



REPUBLIC OF KENYA



**Ombae v Republic (Criminal Appeal E118 of 2024)
[2025] KEHC 3274 (KLR) (18 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3274 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E118 OF 2024
DR KAVEDZA, J
MARCH 18, 2025**

BETWEEN

FRED MOCHACHE OMBAE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 9th October 2022 by Hon. Kabunya I.M (SPM) at Kibera Chief Magistrate's Court Sexual Offences Case No. E114 of 2023 Republic vs Fred Mochache Ombae)

JUDGMENT

1. The appellant was charged and after full trial convicted by the Subordinate Court of the offence of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the 1st November 2023 at around 1600 hrs at [Particulars Withheld] in Dagoretti Sub-county within Nairobi County the appellant unlawfully and intentionally touched the breast and buttocks of CW a child aged 8 years. He was sentenced to serve ten (10) years imprisonment.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted.
3. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
4. The prosecution availed four (4) witnesses in support of their case. PW1, CW gave sworn evidence after a voir dire testimony. She averred that on 1st November 2023, she was playing with her friend T (name withheld) when the appellant told her that her mother had called her. As she went up the stairs,



the appellant stopped her and began caressing her breasts and buttocks, and further forced her to touch his penis using her hand. Seeing her burst into tears immediately after she got home, her mother PW2 GO, inquired what was wrong. She then narrated everything that had occurred. Her mother went to T's house to confirm whether she had been playing with her daughter and afterwards proceeded to Kabete Police Station where they reported the matter. PW1 was taken to Nairobi Women's Hospital the following day. Upon cross-examination, PW1 recalled that the appellant was their apartment's caretaker and identified him in court.

5. PW2 further recounted that as her daughter explained the matter to her, she complained that her breasts were sore. Her family had only moved into that apartment barely three days prior to the ordeal and after the occurrence, she proceeded to move out and was refunded her rent. As she followed up on the matter the appellant's advocate together with the apartment's landlord requested her to withdraw the case in exchange for monetary consideration. However, she declined the offer. She added that it was not the first case of defilement she had reported at Kabete police station but it was the first one against the appellant.
6. PW3, John Njuguna a clinician at Nairobi Women's Hospital adduced the complainant's GVRC, PRC, and P3 forms. He testified that the complainant's hymen was intact. Further, all lab results were negative.
7. PW4, PC Gathoni recalled that on 1st November 2023, she received a report of an alleged indecent act on the complainant herein and proceeded to record statements. The appellant was then arrested the following day and charged accordingly. She produced the complainant's birth certificate in court.
8. In his defence, the appellant, DW1, testified that on the material day, he had been working on repairs of an apartment block named Coordinate that was adjacent to the block named Geo where the complainant and her mother resided. He passed by the complainant and her friend while they were playing and noted that they had left a tap running and further cautioned them not to waste water. He then met with the complainant's mother so as to prompt her to execute her rent agreement when she alleged that he had performed an indecent act on her daughter, which he vehemently denied. The following day, he was arrested.
9. This testimony was corroborated by DW2, Patrick Njogu who worked with the appellant on the Coordinate apartment block. He further recounted that they had tried to resolve the dispute with the complainant's mother to no avail. DW3, T's mother, testified that the appellant reported to her that her daughter had broken one of the apartment's taps while playing with the complainant who she was not familiar with. Hours later, the complainant's mother came to her house to inquire whether her daughter T had been playing with the complainant. She later learnt that the appellant had been arrested over the alleged indecent act with the complainant.
10. The appeal was canvassed by way of written submissions. From the record, I note that the respondent conceded the appeal. Nevertheless, I must reassess the evidence to determine if the offence was proven beyond a reasonable doubt.
11. Section 2 of the *Sexual Offences Act* defines indecent act as follows:
 - (a) Any contact between any part of the body of a person with the genital organs, breast, 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.
12. To begin with the first question of age, this court finds that age is a matter of fact that is founded on facts/evidence presented. I have gone through the evidence tendered and the complainant indeed



testified that she was 8 years old at the time of the incident. Her birth certificate was produced by the investigating officer who confirmed was born on 12th March 2015 and was a child at the time of the alleged incident.

