



**DMN v Republic (Criminal Appeal E058 of 2023)
[2024] KEHC 2455 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2455 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E058 OF 2023**

**A. ONG'INJO, J
MARCH 7, 2024**

BETWEEN

DMN APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the Judgment delivered by Hon. N. W. Kariuki, Principal Magistrate on 22nd June 2023 in Shanzu SGBV Court S. O. No. 020 of 2020, Republic v DMN)

JUDGMENT

1. The Appellant DMN 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. The particulars were that DMN on the 28th day of September 2020 in Kisauni Sub-County within Mombasa County intentionally and unlawfully touched the breast of SW a child aged 16 years with his fingers.
3. The appellant was convicted and sentenced to serve 7 years in jail term. Being aggrieved by the conviction and sentence the Appellant filed Petition of Appeal dated June 30, 2023 on the following grounds: -
 - i. That the learned Magistrate erred in law and fact by not appreciating the fact that the complainant was faced and/or pressurized to make allegations that the Appellant had touched her breasts after several medical examinations to reveal that there was defilement yet there was none.
 - ii. That the learned Magistrate erred in law and fact by not appreciation the fact that the Complainant was forced and/or pressurized to make allegations that the Appellant had touched her breasts after taking her for guiding and counselling sessions for almost one month,



as if the mother of the Complainant had noticed behavioral differences or changes with her child.

- iii. That the learned Magistrate erred in law and fact by not appreciating the fact that the Complainant was forced and/or pressurized to make allegations that the Appellant had touched her breasts after the Complainant's mother made a report of a missing person at Kiembeni Police Station on 2nd and 22nd October 2020 for an alleged incident of 28/09/2020 when Complainant disappeared from home for 2 hours. That the said report was in preparation to undertake an exercise which would lead to pressuring the complainant to make the said allegations.
- iv. That the learned Magistrate erred in law and fact by disregarding serious contradicting evidence tendered by the complainant and her mother as to whether complainant picked her mother's calls or not.
- v. That the learned Magistrate erred in law & fact by disregarding the serious contradicting evidence tendered by the complainant as to whether Appellant touched her breasts in the bedroom or the sitting room.
- vi. That the learned Magistrate erred in law & fact by not appreciating her own finding that there was a grudge between the Appellant and the Complainant's mother – a grudge which started with a caution to the Appellant in 2018 warning him not to communicate with the complainant.
- vii. That the learned Magistrate erred in law & in fact by making a finding that the complainant was traumatized by alleged actions of the Appellant when such trauma could have been as a result of allegations that she was defiled, reports to police and medical examinations and guidance and counselling sessions which took more than one month for the complainant's mother to extract something malicious that could pin the Appellant down.
- viii. That the learned Magistrate erred in law & fact by not appreciating the fact that though Section 124 of the *Evidence Act* lessens the applicability and/or operation of Section 19 of the *Oaths and Statutory Declarations Act*, the same provision makes it mandatory for the trial court, to record the reasons why it believes that the alleged victim is telling the truth. That requirement to give reasons was not complied with. That the trial court did not give reasons why it didn't believe the Appellant's defence.
- ix. That the learned Magistrate erred in law and fact by faulting her own findings that in cases involving a single-eye witness, change(s) can only succeed upon production of circumstantial evidence which must corroborate the complainant's testimony and which evidence should be narrowly examined to avoid cases of fabrication. That the trial Magistrate erred in convicting the Appellant after failing to examine the conduct of the complainant's conduct.
- x. That the trial Magistrate erred in law and fact by not appreciating the fact that she didn't observe the demeanor of the complainant and her mother as she took evidence of only the Investigating Officer.
- xi. That the learned Magistrate erred in law & fact by not appreciating the seriousness of Section 200 of the *Criminal Procedure Code* and convicting the Appellant on evidence taken by her predecessor and which proceedings were prejudicial to the Appellant.



- xii. That the learned Magistrate erred in law & fact by disregarding the evidence tendered by the Appellant without any reasons for such rejection while accepting the prosecution's case as gospel truth.
 - xiii. That the learned Magistrate erred in law & fact by convicting the Appellant yet the prosecution had totally and/or conspicuously failed to prove its case beyond reasonable doubt.
4. The Appellant prayed that the appeal be allowed and judgment and/or conviction delivered on June 22, 2023 be quashed.

