



**Nyamumbo v Republic (Criminal Appeal E009 of 2022)
[2023] KEHC 1898 (KLR) (8 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1898 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL E009 OF 2022
HK CHEMITEI, J
MARCH 8, 2023**

BETWEEN

LAMECK BOB NYAMUMBO APPELLANT

AND

REPUBLIC RESPONDENT

***(BEING AN APPEAL FROM THE JUDGEMENT OF HON. M. KYALO (RM) DATED 10TH
JANUARY 2022 IN NAKURU CHIEF MAGISTRATE SEXUAL OFFENCES NO. 109 OF 2019)***

JUDGMENT

1. The appellant was charged with the offence of Committing an 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 16th day of June 2019 at [Particulars Withheld] area in Nakuru East sub-county within Nakuru County, intentionally and unlawfully committed an indecent act with a child by touching the private parts namely breast and buttock of BNN, a child aged 15 years with hands.
2. The appellant was convicted and sentence to 10 years' imprisonment hence this appeal. The appellant has raised the following grounds of appeal challenging the judgement: -
 - a. That the learned Magistrate failed and/or neglected to address her mind to crucial evidence that was of probative value and in so doing erroneously found that the prosecution has proved its case beyond reasonable doubt.
 - b. That the Learned Magistrate failed to give due regard to the sequence of events as stated in court by the witnesses and in so doing erroneously found that the Appellant acted with the requisite knowledge that the victim of the alleged offence was a minor at the material time.
 - c. That the Learned Magistrate erred in according weight to the evidence of prosecution witnesses when the conduct of the victim at the material time and her evidence in court did not reveal



that she was a minor at the time of the alleged offence thus was thus unsafe to support the charges against the accused and the resultant conviction.

- d. That the Learned Magistrate erroneously interpreted and misapprehended the facts and this misapprehension led to the wrongful conviction of the Appellant.
 - e. That the Learned magistrate erred in stating to give consideration to the common law that guiding principles in deciding what weight to give to the available evidence and how to interpret the same in the light of the Penal Code and thus she reached an erroneous finding on the Appellant's guilt.
3. Before looking at the merits or otherwise of the appeal it shall be worthwhile to summarize the evidence as presented during trial.
 4. PW1 the complainant testified in her sworn evidence that on the fateful day her grandmother had sent her to mama Jerald to get '*Kdf mandazi*'. That upon reaching there, mama Jerald told her to go behind the shop for the appellant to give her the kdf. She testified further that appellant came with the kdf but refused to give her at first then he came in front of her so close, he then pushed her against the wall and then he started touching her on the breast. That when he saw mama Jerald coming, he let her go and that there was no one else around and she did not tell mama Jerald as the appellant had told her not to tell anyone.
 5. PW1 went on to testify that later in the evening as she had gone to pay for the goods they had taken the appellant approached her again and told her that he loved her and he even gave her his number. That she later called the appellant using her auntie's phone and she told him that she was outside the house. He told her again that he loved her and he wanted them to escape so she asked him about school and he said she could ignore it as it was not a must.
 6. PW1 testified further that her auntie JN later realized that she was using her phone to call. She told PW2 who asked her on the same and she told her that it was the appellant's number. She did not tell her grandmother what the appellant had done earlier but only what he had told her on the phone and she only told the police of the same. She testified that she did not know the police station where they had reported the incident. She positively identified the appellant as the one before the court.
 7. On cross examination, she stated that the police are the ones who told her grandmother that the appellant had touched her breast after she had told them. She said that PW2 and her did not report to the chief although she knew that the act was wrong. She added that the appellant pushed her on a wall made of iron sheet and it made noise. That mama Jerald heard it and came but when she asked what was wrong the appellant told her that crates had fallen
 8. PW2 was MNP the grandmother of the complainant. She testified that the complainant was born on May 8, 2004 and that on June 21, 2019 her daughter came and told her that she had seen her foreign number on her phone and that upon her daughter asking the minor she said the said number belonged to a friend. That on June 22, 2019 she had asked PW1 who she was talking to and she said it was the person working for Elijah.
 9. PW2 testified further that she had asked the appellant why he was talking to PW1 but he left and that she told Mr Elijah together with his wife and they said they had talked with him but he had refused to listen. That later the accused sent two ladies to ask for forgiveness.
 10. Further, that PW1 had said that the appellant had caress her body, breast and she also said that they had started friendship in February 2019. She testified on that the appellant used to time PW1 when



- she was sent to the shop and would caress her. She positively identified the appellant in court and also produced the birth certificate SN 17xxxx as Exhibit 1.
11. On cross examination, she confirmed that the appellant used to go for PW1 whenever she had sent her and he would caress her.
 12. Upon re-examination, she testified that she used to open her shop at about 5.00 am, and Elijah used to open around the same time and appellant would also be there.
 13. PW3 was No 8xxx PC John Kanyari attached to Salgaa police station but previously at Nakuru Central Police Station and the investigating officer. He testified that on June 23, 2019 while at Nakuru central police station, the OCS informed him to investigate a case of indecent act which had been reported by the complainant. That he called the complainant who told him that her grandchild PW1 was sent to the shop by her auntie to buy snacks where the appellant caressed her breasts and also tried to push her against the wall but stopped when he heard mama Jared. That the appellant later gave the minor his number and after 3 days the appellant called the minor and told her that he loved her and he wanted them to escape together outside Nakuru.
 14. He then recorded the victim's statement, on July 3, 2019 together with constable Arusu and they arrested the appellant on July 4, 2019 and preferred charges against him. He testified that the minor was taken to the hospital but she had no injuries.
 15. On cross examination, he stated that the appellant's shop was near where PW2's shop was and that it was not true that the complainant borrowed his phone. He stated further that the appellant had initially disappeared and that he later resurfaced and they arrested him.
 16. The appellant when put on his defence chose to remain silent and left it to the court to decide
 17. This Court directed that the matter be disposed by way of written submissions which the parties have complied.

