



REPUBLIC OF KENYA



KENYA LAW
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**Naibei v Republic (Criminal Appeal 39 of 2024)
[2025] KEHC 4418 (KLR) (7 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4418 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 39 OF 2024
DR KAVEDZA, J
APRIL 7, 2025**

BETWEEN

AUGUSTINE NAIBEI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered
by Hon. Njagi (PM) on 13th February 2024 at Kibera Chief Magistrates'
Court Sexual Offences Case No. 51 of 2020 Republic vs Augustine Naibei)*

JUDGMENT

1. The appellant Augustine Naibei was charged and after a full trial convicted for the offence of indecent act with a child contrary to Section 11 of the *Sexual Offences Act*, No. 3 of 2006. He was sentenced to serve fifteen (15) years imprisonment. Being aggrieved, he filed an appeal challenging his conviction and sentence.
2. In the petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He urged the court to quash his conviction and set aside the sentence imposed.
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 that was before the trial court, and itself 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 appeal was canvassed by written submissions which have been duly considered and there is no need to rehash them. The complainant gave sworn evidence after a voir dire examination. She testified that she was 16 years old. She recounted that on 7th June 2020, while washing her clothes, the appellant asked where her mother was, claiming he had her items, and told her sister J (name withheld) not to accompany them. At his house, he failed to give the items, instead touching her breasts, pelvic area, and



- vagina without removing her clothes. At the time, the complainant was pregnant and he promised to care for the child. Her mother called out, and she responded despite his instructions not to, and her mother locked the door with a neighbour's padlock. Police from Langata Police Station arrested him, and they were taken to hospital together, where she identified him as Augustine.
5. EM, PW 2's mother, confirmed PW 2 was born on 3 March 2006. On 7 June 2020, she returned home at 6 pm to find PW 2 absent. J said the appellant had lured PW 2 with items and sent her back. J led her to the appellant's house, where she locked the door with a neighbour's padlock. Police were called, and he was arrested, and they went to the station. She stated PW 2's pregnancy was by Denis, with a separate court case, and her son Jose was friends with Augustine. In cross-examination, she knew Augustine from a theft accusation by Caro, denying any relationship or threats.
 6. John Njuguna, a Clinical Officer at Nairobi Women's Hospital, testified that E.N. was examined on 7th June 2020 by his former colleague, Perminus Mungai. He testified that E.N. reported being touched by the appellant at his house. Examination showed her hymen was perforated with an old scar, and she was pregnant. Njuguna produced the PRC Form, GVRC Report, and P3 Form as evidence.
 7. PW4 Corporal Peris Makio testified that on 7th June 2020, she was alerted by a colleague that PW2's daughter was found in a man's house at Southlands Place. They found the appellant's house padlocked, forced it open, and discovered the appellant and PW 2 inside. Both were arrested and taken to Langata Police Station. PW 2 reported the appellant lured her with food, sent her sister home, caressed her, and promised to care for her child. After the investigation, she charged the appellant and produced an age assessment report.
 8. During the hearing of the defence case, the appellant absconded. He was thus convicted in absentia and sentenced after a warrant of arrest was issued.
 9. Section 2 of the SOA defines an indecent act as: -
 - An unlawful intentional act which causes—
 - 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;
 - exposure or display of any pornographic material to any person against his or her will.
 10. The prosecution case against the appellant was on two key elements under Section 11 of the [Sexual Offences Act](#), No. 3 of 2006. First, the complainant's age. She testified she was 16 on 7 June 2020, supported by her mother, PW3, stating her birth as 3rd March 2006 (14 years old), and an age assessment report from Corporal Peris Makio, confirming her as a child under the age of eighteen years.
 11. Secondly, on the evidence of committing an indecent act, the complainant testified that the appellant lured her to his house, sent her sister away, and touched her breasts, pelvic area, and vagina over her clothes, promising to care for her unborn child. PW4 confirmed the complainant reported caressing her thighs and breasts. Medical evidence from John Njuguna noted a perforated hymen, supporting her account. In addition, the complainant's mother locked the appellant's door, and police found him with the complainant inside. The appellant's arrest and the complainant's immediate identification of him as the perpetrator solidified the narrative.
 12. The prosecution discharged its burden by proving the complainant's minority and the appellant's indecent conduct. The appellant's absconding during trial precluded a defence, leading to his conviction in absentia under Section 11.
 13. It is my finding that the conviction was proper and is affirmed.



14. The appellant was sentenced to fifteen (15) years imprisonment. During sentencing, the court considered his mitigation, and that he was a first offender. The Act provides for a minimum sentence of ten (10) years. In my mind, I have no doubt that the sentence imposed was legal and not harsh or manifestly excessive.

15. The upshot of the above analysis is that the appeal is found to be lacking in merit and is dismissed.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 7TH DAY OF APRIL 2025

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Mutuma for the Respondent

Tonny Court Assistant

