



**PTN v Republic (Criminal Appeal E049 of 2023)
[2024] KEHC 1850 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1850 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E049 OF 2023
A. ONG'INJO, J
FEBRUARY 15, 2024**

BETWEEN

PTN APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the judgment of Hon. Sandra Ogot (PM) delivered on 13th March 2023 in Shanzu S. O. Case No. E088 of 2021, Republic v Richard Kiragu)

JUDGMENT

Background

1. The Appellant, PTN was charged with the offence of indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006.
2. Particulars were that Patrick Tuao Nzivo on the 19th day of September 2021 at around 0630 hours at [particulars withheld] Village, Mangawani Location of Kwale County within Coast Region intentionally and unlawfully touched the vagina of SUN a child aged 12 years with his hand.
3. Based on the evidence of the prosecution and defence, the trial magistrate found the appellant guilty and he was convicted and sentenced to 10 years imprisonment.
4. The appellant was aggrieved by the decision of the trial court and he preferred the appeal herein on the following grounds: -
 1. That the learned trial magistrate erred in law and facts for not appreciating that the prosecution case was not proved beyond reasonable doubt.
 2. That the honourable magistrate erred in fact and law by relying entirely on the uncorroborated evidence of the complainant who was a minor and whose evidence was contradictory.



3. That the learned magistrate erred both in law and fact in finding that the prosecution had proved its case beyond reasonable doubt yet the age of the complainant had not been established beyond reasonable doubt being a material issue requiring proof.
4. That the learned magistrate erred in law and facts for not noticing the medical evidence was not established to corroborate the complainant's evidence.
5. That the learned magistrate erred in law and facts for not considering that crucial witnesses were not summoned in court.
6. That the learned trial magistrate erred in law and facts for dismissing my defence without legal basis.
7. That the appellant's right under Article 50(2)(g) of the Constitution was breached and he did not understand the proceedings.
8. That his right to fair hearing under Article 50(2)(g) of the Constitution was breached
9. That the learned magistrate erred in both law and facts in sentencing me the accused to 10 years in jail and disregarding his mitigation as well as other mitigation factors.

Prosecution case

5. PW1, the complainant, said that she knew the accused as Babu and that she could not remember the date but it was in the morning when she went to Babu. She said that he had called her the previous evening. That when she got there, he asked her to go to the bedroom and that there was no one else in Babu's house. That he was seated on the bed and he told her to move nearer to him. That she was near him and that she stood facing him. That he then lifted her skirt and started to touch her. That he touched her private parts at the front. That she told him to leave her alone but he refused.
6. PW1 said that he heard Nyanya coming and that is when he let her go and told her to get under the bed. The complainant said that Nyanya was looking for some money and that when she shone a torch under the bed where she was, the complainant came out. That she went with Nyanya to Mama Mdogo and she old Nyanya what she was doing under the bed. That they spoke about it and in the evening when her father went home, he was told about it and that is when they went to Shimba Hills Police. That she was then taken to the hospital
7. PW2, MNK said the complainant is her granddaughter and that she used to wake up early and on 19.9.2021, she did and went to milk but remembered she needed to send some boy somewhere and the money was tied in a leso but she did not have the leso with her. That she returned to the house to get the money and found the 2 doors locked. That she had left the front door locked from outside but when she got there the door was locked from the inside and the back door had equally been locked though she had left it open.
8. PW2 said that when she approached, she heard voices from the inside though on low tones. That when she knocked, the accused took 5 minutes to open the door. PW2 said that she went to the sitting room and that she shone a torch around where she normally sits to look for the leso but she did not see it. That she went to the bedroom and the leso was not on the bed but on a chair and when she bent to collect it, she saw feet of someone under the bed. That PW2 asked who it was and the complainant said it was her. That the accused went in from the sitting room and angrily asked what she was looking for. That he did not let her ask the complainant what she was doing there.