Prosecution's case

5. PW1, SW testified on 11.12.2020 that she was born on 5.10.2004 and was a Form 2 student. She said that she was a Christian and goes to [particulars withheld] Church. She said she had 2 siblings a twin sister and 12 years old brother. She said that at about 11.00 am Father DMN sent her a text on her phone and told her to go to [particulars withheld] Church. That she went to church and the guard at the gate told her Father DMN was available. That she said there was a young man who left and Father DMN closed the door to the sitting room and also locked the glass door to the sitting room. That Father DMN then asked her to accompany him to the bedroom. That in the bedroom Father DMN undressed her. She said she was wearing along dress. That Father DMN had alcohol in a cup of coffee which he gave her to drink. That he then caressed her breasts. She said the Fathers phone was ringing. She said it was her mother calling and that is when Father let her go.
6. That when she arrived home their neighbour Jessica asked her where she had been but she didn't say anything. That the complainants mother called the neighbour and asked her to go with the complainant to her house. That she didn't tell Jessica where she had gone to and she returned to their house. That when her mother returned and asked where she had gone to she told her she had gone to church and that she was with Father DMN. That PW2 asked her to accompany her to church. PW1 said she didn't tell her mother what happened at the church. That in the church PW2 went in to talk to PW3 as she waited outside. That when PW3 let her in he asked what she was doing in church and she told him Father DMN had summoned her. She was advised to go to hospital for pregnancy and HIV test. That she was taken to Aga Khan Hospital.
7. PW1 said that Father DMN had never done the same thing before. She said that one time she had a disagreement with her mum. PW2 over Father DMN because she was chatting with him as friends. She said Father DMN had not shown signs he wanted to have an affair with her. She said that alcohol was in a glass on the table in the bedroom. She said Father DMN removed her biker, panty & bra. She said that he didn't remove her dress but unzipped it and touched her breast. She said Father DMN did not pick the phone up to the 5th time is when he picked and spoke to PW2. That she dressed up and left. She said the security guard at the gate saw her leaving the parish. She said she did not scream when Father undressed and touched her. PW 1 said that she had no reason to lie against Father DMN.
8. In cross examination PW1 said her mother was not present when she recorded her statement. She said her statement was recorded by a police woman, he said at 1st she did not say anything to police. She confirmed her statement did not indicate that she went to the bedroom. She confirmed that it was the 1st time in her examination in Chief that she was saying she went to the bedroom. She also said that in her statement she did not indicate that Father DMN undressed her. She said her mother did not like it that she was chatting with Father DMN. She said her mother instigated the case. She said she was afraid of Father DMN and is why she did not complain at 1st to her mother about him. She also said she did not like what Father DMN did to her. She said after she underwent counselling she told her mother everything. She said that she used to chat with Father DMN but he had never tried to touch



her. She said Father A told her to do pregnancy test she said it is her mother who took her to hospital for tests. She said that she attends church regularly but her mother does not attend regularly as she sometimes works on Sunday.

9. PW1 said she was a member of the Church Youth Group and Wana Maria and they are taught to be saints. PW1 said she had never had sexual intercourse with a man and Father DMN did not tell her he wanted to have sexual intercourse with her. That he fists undressed her when she was seated. She said Father DMN said he loved her. She said she told her mother everything and she was upset. She said that 4 priests stay in the parish house but she did not know where the rest were. She said that when she took police to the priest house she showed them where she sat with Father DMN. She said she did not lead them to the bedroom. PW1 said that if her mother had not called Father DMN could have done more than touch her breasts. She said she did not know what Father DMN wanted to do. PW1 said she feared saying the incident happened in the bedroom.
10. PW2, TMW, testified that she was a Nurse at [particulars withheld] Hospital and she resided in [particulars withheld]. She testified that she had 3 children made up of a set of twins aged 17 years old and son aged 12 years. She said that SW was a Form 3 student at [particulars withheld] Girls Secondary School in Bungoma County, she produced her Certificate of Birth showing she was born on 5.10.2004. She testified further that on 28.09.2020 she reported to work at 7.30 am. She said she always call home to find out whether the children were okay. That she called at 1.00 am and M her other twin daughter received phone call and told her that the complainant herein had left and they did not know where she was. That they had been looking for her. PW 2 told them to continue looking for her and also called a neighbour called Jessica to help find out where her daughter was. When he called later and found the complainant had not returned she called the church as the complainant served the church. That she called Father DMN as she had his phone number but he did not pick her several calls. That when he later called Jessica she learnt that the complainant had returned and said she had gone to visit a former school mate at [particulars withheld].
11. That when PW2 returned home she took the complainant to her bedroom and told her to tell her the truth or they go to the alleged friend in [particulars withheld]. That at that point the complainant told her that Father DMN had called her to the church. PW2 said she was devastated. She called the Senior Parish Priest and asked to go and see him. That she went to see the Parish Priest in the company of the Complainant. That when Father A spoke to the complainant she was anxious. That on 29.09.2020 she took the complainant to Aga Khan Hospital where she was examined by Dr. Rukia and Elizabeth and it was found her hymen was intact. That she was advised to take the complainant for counselling.
12. That PW2 was given a letter that she took to Father A and she went with the complainant to Kiembeni Police Station. That the complainant told PC Elizabeth Kanze that Father DMN called her to church but they just sat outside. That the Investigating Officer told PW2 that the complainant could not open up as she was anxious and they returned home. PW2 got a counsellor for the complainant and on 20.10.2020 when she was home for holiday the complainant went to her in the bedroom and offered to tell her what happened. That she told her that Father DMN touched her breasts when she went to see him. That she called Father A and the Police and told them what her daughter told her.
13. That on 22.10.2020 she went with the complainant to Kiembeni Police Station and recorded statements. That they were referred to Coast General Hospital where the complainant was examined. PW2 also said that PW1 told her that Father DMN gave her alcohol on the material day. PW2 said she had cordial relationship with Father DMN. PW2 said that in 2018 the accused was chatting with the complainant on phone and she called and warned him. That on 30.09.2020 she had a meeting with the Bishop concerning this matter and they promised to revert back to her. PW2 said she did not force or threaten her daughter. She waited for her to open up.



