



**A v Republiciic (Criminal Appeal E003 of 2023)  
[2024] KEHC 3546 (KLR) (15 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3546 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL E003 OF 2023  
DR KAVEDZA, J  
APRIL 15, 2024**

**BETWEEN**

**JAA ..... APPELLANT**

**AND**

**REPUBLICIIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered by Hon. E. Bole (SPM) on 20th April 2023 at Kibera Chief Magistrate’s Court Sexual Offences Case No. E036 of 2022 Republic vs Joel Ayoyi Afuga)*

**JUDGMENT**

1. The Appellant was charged with the subordinate Court of the offence of sexual assault contrary to section 5(1)(a)(i)(2) of the Sexual Offences Act No. 3 of 2006. After a full trial, the appellant was convicted on the alternative charge of committing an indecent Act with a child contrary to section 11 (1) of SOA.
2. The Appellant was sentenced to serve 10 years’ imprisonment. He appeals against conviction and sentence in line with his petition of appeal dated 24<sup>th</sup> October 2023. Parties filed written submissions which have been duly considered.
3. This is the first appellate court and in Okeno v. R [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyze and re-evaluate the evidence that was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
4. With the above, I now proceed to determine the substance of the appeal. In his grounds and submissions, the Appellant has raised eight grounds of appeal. The grounds are coalized as follows: He challenged the totality of the prosecution’s evidence against which he was convicted. He complained that the trial court failed to consider his defence. In addition, the charge was not proved beyond



reasonable doubt. He contended that the charge sheet was defective. He urged the court to quash his conviction and set aside the sentence.

5. The prosecution called four witnesses in support of their case. Section 2 of the [SOA](#) defines an indecent act as:-

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;

6. From the facts outlined in the charge sheet, the appellant fell within the first part of the definition of an indecent act. Evidence of the indecent act was given by the victim, (PW2), who gave unsworn testimony after a voir dire examination. She testified that she is a pupil in grade 2. On a day she can't remember, her neighbour, the appellant, found her outside after school. Being neighbours, he asked her to come inside his house. Another child was already indoors watching TV, so she was asked to wait outside. Inside the house, he took her to the bed and inserted his fingers into her vagina. She informed him that she was in a lot of pain but he did not stop. When another neighbor opened an adjacent door, the appellant was startled and stopped.

7. She told the court that she went to her mother's shop and informed her that she was in a lot of pain. However, she didn't disclose her ordeal at the time for fear of being punished, as she had been warned against going to neighbors' houses.

8. At a later date, she confided in the appellant's child, who was her friend, about her ordeal. The appellant's child then informed Mama V, another neighbor, which brought the whole ordeal to light. Mama V, in turn, told the complainant's mother (PW 1), resulting in the appellant's arrest and subsequent charge.

9. Top of Form

10. In her testimony, the complainant gave a clear and graphic testimony of her ordeal. Her identification of the appellant as the perpetrator was not in doubt. She stated that she was acquainted with the appellant and identified him having encountered him on various occasions as Baba (name withheld) Furthermore, the assault occurred in broad daylight, allowing PW2 to identify the appellant. Based on this evidence, I conclude that it was indeed the appellant who perpetrated the act of sexual assault.

11. As discussed in the Kenya Judiciary Criminal Procedure Bench Book 2018 paragraphs 94-96 no corroboration is necessary for the evidence of a child taken on oath although cross-examination is available for sworn or unsworn evidence of a child in the usual way:

“ 94. No corroboration is required if the evidence of the child is sworn (Kibangeny arap Kolil v R 1959 EA 92). Unsworn evidence of a victim who is a child of tender years must be corroborated by other material evidence implicating the accused person for a conviction to be secured (Oloo v R (2009) KLR).

95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, [Evidence Act](#)). The reasons for the court's satisfaction must be recorded in the proceedings (Isaac Nyoro Kimita v R Court of Appeal at Nairobi Criminal Appeal No. 187 of



2009; Julius Kiunga M'birithia v R High Court at Meru Criminal Appeal No. 111 of 2011).

