Musau v Republic (Criminal Appeal E106 of 2022)
[2024] KEHC 17244 (KLR) (3 September 2024) (Judgment)

Neutral citation: [2024] KEHC 17244 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E106 OF 2022

TM MATHEKA, J

SEPTEMBER 3, 2024

BETWEEN

JACOB MUTUKU MUSAU ..... APPELLANT

AND

THE REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant was charged with the offence of Sexual Assault contrary to section 5(1)(a)(i)(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 25th day of January 2021 between 13:25hrs and 14:30hrs at M Primary School in Mukaa Sub-County within Makueni County, the appellant intentionally and unlawfully used his fingers to penetrate the genital organ of CN, a child aged 14 years.

2. In the alternative, he 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. The particulars of the offence were that on the same day, at the same time and place, the appellant intentionally and unlawfully committed an indecent act with CN, a child aged 14 years by inserting his fingers to her genital organ.

3. In Count II, he 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. The particulars of the offence were that on 25th day of January 2021 between 13:25hrs and 14:30hrs at M Primary School in Mukaa Sub-County within Makueni County, the appellant intentionally and unlawfully committed an indecent act with JM a child aged 15 years by touching her genital organ and breasts.

4. In Count III, he 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. The particulars of the offence were that on 25th day of January 2021 between 13:25hrs and 14:30hrs at M Primary School in Mukaa Sub-County within Makueni

County, the appellant intentionally and unlawfully committed an indecent act with CK a child aged 14 years by touching her genital organ.

5. In Count IV, he 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. The particulars of the offence were that on 25th day of January 2021 between 13:25hrs and 14:30hrs at M Primary School in Mukaa Sub-County within Makueni County, the appellant intentionally and unlawfully committed an indecent act with MM a child aged 14 years by touching her genital organ and breasts.

6. In Count V, he 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. The particulars of the offence were that on 25th day of January 2021 between 13:25hrs and 14:30hrs at M Primary School in Mukaa Sub-County within Makueni County, the appellant intentionally and unlawfully committed an indecent act with FM a child aged 15 years by touching her genital organ.

7. The appellant pleaded not guilty on counts I, II, III and IV. The record is silent with regard to the plea on count V. After a full trial, the learned trial magistrate found him guilty and convicted him on the alternative charge to count I and on counts II, III and IV. He was sentenced to 10 years imprisonment on each count with the sentences running concurrently.

The Appeal

8. Aggrieved by that decision, the appellant filed a homemade appeal and raised the following grounds which I have quoted verbatim;

    a. I was sentenced in the case when there was no plea of guilty.

    b. I am in dispute with the conviction and sentence imposed on me.

    c. The prosecution did not prove their case beyond reasonable doubt.

    d. The honorable magistrate overlooked the inconsistencies of the witnesses which were uncorroborated.

    e. Amended grounds of appeal to be added upon receipt of the lower court file.

9. In his submissions, the appellant raised the following grounds;

    a. That the named magistrate erred in both law and fact in failing to do a proper voire dire examination pursuant to section 19 of cap 15 in respect of PW1, 2, 3 and 4, a child aged between 13, 14 and 15 years in compliance with the provisions and principles in the celebrated case of *Francisco Matove v SP* (1961) EA.

    b. That the learned magistrate erred in law and fact in that though accepting the uncorroborated evidence of PW1, 2, 3 and 4 failed to comply with the provisions of section 124 of the *evidence act* cap 80 laws of Kenya.

    c. That the learned magistrate erred in law and fact in shifting the burden of proof to the appellant and in the end demonstrated clear bias against the appellant.

    d. That the learned trial magistrate erred in both laws and fact in sentencing as the sentence imposed was excessive taking into account the circumstances and miscarriage of justice was occasioned.

10. The respondent filed a Notice of Counter Appeal on the grounds that;

a. The sentence meted out by the trial court is manifestly low and unjust.

b. The sentence should be enhanced in the interests of justice.

c. The sentence is not a deterrent sentence.