14. In cross examination PW2 said she stayed about 10-minute walk to the church. She said the complainant returned home after about 2 ½ hours from the time she started calling home at 11.00 am to 1.30 pm. PW2 said she takes care of her children alone. PW2 said that the complainant lied to the neighbour that she had gone to visit a friend at [particulars withheld]. PW2 said she told the complainant that it was annoying that she had been missing for more than 2 hours. She asked her to state if she had been wrapped. PW2 said she doubted that the complainant had gone to visit a friend as her children don't visit friends. She said she took the complainant to Aga Khan Hospital for check-up before she reported to police and before the complainant told her that her breasts were touched. PW2 said the complainant told her that her breasts were touched after one month after she had undergone counselling. She said the doctors told her not to be harsh with the complainant. She said she had warned the Appellant not to keep chatting with her daughter as she learnt he had visited her house twice without her knowledge consent. She said that she had a house phone but her children did not have personal phones.
15. She said she did not see Father DMN's calls on the call logs in the house phone. She said police took the house phone but she didn't know if they checked the call records. PW2 said that the complainant told her Father DMN touched her breasts while in the sitting room.
16. PW3 Father AM testified that in 2020 he was working at [particulars withheld] as a Parish Priest. He said he was together with Father DMN, Father D and Father A. That on 28.09.2020 he was in the office when he received a phone call from the complainant's mother T who said she wanted to see him over an issue. He gave her an appointment at 6.00 pm. That PW2 went to meet him with her daughter the complainant herein. That PW2 told him she wanted to see him with Father DMN. PW2 told him that her daughter had spent long hours at the church with Father DMN and she wanted to know what they had been doing. That when he called Father DMN he found he had left the parish. That Father DMN asked for another appointment the next day. That PW2 became very emotional and said the case must go forward. PW3 informed the Bishop who gave an appointment for 30.09.2020.
17. That T took her daughter to Aga Khan Hospital for examination and it was found there was no penetration but counselling was advised. PW3 said the complainant said that on 28.09.2020 she just chatted with Father DMN who wanted her to be his "*mdemu*". That when they met the Bishop on 30.09.2020 and PW2 stated her case, the Bishop advised her to report the matter to police. That on 23.10.2020 PW3 was at the Parish farm when PW2 complainants mother called him through the phone and told him to go to the parish house as police officers wanted to see him. That PW3 asked the complainant to show them where she was with Father DMN and she showed them 2 seats which they occupied. That initially they sat on 2 seats but later moved to one seat. That PW3 called Father DMN and police asked Father DMN to accompany them to the station. That the following day he went to Kiambeni Police Station and recorded his statement.
18. PW3 said that minors were not allowed to enter the parish house unless they were in a group. PW 3 said that T, PW2, was his parishioner and she ones took to him medicine when he was unwell. He said he didn't witness bad blood between Father DMN and T. PW 3 said that the complainant didn't tell him that Father DMN did anything indecent to her. He said that Father DMN was not present when he and T met the Bishop on 30/09/2020 as he arrived afterwards. PW3 said T, PW2, felt she was not being listened to. PW3 said that the complainant shifted to [particulars withheld] Parish and that Sister Agnes counselled her once.
19. PW4, PC Elizabeth Mwinyi from Kiambeni Police Station Gender Desk, said she investigated the matter. She said that the complainant's mother went to the station on 2.10.2020 and reported that the complainant went missing on 28.09.2020. That when she resurfaced, she said she was in the



