



REPUBLIC OF KENYA



**Mwanguma v Republic (Criminal Appeal E016 of 2021)  
[2022] KEHC 17162 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 17162 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E016 OF 2021  
SM GITHINJI, J  
DECEMBER 20, 2022**

**BETWEEN**

**DAVID MPITA MWANGUMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*((Being an appeal against the Conviction and Sentence in Kilifi SPM  
Sexual Offence Case No. 14 of 2017 by the learned trial magistrate Hon.  
J.M Kituku, Senior Principal Magistrate on the 12th March 2021))*

**JUDGMENT**

CORAM: Hon. Justice S. M Githinji

Mr. Lewa for Appellant

Mwangi for the State

- 1 The Appellant was charged with the offence of Sexual Assault Contrary to section 5 (1) (a) (1) (2) of *Sexual offences Act* No 3 of 2006. The particulars being that on the February 14, 2017 in Kilifi Township, the accused intentionally and unlawfully used his fingers to penetrate the vagina of PMO a child aged 16 years who is mentally challenged.
- 2 On November 27, 2017, the charges were substituted and the accused was charged with defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act* No 3 of 2006. The particulars herein being that on diverse dates between January 2017 and March 2017 at [Particulars Withheld] the accused intentionally caused his penis to penetrate the vagina of PMO a child aged 16 years who is mentally challenged.
- 3 In the alternative, he was charged with Indecent Act with a child contrary to Section 11 (1) of the *Sexual offences Act* No 3 of 2006. The particulars being that on diverse dates between January 2017



and March 2017 within Kilifi, the accused intentionally and unlawfully touched the vagina of PMO a child aged 16 years who is mentally challenged, with his hands.

- 4 The trial court on the main charge of defilement acquitted the appellant but convicted him on the alternative charge of committing an indecent act with a child and sentenced him to ten years imprisonment.
- 5 Aggrieved by the conviction and the sentence of the trial court, the Appellant lodged an appeal on the following grounds:
  1. That the learned trial magistrate erred in law and fact by not conducting a voir dire examination of the complainant who is said to be mentally challenged to determine whether she understood the meaning of taking oath and or being affirmed before she was affirmed.
  2. That the learned trial magistrate erred in law and in fact by not making a finding on whether or not the complainant who is said to be mentally challenged was competent to testify prior her testimony.
  3. That the learned trial magistrate erred in law and fact by relying on a medical certificate that was not produced as an exhibit and is therefore irregularly on record to prove that the complainant is mentally challenged.
  4. That the learned trial magistrate erred in law and fact by not making a finding that evidence adduced by the prosecution was at variance with the particulars of the alternative charge on which the appellant was convicted.
  5. That the learned trial magistrate erred in law and in fact by disregarding the appellant's defence.
  6. That the learned trial magistrate erred in law and fact by holding that the prosecution had proved the alternative charge against the appellant beyond reasonable doubt.
  7. The learned trial magistrate erred in law and fact in not considering the mitigation of the appellant before sentencing him.
  8. That the learned trial magistrate erred in law and in fact in condemning the appellant with a harsh sentence in the circumstances of the case.

### **Evidence at Trial**

- 6 The prosecution in an effort to establish their case against the appellant called a total of seven witnesses. The summary of evidence tendered is as follows.
- 7 PW1- PMO told the court that she was born on July 2, 2011 and attended [Particulars Withheld] Primary in Special School. She informed the court that there was a time she went to the shop at about 12:00 noon and met the accused who was the shopkeeper at the said shop. The accused asked her to enter into the shop where he touched her breasts, unzipped her jeans and inserted his fingers into her vagina before releasing her with a request to go back later in the evening. She then went home and told her mother what the accused had done to her. Her mother took her to Kilifi Sub County Hospital where she was examined. They later reported the matter to Kilifi Police Station.
- 8 When recalled to testify, she added that she had an infant sired by the accused as he was the only one she had had sex with.
- 9 On cross examination, she stated that she had known the accused for a week to the incidence. She had gone to buy chewing gum and she was alone with no other customers present.



