



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Sembe v Republic (Criminal Appeal E013 of 2024)  
[2025] KEHC 11180 (KLR) (29 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11180 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CRIMINAL APPEAL E013 OF 2024  
HI ONG'UDI, J  
JULY 29, 2025**

**BETWEEN**

**ELIZABETH NAFULA SEMBE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the Judgment delivered by Hon. J. Ndengeri  
(SRM) on 3rd June 2024 in Naivasha CMCR (S.O) No. E028 of 2021)*

**JUDGMENT**

1. Elizabeth Nafula Sembe hereinafter referred to as the appellant was charged with two counts of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 2006. On count 1 it was alleged that the appellant on diverse date between 1<sup>st</sup> January 2019 & 28<sup>th</sup> February 2021 at [Particulars Withheld] Academy in Naivasha County the appellant intentionally and unlawfully did cause her breasts to come into contact with the body of S.I a boy child aged 17 years.  
  
For the 2<sup>nd</sup> count it is alleged that the appellant during the same period intentionally and unlawfully did cause her hands to come into contact with the penis of J.M, a boy child aged 13 years.
2. She denied the charges and the matter proceeded to full hearing with the prosecution calling a total of four (4) witnesses while the appellant gave a sworn statement of defence without calling any witness.
3. After the full hearing, the trial court found the appellant guilty and convicted her on both counts, on 3<sup>rd</sup> June 2024. Later on 10<sup>th</sup> June 2024 she was sentenced to three (3) years imprisonment on each of the two counts, with an order that the sentences run consecutively.
4. Being aggrieved by both the convictions and sentences, she filed this appeal through D. K. Gichuki & Co. Advocates on the following amended grounds of appeal:



1. That the Learned Trial Magistrate erred in law and facts in convicting and sentencing the Appellant with the two counts of indecent act with a child when the evidence adduced in court was insufficient, inclusive and uncorroborated in material particulars.
  2. That the Learned Trial Magistrate erred in law and facts in finding that the appellant caused her breasts to come into contact with the body of S. L a boy aged 17 years old when there is no evidence whether such contact (which is denied) was intentionally caused.
  3. That the Learned Trial Magistrate erred in Law and facts in finding that failure to call crucial witnesses like Teacher Faith as witnesses should be construed to mean that should the witnesses have given evidence, the same would have been favourable evidence to the Appellant.
  4. That the Learned Trial Magistrate erred in law and facts in not finding that crucial witnesses who were fellow pupils to JM (PW2) a boy aged 13 years and SL (PW1) should have been called as witnesses as they were alleged to have been present when the offence against JM (PW1) was committed.
  5. That the Learned Trial Magistrate erred in law and facts in putting the burden of proof to the Appellant. The Appellant was prejudiced.
  6. That the Learned Trial Magistrate erred in Law and facts in ordering that the conviction and sentence were to run consecutively.
  7. That the Learned Trial Magistrate erred in law and facts in not finding that the conviction and sentence were unsafe in the circumstances of this case.
  8. That the Learned Trial Magistrate erred in law and facts in failing to find that the age of the victims S.L (PW1) and J.M (PW2) was not proved.
  9. That the Learned Trial Magistrate erred in law and facts in failing to consider the fact that S.L (PW2) who was one of the victims was not sure whether the alleged brushing of Appellant's breasts against his shoulder was intentional or not.
  10. That the Learned Trial Magistrate erred in law and facts in failing to find that the evidence of the victims S.L (PW 1) and JM (PW 2) was at variance in respect of the two charges before court to the point that it raised serious doubts as to their credibility as truthful witnesses or whether they were telling the truth in Court.
  11. That the Learned Trial Magistrate erred in law and facts in considering extraneous evidence allegedly collected by the school administration which was not part of the charges before court.
  12. That the Learned Trial Magistrate erred in law and facts in failing to consider and find that the alleged other teachers who had given adverse information to the school administration particularly Sharon and Veronica were not called as witnesses and their alleged evidence remained as hearsay.
  13. That the Learned Trial Magistrate erred in law and facts in finding that the accused acted upon the vulnerability of the victims to commit the offence.
5. A summary of the case is that the appellant was a teacher at [Particulars Withheld] Academy while the two complainants were pupils there. It was the evidence of S.L (PW1) that the appellant taught his class English. In class she would use examples like PW1 was her husband or boyfriend. She would then use a ruler to explain the length of a penis. One day J (a pupil in the class) was standing on a locker on the appellant's instructions when the appellant while using a ruler showed him how his penis should



