecution 4 witnesses and the accused persons sworn evidence the trial Magistrate acquitted the appellant of the principal court of sexual assault and found accused guilty of the alternative charge of indecent act contrary to section 11(1) of the [Sexual Offences Act](#). The appellant was subsequently sentenced to serve 5 years imprisonment after the trial Magistrate gave due consideration to his mitigation.
5. The appellant was aggrieved by the conviction and sentence and appealed on the following grounds:-



- i. That the learned Magistrate erred in law and in fact when she came to a conclusion that the Appellant committed the offence of indecent act with a child yet the prosecution witness did not link appellant to the offence.
 - ii. That the learned Magistrate erred in law & in fact when she found that the Appellant had committed the offence of indecent assault without considering the inconsistencies and contradictions by prosecution witnesses.
 - iii. That the learned Magistrate erred in law & fact in convicting & sentencing the appellant on the alternative count yet there was no evidence to show how she arrived at that conclusion.
 - iv. That the learned Magistrate did not evaluate fully the evidence before her to satisfy herself that the offence was proved beyond reasonable doubt to the detriment of the Appellant.
 - v. That the learned Magistrate erred in fact and law in convicting the Appellant on the belief that the Appellant committed the offence in the alternative, court without showing how she arrived at that belief and/or conclusion.
 - vi. That the learned Magistrate erred in law & fact and misdirected herself when she ignored evidence of an existing grudge between the appellant and PW 2 that would have formed a basis for false and malicious accusation.
 - vii. That the learned Magistrate misdirected herself in convicting and sentencing the appellant on sole evidence of the complainant in disregard of the inconsistencies of the complainant testimony.
 - viii. That the learned Magistrate erred in law & fact in convicting the appellant while ignoring the medical report that exonerated the Appellant from the offence of indecent act with a minor.
 - ix. That the learned Magistrate misdirected herself and hence arrived at the wrong conclusion when she found that the offence had been proven beyond reasonable doubt.
 - x. That the sentence imposed by the court was too harsh in the circumstances of the case.
6. The appellant prayed that his appeal be allowed and conviction be quashed and sentence set aside.
 7. The prosecution's case was that the accused and PW 2 – the complainants mother were lovers. That the appellant had visited and spent the night at PW 2's house. That the following morning he left PW 2 sleeping in her bedroom and he went to prey on the complainant.
 8. That PW 3 shouted calling PW 2 when the appellant removed her clothes and started penetrating her vagina with his fingers. That when PW 2 learnt of what the Appellant had attempted to do she quarreled with Appellant. That she managed to get out of the house with PW 3 and went to report to police after locking the house from outside leaving the appellant inside.
 9. The complainant was examined by PW 1 but she found no injuries on her genitalia. PW 4 conducted investigations & charged the appellant when placed on defence the Appellant gave sworn statement and said PW 2 the complainants mother was his lover. He said he had visited PW 2 in her house when differences ensued when he allegedly heard another man calling PW 2.
 10. That on the material morning he slept on the sofa waiting for day break so he could leave the complainants mother house as he wanted to quit the relationship. That when he woke up at 8.30am he found he had been locked inside the house and later he was surprised to see police officers arrive in company of PW 2.



11. The appellant denied the charges which he claimed were malicious action by PW 2. He said PW 2 coached PW 3 so as to lie to the court. He urged the court to dismiss the charges as PW 2's evidence was not credible. The Appellant testified that he was a father & respected children and he should therefore be found innocent.
12. The appeal was canvassed way of written submissions.
13. In the appellants submissions filed on March 25, 2022, it was argued that the prosecution witnesses evidence was never corroborated, it was full of contradictions and inconsistencies and glaring gaps that cannot sustain a conviction.
14. It was argued that no connection was established between the Appellant and the offence in the prosecution evidence and that the appellant should be acquitted.
15. The respondents submissions were filed on May 19, 2022 and argued that the courts are not hamstringing by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful.
16. This was the holding in *JWA vs Republic* [2014] eKLR where the court of appeal observed:-

“We note that the appellant was charged with a sexual offence and the proviso to section 124 of the Evidence Act clearly states that corroboration is not mandatory. The trial court having conducted a *voire dire* examination of PW 1 and being satisfied that the complainant was truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial Magistrate”.
17. It was submitted that the trial Court conducted *voire dire* examination and satisfied itself that the evidence was tenable. It was argued that the child's evidence was no doubt truthful and she was categorical as to what had transpired. It was argued the complainant knew the appellant well.
18. The respondent urged the court to find that the evidence tendered was sufficient to convict the appellant and the determination of the trial court should be upheld.
19. Having considered and re-evaluated the evidence in the trial courts record as well as the judgment of the trial Magistrate coupled with the grounds of appeal and submissions thereto, this court is to determine whether the appeal herein should be allowed; whether the prosecution proved beyond all reasonable doubt that the appellant committed an indecent act with the complainant.
20. The appellant and the mother of the complainant were having some drinks on the night of June 1, 2019 and from the evidence on record they ended up quarrelling because according to the appellant the complainant's mother was called by another man known as Vincent and the appellant was not happy since he was her lover. Subsequent to the quarrel at night it was alleged that the appellant committed the offence of indecent act with the complainant.
21. PW 2 alleges that she heard the complainant calling her and ask her to go to the bedroom and when she went the complainant told her that the appellant was trying to insert his fingers on her private parts. The appellant denied that he committed the offence. The quarrel between the appellant and PW 3 at night and the fact that there was no other witness to the allegations of the Complainant makes this court finds that circumstances surrounding the commission of the alleged offence is very cloudy. Such evidence cannot sustain a conviction as it is evidence on a balance of probability and not beyond reasonable doubt. It is the word of the appellant against the word of the complainant.



22. This court therefore finds that the appellant's appeal has merits and the same is allowed. The appellants conviction is quashed and sentence set aside. The Appellant to be set at liberty forthwith unless lawfully detained.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 29TH DAY OF JULY 2022

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel- Court Assistant

Mr. Were Advocate for the Appellant

Appellant – Present in person

Mr. Ngiri for State/Respondent

Hon. Lady Justice A. Ong'injo

Judge

