



**Mbarani v Republic (Criminal Appeal E013 of 2023)
[2024] KEHC 6903 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 6903 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E013 OF 2023
GMA DULU, J
FEBRUARY 15, 2024**

BETWEEN

ERICKSON OMEMU MBARANI APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence in Sexual Offence Case No. 20 of 2019
at Voi Law Courts delivered on 13th May 2021 by Hon. D. Wangeci (PM))*

JUDGMENT

1. The appellant was charged in the Magistrate's court with defilement contrary to Section 8(2) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on 28th September 2019 at about 17:00hours within Taita Taveta County intentionally and unlawfully caused his penis to penetrate the male genital organ (anus) of LM a boy aged 11 years.
2. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, the particulars of which being that on the same date and place intentionally touched the anus of LM a boy aged 11 years with his penis.
3. He denied both the charges. After a full trial, he was convicted on the alternative count of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, and sentenced to ten (10) years imprisonment.
4. Aggrieved by the conviction and sentence, the appellant has come to this court on appeal and relied on the following amended grounds of appeal:-
 1. The trial Magistrate erred in law by convicting him yet failed to find that this constitutional right to a fair trial under Article 50(g) and (h) were violated.



2. The charge sheet was defective since the particulars of the offence as stated in the charge sheet were never disclosed in the evidence tendered by the prosecution witnesses during trial.
3. The trial Magistrate erred in law and fact by failing to adequately consider the appellant's defence vis-à-vis the prosecution's case.
5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.
6. This being a first appeal, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see *Okeno = Versus= Republic* (1972) EA 32.
7. I have evaluated all the evidence on record. In proving their case, the prosecution called six (6) witnesses. On his part, the appellant tendered sworn defence testimony and called on witness DW2 George Omondi.
8. The burden was on the prosecution to prove all the ingredients of the offence for which the appellant was convicted beyond any reasonable doubt for the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, the important elements which were to be proved by the prosecution were the age of the victim who should be a child of less than 18 years. Secondly, the act of touching the private parts of the victim. Thirdly, the identity of the perpetrator.
9. In the present case in my view, the prosecution proved beyond any reasonable doubt that the victim PW1 was 11 years at the time of the alleged incident. In this regard the victim PW1 testified to his age. The guardian PW4 MNM did not testify to PW1's age. However, a birth certificate of LM was produced as an exhibit by PW6 PC Christine Githinji. The date of birth was entered therein as 3rd May 2008 and it was issued on 15th May 2013. The trial Magistrate also saw the victim in court, and PW2 KM and PW3 GN testified that the complainant was a school boy like themselves.
10. I find and hold that the prosecution proved beyond reasonable doubt the age of the victim herein PW1.
11. I now turn to the element of the indecent act. The evidence on record on this element is that of the complainant PW1 LM. He testified in court that he was sexually molested and informed her guardian PW4. The guardian PW4 MNM testified that the complainant, was initially reluctant to disclose what had happened to him, though he had changed his behaviour, especially in the presence of a male person who was familiar to both of them, the appellant. One day, the appellant pulled the victim PW1 in her presence and PW1 stated at that time that the appellant was not a good person.
12. In his testimony before the court PW1 testified that he was penetrated sexually through the anus. The medical evidence of PW7 Dr. Abigail Maremba Musa was however that there was nothing unusual noted in the anus or rectum of the complainant. PW2 and PW3, however stated that they witnessed the complainant being assaulted by a person they knew, the appellant.
13. In my view, there could have been strong suspicion that the complainant was indecently assaulted if the evidence was only that of PW1, PW2 and PW3. However, with the evidence on record from PW4 that the appellant physically pulled the victim PW1 in her presence without any apparent cause, and the complainant telling PW4 that the appellant was not a good person, I find that the prosecution proved beyond any reasonable doubt that the appellant indecently touched the victim PW1.
14. As for the culprit, since I have found that from the evidence on record, indecent act was proved, I find that the prosecution proved that the appellant was the perpetrator or culprit. I will thus uphold the conviction.



15. I find no violation of Article 50 of the *Constitution*, and also find no defect in the charge sheet. I note that the appellant has not appealed against sentence.
16. Consequently and for the above reasons, I dismiss the appeal. Right of appeal 14 days explained.

DATED, SIGNED AND DELIVERED THIS 15TH DAY OF FEBRUARY 2024 IN OPEN COURT AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