- be. Other times the teacher would pinch or poke their hands with a ruler while marking books. She would also brush her breasts to touch his shoulder. PW1, did not know the reason for that. He could remember that this had happened around four times. When she did that she did not say anything. After she left the school PW1, penned her a letter telling her good bye and how he loved her.
6. It was his evidence that he loved the appellant because she would at times not discipline him as she did to others. Secondly, when he did exams and excelled she would buy him gifts. He said he had written to her more than once and would personally take the letters to her, and she would take the letters and read them. A letter marked as PMFI 2 was identified by PW1 as one he wrote. He finally stated that the brushing of her breasts by the appellant on him was intentionally and for a purpose.
  7. In cross-examination he said in his class were 13 pupils (both boys and girls). All the things that happened were in the presence of all other pupils in his class. The habit started in 2018 but he only told his aunt with whom he lived in 2021. He feared telling the head teacher and school administrators. He denied being instructed to do the letter by anyone. He further stated that when the appellant was doing all these things there was a teacher in class who witnessed it. The teacher is called Faith. PW1 was born on 16<sup>th</sup> August 2003.
  8. PW2 (J.M) was taken through a voire dire examination before giving sworn evidence. He said he was asked by the appellant to stand on a locker while she came and sat there. She then rubbed her head on his penis and this happened in the presence of the students. The appellant took a ruler and placed it on his penis, to measure it. She also used to hug him from the front. This was on a different day but in the presence of the other pupils. He added that one day while in class and as she was marking their books, the appellant went behind PW1. He did not see what she did to him. She taught them English and CRE. When he did not do her work well she would punish him. When his penis was measured teacher Faith was in the same classroom. He was born on 6<sup>th</sup> August 2007 as per the birth certificate.
  9. In cross-examination he confirmed that on the day his penis was measured teacher Faith was in class with them. He reported this to the Human Resource Officer called Auntie Veronica. His penis was not removed from the trouser at the time of measuring it. The witness confessed to not recalling a number of things.
  10. Robert Eugene Nendusa Junior – PW3 testified that he was the Executive Director of [Particulars Withheld] incorporated which has a children’s home. It was his evidence that on 28<sup>th</sup> February 2021 he received two reports from a multiple of teachers against the appellant in respect of sexual, physical and verbal abuse against a number of students. The reports were from a number of students. Interviews were conducted and by the end of the day the appellant was suspended, until 5<sup>th</sup> March 2021, when she appeared for a hearing. He gave names of several pupils and their complaints to the team that interviewed the pupils. He said that besides the pupils, were teachers John and Veronicah who complained of sexual harassment, by the appellant.
  11. He stated that they were given a chance to respond. As a disciplinary committee they decided to dismiss her from her duties with effect from 8<sup>th</sup> March 2021. Longonot Police Station was notified and the appellant was taken into police custody.
  12. In cross-examination the witness just repeated what they had done as a committee. He confirmed that they only learnt of the complaints from the teachers. It was then that they spoke to the pupils and decided to act. He also confirmed that between 1<sup>st</sup> January 2019 and 28<sup>th</sup> February 2021 there was no CCTV in the classes.
  13. Zipporah Wataro Wangui-PW4 is the head teacher of [Particulars Withheld] Academy. She stated that on 26<sup>th</sup> February 2021 she received a report from Sharon a teacher at the school against the appellant



also a teacher. The report was that the appellant used indecent language while addressing pupils. She informed the management of the school who then suspended the appellant. A notable report was done by teacher Sharon and given to her. A second notable report was done by teacher John to teacher Zipporah and given to her (PMFI 4 & 5).