9. PW2 left through the back door holding the complainant's hand and that the accused followed them trying to hold her hand but PW2 took off with the complainant to her father's where she was staying. That the complainant told PW2 that the accused was touching her private parts. That PW2 checked the complainant's private parts and that she was wet around her private parts and her thighs. That PW2 went back to the accused's house with the complainant and that the complainant said the accused had done that to her before. That the accused calmed down and that PW2 made tea and they drank. That when the complainant left to go home, the accused asked PW2 whether they could talk about what had happened. That they were not able to resolve the issue because the accused refused to sit with another mzee that PW2 had talked to about what happened.
10. PW3, CNK testified that the complainant is his child and that on 24.9.2021 he found out his mother found Patrick had locked himself in his room with the complainant under his bed. That thereafter, he went to the complainant's head teacher who called PW3's mother who went and told her what had happened. That the head teacher wrote a letter to the Chief and PW3 wrote another letter to Shimba Hills Police Station who sent them to hospital. PW3 said the complainant lived with him, his wife and 2 siblings and that the accused was their neighbour and that he was his mum's husband.
11. PW4, No. **** PC CO the Investigating Officer at Kubo Police Station at the time of the incident said that on 25.9.2021, a report was taken to the station by 2 adults and 1 child. That they reported a case of attempted defilement and PW4 was instructed by the OCS to investigate. That on 27.9.2021, PW4 finally got in touch with them as the number they had left was not going through. That they said the incident occurred on 17.9.2021 and that the report was made on 25.9.2021. PW4 said that he took the minor to Shimba Hills Health Center and later to Msambweni Hospital for other tests. That the doctor confirmed that there was no defilement. That the girl had told PW4 that the grandfather touched her private parts and tried to insert his finger.
12. PW4 said that they went back to the station and recorded statements of the 2 witnesses and that of the accused. That PW4 found out that the accused and the biological grandmother to the complainant used to live together and the minor used to go to the home of the accused all the time, even to play. That the minor said the accused called her on 16.9.2021 and on 17.9.2021, the minor went there at 6.00 am. That however, the minor did not find her grandmother but the accused alone. That he called her into the bedroom and started to touch her in her private parts and thighs, and that shortly thereafter, the grandmother knocked on the door and that the accused told her to hide under the bed and she did. That the accused opened the door and the grandmother started looking for the money that she had previously mentioned to have lost. That she looked for the money under the bed as well and instead found the complainant. That she took the complainant out and asked her questions, and later took her to her stepmother and they spoke and on 25.9.2021 they decided to report the case to the police for investigations.
13. PW4 said that he requested for the birth certificate but the father said he did not have them due to differences with the birth mum. That he instead presented a clinic card with date of birth of 3.9.2009. PW4 produced it as ExP1. PW4 positively identified the accused as the one in the dock.

Defence Case

14. The accused, PNT, gave sworn evidence that on the material day at 6.00 am, the complainant, the granddaughter to Mariam, went to his house and told him that she had not eaten the night before and was hungry. She said that the grandmother had refused to give her food from Saturday morning and that the accused gave her leftovers from the previous night. That the accused and the girl were in the sitting room as she ate when the grandmother knocked on the door. That when the accused went to



- open the door, the girl ran and hid under the bed in the bedroom. That Mariam said she was looking for her money and that she entered the bedroom to look for it and that the girl's legs and thighs could be seen from the side of the bed and that Mariam found her there.
15. The accused informed court that Mariam asked the girl what she was doing there and that she started to beat her. That Mariam then went with the minor to her son's place. He said that on 27.9.2021 at 1.00 am, he was arrested and when he got to the police station, he found Mariam, the child and her father had reported on 25.9.2021 that the accused had defiled the girl. That he was brought to court and charged with defilement and later the charge was amended to indecent assault. He denied the allegations and that he only fed the child. The accused said that Mariam and the child used to have problems and that the child is the one who suffered and sometimes went hungry so the child would ask him for food secretly as she said they would beat her if they found out. The accused said that Miriam told the court that there were no issues between her and the accused but there was a pending case at the Chief because she had sold the accused's cow.
 16. DW2, Pius Munyoki Wakulanga, a catechist, said the accused was his son-in-law and is a neighbour to the complainant and the accused. He said that he stood surety for the accused and that when he heard about the incident, he summoned both the accused and the grandmother to the complainant. That they refused to show up and that he referred the matter to the chief. DW2 said that the accused wanted his property back from the complainant's grandmother. That when they got home, they found that the cow had already been sold. DW2 said that the issue went on and he got a forwarded message from the accused saying "toa elfu tano watu wa haki ya watoto ili wamalize kesi." That when DW2 told the accused that he had found out who the owner of the number was, he said he would deal with it.
 17. DW3, Umazi Nyondo Mwachondo, the stepmother to the minor testified that the accused was her neighbour and that it was on a Sunday when a child was taken to her in the morning by Nyanya having been caned by her and that the child was upset. That when they got to her, Nyanya asked where the child had been sent and DW3 she had sent the child to fetch water. That they then left for Babu's and when the child returned on her own, DW3 asked where she had been and the child said she had gone to fetch water but stopped at Babu's to eat leftovers and when Nyanya went to Babu's, the child hid under Babu's bed because she was scared Nyanya would cane her. DW3 said that the next day on Monday, Nyanya went to her in the morning and asked for the child and 5 days later DW3's husband was called to Kubo Police Station where the allegations herein had been reported. DW3 said she did not know anything despite living with the child.
 18. DW4, Teresia Kanini, said that the accused had acquire property through the marriage and when he wanted out, the woman took his property. That the woman continued sleeping in his house although the accused demanded for his property back, especially the cows. That they asked her for a sit-down thrice but she failed to show up. That they advised the accused to report the issue to the Chief as the vice chairman could not handle it anymore. That they had the meeting with the chief and she was ordered to return the property but she went to the market and sold it. That a week later, they heard that the accused had been picked up by the police for touching a girl.
 19. This appeal herein was canvassed by way of written submissions.

