



REPUBLIC OF KENYA



KENYA LAW
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**Mwenda v Republic (Criminal Appeal E063 of 2021)
[2023] KEHC 17230 (KLR) (10 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17230 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E063 OF 2021
AK NDUNG’U, J
MAY 10, 2023**

BETWEEN

CHARLES MWENDA ALIAS MWANGI APPELLANT

AND

REPUBLIC RESPONDENT

*(From original Conviction and Sentence in Nanyuki
CM Criminal Case No 21 of 2020 – L Mutai, CM)*

JUDGMENT

1. The Appellant in this appeal, Charles Mwenda alias Mwangi, was convicted after trial of the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, No 3 of 2006 (the Act). He was acquitted of the main charge of defilement. It was alleged that on diverse dates between 14th day of April, 2020 and 18th April, 2020 at Nyakio area, in Laikipia central sub-county within Laikipia County, he intentionally and unlawfully touched the vagina of JKM a child aged 16 years with his penis. On 05/10/2021, he was sentenced to 10 years imprisonment. He has appealed against both the conviction and the sentence.
2. The Appellant filed amended supplementary grounds of appeal substituting his former grounds of appeal. The conviction and the sentence have been challenged upon the following grounds-
 - i. The learned magistrate erred by failing to note that there was an error in the identification of the perpetrator.
 - ii. The learned magistrate failed to note that the ordeal was not witnessed by anyone.
 - iii. The learned magistrate failed to note that the medical report did not corroborate the complainant’s evidence.



- iv. That investigation was not properly conducted.
 - v. That the testimony of the crucial witnesses was contradicting.
 - vi. The learned magistrate failed to note that the matter was fabricated.
3. The Appellant argued that according to the complainant's testimony, it was not clear that the complainant identified the perpetrator. That the trial court erred convicting the Appellant on a single witness evidence. That the medical report did not reveal that the complainant had any injuries despite testifying that she was tied up. The investigating officer did a shoddy work since the investigating officer did not visit the scene. That there were contradictions on the complainant's testimony and her mother's testimony on the Appellant's occupation. He submitted that the case was a total fabrication.
 4. The Respondent's counsel supported the conviction and the sentence. The counsel submitted that the charge was proved to the required standard. On identity, the counsel submitted that PW1 was able to identify the Appellant and that the age of the complainant was proved. On the sentence, the counsel urged this court not to interfere with the same.
 5. This being the first appellate court, my duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.
 6. I have therefore considered the submissions and the authorities relied on by the parties. I have also read through the record of the trial court in order to evaluate all the evidence placed there and arrive at my own conclusions regarding the same. I have borne in mind however, that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.
 7. The Appellant was convicted of indecent act under section 11(1) of *Sexual Offences Act* which provide as follows;
 - “(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.”
 8. Section 2 of the Act defines indecent act as;
 - “indecent act” means 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;
 9. Therefore, the main ingredients of the offence of committing an indecent act with a child are:-
 - a. Proof that the victim is a child in law;
 - b. Proof that there was contact between any body part of the accused person with the genital organ, breast or buttocks of the child victim (but that act must not be an act that caused penetration) or proof of exposure or display of any pornographic material to a child;
 - c. Proof of identity of the perpetrator.



10. The complainant's age (16 years at the time of the offence) was proved beyond reasonable doubt by her birth certificate (Exhibit P2) which was produced in evidence by her mother (PW3). It says she was born on 10/04/2004. The offence was alleged to have occurred on 14/04/2020.
11. On identity of the alleged perpetrator, the complainant testified that she knew the Appellant very well. He was a herdsman and he was her father's friend. He identified him as Mwenda. She testified on cross examination that the Appellant also used to work as a boda boda rider.
12. On the material day, she met him on the road herding the cattle. She testified that someone held her neck and covered her mouth and took her to a timber room. She was tied there for three days. In the evening, this person returned and ordered her to lie on the bed and she was defiled. She was sexually penetrated for those three days she was held in that house. She identified the Appellant as the person who defiled her. On re-examination, she testified that the Appellant took her to his house. She saw him well for he was with her for enough time. His home had green iron sheets.
13. PW3, the complainant's mother testified that the complainant ran away from home. She looked for her to no avail. On the next day, she came across Mwangi, the Appellant and asked him if he had seen her daughter. She testified that Mwangi was her neighbour and used to carry her on his boda boda. On the fourth day, she went to report the matter to the police but she was contacted that the complainant had reappeared. She testified that the complainant informed her that the Appellant had locked her up in some house.
14. On cross examination, she testified that she knew the Appellant as Mwangi and he was a boda boda rider. That the complainant showed her where she was locked up and identified the Appellant as the defiler. That she did not know Appellant's relatives or where he lived.
15. PW4, was the arresting officer. He testified that PW3 pointed out the Appellant to them. That he was told that the Appellant is known as Mwangi. He called out his name Mwangi and the Appellant responded. They arrested him. PW5 was the investigating officer. He testified that PW3 had reported at the station that the complainant was missing. The complainant returned home and she went to the station accompanied by PW3. She reported that she was with Charles Mwenda, the Appellant who defiled her.
16. The Appellant on his defence testified that he was approached by two officers who called out Mwangi. He responded and he was arrested. He testified that he was a boda boda rider and not a herdsman.
17. From the foregoing evidence, it appears that the Appellant was well known by the complainant and PW3, her mother. He held the complainant inside a house for three days which was enough time for the complainant to recognize him. Though he denied that he was a herdsman, the complainant also identified him as a boda boda rider. PW3 also testified that the Appellant was a boda boda rider. The Appellant himself confirmed this as well.
18. The Appellant himself in his cross-examination of prosecution witnesses, and in his sworn statement, did not once suggest that the complainant did not know him well or at all.
19. As to the next ingredient, proof that there was contact between any body part of the accused person with the genital organ, breast or buttocks of the child victim (but that act must not be an act that caused penetration), the complainant testified that on the three days the Appellant held her captive, she was sexually penetrated by the Appellant. She testified that on the first day, the Appellant ordered her to lie on the bed, he removed her inner wear, and with his penis, he penetrated her vagina.