11. The prosecution's case was that on 25/01/2021, the head teacher M Primary School invited the appellant in his capacity as a counsellor to speak to both parents and pupils. After the lunch break he began individual counselling. Each of the female pupils would enter the class room where the sessions took place, close the door and the session would begin, these were girls in class 7 and 8. During these sessions he touched the private pars of some of these girls. The girls realized that this is what had happened to several of them and they reported to their lady teacher who took up the matter with the head teacher, who told them not to tell their parents. One of the girls however reported to her grandmother who in turn escalated the matter to the chief. The chief escalated the matter to the police whereupon the appellant was arrested and prosecuted.

12. The prosecution called 11 witnesses; the complainant in Count I (PW1), complainant in Count IV (PW2), the grandmother of PW1 (PW3), complainant in Count II (PW4) a teacher (PW5), another teacher (PW6), the Deputy head teacher (PW7), the Head teacher (PW8), complainant in Count III (PW9), the Clinical Officer (PW10) and the Investigating Officer (PW11).

13. The exhibits produced were; Birth Certificate for PW1 (P.Ex 1), Treatment notes for PW1 (P.Ex 2), PRC Form for PW1 (P.Ex 3), P3 Form for PW1 (P.Ex 4), Immunization Card for PW2 (P.Ex 5), Treatment notes for PW2 (P.Ex 6), P3 Form for PW2(P.Ex 7), Birth Certificate for PW4 (P.Ex 8), P3 Form for PW9(P.Ex 9), Treatment notes for PW9 (P.Ex 10), P3 Form for Faith Mulwa(P.Ex11) and Treatment notes for Faith Mulwa (P.Ex12).

14. The appellant elected to give unsworn evidence and not to call any witnesses. He testified that he was a resident of Machakos and a volunteer and facilitator at AIC Health Ministries. That on 22/01/2021, Mr. Muthoka called and informed him that he got his number from the deputy-Mr. Kawaya. He requested him to talk to the pupils and their parents on issues of morality and god parenting.

15. He went to the school on Monday 25/01/2021 and found Mr. Muthoka talking to the parents. He went to the office and found Mr. Kawaya who told him that he wasn't getting along with Mr. Muthoka because Mr. Mathoka wasn't involving him in the running of the school. The appellant said that he knew Mr. Kawaya from his previous school called Itiani Primary school. As they were speaking, Mr. Muthoka went for him and took him to the parents where he spoke to them for about an hour.

16. Thereafter, he left Mr. Muthoka finalizing with the parents and was taken to the children by another teacher Anne Mwende Kioko. He found the children in a class that had no windows. He said that Mr. Muthoka had told him to talk to the children on self-esteem, relationships, sexual abuse, rape and domestic violence. After doing so he gave the children time to ask question. They wrote the questions on pieces of paper and he answered them. He then proceeded for a one-on-one session with the pupils where he talked to the girls and did nothing to them. He testified that he had done the said work for 8 years in various schools and had never been accused of such a thing. That when he conducted the one-on-one session happened where there were children all over the school compound and their parents as well and he would have been insane to carry such acts in a school. That he finished speaking with the children and parted ways with the head teacher after being given fare.

17. He said that it was surprising that he was arrested after 5 days yet he was in that school until 4-5 pm. That he was of the opinion that the head teacher decided to tarnish his name as he ought to have taken

action on the very day. That he was the only stranger in the school and everybody knew him but he did not know them. He denied the charges completely.

18. The parties canvassed the appeal through written submissions.

The Appellant's Submissions

19. The appellant submitted that the trial magistrate did not conduct voire dire of the complainants in order to establish that they were possessed by such intelligence capable of appreciating the duty to tell the truth. He referred to the cross examination of the complainants where they said that they saw him as a good person and where they said that the head teacher told them not to tell their parents. He contended that it was an indication that there was a cartel of people whose main aim was to have him convicted. It was also his contention that the witnesses were coached to lie in court. He relied on *Kibagenyi v R* (1959) EA 92 where the court stated;

> "There is no definition in the oath and statutory declaration ordinance of the expression 'child of tender years' for the purposes of section 19 but we take it to mean, in the absence of special circumstances, any child of age or apparent age of under 14 years."

