



**Kivihya v Republic (Criminal Appeal E290 of 2023)
[2025] KEHC 1024 (KLR) (Crim) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1024 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

CRIMINAL APPEAL E290 OF 2023

CJ KENDAGOR, J

FEBRUARY 14, 2025

BETWEEN

MAURICE AMAGANGA KIVIHYA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction in Judgment delivered on 8th November, 2024 by Hon. H. Onkwani, SPM in Chief Magistrates Court Makadara Sexual Offence No. 22 of 2028)

JUDGMENT

1. The Appellant herein was charged in Count One with the offence of abuse of a position of authority contrary to Section 24 (4) of the *Sexual Offences Act*. Particulars of the charge are that on the 26th day of January, 2018 within Nairobi County, he took advantage of his official position as a teacher at [Particulars Withheld] School to seduce AHA, a pupil at the said school to have sexual intercourse with him.
2. In the alternative, he is charged with committing an indecent act with a child contrary to Section 11 (i) of the *Sexual Offences Act*. The particulars of the charge are that; on the 26th day of January, 2018, within Nairobi County, he intentionally touched the breasts and buttocks of AHA, child aged 8 years.
3. The plea was taken on the 8th of February 2018, when the Appellant pleaded not guilty to the charge. The prosecution called six witnesses to substantiate its case. After a full trial, the appellant was convicted and sentenced to five years imprisonment on the main count, while the alternative count was held in abeyance.
4. Dissatisfied with the conviction and sentence, he filed a petition of appeal listing six (6) grounds of appeal:



1. That the learned trial magistrate erred in both fact and law in unreasonably, injudiciously and wrongly, finding that the prosecution had proved its case beyond reasonable doubt, thereby convicting and sentencing the appellant.
 2. That the learned trial magistrate erred in law and in fact, in failing to find and rule that the evidence adduced by the prosecution was insufficient to sustain the conviction and sentence of the appellant and in convicting him against the weight of uncorroborated evidence adduced that was full of contradiction and inconsistencies.
 3. That the learned trial magistrate erred in law and in fact, in failing to find and rule that there was no cogent, substantial, credible, and direct evidence connecting the appellant to the offence of Abuse Of Position of Authority Contrary To Section 24(4) of the Sexual Offence Act No.3 of 2006.
 4. That the learned trial magistrate erred in law and in fact and law by failing to consider that the inner clothing of the Victim was not subjected to DNA analysis, hence making the nexus between the Appellant and Victim unverified.
 5. That the learned trial magistrate erred in law and fact by not appreciating that key material witnesses did not testify, hence making the chain of events broken, thus making the conviction unsafe.
 6. That the learned trial magistrate erred in law and fact by convicting the Appellant on a piecemeal investigation by PW6 that was solemnly anchored on the doctor's report, which was extraneous and not convincing enough.
5. The appeal was canvassed through written submissions. The Appellant argues that the prosecution did not meet the standard of proof beyond a reasonable doubt. He also asserts that the trial Court incorrectly shifted the burden of proof onto him and failed to give him the benefit of the doubt when the evidence was insufficient to meet the required standard for securing a conviction.
 6. As an appellate Court, I must reconsider and evaluate the evidence before the trial Court and arrive at an independent conclusion, bearing in mind that I did not hear or see the witnesses. I am guided by the decisions in *Njoroge v Republic (1987) KLR, 19* & *Okeno v Republic (1972) E.A, 32* And *Kiilu & another v Republic (2005)1 KLR 174*.
 7. The Complainant was a pupil at [Particulars Withheld] School, where the Appellant was employed as a teacher. She told the Court that on the relevant date, she was at school when the Appellant took her to one of the classrooms and locked the door. She stated that the Appellant brought two tables together and laid her upon them. She then recounted that the Appellant inserted something into her private parts, which she referred to as her place for urinating. She stated that the Appellant inserted his penis once into her vagina, then asked her to bend and repeated the same action in her anus. During cross-examination, she described the location of the class as being on the second floor and stated that the insertion of the penis was slight. She stated further that the Appellant covered her mouth and warned her against informing anyone of what had transpired.
 8. PW2 was the Complainant's mother. She told the Court that her daughter went home and went straight to the bathroom, which caused her concern. She then asked her if she was okay, to which she stated that her private part was painful. She mentioned that she checked her daughter's private part and found some discharge. After hearing the account from the Complainant about what had transpired at school, they left for the hospital and subsequently made a report at the police station.



