



**Dwalo v Republic (Criminal Appeal E027 of 2023)
[2024] KEHC 2219 (KLR) (5 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2219 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E027 OF 2023**

KW KIARIE, J

MARCH 5, 2024

BETWEEN

WILLIAM AGUNGA DWALO APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O case NO.54 of 2018 of the Chief Magistrate's Court at Homa Bay by Hon. J.S. Wesonga–Principal Magistrate)

JUDGMENT

1. William Agunga Dwalo, the appellant herein, was convicted of an 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 1st day of July 2020, at Rangwe sub-County within Homa Bay County, intentionally and unlawfully touched the vagina and buttocks of V.A., aged 13 years, a child with mental disability.
3. The appellant was sentenced to ten years' imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. He raised grounds of appeal as follows:
 - a. The learned trial magistrate failed to appreciate each of the elements of the alternative count, more particularly that the particulars given (charge sheet) alleged the offence to have been committed on 1st July 2020, while the evidence given alleged the offence was committed on 15th July 2020, which greatly varied and thus disclosed no offence.
 - b. That the learned magistrate erred in law by convicting the accused on the alternative count of the indecent act when the evidence purportedly adduced included the act of penetration while the definition of an indecent act excludes an act that causes penetration.



- c. That the learned magistrate erred in law by convicting the accused on the alternative count of indecent, having acquitted him on the primary count.
 - d. That judgment was contrary to the weight of the evidence before the learned magistrate, particularly about the date of the offence, which differed from the charge sheet, PW1, PW2 and PW5.
 - e. That the learned trial magistrate erred both in law and fact by giving undue weight to the prosecution witnesses (PW1 & PW5), who greatly contradicted themselves as to the date of the alleged offence.
 - f. That the learned magistrate erred in law by relying on the report of a Psychiatric nurse rather than a psychiatric doctor in establishing the psychiatric status of the complainant and erroneously ruled that she was not in a position to testify. The net effect is that the complainant had the capacity but failed to testify.
 - g. That the learned magistrate erred in law and fact by convicting the accused when ingredients of an indecent act had not been established on the part of the accused/appellant.
 - h. The trial court erred in treating the appellant's defence of alibi as an afterthought when it was not proved otherwise.
 - i. The trial court failed to find that the accused needed to be examined by the doctor for any possibility of injury in the genitalia.
4. The state opposed the appeal. It was contended that the evidence proved the offence and the sentence was proper.
 5. This is a first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court afresh. I have concluded, considering I have not seen or heard any witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.
 6. In the *Sexual Offences Act*, "an indecent act" is defined 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 organs, breasts 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.
 7. Therefore, the main ingredients of the offence of committing an indecent act with a child are: -
 - a) The victim is a child, as prescribed in law;
 - b) Intentional contact by the accused with the genital organ, breast or buttocks of the child victim. The act must not be an act that caused penetration; or
 - c) exposure or display of any pornographic material to a child; and
 - d) Absence of any lawful justification for the act(s) complained of.
 8. These are the ingredients I will endeavour to find if they were proven.



9. Georgina Achieng Otieno (PW4) is a Homa Bay County Teaching and Referral hospital psychiatrist nurse. She testified that the complainant had been her patient since April 2020. She informed the trial court that the patient could not express herself and required assistance in her daily activities. Her opinion was that her mental age was that of a five-year-old. While analyzing the evidence on record, I will consider her opinion.
10. The evidence of B.O.O. (PW1), a minor, was self-contradictory. When he testified in court, he said that when he returned home, he found the complainant (his sister) naked on a seat. The appellant was standing next to her, and his penis was out through the zip opening. The appellant, on seeing him put his penis back and offered him ksh 20.00, which he declined. Since his starter could not talk, he did not know whether he had defiled her. However, in his statement to the police, he had recorded that he found the appellant kneeling and was half dressed. The Court of Appeal, in the case of *Ndungu Kimanyi v Republic* [1979] KLR 283 (Madan, Miller and Potter JJA), held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in 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.

Were it not for this witness's credibility issue, this would have been prima facie evidence of preparation to commit the offence of defilement, but for his PW1 appearance at the scene.
11. D.A.S. (PW2) is the complainant's mother, who was away at the material time. Her evidence was that upon her return, PW1 informed her that he found the appellant sitting in their house. The complainant kept pointing at her private part, indicating that Baba Jacinta, presumably the appellant, hurt her. In her evidence during cross-examination, she said she speaks orally to her daughter. She said the complainant volunteered the information that she had been defiled without asking her. This evidence contradicted that of PW1 and PW4's evidence.
12. The medical evidence adduced by Steven Kerario (PW5) was that there were bruises and lacerations on the vaginal wall of the complainant. He concluded that there was penetration. There being contradictions among the key prosecution witnesses, I find it unsafe to convict the appellant.
13. The conviction is quashed from the preceding, and the sentence imposed by the learned trial magistrate is set aside. The appellant is set at liberty unless otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 5TH DAY OF MARCH 2024

KIARIE WAWERU KIARIE

JUDGE