20. He also relied on *Francisco Matove v R* (1961) EA where the court stated that;

> "In conducting a voire dire, the learned trial magistrate must form the opinion whether the child is possessed of sufficient intelligence to justify the reception of evidence and understands the duty to speak the truth."

21. He submitted that the decision of the trial court is incompatible with the principle in the above case and section 19 of Cap 15.

22. The appellant submitted that the trial magistrate erred for accepting uncorroborated evidence of the complainants contrary to section 124 of the *Evidence Act*. He cited *Gamaldene Abdi Abdiraham & Anor v R* where the High Court in Garissa set aside a conviction and sentence on account of failure on the part of the trial court to conduct a proper voire dire examination of the complainant who was aged 13 years at the time she gave evidence. Further, he cited *JGK v R* [2015] eKLR where the appellate court stated that; "so long as the witness was below 18 years as in the present case, she was a child and a voire dire was necessary."

23. The appellant also relied on *Samuel Warui Karimi v R* [2016] eKLR where the Court of Appeal insisted that the competency be tested through questions that must be put to the child and answers given by the child be recorded verbatim. He submitted that the purpose of voire dire examination in criminal trial is to protect the guaranteed right of a fair trial. He contended that the evidence of the complainant was not received properly hence his conviction was unsafe.

24. The appellant submitted that the prosecution ought to prove each element of the offence beyond reasonable doubt as provided for in the case of *Charles Karani v R*; CR Appeal No. 72 of 2013. He also submitted that there were irreconcilable contradictions in the evidence of PW1,2,3 and 4 and it was inappropriate for the trial magistrate to place reliance on their evidence.

25. He submitted that there were no eye witnesses in the whole case and the witnesses who testified including teachers relied on hearsay evidence which is not reliable as per law to sustain a conviction. That the whole evidence was unbelievable and it caused the trial magistrate to shift the burden of proof to him. He relied on *Charles Aplangat Ngeno v R*; CR Appeal No. 77 of 2009 where the Court

of Appeal reconciled the contradictions and inconsistencies in the prosecution's case in favor of the appellant.

26. He submitted that section 382 of the *CPC* cannot cure the anomalies as they are fatal and material to the whole case. That he was prejudiced and could not raise an adequate defence.

Submissions by the Respondent

27. The State, through Prosecution Counsel Nyakibia Mburu, opposed the appeal in its entirety.

28. She submitted that the State is dissatisfied with the sentence of ten years and the same ought to be enhanced to life imprisonment. That the offence was committed in extraneous circumstances and with a lot of impunity and the complainants underwent individual and incomprehensible trauma as a result. That the offence occurred in school during school hours and was very calculated.

29. Further, she submitted that by committing the offence in a public school, a place of safety was turned into an unsafe environment hence eroding public trust and confidence in

learning institutions. She submitted that this case is of great public interest and its outcome will affect the lives of each and every child of M primary and members of the community in which the school is located.

30. She submitted that the appellant committed the offence with the knowledge that he had gained the confidence of the parents and the girls and as such, he breached the trust placed on him and disregarded the authority placed on him by the learning institution.

31. She submitted that the ground on voire dire should be disregarded as the complainants were aged between 14 and 15 years hence not children of tender years.

32. She submitted that the appellant misinterpreted section 124 of the *Evidence Act* in that in sexual offences, the court only needs to satisfy itself that the complainant is telling the truth. She submitted that corroboration is not required.

33. She submitted that this court should examine the record of appeal and reject the ground stating that the burden of proof was shifted to the appellant.

34. She submitted that the sentence imposed cannot be said to be excessive and that ground of appeal is not supported by any evidence. That the sentence should be enhanced as it was manifestly low.

35. In rejoinder, the appellant filed supplementary submissions and submitted that if the trial magistrate had subjected the prosecution evidence to exhaustive examination and scrutiny, she would have found fatal doubts and gaps.