14. She again passed these reports to the management which suspended the appellant. Later investigations were done after the boys were interrogated. She did the report dated 1<sup>st</sup> March 2021 (MFI 6) on Grade 7 classroom. She informed the court of a number of things that the appellant was accused of by the boys.
15. In cross examination she said teacher Sharon was still in the school but teacher John was no longer there.
16. No. xxx Cpl Bonface Amboki testified as PW5, and was the investigating officer. He produced the birth certificates of PW1 and PW2 as Exb 1 & 2. He interrogated PW1 and PW2 and thereafter charged the appellant.
17. In her sworn defence the appellant said she was a teacher at [Particulars Withheld] School Maai Mahiu. She knew PW1 and PW2 as pupils in the said school. In February 2021 she was informed of her suspension following some complaints including one by teacher John who had complained that she had insulted him before pupils.
18. After a week of suspension, she reported back and appeared before the management team comprising of the Head Teacher and the Human Resource. They informed her of the outcomes and that they were protecting whistle blowers. She said the classes were mounted with CCTVs and so she asked for the CCTV footage to confirm the allegation of rubbing the boy's private parts with her hand. She was handed a letter allegedly written by one of the pupils and told to wait outside.
19. She was arrested by police from Longonot Police Station as she waited outside. She denied all the allegations against her by PW1 and PW2. She stated that PW1 and PW2 were in different classes, as PW2 was a child with special needs. There were only two pupils in the special needs class while PW1's class had 13 pupils.
20. In cross examination she said the school allowed them to gift children. She used to mark books as she went round the class.
21. The appeal was canvassed by written submissions.

### **Appellant's submissions**

22. These were filed by David K. Gichuki advocate and are dated 28<sup>th</sup> March 2025. Counsel condensed all the thirteen grounds of appeal and argued them together. A high light of his submissions is as follows: Crucial witnesses like teachers Faith, Kevin, Sharon, Veronica never testified. The alleged unsigned love letters to the appellant by PW1 were never produced as exhibits. The report (MFI 6), notable reports (MFI 4 & 5) were never produced as exhibits. No evidence to confirm the measuring of PW2's penis was given. PW1's and PW2's evidence needed corroboration as held in the case of O.K.K Vs. Republic Cr. Appeal No. [24 of 2020](#) where it was held at page 16:

“On the other hand, it is trite that in defilement or rape cases, trial courts have to consider the nature of evidence in consonant with the provisions under Section 124 of the [Evidence Act](#). The strength of the authority in MOHAMMED V.R 2008 (LKR) and JACOB ODHIAMBO V.R observed that the court must satisfy the criteria that the victim told the truth and must record the reasons for such beliefs...”



The trial magistrate did not give any reasons that made her believe PW1 and PW2 to convict the appellant on both counts. Failure to call the pupils in class with PW1 and PW2 to corroborate their evidence. Whether PW1 and PW2 were in the same class.

23. In highlighting the above points, Mr. Gichuki submitted that the evidence adduced was not sufficient to sustain any conviction as crucial witnesses were never called to testify. That the trial court heavily relied on the evidence of PW3 and PW4 which was hearsay evidence and the makers of the reports never testified.

### **Respondent's submissions**

24. The respondent through counsel Judy Kakunga filed grounds of opposition and submissions both dated 3<sup>rd</sup> October 2024. In her submissions, counsel expounded on her grounds of opposition. It was her submission that the age of both minors in counts 1 and 2 was proved to be 17 years and 13 years respectively by production of birth certificates (EXB 1 & 2). On identification she contended that the appellant was well identified by the complainants, the school management and the investigating officer.
25. While referring to Section 11(1) and the meaning of “indecent act” under the *Sexual Offences Act* and the evidence by PW1 and PW2 counsel submitted that there was no doubt that there was improper contact between the appellant and the complainants. Thus, the charge was proved and the conviction should stand and the sentence be upheld.
26. In highlighting the submissions Mr. Abwajo for the respondent submitted that under section 143 of the *Evidence Act* there is no requirement for a particular number of witnesses to prove a case. Further that corroboration is not a requirement under Section 124 of the *Evidence Act*. That it is the court to evaluate the evidence adduced. He submitted that there was evidence sufficient to found a conviction. He thus prayed for dismissal of the Appeal.

