



REPUBLIC OF KENYA



KENYA LAW
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**Mwaniki v Republic (Criminal Appeal E004 of 2023)
[2023] KEHC 23235 (KLR) (4 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23235 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E004 OF 2023
LM NJUGUNA, J
OCTOBER 4, 2023**

BETWEEN

DAVID NJIRU MWANIKI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising from the decision of Hon. S. Ouko (RM) in the Senior Principal Magistrate's Court at Runyenjes Sexual Offence No. 15 of 2019 delivered on 27th October 2021)

JUDGMENT

1. The appellant, vide petition of appeal, prays that the appeal be allowed, conviction quashed and sentence be set aside and the appellant be set at liberty. The grounds of the appeal are that the trial magistrate erred in law and fact by:
 - a. Failing to note that the medical report did not link the appellant to the offence as provided under Section 36(1) of the *Sexual Offences Act*;
 - b. Convicting the appellant against the weight of the evidence whereas the prosecution did not prove their case beyond reasonable doubt;
 - c. Disregarding the appellant's watertight defense without giving cogent reasons; and
 - d. Other grounds to be adduced at the hearing of the appeal.
2. The appellant was faced with the charge of defilement contrary to Section 8(1) as read together with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that, on 29th July 2019 at Karurumo Sub location in Embu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of S.M. a child of 3 years. The alternative charge was committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006



whose particulars are that on 29th July 2019, at Karurumo sub-location Embu County, the appellant intentionally touched the vagina of S.M. a child of 3 years with his penis.

3. The appellant pleaded not guilty and a plea of not guilty was duly entered. The prosecution called (four) 4 witnesses in support of its case.
4. PW1 was the victim who stated that the appellant took her to his house then used his hand to piece her private parts. That after doing so, he sent her away to her mother. On cross examination she confirmed that the act happened at the house of the appellant and when she went back to her home, she told her mother what the appellant had done to her.
5. PW2 was the clinical officer who examined the victim at Runyenjes Hospital. He testified that the minor had been brought to the hospital on 29th July 2019 alleging that the appellant had touched her genitals with his fingers. That upon examination, he found that the hymen was intact and there was no sign of penetration and no other injuries were observed. He concluded that the victim had not been defiled. He produced P3 and PRC forms as exhibits. On cross-examination, he stated that there was attempted rape.
6. PW3 who is the mother of the victim stated that on 29th July 2019, she had gone to the shop in the afternoon, leaving her daughter at home. That when she returned, she saw PW1 coming from the opposite direction and saying that “uncle” had pierced her with his fingers. That PW1 took PW3 to the maize plantation where the appellant had allegedly pricked her. That on the way back PW3 met with a neighbor who told her that he had seen the appellant with PW1. On cross-examination, PW3 stated that the appellant took PW1 from her home as there was nobody else but a neighbor saw him. That the appellant cannot claim that PW1 was lost and he was aiding her back home. That she (PW1) came home shortly after the appellant had taken her.
7. PW4 was the investigating officer of the case. He stated that on 30th July 2019 at around 10AM, the matter was reported at the police station. That the appellant was arrested and detained at the police station before arraignment. That he confirmed the age of the victim through a copy of her birth certificate shown to him by her parents. On cross-examination, he stated that PW1 reported that the appellant had touched her private parts.
8. The prosecution closed its case and the court ruled that a prima facie case had been established. The appellant was put to his defense.
9. The appellant, DW1, gave unsworn evidence stating that he does not remember his whereabouts on the day of the alleged incident. That he was framed for the offence by a neighbor with whom he disagreed over a land transaction. That there is also bad blood between PW3 and the appellant but the police did nothing about it when he told them. He denied knowledge of the offence.
10. At the end of the prosecution’s case, the trial magistrate analyzed the evidence and the law and found the appellant guilty of the alternative charge and sentenced him to 10 years imprisonment.
11. In this appeal, the court directed that the parties file their written submissions. Only the respondent complied.
12. The respondent submitted that the appellate court is obligated to re-evaluate the evidence presented at trial and reach its own findings as was held by the court of appeal in the case of *David Njuguna Wairimu v. Republic* (2010) eKLR. That corroboration was not necessary in sexual offences under Section 124 of the *Evidence Act* and the cases of *JWA v Republic* (2014) eKLR and *Jacob Odhiambo Omuombo v Republic* (2008) eKLR. That the trial magistrate observed the demeanor of the child as she testified and had no doubt that the child was telling the truth. That even though there was no evidence