36. He submitted that the charge sheet was defective for being at variance with the evidence tendered. He contended that he was convicted on the main count based on a wrong charge which could not sustain any conviction. That the trial court and prosecution did not find it worthwhile to amend the charge sheet or to pass a decision which reflected the true position of the matter. He relied on the case of *Pattiram v State of M.P* (2012) 4SCC 516 where the court stated;

> " Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favourism... decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances prejudice should be caused to the accused."

Duty of Court

37. It is now settled that the duty of a first appellate Court is to scrutinize the evidence on record, make its own findings and draw its own conclusions giving due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses.

38. I have carefully considered the grounds of appeal, the rival submissions and the entire record, and the following issues arise for determination;

    a. Was voire dire examination necessary in this case?

    b. Was the charge sheet defective?

    c. Were the charges proved beyond reasonable doubt?

Was Voire Dire Examination Necessary in this Case?

39. The appellant argued that his conviction was unsafe because the trial court did not conduct voire dire examination of the complainants.

40. The basis of voire dire is found in statute and precedent. Section 19 of the *Oaths and Statutory Declarations Act* Cap 15 provides;

> 19. Evidence of Children of Tender Years
>
> (1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the *Criminal Procedure Code* (Cap. 75), shall be deemed to be a deposition within the meaning of that section.
>
> (2) If any child whose evidence is received under subsection (1) willfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment.

41. This is because children are competent witnesses as provided for by section 125 (1) of the *Evidence Act*;

> " All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause)".

42. In *Patrick Kathurima v Republic*, [2015] eKLR; the Court of Appeal held:

> "We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap 15. We are aware that Section 2 of the Children's Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes".

43. And in *Samuel Warui Karimi* (*supra*) where the Court of Appeal reviewed several decisions including that of *Patrick Kathurima* (*supra*) and expressed itself as follows;

> "We are persuaded the definition of a child of tender years under the Children Act cannot globally be imported for offences under the criminal law. This is because children develop and mature differently depending on their social economic and other factors such that, some children of 11, 12 or 13 years can be very sharp and intelligent witnesses whereas others in the same age bracket may not at all comprehend what is a court of law. This explains why the Courts have held on the age at 14 years and sometimes even a higher age as the age below which a child is of tender years for purposes of criminal trials and insisted the competency be tested through questions that must be put to the child and answers given by the child be recorded verbatim....
>
> On our part, we have no good reason to depart from this well-trodden path, as we are in agreement the purpose of undertaking voire dire examination in a criminal trial is to protect the guaranteed right of a fair trial."

44. Consequently, it is well settled that children of 14 years and below should be taken through voire dire examination before their evidence can be received.

45. In this case, the complainants were aged just below 14 and 16 years and it was a legal requirement for the complainants aged 14 years to be taken through voire dire.

That however does not mean that the whole of the prosecution case is lost as there are other witnesses who testified and this court has a duty to look at the evidence in totality. In *Maripett Loonkomok v Republic* [2016] eKLR, the Court of Appeal stated that;

> "It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person."

Was the Charge Sheet Defective?

46. The appellant argued that the charge sheet was defective for being at variance with the evidence tendered and that he was convicted on the main count based on a wrong charge which could not sustain any conviction.

47. It is only count 1 that contained a main charge and an alternative charge. Section 5 of the *Sexual Offences Act* provides the offence of Sexual Assault. It concerned PW1. The section provides as follows;

(1) Any person who unlawfully- Penetrates the genital organs of another person with-

I. Any part of the body of another or that person or

II. An object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes

III. Manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body; Is guilty of an offence termed sexual offence.

48. Section 134 of the *Penal Code* stipulates that; "Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

49. Looking at the description of the offence vis-a vis the particulars, the charge sheet in respect of count is in order and the appellant was not convicted on this main count,

Whether the charge was proved beyond reasonable doubt

50. Section 11(1) of the *Sexual Offences Act* (the Act) states;

> 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.