### **Analysis and Determination**

27. This being a first appeal this court has a duty to re-consider and re-evaluate the evidence on record and arrive at its own independent conclusion. In the case of Gabriel Kamau Njoroge v Republic (1982 – 1988) I KAR 1134 the Court of Appeal held as follows:

“It is the duty of the first appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law, and the court is required to weigh conflicting evidence and draw its own inferences and conclusion, but bearing in mind always that it has neither seen nor heard the witnesses and make due allowance for this.”

Also see: Okeno, VR 1972 E.A 32; Pandya VR 1957 EA 336.

28. In view of the above and having carefully considered the record of appeal, the grounds of appeal and both submissions I find the issue falling for determination to be whether the prosecution proved its case against the appellant on both counts. In both counts the appellant was charged with committing an indecent act against the two complainants.
29. What then is an indecent act? Section 2 of the *Sexual Offences Act* describes it as 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 what causes penetration.



- b. exposure or display of any pornographic material to any person against his or her will.
30. The acts complained of herein are according to PW1 and PW2 said to have occurred in a classroom, in broad daylight, in the presence of other pupils and a teacher called Faith. In her defence the appellant stated that PW1 and PW2 were not in the same class since PW2 was a child with special needs. The trial Magistrate in her Judgment stated this at page 4 line:
- “PW2 was a special pupil with learning needs that required extra intervention.”
31. PW3 and PW4 who are persons with high positions in [Particulars Withheld] Academy told the court that the school did not have CCTV cameras in the classrooms though the appellant said they were there in each class. PW5 Cpl Bonface Amboki, the investigating officer in cross examination said he never entered the classrooms where the offence is alleged to have taken place. He did not establish whether the school had any CCTV cameras. Further that he could not confirm whether there were other teachers present in the classes during the assault, but he admitted having recorded statements from the teachers including Venoninah who never testified.
32. PW3 and PW4 stated that they conducted investigations and found the appellant guilty and so dismissed her from the school. According to them, they interviewed pupils and teachers whose statements were in notable reports marked as PMFI 4 and PMFI 5. It is surprising that though these reports were never produced as exhibits the trial court relied on them to buttress the prosecution case.
33. PW3 and PW4 were not investigating officers. They were carrying out administrative duties whose results ought to have been placed before the court for interrogation. They never witnessed nor heard of what was being talked about from 2019 until 2021 yet they were in the said school.
34. There are also love letters alleged to have been written to the appellant by the 17 year old (PW1). The said letters were neither marked nor produced as exhibits for the court to read their contents.
35. From the evidence of PW3 and PW4 the appellant insulted, sexually harassed and used vulgar language not only to the pupils but also to the teachers who were her colleagues. None of the teachers nor pupils appeared before the court to testify about these allegations.
36. Mr. Gichuki in his submissions raised issues about failure to call witnesses to support the claims by PW1 and PW2. It is the respondent’s argument that there is no requirement for a particular number of witnesses to prove a case. Further that corroboration is not a requirement under Section 124 of the [Evidence Act](#).
37. This is what Section 124 of the [Evidence Act](#) provides:

Corroboration requirement in criminal cases:

“Notwithstanding the provisions of Section 19 of the [Oaths and Statutory Declarations Act](#) (Cap 15) where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused should not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.” (emphasis mine).



38. My interpretation of this provision is that the court will rely on the victim's evidence to convict if that is the only evidence available and believable. The court must also give reasons for believing the sole witness. However, where there are witnesses who would offer further evidence to corroborate the victim's evidence, the prosecution should not deny the court the opportunity to hear that evidence in the pretext of clinging to the proviso to Section 124 of the *Evidence Act*. And this is especially in cases where the victim's evidence is shaky.

39. In this case as stated by PW1 and PW2 the incidents occurred in the presence of other pupils plus even teacher Faith. Even if none of the pupils in that class was to be called, teacher Faith should have testified to tell the court what really happened and why she took no action.