96. The evidence of a child, sworn or unsworn, received under section 19 of the *Oaths and Statutory Declarations Act* is subject to cross-examination pursuant to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (art. 50(2)(k), CoK”
12. PW2's testimony did not require corroboration in accordance with the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if there are reasons to believe that the child was telling the truth. In this regard, the trial magistrate noted that PW2 testified with the innocence of a child and that the evidence as to what transpired remained consistent throughout. While I acknowledge that PW2's testimony was tendered with the innocence of a child, her grasp of the events was quite clear.
13. Regarding the additional corroborating evidence, the complainant's mother, PW1 testified that on March 30, 2022, while she was in her shop, her daughter arrived with the neighbour's baby and left the baby there. Around 6:30 pm, she decided to return the baby to its mother. Upon reaching her neighbour's house, she found the complainant with the appellant's wife and another neighbour's child. Their surprise prompted her to inquire further. She learned that the complainant had disclosed that the appellant had behaved inappropriately with her. PW1 confronted the complainant, who then recounted her ordeal involving the appellant. They reported the matter to the area chief, leading to the appellant's subsequent arrest. The complainant was taken to hospital for examination and treatment. PW1 also informed the court that the complainant was born on August 7, 2014.
14. Additionally, the prosecution called Dr. Sarah Adanji (PW 4) a medical officer at Mbagathi Hospital who examined the complainant on 4<sup>th</sup> April 2022. She was taken to the facility with a complaint of being sexually assaulted. Upon examination, the doctor observed as follows: there was no penetration was reported, her external genitalia was normal, there were no lacerations in the vagina and the hymen was intact. There was a yellowish discharge. She filled out a P3 form which was produced as an exhibit.
15. On the age of PW2, the trial court considered the birth certificate produced in evidence by PW1, the complainant's mother. From the record, the complainant was born on 7<sup>th</sup> August 2014 and was about 7 years old at the time of the incident. There is therefore no doubt that PW2 was a child within the meaning of the law.
16. From the record, the evidence of the complainant was vividly corroborated with the evidence of PW 1, which proved an indecent act with a child. The victim's evidence is corroborated by the evidence from PW1 and PW4. PW1 also testified that she was afraid to tell her mother what had happened because she was afraid of being punished having been warned against going to neighbour's houses. Taken together, the evidence proved an indecent act beyond reasonable doubt.
17. In his appeal, the appellant complained that his defence was not considered by the trial court. I however noted from the proceedings, that the appellant called 3 witnesses during the trial. The appellant presented his sworn testimony and called his wife (DW2) and his colleague at work (DW3) as witnesses. He stated that he had worked as a salesman for two years and had three children, the youngest being a year old. He further stated that on March 30, 2022, he arrived home from work at 7:00 pm and found a letter from the chief, summoning him to appear before the Chief the following day. When he visited the chief's office, he was however informed that his case was already with the police. He proceeded to the police station where he was questioned about allegations made by the neighbours, but he maintained his innocence, stating that he was at work at the time of the alleged incident. He provided evidence of



his work hours and asserted that the incident couldn't have occurred on March 30 due to it being a school holiday. He accused the neighbours of fabricating the case due to personal conflicts.

18. DW2, his wife, testified that she was at home on March 30, 2022, due to maternity leave after delivering their child on January 26, 2022. She confirmed her husband's work schedule and stated that she was with their children at home during the alleged incident. DW3, a colleague, confirmed the appellant's work hours and provided a letter from the company supporting their work schedule. However, the letter lacked a signature and confirmation of employment. During cross-examination, he admitted that the work schedule produced as a defence exhibit was not signed by their employer and he had no other information to show that the appellant was at work on the material day. In addition, he acknowledged limitations in monitoring the whereabouts of the appellant on his day to day activities. This is because the appellant's role was limited to deliveries and he only clocked in the office at 8 am and left to do deliveries and clocked out as 6pm.
19. From the trial court record, the trial magistrate considered the appellant's defence and found it to be unbelievable. The court weighed the evidence and found that the victim was telling the truth. The claim by the appellant that the charge was a fabrication by the complainant's mother was found to have no basis. The issue was considered by the trial court and found to be an afterthought. For the foregoing reasons, I have come to the same conclusion as the learned trial magistrate. In this case, the prosecution proved its case against the appellant beyond any reasonable doubt.
20. On the defectiveness of the charge sheet, the appellant contended that charge sheet did not disclose the date of the alleged offence. In addition, particulars of the indecent act with a child indicated that he touched the vagina of SMK with his penis. This is despite the prosecution leading evidence to the contrary. The particulars of the alternative count charged were as follows:

‘On unknown date, unknown month 2022, at Soweto in Lang’ata Sub County within Nairobi, intentionally and unlawfully touched the vagina of SMK years with his penis’
21. From the record, there is concession by the trial court that indeed although the charge sheet indicated that the complainant was touched by the appellant's penis, the evidence of the child victim was that the appellant was inserting his finger in her vagina. This confirms that appellant indeed committed the indecent act with a child. In an attempt to cure this defect, the learned trial magistrate applied Section 382 of the Criminal Procedure Code. The Code contemplates that there may be variations, so long as there is substantial compliance with the rules. In the same vein section 382 of the Code focuses, not on formal compliance with the rules of framing the charge, but on whether any error, omission or irregularity that has occurred in the charge, has occasioned a failure of justice. (See: [John Irungu v Republic \[2016\]](#) eKLR (Criminal Appeal No. 20 of 2016))
22. I respectfully agree with the reasoning of the trial court. While the charge sheet may not have been drafted in the most elegant of terms, it is clear that the appellant understood the charge against him and participated in the trial. The appellant's claim that the error resulted in a miscarriage of justice is therefore baseless, and I reject it. I am thus satisfied that the appellant was properly convicted.
23. On sentence, the appellant was sentenced to serve 10 years imprisonment. During sentencing, the court considered his mitigation, and that he was a first offender. The court noted that the appellant was not remorseful. In addition, he deserved a deterrent sentence to rehabilitate him. In my mind, I have no doubt that the sentence imposed was legal and not harsh or manifestly excessive.
24. The upshot of the above analysis is that the appeal is found to be lacking in merit and is dismissed.

Orders accordingly.



**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 15<sup>TH</sup> DAY OF APRIL 2024**

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**D. KAVEDZA**

**JUDGE**

In the presence of:

Mr. Simiyu for the Appellant

Mr. Mutuma for the Respondent

Nelson Court Assistant