51. The Act defines 'indecent act' to mean' any 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;

52. In the context of this case, the ingredients of the offence of indecent act can therefore be distilled as;

a. That the complainants were children;

b. Unlawful intentional acts done by the appellant that resulted in contact between any part of the appellant's body with the genital organs, breasts or buttocks of the complainants.

53. The fact of the complainants being children was established by the birth certificates and immunization cards which show that PW1 CNW was born on 5/9/2006, PW2 MM was born on16/10/2007, PW4 JM was born on 28/10/2005 and PW9 was born on 12/7/2007. Hence they were 15, 16, and just below 14 at the time of the offence. Section 2 of the repealed children Act defined a child as any human below the age of eighteen years.

54. Evidently two of the children ought to have been taken through voire dire before giving their evidence.

55. JM testified that on 25/01/2021, the appellant had visited their school as a counsellor. They wrote notes to indicate their problems and the appellant told them that he would guide them one by one. She proceeded to testify that; "Accused told me to ask him questions and I asked him how I can control my feelings. He did not respond to my questions. He asked if I was a virgin and I told I was still a virgin.

He began to touch me from my buttocks up to my private parts and told me to never allow someone to touch there. He was touching me over my clothes.... accused did not touch my flesh when he touched me. He touched me over my clothes."

56. On cross examination, she confirmed agreed that the class room had windows which had no curtains and someone could see the class from outside. That the door was closed but not completely. She confirmed that the parents were around but not near the classroom. She said that she first told her friends about the incident so that they could also confirm. That she went to the police station with PW1's grandmother and the teachers.

57. PW1's testimony was that her question was why breasts are painful when growing. The appellant told her that the round thing (nipple) when growing must be painful when growing. He tried to get to her breasts through her polo neck but the hand could not go through, He proceeded to touch her breasts through her cloths, while asking her whether she had ever had sex with anyone. He put his fingers into her vagina, and asked whether he could show her his private thing which she declined. She later reported to her parents.

58. The other two children also testified PW2 MM testified that her question to the counsellor was how always is used. He asked her whether she had ever had sex, whether she had periods, he asked whether she had breasts and squeezed her breasts. He touched her genitals while asking whether she had pubic hair.PW9 KCN 's question was why menstruating was painful. He asked her whether she had breasts, lifted her dress to her knees, touched her breasts

59. The children spoke to one another on what had happened and proceeded to report to their teacher PW4 Ms. Mwonga who testified as PW6. PW6 confirmed that indeed she had received the reports with regard to the appellant's conduct. Further, she testified that she escalated the issue to the head teacher and was instructed to stop the appellant's sessions. The headteacher was also a witness (PW8) in the case and he confirmed that he received a report from PW6 about what the appellant was doing to the girls. Further, the guidance and counseling teacher for boys (PW5), testified that; "Accused said that he wanted to talk to the children one by one hence I and my colleague went to the staffroom. While in the staff room, MM came and told us that the accused was touching them. The children were called and said accused was touching their breasts."

60. From the totality of the evidence, it is not in dispute that the appellant was at Muthitha Primary School on 25/01/2021 where he had been invited to give guidance and counselling to the parents and students. The appellant confirmed this fact in his defence. It is also clear that the appellant had a one-on-one session with the girls in the afternoon and this fact was also confirmed by the appellant in is defence. The appellant tried to create the impression that since the windows had no curtains, it was impossible to commit the offence without being seen.

61. I have carefully considered the evidence of the young ladies herein. They immediately reported to their teachers what had happened, and one of them actually went to the staff room and told the teachers that the counsellor was touching their breasts. The scenario for this offence was created when the school ceded its care and protection duty to a total stranger, leaving him with individual minors in a 'private space'.

62. The modus operandi of the appellant was such that he earned the trust of the children, the parents and the school and hence got the opportunity to be alone with the children. All the questions he was being asked by the children in private were things that were for general discussion. There is nothing to show that there was any need for individual counselling sessions. Growing, menstruation are all topics that were to be dealt with in the open discussions.

63. The contention that the class room had no windows and anyone could look in, but no one looked, no one imagined or suspected him and it was obvious no one was on the lookout for any wrong doing on his part.