Appellant's Submissions

20. The appellant submitted that according to Section 124 of the *Evidence Act*, it was important for the trial magistrate to record her reasons for believing that the victim was telling the truth but there is nothing on record to show why the trial magistrate believed the complainant. The appellant relied on the case of *PMG v Rep*, High Court Criminal Appeal No. E008 of 2020 where Onyiego, J. held that although



a court has the power to convict under Section 124 of the Evidence Act, the same section should be tested with the greatest care and only be applied against the clearest of the victim's evidence without an iota of doubt. The appellant also cited the case of *Abdalla Bin Wendo v Rep* [1953] 20 EACA 166 where the court held that there was need for the court to have warned itself of the dangers of relying on the evidence of a single witness to convict. Further, the appellant supported his argument with the cases of *George Kioji v Rep*, *Mohamed v Rep* [2008] KLR and *Jacob Odhiambo v Rep*.

21. The appellant contended that the court failed to consider his evidence which clearly demonstrated that the charges brought against him arose out of a family dispute and in particular division of matrimonial property between him and his former wife.
22. The appellant argued that there was evidence that the minor had been coached by PW2 to testify against the appellant. That Section 31 (2) of the Sexual Offences Act provides for appointment of an intermediary once the court declares a witness as a vulnerable one.
23. The appellant further submits that the use of the word liable connotes that the trial court has discretion to impose a lesser sentence where the circumstances dictate so. This was the holding in the case of *Daniel Kyalo Muema v Rep* (2009) eKLR. He stated that a person convicted for the offence of committing an indecent act with a child is liable upon conviction to a sentence of 10 years imprisonment under Section 11(1) of the Sexual Offences Act. That as the same does not stipulate a mandatory minimum sentence, the court has the discretion to impose a lesser sentence or even a fine.
24. The appellant prayed that the appeal be allowed, conviction quashed and imposed sentence be set aside.

Respondent's Grounds of Opposition

25. The Respondent opposed the Petition of Appeal on the following grounds: -
 1. Identification of the appellant was established.
 2. The age of the minor was proved at the trial court.
 3. The fact of penetration was proved.
 4. The trial court guaranteed the appellant's right to a fair trial.
 5. That the appellant's defence was considered by the trial court and a finding made on the same.
 6. The prosecution proved its case beyond reasonable doubt.
 7. The period spent by the appellant in custody was considered during sentencing.
 8. The sentence meted by the trial court was lawful.
26. The Respondent prayed that the appeal be dismissed.

Analysis and Determination

27. This being the first appellate court, it is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think



there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

28. After considering the grounds of appeal, records of the trial court, submissions and grounds of opposition, the issues for determination are as follows: -
- i. Whether the prosecution proved its case beyond reasonable doubt
 - ii. Whether the trial court relied on the uncorroborated evidence of the minor which was contradictory
 - iii. Whether medical evidence was crucial to corroborate the complainant’s evidence
 - iv. Whether crucial witnesses were summoned by the court
 - v. Whether the appellant’s defence was considered
 - vi. Whether the appellant’s right under Article 50(2)(g) of the Constitution was breached
 - vii. Whether the appellant’s mitigation was considered before sentencing.

Whether the prosecution proved its case beyond reasonable doubt and whether the trial court relied on the uncorroborated evidence of the minor which was contradictory

29. Section 11(1) of the *Sexual Offences Act* provides: -

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 of not less than ten years.

30. The ingredients for the offence of indecent act as provided above are the age of the complainant and proof of indecent act.

31. The Court of Appeal in the case of *Richard Wabome Chege v Republic* [2014] eKLR held: -

“On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant, and the complainant herself”.

32. Section 124 of the *Evidence Act* gives the proviso that: -

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 of it, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

33. In the case of *J.W.A v Republic* [2014] eKLR, the Court of Appeal held that: -

“We note that the appellant was charged with a sexual offence and the proviso to section 124 of the *Evidence Act* clearly states that corroboration is not mandatory. The trial court having conducted a *voire dire* examination of PW1 and being satisfied that the complainant was a



truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate”.