Appellant's Submissions

18. The appellant in his submissions submitted that the complainant before, during and after the alleged incident presented herself as an adult. That the evidence of PW1 starting at page 20 onwards during cross examination contradicted the version of evidence presented by PW2 at page 14 of the record of appeal starting at line 17. Therefore, the evidence of PW2 could not be said to corroborate that of PW1 in order to secure a conviction. He placed reliance on the cases of *Erick Kipkoech Byegon v Republic* [2014] eKLR and *Stephen Nguli Mulili v Republic* [2014] eKLR.
19. The appellant submitted further that the sentence meted against him was harsh and excessive. That mandatory sentence as set by the statute have been held as unconstitutional by the high court and the Court of Appeal under the current constitution. Further, that the said sentences did permit courts to consider the peculiar circumstances of each case in order to arrive at an appropriate sentence informed by the said circumstances.
20. Therefore, it was the appellant's submission that the mandatory sentence meted out to him under section 8(2) of the *Sexual Offences Act* was not in tandem with the principle of rehabilitation. In addition, the appellant submitted that a strict application of some provisions of the *Sexual Offences Act* would cause injustice. He urged the court to allow his appeal. The court's attention was drawn to the cases of *Douglas Muthaura Ntoribi v Republic* [2014] eKLR and *Evans Wanjala Siibi v Republic* [2019] eKLR.



Prosecutions Submissions

21. The prosecution submitted that regarding ground one of the petition of appeal, it was upon the magistrate to observe the demeanour of the victim and make conclusions that the testimony could be considered valid. That from the witness statement the appellant had conducted himself as a person who from 2019 had regularly harassed the victim. Further, that the appellant knew the victim very well and that she was school going having been a visitor at their house.
22. The prosecution submitted further that the guardian to the minor produced her birth certificate to confirm her age which was a requirement in proving one of the ingredients in sexual offences. That the appellant when put on his defence opted to keep quiet and allowed the court to decide. Further, that the appellant by touching the minor's breast was not accidental as he would tell her not to disclose it to anyone. Therefore, the court should come to the aid of such victims. It was the prosecution's submission that the trial magistrate applied close scrutiny to the facts and evidence tendered and that from her assessment, it left no doubt that the appellant did commit the said act despite being warned not to do so. The prosecution urged the court not to interfere with the sentence.

Analysis and Determination

23. Having perused the entire record herein, the proceedings and the two rival submissions, the duty of the court was clearly spelt out in the case of *Okeno V rep* 1972 EA 32. The Court of Appeal stated that;

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya v R* [1957] EA 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] EA 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] EA 424.”

24. Indecent act is defined in the [Sexual Offences Act](#) 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.”
25. The penalty for indecent act with a child under section 11(1) of the [Sexual Offence Act](#) is an imprisonment term for not less than 10 years as follows:
 - “11.1 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.”



26. In the instant appeal, I note that the appellant in his submissions argued that the evidence of PW2 could not be said to corroborate that of PW1 in order to secure a conviction. This court takes judicial notice that the courts are not hamstringing by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful. This was reaffirmed in the case of *JWA v Republic* [2014] eKLR, the Court of Appeal observed: -

“We note that the appellant was charged with a sexual offence and the proviso to section 124 of the Evidence Act, clearly states that corroboration is not mandatory. The trial court having conducted a *voire dire* examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate.”

27. In this case the victim is a child of tender years and before a child of tender years is allowed to testify in court the court is required to satisfy itself that the child understands the duty of speaking the truth and whether he/she is of sufficient intelligence to allow his/her evidence being taken. This is done by conducting a *voire dire* examination before the evidence is taken. In the instant case the trial magistrate indeed undertook the same on the complainant and satisfied herself that the witness evidence was tenable, which position I agree with. Further, the complainant was categorical that indecent act was performed on her by the appellant, a person she knew and even identified at the dock.

28. In the upshot, I find that the evidence on record is consistent with the commission of the offence of Committing an Indecent Act with a child and therefore the trial magistrate did not err in finding the appellant guilty of the said offence. On this ground the appeal is dismissed.

29. As noted by the appellant that mandatory sentence as set by the statute has been held as unconstitutional by the High Court and the Court of Appeal under the current constitution as the courts ought to be granted some latitudes depending on circumstances of each case to determine an appropriate sentence.

30. However, taking the totality of the facts herein I find that the trial court ought to have exercised some discretion as rightfully submitted by the appellant. It is noted for instance that the appellant was a first offender with a young family. There was no other evidence tendered in terms of his deviant behaviour.

31. In the premises the sentence of 10 years is hereby set aside and the appellant is placed on probation for three years under the relevant probation office. He is therefore released unless lawfully held.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 8TH DAY OF MARCH 2023.

H. K. CHEMITEL.

JUDGE