showing penetration, the trial court rightly convicted the appellant on the alternative charge which was proved. That the testimony of the appellant did not in any way cast doubt on the prosecution's case and the trial magistrate noted as much.

13. From the petition of appeal and the submissions, the issues arising for determination are whether the prosecution proved its case on the alternative count beyond reasonable doubt.
14. The trial court found that the offence of defilement was not proved but the offence of indecent act with a child was proved beyond reasonable doubt. The analysis of the trial court to this end was that the element of penetration was not proved as the medical evidence adduced by PW2 failed to corroborate the evidence of PW1, thereby casting doubts though the other two elements of the offence of defilement, being age of the victim and positive identification of the assailant were proved. While taking the evidence on these two facets, the trial court had the remarkable advantage of hearing the testimonies first-hand and observing the demeanor of the witnesses, something that this appellate court lacks. It is paramount that as far as possible, this court depends on the observations made by the trial court first-hand as were the sentiments of the court in the case of *Okeno v Republic* (1972) EA 32 where it was held that:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding 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.”

15. The age of the victim was satisfactorily ascertained through production of a birth notification produced by PW3 as an exhibit in the case. The victim identified the assailant as the appellant in the dock, as the one who

“did bad things” to her.”

The court was satisfied that the appellant was positively identified as the assailant.

16. The offence of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) is defined as follows:

“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.

Indecent act is defined under section 2(1) of the [Act](#) as follows:

- i. 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;”



17. This court is only bound to find out if the absence of penetration automatically means that the appellant is guilty of the alternative charge. There must be evidence that the appellant touched or made contact with any part of his body to the genitals, buttocks or breasts of the victim. PW1 said that the appellant removed her clothes from the waist down and then pierced her private parts. She pointed at the private parts. She said “*alinidunga na mikono*”. The trial court trusted that PW1 was telling the truth. Section 124 of the *Evidence Act* provides:

.... Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, or reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

18. While resorting to the alternative charge, the trial court is usually cautioned to interrogate the elements of the alternative charge before convicting. In the case of *Paul Otieno Okello v Republic* (2019) eKLR the court held thus:

“... 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.”

19. With this in mind, the appellant, in his defense at trial, stated that the incident was a mystery to him and that there is bad blood between him and PW3 as well as the neighbor who implicated him. That the neighbor has been trying to get him placed in custody and that this was the perfect opportunity for them to frame him for the offence. To a large extent, this case relies on the evidence of PW1 as to identification of the assailant and the act of indecency. On the day when PW1 testified, the court noted as follows:

“I note that the child is of extremely tender years and is incapable of talking”.

Eventually, the court stated that it believed the testimony of PW1 to be true.

20. In my view, corroboration (which is not mandatory in this case) would have served the interest of justice better in identification of the appellant as the assailant. I would think that the neighbor who allegedly saw the child with the appellant would have been a key witness in identifying the assailant. In the case of *Wamunge v Republic*, (1980) KLR 424 it was held;

“It is trite law that where the only evidence against a defendant evidence of identification or recognition a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it a basis for conviction”

21. In light of the foregoing and considering the trial court record and relevant case laws, I do find that neither the main count nor the alternative count have been proved to the required standard that is; beyond reasonable doubt.

22. I hence find that the appellant was wrongly convicted. The conviction is hereby quashed and the sentence of 10 years’ imprisonment set-aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

23. It is so ordered.



DELIVERED, DATED AND SIGNED AT EMBU THIS 4TH DAY OF OCTOBER, 2023.

L. NJUGUNA

JUDGE

..... for the Appellant

..... for the Respondent