9. PW3 was a teacher at the school where the incident is stated to have occurred. Her testimony was that the Appellant was on duty on the relevant date and further that she was with him on that date. She stated that she left the Appellant in the dining area during lunch while watching over the children and that at approximately 1:20 pm, she encountered the Appellant on the stairs. She noted that she became aware of the complaint regarding the incident two days later when she was contacted and informed that the Appellant had been arrested.
10. The investigating officer informed the Court about the report made to the station and presented the birth certificate for the minor, along with a payslip indicating that the Appellant worked at the school. Her evidence was that the Appellant was charged with the current offence as there was insufficient evidence for an offence of defilement, and she further stated that the charges were based on the medical reports obtained. PW 4 further informed the Court that the school had not cooperated in recording statements during the investigation.
11. PW5 was a clinician at the MSF Sexual Recovery Centre. She produced the medical notes that were issued from the centre. Her testimony on findings on examination was that there were no visible injuries, that the vagina was moist with clear discharge, reddened vulva walls, and that the anus was normal. Urine analysis did not show spermatozoa.
12. The Appellant, in his defence, acknowledged that he taught at the stated school and was on duty on the relevant date; however, he denied the charges against him. He informed the court that he did not know the minor, as she had been at the school for less than ten days since her enrolment. He explained that after the bell rang, he went to the staff room after supervising the children during lunch. According to the Appellant, he was the last to leave and denied any inappropriate behaviour towards the minor.
13. He stated that on 29th January, 2018 — two days after the alleged incident—he was at school when the police arrived. The exam teacher, Dennis, was called to the office. The Appellant testified that he was briefed on the Complaint and subsequently called all the male staff members so the minor could identify the perpetrator. He claimed that as he was calling in the male personnel, the minor pointed at him, and the police then asked him to accompany them to the police station, leading to his subsequent arraignment in Court.
14. The issues for determination are;
 - i. Whether or not the Prosecution proved its case beyond reasonable doubt;
 - ii. Whether or not the sentence meted out by the Trial Court was manifestly excessive.
15. The Complainant was a child of tender years who gave unsworn evidence. The record shows that the trial Court conducted a *voire dire* examination and recorded it in terms. I am satisfied that the trial court employed the correct procedure in ascertaining the child’s competence to give evidence. Her age was verified by the presentation of a birth certificate.
16. Section 24 (4) of the *Sexual Offences Act* provides as follows;

“Any person who being the head-teacher or employee in a primary or secondary school or special institution of learning whether formal or informal, takes advantage of his or her official position and induces or seduces a pupil or student to have sexual intercourse with him or her or commits any other offence under this Act, such sexual intercourse not amounting to the offence of rape or defilement, shall be guilty of an offence of abuse of position of authority and shall be liable upon conviction to imprisonment for a term of not less than ten years.”



17. My understanding of the above is that the offence in the preceding section refers to a situation in which a person in a position of power, such as a teacher or employer, exploits their authority to engage in sexual activity with another person under their care, without constituting a full charge of rape or defilement.
18. In *Hezbon Aura Ngutu v Republic* [2021] eKLR7. Ochieng J. (as he then was) when handling a case under the same Section 24 (4) of the *Sexual Offences Act* held as follows;

