



REPUBLIC OF KENYA



**Mwita v Republic (Criminal Appeal E024 of 2023)
[2024] KEHC 2325 (KLR) (1 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2325 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E024 OF 2023
RPV WENDOH, J
MARCH 1, 2024**

BETWEEN

PETER MWITA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal arising from the conviction and sentence by Hon.
K. Njeru Senior Resident Magistrate in Kehancha Magistrate's
Court Sexual Offence Case No. E033 of 2021 delivered on 31/3/2023)*

JUDGMENT

- 1 The appellant, Peter Mwita was convicted by SPM Kehancha court for the offence of Abuse of Position of Authority Contrary to Section 24(5) of the [Sexual Offences Act](#).
- 2 The particulars of the charge are that on diverse dates between April and May 2021, at Kuria Sub-County, being Assistant Bishop at the Apostolic Transformation Ministry Ref No. ATMA/00/2020, a position of trust, seduced MBB, a student of (Particulars withheld) Secondary School form 2 to have sexual intercourse with him without her consent.
- 3 After full trial, he was convicted and sentenced to serve 10 years imprisonment. Aggrieved by the Judgment of the trial court, the appellant has preferred this appeal based on the following grounds:-
 1. That the offence was not proved to the required standard.
 2. That the court failed to consider the appellants defence.
- 4 He therefore prays that the appeal be allowed, conviction be quashed and sentence set aside.
- 5 The firm of Capis Gembe filed the Appeal. The appellant filed submissions reiterating the grounds of Appeal that the complaints demeanor was questionable. On the issue of rape and identification, he



urged that there was no proof that the complainant was under the care and trust of the appellant for him to abuse his position of trust; that there was no evidence of seduction.

6 The prosecution counsel Mr. Kaino conceded the appeal for the following reasons; that under Section 24 of the Sexual Offences Act, two distinct offences are disclosed. Under Section 24 (1) an offence relating to position of authority while under Section 24 (5) of the Sexual Offences Act, it discloses an offence of abuse of position of trust; that the appellant should have been charged under section 24 (5), ie abuse of trust but not under Section 24 (1) of Sexual Offences Act; that it needed to be established that the offender was in a position of trust over the victim, took advantage to induce or seduce the victim to have sexual intercourse; that importantly, the victim should have been under the offenders care and that the offence is committed regardless of consent; that the term ‘care’ and ‘trust’ are not explained but taking cue from Section 22 of the UK SDA 2003, the subject has to be a minor not an adult like in this case. Counsel also submitted that the evidence was at variance with the charge; that the evidence on record supports an offence of rape under Section 3 of the Sexual Offences Act.

7 This being a first appeal, this court has the duty to examine all the evidence tendered in the trial court, evaluate and analyse it and approve at to its on findings. The court will have to make allowance for the fact that it neither saw nor heard the witnesses testifying in order to assess their demeanor.

8 This court takes guidance from the decision in *Okeno vs= Republic* (1972) EA 32 in which the court said;-

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”

9 The prosecution called a total of five witnesses in support of their case. PW1 MB told the court that she was born in 2000 and that the appellant was her pastor who used to come to their home on invitation of her fathers, so that he could pray for her sister; that he sometimes spent night at their home and on one night in May 2021, when asleep, the appellant went to her room, ordered her to undress which she refused; then he forcefully removed her clothes and had sex with her. He threatened to pray for her to become mad if she revealed what happened to anybody; that he repeated the same three times; that in July 2021 she became sick, reported to her teachers, who referred her to hospital and it was found that she was pregnant. She later miscarried at two months.

10 PW2 TB is the father of the complainant (PW1). He identified the appellant as his Pastor who used to go to his house every weekend to pray for his daughter who was demon possessed; that the appellant used to sleep in a room in the same compound; that in July 2021, PW1 was found to be pregnant and are revealed that the appellant had promised to give her money for an abortion and he recorded that conversation which he gave to the police. PW1 informed him that she feared to report because the appellant had threatened to pray for her to be mad. He reported to the police.

11 PW4 CIP Kibiton Boino of Kehancha police station received a report of rape of a student. He summoned the assailant and who is the appellant. PW4 arrested and charged the appellant after he had identified himself as a Pastor. PW4 produced the appellant budge as PEX 4 describing him as Assistant Bishop.



- 12 PW5 PC Magdalene Kibe was also an investigating officer in the matter. She reiterated what the complainant told her that the appellant threatened to cause her to become mad if she did not agree to his advances for sex; that the complainant became pregnant and the appellant wanted her to abort. PW5 issued the complainant the P3 form.
- 13 When called upon to defend himself, the appellant admitted that he is a Bishop in Apostolic Transformation Ministry Church. He told the court that he came to know of the complainant before the OCS and court. He denied ever ministering to her. He also admitted that sometimes in July 2021, PW2 invited him to pray for his sickly daughter but that he never met the complainant.
- 14 The appellant was charged under Section 24 (5) of the *Sexual Offences Act*. I think it is necessary to set out the whole of Section 24 of the *Sexual Offences Act*. It reads as follows ;