20. PW2 was the medical doctor who produced the P3 form. She examined the complainant and noted no injuries on her outer genitalia. Her hymen was broken though she could not tell whether there was recent sexual penetration or not.
21. The trial court while acquitting the Appellant on the main charge of defilement observed that the medical evidence did not find proof of penetration. She believed the complainant's who was candid when she testified. The trial court further held that even though penetration was not proved, the Appellant felt the complainant's vagina with his penis during the time they remained together.
22. From the complainant's testimony, she did not testify that the Appellant touched her vagina, breasts or buttocks. As seen earlier, indecent act is defined as 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. This means that what needed to be proved is contact and not penetration. The evidence on record reveals that the complainant was penetrated by the Appellant.
23. See the case of [*Paul Otieno Okello v Republic \[2019\]*](#) eKLR where Hon. A.C Mrima J held as follows:

“As to whether there was any contact between any body part of the appellant with the genital organ, breast or buttocks of the complainant which act however did not cause any penetration, I must say that I have re-read the proceedings severally and did not see anywhere where the complainant alleged that the appellant touched her genital organ, breast or buttocks. The complainant talked of the appellant having had sex with her twice, an allegation which the trial court rejected for lack of proof and no appeal was lodged against the finding. The complainant was not lead to describe how the sexual act unfolded and which part of her body was touched by which part of the body of the appellant. With such state of evidence, I do not see how the offence of committing an indecent act with a child was proved. A trial court should not assume that once it finds no evidence of commission of the principal charge of defilement then the lesser charge of committing an indecent act with a child must have been committed. Every offence has the same threshold of being proved beyond any reasonable doubt.”
24. Guided by the above case, it is my opinion that the prosecution needed to prove that the Appellant indeed touched the complainant's genital organs.
25. Furthermore, I noticed that the Appellant on 25/01/2021 applied for the complainant to be recalled for further cross examination. Though the application was opposed by the prosecution counsel, the trial court in its ruling allowed the Appellant's application and ordered the complainant to be recalled for further cross examination during the next hearing date. The matter was set down for hearing on 18/02/2021. However, the trial court was not sitting. When the matter came up for hearing on 12/03/2021, the prosecution informed the court that the complainant was admitted in hospital. The matter proceeded on subsequent dates without the complainant being recalled.
26. It is my view that this was crucial even though the Appellant did not raise it in his appeal. The Appellant while making an application to recall the complainant indicated to the court that there was an issue he wanted clarification on by the complainant. That issue might have changed the outcome of his case or not if the complainant was recalled. This also infringed his right to fair trial as enshrined in [*the Constitution*](#) under Article 50. I am also guided by the case of *Moses Ngichu Kariuki v Republic [2009]* eKLR whereby the Appellant claimed his right to fair trial had been breached when he was not afforded an opportunity to further cross-examine the complainant. The Court of Appeal considered



the provisions of section 77 of the former Constitution which is similar to Article 50 of *the Constitution* and stated thus:-

“ However, as regards the alleged violation of Section 77 (1) (d) of *the Constitution*, we have carefully considered the effect of the failure on the part of the court to recall the complainant for the purpose of further cross-examination by the appellant and we are of the view that failure to accord the defence that opportunity is a violation of Section 77 (1) (e) of *the Constitution*. In this regard, the trial court had made an order for further cross-examination but the complainant whose evidence was critical to the final outcome was never availed. We do not know and we are unlikely to know the questions the appellant wanted to put to the complainant and the likely effect the answers thereof would have had on the prosecution case.

In our determination, the right to cross-examine is the linchpin of the concept of a fair trial in that, it has a bearing on the principle of the equality of hearing and the equality of arms without which a trial cannot be said to have been conducted fairly. In our view, denial to cross-examine in turn means that the defence was not treated fairly and the two requirements of equality of hearing and equality of arms were not satisfied. Our view on this is reinforced by the marginal notes in Section 77 in that the entire provision is entitled the provisions to secure protection of law. Clearly the failure to recall the complainant for purposes of further cross-examination by the appellant caused prejudice to the appellant.”

27. My view is that by failing to recall the complainant, this occasioned grave injustice to the accused person by locking out evidence that could have been brought out by the intended cross-examination. This in my view was prejudicial to the Appellant’s defence.
28. From the foregoing it is clear that the trial court misapprehended the evidence and reached a conclusion that since there was no evidence of penetration, the offence of indecent act with a child was automatically proven yet no evidence was called in support of this. The complainant having stated that she was held and defiled for three days, greater circumspection was required in analysing the evidence from the prosecution and the trial court. Her evidence was that in the entire period she was penetrated severally. There was no evidence from her that the Appellant’s penis touched her vagina. Given the chronology of the offence from the alleged capture to defilement for 3 days, this is a case that required serious investigations which apparently are lacking. The conclusion by the trial court that an indecent act on the child was committed is not backed by evidence on record.
29. Having reviewed the evidence, it is my finding that the conviction of the Appellant was unsafe. It is not sustainable. The appeal has merit and is allowed. I quash the conviction and set aside the sentence of 10 years imprisonment. The Appellant is to be set at liberty unless otherwise lawfully held.

Dated signed and delivered at Nanyuki this 10th day of May 2023

A. K. NDUNGU

JUDGE

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