



**Ochieng v Republic (Criminal Appeal E139 of 2023)  
[2025] KEHC 2758 (KLR) (Crim) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2758 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL E139 OF 2023  
AB MWAMUYE, J  
FEBRUARY 13, 2025**

**BETWEEN**

**JOSEPH OCHIENG ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against the Judgment, Conviction and Sentence of the Hon.  
E. Mutunga (PM) delivered on 16th March, 2023 in S.O Case No. 48 of 2017)*

**JUDGMENT**

1. The appellant Joseph Ochieng was charged with three (3) Counts of committing an indecent act with a child contrary to Section 11 (1) of the [Sexual Offences Act](#). The particulars of the first count are that:-  
  
“On the 2<sup>nd</sup> day of September, 2016 in Embakasi Division within Nairobi County, intentionally touched the breasts of BNN, a child aged 13 years with his hands”.
2. The appellant was charged in Count 2 with the offence of committing an indecent act with a child contrary to Section 11 (1) of the [Sexual Offences Act](#). The particulars of the second count are that:-  
  
“On the 15<sup>th</sup> day of February 2017 in Embakasi Division within Nairobi County, intentionally touched the breasts of VMM, a child aged 13 years with his hands”.



3. The appellant was charged in Count 3 with the offence of committing an indecent act with a child contrary to Section 11 (1) of the [Sexual Offences Act](#). The particulars of the third count are that:-

“On the 24<sup>th</sup> day of February 2017 in Embakasi Division within Nairobi County, intentionally touched the breasts of VR, a child aged 11 years with his hands”.

4. The Appellant pleaded not guilty. The prosecution called 7 witnesses; the Appellant was put to his defence. The Appellant was subsequently convicted and sentenced to serve 5 years imprisonment on each count.
5. Having set out the background to the matter, this Court’s duty is to evaluate and scrutinize the evidence and proceedings on record and reach its own independent conclusion as espoused in David Njuguna Wairimu V Republic [2010] where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

6. I have considered the grounds of appeal, evidence adduced in the lower court and the rival submissions of parties. The two broad issues for determination are:
- a. Whether the prosecution proved beyond reasonable doubt the guilt of the appellant for the offence of indecent act with a child?
  - b. Whether the sentence was manifestly harsh and excessive

**Whether the prosecution proved beyond reasonable doubt the guilt of the appellant for the offence of indecent act with a child**

7. Section 2 (1) of the [Sexual Offences Act](#) defines indecent act as: -

“Indecent act means an unlawful intentional act which causes: -Any contact between any part of the body of a person with the genital organ, breast or buttocks of another, but does not include an act that causes penetration;

Exposure or display of any pornographic material to any person against his or her will.”

8. The interpretation given in section 2 of the Act is clear and straight- forward. It does not need any expounding. Any touch or contact by any part of the body against a person’s genitals, breasts or buttocks is indecent.
9. Thus to establish the offence of committing an indecent act on a child, the prosecution had to establish the age of the victim, the indecent act and the positive identification of the perpetrator.
10. The Children’s [Act, No. 29 of 2022](#) defines a child as an individual who has not attained the age of 18 years. From the record I notice that the age of the complainants was not in contention.



11. On the indecent act and identification of the perpetrator, the trial court relied on the evidence of the victims as to establish those ingredients in the affirmative. Section 124 of the Evidence Act provides that a conviction shall not be sustained on the evidence of a single identifying witness except in cases of sexual offences so long as the court can ascertain that the witness was deliberately telling the truth.
12. In this case, it was the evidence of PW1- BNN was that she was in class 8 and 13 years old. She knew the appellant as he was her CRE teacher at [Particulars withheld] School. On 2.09.2016 the appellant called the minor. He told her that her breasts were good and he told her to accompany her to his house and she refused. He then started touching her breasts and the minor ran away and went back to class.
13. PW2- VR; also testified that she schools at [Particulars withheld] Academy and that she was 11 years old and in Class 6. She stated that she knew the appellant as he used to teach her CRE. On 24.02.2017 the appellant touched her breasts. She was standing next to him and he was seated.
14. PW3- VMM testified that she was in class 8 at [Particulars withheld] School and is 13 years old. The appellant was her CRE teacher. On 15.02.2017 they were at break time when the appellant touched her shoulders. He then extended his hand from her shoulder and touched her right breast. She moved but the appellant followed her and told her that she was his girlfriend.
15. In my view, there is sufficient evidence that the appellant was involved in the commission of the offence and he was well known by the victims as he was their CRE teacher.
16. I therefore find that all the elements of the offence were proved beyond all reasonable doubt and the evidence tendered was sufficient to sustain a conviction.

#### **Whether the sentence was harsh and excessive under the circumstances**

17. The The first appellate Court can only interfere with the sentence imposed by the trial court if it is satisfied that; the trial court did not exercise discretion judicially in that;
  - i. in arriving at the sentence, the trial court did not take into account a relevant fact or that it took into account an irrelevant factor; or
  - ii. that in all the circumstances of the case, the sentence is harsh and excessive (*Wanjema v Republic* (1971) EA 493)
18. The penalty for committing an indecent act with a child under Section 11(1) of the Sexual Offences Act is prescribed as follows:

“ 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.”
19. In passing sentence, the court takes into account the individual circumstances of the case.
20. It is material fact that the appellant committed an indecent act with three different children aged 11 and 13. From the evidence on record, the appellant was the teacher to the said minors and he took advantage of that to commit the offence against the minors.
21. I note that the trial magistrate considered the appellant’s mitigation where it noted that he was remorse.
22. I find that the sentence of 5 years imprisonment on each count that was meted upon the appellant by the trial court was neither harsh nor excessive considering the aggravating factors of the case.



23. From the foregoing analysis, I am satisfied that the appellant was convicted on strong evidence and the prosecution discharged the burden of proof beyond reasonable doubt. I therefore find no merit in the appeal. In the result, I affirm the judgement of the court below and dismiss the appeal in its entirety.

**DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 13<sup>TH</sup> DAY OF FEBRUARY, 2025.**

.....

**BAHATI MWAMUYE**

**JUDGE**