priest house in church compound where the priest indecently touched her breast. PW 4 referred the complainant to Coast General Hospital for examination and P3 form was duly filled and statement recorded. PW 4 proceeded to arrest the Appellant from church compound in company of PC Mustafa. That it is the complainant who led them to the Appellants house. PW 4 recorded statements of the witnesses and produced Certificate of Birth, letter dated 29.09.2020, consent letter and PRC form.

20. PW 4 said the complainant took them to the sitting room of the priest house. PW 4 said she did not establish if there was a grudge between the appellant and complainants mother. PW 4 said the complainant told her that her mother called the Priest many times. That when the Priest went to pick her mother's call she got a chance to leave.

Defence Case

21. The Appellant in his defence gave a sworn statement and said that he was previously Assistant Priest at [particulars withheld] Church where his duties included celebrating mass; visiting small Christian communities and church groups and he was also in charge of the youth at the parish. He testified that on 28/09/2020 the complainant who was an Alter Server and Mwana Maria Youth called and requested if she could see him. That the complainant went to the church at 10.00 am. That he was with someone else in the house and that person left and the complainant entered. That he offered her refreshments. That the complainant even got water from the dispenser.
22. The Appellant testified that a Youth Members or Parish members are allowed to visit the priest house during official hours. He said he asked the complainant where her phone was as he was concerned someone could look for her. That the complainant said she was not going to take long. That the complainant said she had a problem with online classes and academic life during the Covid 19 period. He assured her that the Government would re-open schools and she will proceed from where she left the syllabuses. That he encouraged her to be patient. The Appellant said that the complainant was also worried that she could not celebrate her birthday on October 4, 2020 due to Covid 19 as the hotels were closed. That he told her not to worry as the celebrations would take place even at home.
23. The Appellant said the complainants mother was also his parishioner and was by then a nurse at [particulars withheld] Hospital. The Appellant said he spent 2 hours with the complainant as he had other discussions with her as individual and as a group. That the complainant was not the only one who visited the parish house. That when the complainant left the Appellant he took his lunch and went to his room. That he did find T's missed call. That when he returned the call T wanted to meet him with Father A the parish priest then. That they agreed to meet the following day. That as he left in the evening on Monday, he saw T and the complainant going to the parish office. That they did not talk to him. Later he learnt that the parish priest and T interviewed the complainant. That the complainant was taken to hospital on Tuesday. That the complainant told him through phone she was told to go to hospital for medical examination and that she did not know why she was told to go to hospital.
24. That the following week the Arch-Bishop called him to the Mombasa Dioceses Office and told him the complainant's mother reported her child went missing on Monday. That he told the Arch-Bishop the events of Monday. The Arch-Bishop asked if they could visit the complainant's mother severally but she did not turn up. That on 23.10.2020 police from Kiembeni went to the parish and told him to go and record statement at the station. That the police found Father A. That when he went to the police station he was placed in cells but he was not told the nature of indecent act he was accused of. He said he heard the particulars of the indecent act in court. The Appellant denied having touched the complainant's breasts.



25. The Appellant said the complainant recorded her statement one month later. He said he did not take the complainant to the bedroom. He said the complainant's statement did not indicate that she was taken to the bedroom. That when the complainant took police to the Appellant's house in his absence they found the Parish Priest and showed the police where she sat with the Appellant in the sitting room and did not mention she was touched inappropriately.
26. The Appellant said that he knew the complainants mother who had previously called him and wondered why the complainant was close to him and sharing her personal problem with the Appellant. That the Appellant told the complainants mother that he was a counsellor and it was the complainants choice as she felt free talking to the Appellant about her personal issues. The Appellant said he was shocked about the complainant's statement as nothing happened between them. The Appellant in cross-examination said that he did not interact with all the 60-70 members of Wana Maria Group. He said he had a close relationship with the complainant, C and L. He said they would visit him in and outside the parish house.
27. The Appellant said that he was not counselling the complainant without the permission of the parents. He said priests receive people of all ages. He said they do counselling at the parish office or parish house depending on the case. He said the parish had a 7-bedroom parish house and that he parish had 4 priests. He said the priests were not in. He said that the cook was in the open plan kitchen. The Appellant admitted that the complainants mother had warned him not to communicate with the complainant but the complainant asked to meet him. He said the church did not have a garden. He said that Monday was his off day and Parish Priest had travelled to Kisumu for a burial. The Appellant said that he had no grudge with the complainant's mother

Appellant's Submissions

28. The Appellant filed submissions dated November 13, 2023 on November 21, 2023 which have been considered by this court.
29. The Respondents did not file any submissions.

