



**Kinini v Republic (Criminal Appeal 51 of 2018)
[2023] KEHC 2658 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2658 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL 51 OF 2018
HPG WAWERU, J
MARCH 23, 2023**

BETWEEN

YUSUF MUREITHI KININI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal against Conviction and Sentence in Nanyuki
CM Sexual Offence Case No 56 of 2017 – L Mutai, CM)*

JUDGMENT

1. The Appellant herein, Yussuf Mureithi Kinini, was on 24/08/2018 convicted after trial of two counts of sexual assault contrary to section 5(1) (b) & (2) of the 3 *Sexual Offences Act*, 2006 (the Act). It was alleged in the particulars of the offences that on 06/11/2017 at unknown time in Laikipia County within the Republic of Kenya, he unlawfully touched the vaginas, respectively, of the two children named in the charges, aged 6 years and 3½ years with his finger and tongue. He was sentenced to 10 years imprisonment on each count. As the trial court did not state that the sentences were to run concurrently, they would have to be served consecutively under the law.
2. Being aggrieved by the said convictions and sentences, the Appellant appealed and raised various grounds of appeal, including this one: that the charges were incurably defective. I will look at this ground first. The Appellant submitted that the charges were incurably defective for the reason that the particulars of the offences and the evidence adduced were at variance with the offence charged. Learned counsel for the Respondent submitted that there was no defect in the charges.
3. The rules for the framing and contents of charges and informations are set out in sections 134 and 137 of the *Criminal Procedure Code*, Cap 75. Section 134 provides -

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”.

In determining whether a charge is defective or not, the Court of Appeal in *Sigilani –vs- Republic* (2004) 2 KLR, 480 held -

The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence”.

In the case of *Isaac Omambia v Republic*, [1995] eKLR, the same court made reference to section 134 aforesaid in the following terms -

In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge....”

4. In *Peter Ngure Mwangi v Republic* [2014] eKLR the Court of Appeal stated -

A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in *Yongo v R*, [1988] eKLR that:

“In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:

- (i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment, or because the indictment charges offences not disclosed in that evidence, or fails to charge an offence which is disclosed therein;
- (ii) when for such reason it does not accord with the evidence given at the trial.”

5. Looking at the charges in the present case, sexual assault contrary to section 5(1) (b) & (2) of the *Sexual Offences Act* in the two counts, they indeed contain a statement of the offence in clear terms. That offence is -

- (1) Any person who unlawfully
 - (a) ...;
 - (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.”

6. The charges also contain particulars of the offences. Analysis of those particulars vis-a-vis the statement of offence shows clearly that the particulars do not disclose the offence of sexual assault charged. They disclose the offence of indecent act with a child contrary to section 11(1) of the Act. The evidence adduced by the prosecution also established that offence of indecent act with a child, not the offence charged. The charges should have been appropriately amended. They were never amended.

7. The charges were thus incurably defective. The situation cannot be salvaged as the offence of indecent act with a child, though cognate to that of sexual assault, is not minor to it because they essentially carry the same punishment.



8. In view of the foregoing, the Appellant's conviction cannot be sustained. I therefore find merit in this appeal and it is hereby allowed. Consequently, the Appellant's convictions are hereby quashed and the sentences set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 21ST DAY OF MARCH 2023

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 23RD DAY OF MARCH 2023