13. On the question of proof, this court agrees with the appellant and the state that the evidence in the absence of medical evidence was insufficient to find a conviction. This is not to say that a conviction on sexual offences is only founded on medical evidence. That certainly is not the case because the trial court can even on the evidence of the complainant alone can render a conviction under section 124 of the *Evidence Act* so long as it has reasons to believe that the complainant is speaking the truth. A Court should in addition record the reasons it perceives makes it believe that the victim is speaking the truth. It should for example describe the demeanor of the victim and how she/he answers the questions put to him/her.
14. The complainant testified that she met the appellant on the second-floor stairs while heading to her fifth-floor home. She said he touched her breasts and buttocks and forced her to touch his penis. Afterwards, she went home and told her mother. Earlier, she'd been playing with her friend T, who stopped when the appellant said T's mother was calling.
15. PW2, the complainant's mother, told the court her daughter came home crying and described what the appellant did. PW2 was moving out at the time and said her daughter felt breast pain.
16. At the hospital, the complainant told the medical examiner (PW3) that the appellant touched her breasts and fondled her genitalia. However, PW3 found no signs of breast pain and none was reported at the hospital.
17. PW2 also admitted this was not her first defilement report. This raises questions, as the medical evidence showing the complainant's hymen still intact does not back up the claims. Still, this case concerns an indecent act with a child, not defilement.
18. As discussed in the Kenya Judiciary Criminal Procedure Bench Book 2018 paragraphs 94-96 no corroboration is necessary for the evidence of a child taken on oath although cross-examination is available for sworn or unsworn evidence of a child in the usual way:

“94. No corroboration is required if the evidence of the child is sworn (Kibangeny arap Kolil v R 1959 EA 92). Unsworn evidence of a victim who is a child of tender years must be corroborated by other material evidence implicating the accused person for a conviction to be secured (Oloo v R (2009) KLR).

95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, *Evidence Act*). The reasons for the court's satisfaction must be recorded in the proceedings (Isaac Nyoro Kimita v R Court of Appeal at Nairobi Criminal Appeal No. 187 of 2009; Julius Kiunga M'birithia v R High Court at Meru Criminal Appeal No. 111 of 2011).

96. The evidence of a child, sworn or unsworn, received under section 19 of the *Oaths and Statutory Declarations Act* is subject to cross-examination pursuant to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (art. 50(2)(k), CoK”



19. In this case, the trial magistrate noted that the victim was consistent and coherent in her evidence in chief and during cross-examination. Despite the lack of any corroborating evidence, the trial magistrate believed the child was telling the truth.
20. In my view, several factors cast doubt on the case. PW2 admitted to a tenancy dispute and was moving out less than three days after arriving. The prosecution failed to call the complainant's friend, who was playing with her, and could have confirmed her story. The appellant's alibi was backed by DW2, who was with him at the time and saw no incident. Plus, there's no medical evidence of the breast pain as claimed by the complainant.
21. The complainant's claim of breast soreness seems like a last-minute addition to bolster the prosecution's case, but the medical report didn't support it. She also told the doctor the appellant fondled her genitalia, yet if true, she would hardly forget to mention it earlier. In her testimony before the court and cross-examination, she never brought up the genital fondling. This suggests it did not happen.
22. The trial magistrate rejected the appellant's alibi, arguing he and not DW2 was the accused. But if the story was made up, the appellant, as caretaker, could easily have been framed due to his landlord-tenant link with PW2.
23. Taken together, these points: disputed tenancy, missing witness, solid alibi, and lack of medical proof, create sufficient reasonable doubt to favour the appellant.
24. Having analysed and re-evaluated the evidence on record, it is my finding that the complainant and PW2 were untruthful witnesses by the contradictions of material facts. The said contradictions are so substantial as they relate to material facts. I therefore disagree with the trial magistrate that she believed the minor was telling the truth and disregarded the appellant's defence.
25. For the foregoing reasons, I find the appeal merited and hereby quash the conviction and set aside the sentence of ten (10) years imprisonment imposed by the trial court. The appellant is thus set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 18TH DAY OF MARCH 2025

D. KAVEDZA

JUDGE

In the presence of:

Odhiambo for the Appellant

Mutuma for the Respondent

Tonny Court Assistant.

