



**Muriithi v Republic (Criminal Appeal E002 of 2022)  
[2022] KEHC 14442 (KLR) (26 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14442 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL APPEAL E002 OF 2022**

**M MUYA, J  
OCTOBER 26, 2022**

**BETWEEN**

**ROBERT MAINA MURIITHI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against both conviction and sentence in  
MSC.50/E010/2020 SRMs Court Karatina Hon. Vs Kosgei)*

**JUDGMENT**

1. Robert Maina Muriithi hereinafter referred to as the appellant herein was convicted and sentenced to 20 years imprisonment in the alternative count of committing an indecent act with a child contrary to section 11 (i) of the *Sexual Offences Act* No 3 of 2006.
2. The particulars being that on the December 12, 2020 at {Particulars Witheld} Mathira East sub location of Nyeri County Intentionally and unlawfully touched the vagina of CW a child aged 6 years.
3. The appellant was dissatisfied with both the conviction and sentence and lodged this appeal.  
Whose grounds may be summarized as follows:
  - a. That the learned trial magistrate erred in both Law and in fact in convicting the appellant against the weight of the evidence adduced
  - b. That the learned trial magistrate erred in Law and in fact in failure to consider the defence adduced.
4. This is the first appellate court.
5. It is the duty of the first appellate court to re-evaluate and consider afresh the record of proceedings so as to arrive at its own conclusion. *Okeno v Republic* [1972] EA 32



## **Brief facts**

6. In this case it's not in dispute that the complainant was a child aged six years at the time of the alleged defilement.
7. The issue of penetration is a bit hazy and unclear; On the main count, it is alleged that the accused intentionally and unlawfully attempted to cause his penis to penetrate the vagina of the complainant
8. The evidence by the complainant is, that the accused inserted a lollipop, a sweet into her private parts.
9. That is contrary to the charge which refers to an attempt to insert a penis.
10. This contradiction may be the reason why the trial magistrate decided not to find the accused guilty on the main count of attempted defilement but the alternative one of indecent act with a child.
11. From a perusal of the record of the lower court, it is noted that the incident took place on the night of December 12, 2020 and date of arrest as per the charge sheet is shown as December 22, 2020 and date of arrest as December 23, 2020. There is no explanation tendered as to why it took that long to arrest the accused who was staying in the same compound as the victim's parents.
12. The father of the complainant tried to explain the lapse as having been caused by their sending the child to stay with their aunt.
13. That explanation is not plausible as the parents of the child were the right people to see to the health of the child, more so where allegations of defilement were made.
14. The court further notes that the appellant gave a sworn statement and right from the beginning stated that he was not present at the alleged scene of crime on the day alleged as he was at his rural home. He called as his witness his wife who testified that she was with her husband on the December 11, 2020 and that he returned to Karatina on December 15, 2020.
15. No efforts were undertaken by police to test the alibi evidence even when the accused had given prior notice to it before the hearing.
16. I find that the prosecution did not prove this case beyond reasonable doubt.
17. The conviction was not safe and the sentence was unwarranted. The conviction is quashed and sentence set aside.
18. The appellant is set at liberty unless otherwise lawfully held.

**JUDGMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 26<sup>TH</sup> DAY OF OCTOBER, 2022.**

**HON. JUSTICE M. MUYA**

**JUDGE**

**In the presence of:**

Present: Appellant

Mwaniki: Respondent

**Court Assistant: Kinyua**

R/A 30 days.

