



REPUBLIC OF KENYA



**Mwamidi v Republic (Criminal Appeal E037 of 2021)
[2022] KEHC 12776 (KLR) (31 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12776 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E037 OF 2021
JM MATIVO, J
AUGUST 31, 2022**

BETWEEN

CONRAD MWASHASHU MWAMIDI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal against Judgement conviction and sentence in SO Number
E012 of 2020, Republic v Conrad Mwashashu Mwamidi at
Wundanyi, delivered by Hon. E. M. Nyakundi R.M. on 16.9.2021)*

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* (the Act). He faced an alternative charge committing an indecent act with a child contrary to section 11(1) as read with section 2(a) of the Act. After evaluating the evidence, the trial Magistrate was not satisfied that the principal count was proved. However, he was satisfied that the alternative count was proved. He convicted the appellant and sentenced him to serve 15 years in prison.
2. The appellant seeks to overturn the said verdict citing several grounds:- (a) that the learned Magistrate arrived at the wrong decision; (b) that he for misdirected himself on his defence of alibi; (c) he failed to appreciate that he was not properly identified; (d) he substituted the testimony of Dr. Wisdom Njumwa in place of Dr. Robert Anika who had medically examined the complainant; (e) he failed to appreciate material contradictions in the prosecution evidence; and, (f) that the sentence is manifestly excessive.
3. The particulars of the alternative charge were that on the 29th day of August 2020 at around 0600hours at [Particulars withheld] Village in Mwakitau sub-location in Mwatate sub-county within Taita Taveta County he intentionally and unlawfully touched the vagina of E.K, a child aged 6 years with his penis.



4. The complainant's testified that the appellant who was her neighbour used his fingers to touch here. Her mother testified that she took the complainant to the hospital and the upon being examined, it was confirmed that she had been defiled. PW 3 testified that the complainant had blood on her clothes, while PW3 who was the village elder called the sub-chief and they took the complainant to Mwatate Police Station. PW4, Dr. Wisdom Njumwa produced the medical report prepared by Dr. Arika whom he had worked with. His findings were that she had deep cuts at the area between her vagina and anal area, and that blood and white discharge were noticed at the vagina, but no spermatozoa was detected. He concluded that she had bled from her vaginal area. PW5 was the investigating officer. He produced the exhibits in court. In his defence, the appellant denied the offence. He called DW2 as his witness, but the evidence is of little help.

5. In his judgment, the learned Magistrate was satisfied that the offence of indecent act had been proved. He convicted him and sentenced him to serve 15 years imprisonment. As was held in *Okeno v R*:

“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 to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; it must make its own findings and draw its own conclusions; only then can it decide whether the magistrate's findings 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.”

6. Section 11 (1) of the [Sexual Offences Act](#) 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”

7. The Act defines “indecent act” as act which causes: -

- a. Any contact between the genital organ of a person, his or her breasts and buttocks with that of another person; or
- b. Exposure or display of any pornographic material to any person against his or her will, but does not include any act which causes penetration.

8. Undisputedly, many offences of indecency also involve unlawful and indecent dealings with children. As such, it's worth highlighting the observation of Callaway JA in *R v Coffey* where his Honour said, indecent acts “... are as various as human imagination can make them.” However, the practice of law requires a certain amount of specificity and although many of us will agree with the statement of Callaway JA in regards to indecent acts, indecency as a legal construct needs further illumination and may be found in *Crowe v Graham*, where Windeyer J in the High Court of Australia had to explore the meaning behind the words, ‘obscene’ and ‘indecent.’ His Honour observed that both ‘obscene’ and ‘indecent’ were terms that are well known and has a long history of usage in law. His Honour went to deconstruct the meaning of the words saying: -

“Apart from any definitions given them by statutes, they are both to be understood with the meanings they have for common law; and for present purposes each must be understood with any colour it takes by their collocation. I say this because the adjective “indecent” has



long been used in law to describe multifarious forms of offensive or objectionable conduct. In this general sense it sometimes denotes lewd forms of misbehavior, but not always. Indecent exposure, indecent assaults involve lewdness. Indecent language does not...

