



**Swara v Republic (Criminal Appeal E082 of 2023)  
[2024] KEHC 18 (KLR) (12 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 18 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E082 OF 2023  
KW KIARIE, J  
JANUARY 12, 2024**

**BETWEEN**

**CHARLES SWARA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in S.O case NO. E087 of 2021 of the Chief Magistrate’s Court at Mombasa by Hon. D. O. Odhiambo–Senior Resident Magistrate)*

**JUDGMENT**

1. Charles Swara, the appellant herein, was convicted of the offence of indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence are that on the 27<sup>th</sup> of June 2021, at Changamwe sub-County within Mombasa County intentionally touched and squeezed the breast of P.K., a child aged 9 years.
3. The appellant was sentenced to ten years’ imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. He was represented by the firm of Nzamba Advocate. He raised grounds of appeal as follows:
  - a) That the learned trial magistrate erred in law and fact by convicting me in the absence of any cogent and tangible evidence.
  - b) That the learned trial magistrate erred in law and fact by forming a conviction in reliance on single witness testimony that was not substantiated by an independent witness.
  - c) That the learned trial magistrate erred in law and fact by relying on contradictory, inconsistent, and unsubstantiated witness accounts of the allegation levelled against the appellant.



- d) That the learned trial magistrate erred in law and fact by failing to take into consideration the defence.
4. The appeal was opposed by the state through M/s. H. Mburu learned counsel. She contended that the prosecution proved all the ingredients of the offence to the required standards. She further said that the sentence was proper.
5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court. I have drawn my conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.
6. Section 11 (1) of the *Sexual Offences Act* states that:
- 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 not less than ten years.
7. Section 2 (1) of the said *Act* defines an ‘indecent act’ as follows:
- “indecent act” means an unlawful intentional act which causes-
- (a) 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;
- (b) Exposure or display of any pornographic material to any person against his or her will;
8. After the prosecution had closed its case, the appellant opted to exercise his constitutional right of keeping mum. He cannot turn around and contend that the learned trial magistrate erred by failing to take into consideration his defence; there was no defence to be considered.
9. K (PW1) testified as follows:
- On this day when he came to our shop, he entered inside our shop and sat on a chair. I was inside the shop. He moved the seat close to me. He also asked me to move my seat towards him. I moved my seat towards him. He sent me to buy a packet of groundnuts from outside vendor. I went and brought the groundnuts which he ate and finished. He asked me to move my seat so that we can face each other. He took my hand and placed it on his lap. He placed his hand inside my clothes on my chest and touched my breast. He started fondling my breast while laughing.
10. Her mother (PW2) however contradicted her. She said she found the complainant standing between the appellant’s legs and when he saw her panicked. She further said that the complainant told her that after she had purchased groundnuts for the appellant, he pulled her between his legs fondled her breasts, and put his fingers inside her vagina.
11. These are material contradictions. The Court of appeal in the case of *Ndungu Kimanyi v Republic* [1976-80] I KLR 1442 said:
- The witness is a criminal case upon whose evidence it is proposed to rely should not create an impression on the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a



person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

It was unsafe to rely on these two witnesses.

12. It was contended by the complainant and her mother that there was a lady who not only witnessed the incident but reprimanded the appellant. She was not called as a witness. The Court of Appeal for Eastern Africa in the case of *Bukenya v Uganda* [1972] EA 549, (Lutta Ag. Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

Had this lady been called, she may have testified as to what she saw. The investigating officer other than saying that the lady did not record her statement, she did not inform the court why this was so. This omission was fatal to the prosecution case.

13. The conviction was not safe. The same is quashed and the sentence is set aside. The appellant is at liberty unless otherwise lawfully held.

**DELIVERED AND SIGNED AT MOMBASA THIS 12<sup>TH</sup> DAY OF JANUARY, 2024**

**KIARIE WAWERU KIARIE**

**JUDGE**