24

- (1) Whoever being the superintendent or manager of a jail, remand home or children's or any institution or any other place of custody established by or under any law takes advantage of his or her official position and induces or seduces any inmate or inhabitant of such jail or institution, remand home, place or institution to have sexual intercourse with him or her, such sexual intercourse not amounting to the offence of rape or defilement shall be guilty of a sexual offence relating to a position of authority and shall be liable upon conviction to imprisonment for a term of not less than ten years.
- (2) Any person who being a law enforcement officer takes advantage of his or her position and has sexual intercourse or commits any other sexual offence under this Act;
 - a) within the limits of the station to which he or she is appointed; or
 - b) in the premises of any station house whether or not situated in the station to which he or she is appointed; or
 - c) on a person in his or her custody or in the custody of a law enforcement officer subordinate to him or her.
- (3) Any person whom being the manager of any hospital or staff of a hospital takes advantage of his or her position and has sexual intercourse with or commits any other sexual offence under this Act with any patient in the hospital, such sexual intercourse not amounting to the offence of rape or defilement shall be guilty of an offence of abuse of position of authority and shall be liable upon conviction to imprisonment for a term of not less than ten years;
- (4) Any person who being the head teacher, teacher or employee in a primary or secondary school or special institution of learning whether formal or informal, takes advantage of his or her official position and induces or seduces a pupil or student to have sexual intercourse with him or her or commits any other offence under this Act, such sexual intercourse not amounting to the offence of rape or defilement, shall be guilty of an offence of abuse of position of authority and shall be liable upon conviction to imprisonment for a term of not less than ten years;
- (5) Any person who being in a position of trust take advantage of his or her position and induces or seduces a person in their care or have sexual intercourse with him or her or commits any other offence under this Act, such sexual intercourse not amounting to the offence of rape or defilement, shall be guilty of an offence of abuse of position of



trust and shall be liable upon conviction to imprisonment for a term of not less than ten years.”

- 15 In this case, the charge read as follows, abuse of position of Authority contrary to Section 24(5) of the [Sexual Offences Act](#) No. 3 of 2006.
- 16 The particulars of the charge are that on diverse dates between April and May 2021 in Kuria West Sub County within Migori County being an assistant Bishop of the Apostolic Transformation Ministry Africa vide registration Number ATMA / 003/2000a position of ‘trust’ seduced MBB a student of [Particulars Withheld] Secondary School Form 2 to have sexual intercourse with her without her consent.
- 17 In this case, the charge reads as follows; abuse of position of authority contrary to Section 24(4) of the [Sexual Offences Act](#) No. 3 of 2006.
- 18 In the instant case, the statement of charge states that the appellant was a person in authority over the complainant. However, the particulars relate to a person who was in a position of trust over the complainant. To that extent, the charge is defective. This is because Section 24 (1) (2) and (3) define persons in authority to include , manager, teacher or superintendent.
- 19 From the testimony of PW1 and PW2, the appellant was not a person with authority over PW1. He is just a Bishop who used to pray for the complainant’s sister. Besides, if the appellant had authority over PW1, then the charge should have been under Section 24 (1) of the [Sexual Offences Act](#).
- 20 As properly submitted by counsel, the [Sexual Offences Act](#) does not define somebody in trust and borrowing from the Section 22 of the UK [Sexual Offences Act](#), where trust is explained as an adult coming for, training, supervising or being in sole charge of a child under the age of 18 years. For one to be in a position of trust, the victim must be a minor. In this case, the offence was committed sometime in 2021. The complainant was said to have been born in 2000. As of April - May 2021, she was 21 years old and hence even Section 24 (1) would not have applied.
- 21 Although there is overwhelming evidence from PW1 and PW2 that the appellant had sexual intercourse with PW1 resulting in a pregnancy through threats and manipulation that he would pray madness over her, no offence was disclosed under Section 24 of the [Sexual Offences Act](#). PW1 did not freely consent to the sexual act, and the defence was a hollow denial which was not believable.
- 22 PW2 said that the appellant is his friend and there was no grudge between them. There is totally no reason why PW1 would frame a “Man of God’ with such serious allegations for no apparent reasons. There is no doubt that the appellant did not deny that he used to visit PW1 and spent nights at PW2s home.
- 23 In the end, I find that the charge was defective and in any case even, if it was amended, the offence under Section 24(5) [Sexual Offences Act](#) was not proved. Instead an offence of rape was disclosed and the appellant should have been charged with that offence. However, due to the negligence of the prosecution to charge the appellant under the wrong provisions of law, this court has no option but to allow the appeal, quash the conviction and set aside the sentence. The appellant is therefore set at liberty forthwith unless otherwise lawfully held. Though acquitted it is clear that the appellant committed a sexual offence and this judgment should be served on his church so that he is not given an opportunity to pray on his congregants.
- 24 It is so ordered.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 1ST DAY OF MARCH, 2024.



R. WENDOHO

JUDGE

In presence of; -

Ms. Wainaina for the state

Appellant Present

Emma / Phelix –Court Assistant