64. Further, the evidence of PW6 was that; "I went to the window to see what the counsellor was doing to them and when the counsellor saw me, he released the girl." This implies that a person needed to be close to the classroom in order to see what was happening inside. Furthermore, the act of groping does not require a lot of time and can happen without notice in a classroom set up where only two people are inside.

65. The appellant also complained that there were no eyewitnesses and that the witnesses relied on hearsay evidence. He also submitted that there were contradictions and inconsistencies which could not be cured. These complaints are not sustainable because the victims gave direct evidence of what had been done to them by the appellant. Similarly, the teachers were clear that they did not witness the incidents but they gave direct evidence of what they heard from the children, the appellant's presence in the school and the actions they took after receiving reports from the victims.

66. As for contradictions, the only one which is apparent is where the Deputy head teacher (PW7) said that he received the report from madam Kioko (PW6) and went to the head teacher with her whereas the head teacher said that PW7 did not take the report to him. The evidence of PW6 was that after receiving the complaints from the girls, she went directly to the head teacher. The accounts of the head teacher and PW6 are therefore corroborative. In my view, that was a minor contradiction when the evidence is examined in totality. In *Philip Nzaka Watu v Republic* [2016] eKLR the Court of Appeal stated;

> "Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

67. In his defence, the appellant said that the head teacher decided to tarnish his name as he ought to have taken action on the very day. He submitted that there was a group of people whose intention was to have him convicted. The evidence shows that it was the first time for the appellant in this school and the only person who was familiar with him from previous interactions was the deputy head teacher (PW7). The pupils, parents and other teachers were therefore total strangers to him and nothing was produced to suggest that any of them would be interested in framing him. The reports originated from the pupils who were not known to him. As for the head teacher (PW8), the evidence of PW4 was that after he became aware of their complaints, he told them not to tell anybody. In my view, that kind of reaction is not consistent with that of a person who was out to tarnish the appellant's name.

68. The totality of the foregoing therefore is that there was sufficient independent and corroborative evidence showing that the appellant committed the offences. The fact that the touching was over the clothes of these children does not matter. The appellant's acts of touching their breasts and buttocks, and their private parts cannot be excused simply because the children were not naked.

69. In *Maripett Loonkomok* (*supra*) the Court of Appeal stated;

> "In appropriate cases where voir dire is not conducted but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction."

70. I find that the totality of the evidence before me is that the appellant touched these children inappropriately, He touched their genital organs, breasts or buttocks. The *Sexual Offences Act* is: An Act of Parliament to make provision about sexual offences, their definition, prevention and the protection of all persons from harm from unlawful sexual acts, and for connected purposes

71. These children were clearly affected by what happened to them. They knew it was wrong and it does not matter that the children's body parts were touched through their clothes by a person who was they trusted and who was asking them sexual related questions.

72. There was the cross appeal for the enhancement of the sentence. I have considered the same.

Section 5. Sexual assault

1. Any person who unlawfully- (a) penetrates the genital organs of another person with

   i. any part of the body of another or that person; or

   ii. an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

   (b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body; is guilty of an offence termed sexual assault.

2. A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

73. The sentence referred to applies to the charge of Sexual Assault. I have considered the evidence and agree with the learned trail magistrate that the main count on count 1 was not proved to the required standard. It is this charge that carries the possibility of a extension of the sentence to life imprisonment.

74. Regarding the charges of indecent acts, the law states: Section 11. Indecent act with child or adult (1) 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.

75. The trial court heard the matter and delivered a legal sentence under the law, and the provision does not bear any room for enhancement.

76. The Appeal is not merited. I find no reason to interfere with the decision of the subordinate court. The Appeal is dismissed. The conviction is sustained and the sentence is upheld.

DATED, SIGNED AND DELIVERED VIRTUALLY ON 3RD SEPTEMBER 2024

MUMBUA T MATHEKA

JUDGE

CA Ms. Mwanatumu

Ms. Nyakibia for State Appellant

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2024-09-09 09:04:20