Brawling in church, maltreating corpses, grave-snatching have all been punished as indecent. Sometimes indecent conduct was punished at common law because it created a public nuisance. Sometimes simply as, in Lord Mansfield's words, 'against public decency and good manners.'

9. The attempt by Windeyer J is one of many in trying to unravel the meaning behind the term of indecency, and even a cursory overview of the common law highlights some of the challenges in finding a meaning behind the term. However, further guidance may be found in *R v Stringer*, where Adams J in the Supreme Court of New South Wales, Court of Criminal Appeal (NSWCCA) set out the following test for indecency: -

“The test of indecency has been variously stated as whether the behaviour was unbecoming or offensive to common propriety...or to modesty...or would offend the ordinary modesty of the average person...”

10. Arguably, one of the most common offences of indecency is that of indecent assault, with the offence exhibiting an element of sexual connotation. In *R v Harkin*, Lee J in the NSWCAA, with whom the others agreed, said the following: -

“It is in my view clear that if there be an indecent assault it is necessary that the assault have a sexual connotation. That sexual connotation may derive directly from the area of the body of the girl to which the assault is directed, or it may give rise to a sexual connotation in the carrying out of the assault. The genitals and anus of both male and female and the breast of the female are the relevant areas... The purpose or motive of the appellant in behaving in that way is irrelevant. The very intentional doing of the indecent act is sufficient to put the matter before the jury. But if the assault alleged is one which objectively does not unequivocally offer a sexual connotation, then in order to be an indecent assault it must be accompanied by some intention on the part of the assailant to obtain sexual gratification.”

11. Like other criminal offences, indecent assault requires a mental element with the onus on the Crown to establish the intention of an accused. In *Fitzgerald v Kennard*, Cole JA said:-

“It has always been the law that the onus is on the Crown to establish the absence of consent if a prosecution for a sexual assault, or indeed any assault, arising from physical contact, is to succeed. The mental ingredient required to be established by the Crown in such cases is an intention on the part of the accused to perform the act, be it intercourse or other forms of sexual or indecent assault without the consent of the victim or 'willy nilly not caring whether the victim consents or no.'”

12. From the above judicial pronouncements, it is manifest that the offence of indecency involves many elements. As was held in *R v Court*, there seems to be an overall test of indecency divided into three kinds. First, where the acts are inherently indecent, like touching the victim's genitals, anal areas or a female's 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. Second is where the act is such that an indecent motive is obvious to reasonable persons. Third is conduct or act that may not be indecent but an indecent motive will make it so. Apparently superimposed on the foregoing is a general test that the act must also



be indecent according to right minded or respectable members of the community though a reasonable belief that there was consent is a good defence.

13. In addition to basic indecent assault, courts have singled out offences of aggravated indecent assault characterized by factors such as age of the victim or physical or mental condition of the victim or even the presence of third parties, certain forms of violence all of which aggravate the offence.
14. Whether or not it involves penetration, an assault committed in indecent circumstances may amount to the offence of an indecent act. The prosecution is required to prove that there was an indecent act which was unlawful and intentional. Unlawful means the act was not justified or excused. The very intention of doing an indecent act is sufficient. From the evidence adduced, the appellant touched the complainant's genitals with his fingers. The appellant's defence did not dislodge the allegations against him. I am persuaded that the learned Magistrate considered the appellant's defence in his judgement. Accordingly, I am unable to upset the conviction. As for the sentence, section 11(1) prescribes a penalty of not less than 10 years. The learned Magistrate imposed a jail term of 15 years. I hereby reduce the sentence to 10 years. In computing the said sentence, the period the appellant was in custody will be considered.

Right of appeal

DATED AND SIGNED AT VOI THIS 29TH DAY OF AUGUST 2022

JOHN M. MATIVO

JUDGE

DATED AND SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF AUGUST 2022

STEPHEN GITHINJI

JUDGE