- 10 PW2 – Aziza Muren a doctor working at Kilifi County Hospital produced as PEX 1 and PEX2, a P3 form and a PRC form respectively. She stated that the victim was mentally challenged. The examination showed that there were no bruises on the genitalia, the hymen was not intact, there was no discharge and the injury was harm. Further, pregnancy was negative, HIV and syphilis tests were negative.
- 11 On cross examination she stated that it was not possible to tell when the hymen was broken.
- 12 PW4- HG the victim’s mother, told the court that the complainant was born on July 13, 2001. She testified that on February 14, 2017 she was at a merry-go-round meeting when she received a call from one J informing her that the victim was missing from home. She asked J to go and look for her and she went to the shop where she found neither the shopkeeper nor the victim. She then went home and met the victim and interrogated her. The victim took her to the accused’s shop. The accused confirmed that the victim had been there and since they were not communicating, he asked her to go inside and identify the goods she wanted. On the other hand, the complainant told her that the accused had touched her breasts and vagina. Prior to the day, the complainant had told her that the accused had defiled her. Later, the complainant was found to be pregnant and gave birth to a girl child in October 2017.
- 13 PW 5- JMK told the court that on February 14, 2017, she left the victim and her child at home and went to get vegetables. Upon her return home, the victim left and returned back 20 minutes later. That before the victim returned, she had sought for her whereabouts to no avail. She then went to the accused’s shop from which the victim emerged holding three chewing gums. When she asked her what she was doing in the shop she just clicked. They went back home and returned to the shop in the company of Pw4 and the victim told them that the accused had touched her breasts and inserted his fingers into her private parts. She further told them that she had had sex thrice with the accused in the past. Later the victim was confirmed pregnant and she alleged that the accused was responsible.
- 14 The accused was placed on his defence and elected to give sworn evidence and called one witness.
- 15 In his defence he denied committing the offences he was charged with. He told the court that he was ready to undergo a DNA test to prove he had not sired the victim’s child. Further, he had not had sexual intercourse with the victim. He testified that he had not seen the victim till February 14, 2017 when she went to the shop and there were other customers in the Mpesa section. She queued but did not talk. She had one shilling and since they could not communicate, he gave her back the shilling. She then pointed out lollipops that cost 5 & 10 shillings. He sold her three straw berries that cost one shilling.
- 16 Dw2 CMN told the court that the accused was his customer as he would sell groundnuts to him. On February 13, 2017 the accused called him and placed an order for groundnuts which he delivered on February 14, 2017. While they were at the shop a lady visited and pointed out at lollipop. The accused told her the money was not enough but instead gave her chewing gums. They then started sorting out the nuts when a lady appeared assaulting the one who had bought the sweets. He alleged that he did not see the accused defile the victim.

### **Analysis and Determination**

- 17 Having analysed the trial court proceedings, the grounds of appeal and the parties’ respective submissions, the only issue pertinent for my determination is whether the offence of indecent act was proved to the required legal standard, and whether the conviction and sentence were deserved given the circumstances. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyze it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses



and the Appellant during the trial and can therefore only rely on the evidence that is on record. See *Okeno v R* (1972) EA 32, [Eric Onyango Odeng'v R \(2014\) eKLR](#).

18 As earlier on noted, the appellant was charged with the offence of defilement and in the alternative committing an indecent act with a child. He was acquitted on the charge of defilement but convicted on the alternative charge. Having perused the trial court's record, the complainant delivered a baby girl before the trial was concluded. The appellant herein at the time requested for DNA testing to confirm the paternity of the child in question. It is not clear as to why the court did not grant the said request. In my view I wonder, what better evidence in the circumstances as, would be conclusive in determining a charge of defilement than a DNA test. The circumstances of this case troubles the court as to why the trial court did not commission the DNA at the behest of a man who desperately wished to establish his innocence.

19 For a charge of committing an indecent act with a child, the offended section of the law is section 11. It states 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.'

20 The [Sexual Offences Act](#) defines what entails an indecent act under Section 2 as follows: -

indecent act means an unlawful intentional act which causes-

- (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.'

21 Thus, the key ingredients in this case are the commission of the act and that the complainant is a child. On age, a child health card was produced as PEX3 which shows that the complainant was born on July 2, 2001. The offence herein was allegedly committed on February 14, 2017. By simple calculation, the complainant was 16 years old at the time the offence allegedly took place. To this end, I am satisfied that the prosecution proved beyond reasonable doubt the age of the complainant.

22 On commission of the indecent act, the complainant testified that the appellant touched her breasts and inserted fingers into her vagina. Once questioned by Pw2 her mother, she insisted that the appellant had committed the act. When recalled, she testified that the accused had defiled her. The appellant's defence is that the complainant went to the shop to buy sweets but they could not communicate as she is mentally challenged. He called a witness Dw2 who told the court that he went to deliver nuts at around 8:00 am. What he did not tell the court is how long he stayed with the appellant. The offence is said to have taken place at noon. He did not tell the court at what time he was with the appellant. Pw4 told the court that she saw the complainant walk out of the shop in the company of the appellant. I have weighed the entire evidence in the case. In my view, I find that the complainant's evidence is littered with inconsistencies. The appellant was convicted by the trial court mostly on circumstantial evidence.



- 23 The Court of Appeal in *Abamad Abolfathi Mohammed and Another v Republic [2018] eKLR* has laid down the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated: -
- 24 Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Accused person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R Cr App No 32 of 1990*, this court set out the conditions as follows:
- 25 It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else.'
- 26 From the foregoing, I am not convinced that the prosecution met the test to warrant the appellant being convicted on circumstantial evidence. Further, the trial court in its judgment did not elaborate the basis upon which the accused was convicted on the circumstantial evidence. I find that the charge of indecent act with a child was not proved to the required standard. There are reasonable doubts hanging, begging to be cleared. It is trite that the required standard in criminal cases is beyond reasonable doubt. In this case, the prosecution failed to meet the standard. The complainant testified that the appellant touched her breasts and inserted fingers into her vagina. This suggests there was penetration. The charge that ought to have been preferred is of Sexual assault and not indecent act with a child.
- 27 The upshot of the foregoing is that the prosecution failed to establish the offence of indecent act with a child. The appeal therefore succeeds in its entirety. The conviction is hereby set aside and the sentence quashed. The appellant is accordingly set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 20th DAY OF December 2022**

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**S.M GITHINJI**

**JUDGE**

In the presence of the Appellant and the Prosecutor.

