



**Levu v Republic (Criminal Appeal E096 of 2021)  
[2023] KEHC 24265 (KLR) (16 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24265 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL APPEAL E096 OF 2021  
GMA DULU, J  
OCTOBER 16, 2023**

**BETWEEN**

**NDOTU LEVU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the conviction and sentence in Sexual Offence Case No. 71 of  
2018 delivered on 3rd September 2021 by Hon. J. D. Karani (RM))*

**JUDGMENT**

1. The appellant was charged in the Magistrate's court with defilement of a child with mental disorder contrary to Section 7 of the *Sexual Offences Act* No. 3 of 2006. The particulars of offence were that on 31<sup>st</sup> August 2018 at Kibwezi Sub County in Makueni County intentionally and unlawfully caused his male organ namely penis to penetrate the vagina of M.K (name withheld) aged 14 years a child with mental disability.
2. In the alternative, he was charged with indecent act with a child with mental disability contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006, the particulars of which being that on the same day and place intentionally and unlawfully caused his male organ namely penis to touch the vagina of M.K a child aged 14 years with his penis.
3. He denied both charges. After a full trial, he was convicted of the alternative count of indecent act and sentenced to ten (10) years imprisonment.
4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied on the following grounds:-
  1. That the offence he was framed on him by the complainant.\*\*



2. That the medical examination did not have enough evidence to cause his conviction for the offence.
3. That he was sentenced to imprisonment when no plea of guilty was entered.
4. That PW2 insisted (on) his conviction because of personal grudge of a bicycle theft.
5. That he is a scholar and begs to complete his education.
5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.
6. This is a first appeal. As a first appellate court I am duty bound to evaluate all the evidence on record afresh and come to my own conclusions and inferences – see *Okeno =Versus= Republic (1972) EA 32*.
7. In proving their case, the prosecution called six (6) witnesses. On his part, the appellant tendered sworn defence testimony and did not call any other defence witness.
8. The elements of the offence of indecent act with a child who is mentally retarded, is first of all the age of the victim, who should not be more than 18 years. Secondly, the victim should have a mental incapacity amounting to mental disability. Thirdly, the act of indecent touch. Fourthly, the identity of the culprit.
9. Was the victim, who did not testify in court because she was only smiling in response to questions, aged 14 years as alleged? The evidence on record from PW1 KK the father was to the effect that the victim was called M. He testified to a clinic card of the victim, which was produced as exhibit. I have seen copy of the immunisation card whose front page shows that it comprised of three (3) separate documents which were photocopied in different shades of white colour.
10. In my view, though that document shows the name of a child M, and father as K and mother as V, its authenticity is in doubt, and should not have been relied upon to prove the age of the victim who did not testify in court.
11. I thus find and hold that the prosecution did not prove the age of the victim beyond reasonable doubt.
12. Did the prosecution prove mental incapacity of the victim? It is indeed on record that the victim did not testify, as she only responded to questions by smiling.
13. Considering the evidence on record, I am of the view that the prosecution did not prove beyond reasonable doubt that the victim herein had mental incapacity. In my view, the mental incapacity of the victim could only be established through a mental examination report, which was not done in the present case. The mere fact that the victim was merely smiling on being questioned in my view could possibly be for the reason that the victim was deaf and dumb not necessarily amounting to mental incapacity.
14. I find therefore that the prosecution did not prove beyond reasonable doubt that the victim had mental incapacity.
15. Was there an indecent act committed on the victim? Indeed PW2 Julius Myamzo Mwakavi stated that he saw the appellant in broad daylight naked and lying on top of the victim, while the victim had her pants removed and skirt lifted.
16. That being true however, it does not amount to an indecent act, unless the prosecution proved that the victim did not give consent or lacked the capacity to give consent to that act, which the prosecution in the present case has failed to do so.



17. I thus find that the prosecution did not prove any act of the appellant which was not consented to and which fell within the definition of an indecent act or touch on the victim.
18. With regard to the culprit, as I have found that the prosecution has not proved vial elements of the offence of indecent act, I also find that the prosecution did not prove beyond reasonable doubt that the appellant was the culprit of the alleged criminal act.
19. Consequently, I will allow the appeal herein.
20. I also note that the original birth certificate of Belden Nduto was filed herein. In my view a photocopy of same should be retained in the file, but the original be released to the owner, who appears to be the appellant, and I so order its release.
21. Consequently, and for the above reasons I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held. I also order that the original birth certificate of Belden Nduto be released to the owner.

Dated, signed and delivered this 16<sup>th</sup> day of October 2023 virtually at Voi.

**GEORGE DULU**

**JUDGE**

**In the presence of:-**

**Alfred – Court Assistant**

**Appellant**

**Mr. Kazungu for State**

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