34. In *George Kioji v Republic* (UR) the Court of Appeal expressed itself as: -

“Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

35. It is not in dispute that the appellant and the complainant were together in the house when the grandmother to the complainant returned and found the complainant under the bed. The grandmother, PW2, said that when she returned, she found the door was locked and it took 5 minutes for the appellant to open the door only for her to find the complainant hiding under the bed. The appellant was very restless when PW2 wanted to talk to the complainant and he became furious but when PW2 managed to talk to the complainant, she told her that the appellant had touched her private parts.

36. According to PW2, she examined the complainant’s private parts and found that she was wet. She tried to talk to the appellant but the appellant was unruly and as a result she reported to the father of the complainant who in turn reported the matter to the police and the appellant was arrested.

37. The fact that the appellant locked himself inside the house with the complainant and when he heard PW2 coming told the complainant to hide under the bed is proof that he had malicious intentions in locking himself up in the house with the child.

38. The trial magistrate said she believed the evidence of the complainant because she was not aware of the differences between the appellant and her grandmother and she had no reason to lie against the appellant. The complainant testified on oath after voire dire examination and she was exhaustively cross examined by the appellant, and she was very clear as to what happened.

39. The allegations that the appellant was fabricated because he demanded for his property from the grandmother of the complainant cannot be true because evidence that is adduced relates to 1st November 2021 when the offence was committed on 19th September 2021 and the appellant was taken to court on 4th October 2021. The minutes produced by the appellant shows that Mwangangi wanted to sell a cow so that he can sort out his court case. Whether Patrick Mwangangi is also PTN is not clear.

40. This court finds that the circumstances under which the appellant and the complainant were found corroborates the complainant’s evidence that the appellant touched her inappropriately and therefore the prosecution proved the offence of indecent act beyond reasonable doubt.

Whether medical evidence was crucial to corroborate the complainant’s evidence

41. The complainant was never taken to hospital and it was not necessary as the offence committed did not involve physical bodily harm such as injuries to the genitalia or any parts of the body. There was no penetration and there was therefore no need of proof by medical evidence.

Whether crucial witnesses were summoned by the court

42. In the case of *Kihara v Republic* [1986] KLR 473 the Court of Appeal stated that: -

“The Prosecution is not compelled to call as many witnesses as there could be as what matters is not the number of witnesses but the best sound evidence that can be given in Court. It



would have been pointless to call witnesses who did not know what had happened between the Appellant and the deceased.”

43. In *Keter v Republic* [2007] 1 EA 135 the Court of Appeal held: -

“The Prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt”.

44. The appellant has not submitted on this ground and a reevaluation of the record of the trial court does not indicate if there were any crucial witnesses who were not called by the prosecution.

Whether the Appellant’s Defence was Considered

45. The appellant’s defence was considered by the trial court at page 8 to page 9 of the judgment and said that there was no evidence that the complainant’s grandmother coerced her to testify against the appellant. The trial magistrate also considered the evidence of the appellant’s witnesses and found that DW2 said he knew nothing about the charges, DW3 gave hearsay evidence that the complainant had gone to eat at the appellant’s house, and DW4 said that the complainant’s grandmother refused to attend meetings where the appellant was demanding for his properties and that she sold the appellant’s stuff at the market before causing him to be arrested and charged. She was not present on the material day that the offence was committed.

46. The appellant has alluded to defence of alibi in his submissions but he has not explained how it arises because he admits that he was with the complainant in the house where the offence was committed.

Whether the appellant’s mitigation was considered and whether the sentence was harsh and excessive

47. The appellant gave his mitigation but the prosecution objected to him being placed on a non-custodial sentence. The trial magistrate agreed with the prosecution that the appellant deserved custodial sentence so as to serve as a lesson to him and others of similar mindset.

48. The appellant was sentenced to serve 10 years imprisonment which is the minimum sentence provided for under Section 11(1) of the *Sexual Offences Act*. It is clear that the trial magistrate exercised her discretion in arriving at the sentence. This court is therefore minded not to interfere with such discretion except where there are special circumstances.

49. In consideration of the age of the appellant, this court sets aside the 10 years imprisonment and substitutes thereof with 5 years imprisonment to commence from 13th March 2023 when he was convicted.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS
15TH DAY OF FEBRUARY 2024**

HON. LADY JUSTICE A. ONG’INJO

JUDGE

In the presence of: -

Etropia- Court Assistant

Mr. Ngiri for the Respondent

Appellant present in person

HON. LADY JUSTICE A. ONG’INJO



JUDGE