The investigating officer did not carry out thorough and independent investigations in this case.

Reference was made to the case of OKK *vs Republic Criminal Appeal No. 24 of 2020* (supra) by Mr. Gichuki and I agree with the finding that the court must satisfy the criteria that the victim told the truth and must record the reasons for search beliefs.

40. In his evidence, PW2 in respect of S (PW1) stated this at page 10 lines 4 - 29:

“I did not see teacher Elizabeth do anything else out of the ordinary, one time while we were in class and she was marking our books she went behind S. I do not know what she was doing behind S. S was my classmate. I have not seen teacher Elizabeth doing anything else to any other student. I do not know if there was anything out of the ordinary between teacher Elizabeth and S.”

41. In cross examination PW2 stated thus at page 12 and 13:

“ - on that day teacher Faith was in the class. Teacher Faith was there when my penis was being measured. When my penis was measured it was not removed from the trouser. The accused hugged me in the classroom. It was in the presence of the other students. Teacher was still in the class when I was hugged.”

42. I have cited the above responses and statements to confirm two things namely: Teacher Faith who was an adult was a key witness and ought to have been called as such. PW2's evidence does not support PW1's claims of the appellant brushing her breasts on his shoulders. PW2 did not hear the appellant refer to PW1 as her boyfriend or husband.

43. It was PW1's evidence that the appellant told PW2 to stand on the locker because he was disturbing her. At page 4 line 14 he stated this:

“She would take a ruler and show that if you are a boy our penis should be like this many inches equivalent. She showed and told J that.”

44. The inconsistencies in the evidence of the two boys (PW1 and PW2) would definitely have required teacher Faith and/or any of the pupils to testify and state the position on what happened. Secondly, the trial herein was handled by three (3) Magistrates. The first Magistrate Hon. Sarapai took the evidence of PW1, PW2, PW3 and part of PW4, while Hon. Njora did the first recall of PW4.

45. Hon. Ndengeri who did the Judgment did the 2<sup>nd</sup> recall of PW4 and took the evidence of PW5. This may explain why she did not give the reason/reasons for believing that PW1 and PW2 spoke the truth. She never at any point saw them nor heard them testify.



46. In her sworn defence the appellant denied the charges. It was her evidence that the classes had CCTV cameras but she was never shown the CCTV footage. She admitted having gifted children who did well which was allowed by the school.
47. On the issue of CCTV cameras, it is not clear as to who was speaking the truth between the appellant and PW3 and PW4. The only person who would have confirmed whether or not there were CCTV cameras would have been PW5 – the investigating officer. He never visited the classrooms nor made any inquiry about the CCTVs.
48. There is no dispute as to the ages of PW1 and PW2. From the birth certificates EXB 1 & 2 the ages of PW1 and PW2 were confirmed to be 17 years and 13 years respectively as at the time of incident. They were therefore minors.
49. However when it comes to the proof of the alleged offences committed there is a serious doubt from what I have set out in my analysis in the above paragraphs. Every criminal case whether it is an ordinary crime or one under the *Sexual Offences Act*, must be proved beyond reasonable doubt. The burden of proof on the prosecution never shifts. See Stephen Nguli Mulili V. Republic [2014] eKLR, Festus Mukari Murwa V Republic [2013] eKLR, D.P.P V Woolmington (1935) UKHLI.
50. On my part I find the evidence of PW1 and PW2 to have been shaky and could not on its own be proof of the charges. That of PW3 and PW4 was not supported by any evidence as the alleged reports and letters relied on by the prosecution were never produced as exhibits. They therefore relied on hearsay evidence. All this leaves a doubt in the court’s mind as to the sincerity of the prosecution witnesses and the guilt of the appellant.
51. The upshot is that the Appeal has merit and is allowed. The conviction on each count is quashed and the sentences set aside. The appellant shall be released forthwith unless otherwise held under a separate warrant.
52. Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 29<sup>TH</sup> DAY OF JULY 2025 IN OPEN COURT AT NAKURU.**

**H. I. ONGUDI**  
**JUDGE**