Analysis and Determination

30. 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.”

31. After considering the grounds of appeal, records of the trial court and submissions, the issues for determination are as follows: -
 - i. Whether the prosecution proved its case beyond reasonable doubt
 - ii. Whether the complainant was coerced into implicating the appellant



- iii. Whether the evidence tendered by the complainant was contradicting
- iv. Whether the complainant's testimony was corroborated
- v. Whether the trial court complied with Section 200 of the *Criminal Procedure Code*
- vi. Whether the appellant's defence was considered and whether reasons for rejection of the defence were given
- vii. Whether the trial court complied with Section 124 of the *Evidence Act* as well as Section 19 of the *Oaths and Statutory Declarations Act* on the requirement to give reasons why it believed that the complainant was telling the truth

Whether the prosecution proved its case beyond reasonable doubt

32. 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.

33. The ingredients for the offence of indecent act as provided above are the age of the complainant and proof of indecent act. The issue of the age of the complainant is not disputed. What is in dispute is the indecent act of touching the complainant's breasts by the appellant. It is also not in dispute that the complainant and the appellant were alone in the priest's house at [particulars withheld] Parish.
34. The complainant, a High School student, was at home following the Covid-19 pandemic lockdown which resulted in institutions of learning being closed indefinitely. This was accompanied by curfews to minimize the viral infection spreading as a result of human interaction. The Appellant either called the complainant to visit him or the complainant called the Appellant. It is not clear who initiated the visit as the call logs and text messages from their phones were not investigated. Evidence however confirmed that the complainant left their house without telling her twin sister and her 12-year-old brother where she was going and when PW2 called the house and found she was not in, she suspected she had gone to the church but the Appellant did not pick her calls.
35. Evidence was adduced by PW2, the mother of the complainant that she had warned the Appellant against chatting with her daughter, the complainant herein in 2018. The Appellant in response told PW2 that he was a counselor and it was the complainant's choice as she felt free talking to him about her personal issues. The Appellant having been warned by the mother of the complainant to stop interacting with her, it was irresponsible for him to say that it was the complainant's choice that he counsels her without the parent's permission and without proof that he was a professional counselor. PW3, the Parish Priest, told the court that minors are not allowed to enter the parish house unless they were in a group.
36. The Appellant having breached the Covid-19 protocols and having breached the church regulations that children are not allowed to enter the parish house as well as defying the complainant's mother that he should not interact with her daughter makes this court believe that the Trial Magistrate was proper in finding that the prosecution's evidence had been proved beyond reasonable doubt. The Appellant did not only defy the protocols and rules but he was also only with the complainant in the parish house. The Appellant stood in the position of a spiritual guardian to the complainant and encouraging the complainant to defy the parent was contrary to the 10 commandments that he should uphold and promote.



37. On whether Section 200 of the *Criminal Procedure Code* was complied with, Hon. Nelly Kariuki (PM) took over the conduct of the proceedings on 30.6.2022, and on 15.11.2022, it is indicated that the provisions of Section 200(3) of the *CPC* were explained to the accused person and Mr. Kaburu for the accused person said the matter may proceed from where it had reached. The evidence of the Investigating Officer, PW4, was taken and the prosecution's case closed. It is therefore not true that the Trial Magistrate did not appreciate the provisions of Section 200 of the *Criminal Procedure Code*. That the predecessor of Hon. Kariuki would have arrived at a different verdict is speculation on the part of the appellant's counsel.
38. In conclusion, this court finds that the appeal on conviction has no merit. However, in consideration of the circumstances and history of the matter, including the Pre-Sentence Report dated August 10, 2023 filed in the Trial Court, this court sets aside the 7 years jail term and substitutes thereof 3 years under supervision of a Probation Officer. While on probation, the Appellant is hereby ordered to sensitize his congregants about the *Sexual Offences Act* at least one Sunday in a month. Upon completion of the period under supervision, the Parish Priest and the Probation Officer will file a report in court to confirm compliance.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 7TH DAY OF MARCH 2024**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Etropia- Court Assistant

Mr. Ngiri for the Respondent

Mr. Chengo h/b for Mr. Kenga Advocate for the Appellant

Appellant present in person