“In my considered opinion, the offender shall only be liable to conviction for an offence under this section if the offence he or she committed did not amount to the offence of rape or defilement.”
19. In order to establish an offence under Section 24(4) of the *Sexual Offences Act*, the prosecution must prove that the accused person, being in a position of authority or trust, used that position to commit a sexual offence against the victim.
20. Based on the comprehensive evidence presented during the proceedings, I have no doubt that an incident of sexual assault took place within the school environment involving the minor in question. Upon reviewing the minor’s testimony, it becomes apparent that there was a lack of definitive evidence regarding the occurrence of penetration; a critical component that must be established in order to substantiate offence of defilement.
21. She stated that the perpetrator partly inserted ‘something’, which she then referred to as a penis. She was eight years old when she testified, and her account of the incident was that it caused her pain in her place for urinating, which is her vagina. Upon careful examination of her testimony in conjunction with the medical examination reports that were provided, I noted that both the vaginal and anal areas were assessed as normal. However, there were notable findings of the walls of the vulva were reddened, indicating potential irritation or distress, and the margins of the vulva also exhibited pronounced redness. These observations indicate that while the internal aspects seemed unaffected, there were visible signs of inflammation on the outside. There was sexual activity, but it did not amount to an act which caused penetration.
22. The remaining issue is whether the Appellant was the perpetrator. The Complainant identified the perpetrator as ‘teacher Boli’, who taught Kiswahili. She recounted that the perpetrator had led her away from the other pupils and up the stairs to one of the classrooms, where the incident took place. She explained that she was in isolation because she had recently undergone medical treatment, and her mother had advised her against playing with the other children to avoid potential injury.
23. Although an identification parade was not conducted, I did not find any potential error in the Complainant’s reference to the identification of the Appellant as the perpetrator. PW3 confirmed that the Appellant was the one who remained in the dining area, and the Appellant acknowledged that he was the last to leave. It is plausible that he then led the minor to the classroom and assaulted her. I concur with the trial court’s assessment that accurate identification of the perpetrator was far more critical than pinpointing the exact room where the incident occurred.
24. The defence’s argument that he was misidentified because he was the one guiding the male personnel into the room where the minor was being interrogated at school is an afterthought and lacks credibility. The reference to Dennis and the interrogation that occurred prior to the Appellant being summoned to the office makes it clear to me that the Complainant was certain it was the appellant who sexually assaulted her, not Dennis. The headteacher’s (DW2) testimony did not contain evidence or details pertaining to the timeframe during which the alleged offence is said to have taken place. The



headteacher highlighted the absence of reporting as a significant issue in favour of the Appellant; however, the minor stated that she was threatened, which explains why she might not have reported the incident at school on the same day.

25. The investigating officer testified that the school was reluctant to facilitate the recording of statements. However, the prosecution's case has no weaknesses that could raise doubts or require additional witnesses, as the Complainant's testimony was credible. There was substantial evidence regarding the perpetrator's actions and identity. Additionally, the lack of CCTV camera recordings and the decision not to call further witnesses did not compromise the integrity of the case.
26. The Appellant contested the specifics of the charge, indicating 'seduce'. This also emerged during the examination of witnesses. As previously mentioned regarding the elements of an offence of this nature, the individual was a person in authority who used that status to engage in sexual activity with the victim; there was no ambiguity in how the charge was framed and the particulars thereof.
27. The Appellant was properly convicted of the offence of abuse of a position of authority contrary to Section 24 (4) of the *Sexual Offences Act*. The trial Court's findings on the alternative charge were correct; the main charge was proven to the required standard.
28. The Appellant did not contest the sentence. The learned trial magistrate requested pre-sentence reports, which included a victim impact assessment. The trial Court referenced the findings from the "Muruatetu" case concerning mandatory sentences and subsequently sentenced the appellant to five years of imprisonment. In delivering the sentence, the magistrate clearly explained the reasons she deemed it appropriate, and I will not interfere with the sentence imposed. The appellant was out on bond, and the sentence runs from the date of conviction.
29. The upshot is that the appeal on conviction is hereby dismissed. The sentence is upheld.
It is so ordered.

DATED, DELIVERD AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS PLATFORM ON THIS 14TH DAY OF FEBRUARY, 2025.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Appellant: Maurice Amaganga Kivihya

Respondent: Mr. Omondi, ODPP

