



**Ohanga v Republic (Criminal Appeal 127 of 2023)
[2024] KEHC 12256 (KLR) (14 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12256 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 127 OF 2023
DR KAVEDZA, J
OCTOBER 14, 2024**

BETWEEN

MICHAEL OKUMU OHANGA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence
delivered on 27th April 2023 by Hon. Esther Boke (SPM) at Kibera
Chief Magistrate's Court Sexual Offences Case No. E086 of 2021)*

JUDGMENT

1. The Appellant was charged and after full trial convicted by the Subordinate Court of the offence of sexual assault contrary to section 5(1)(a)(i) and (ii) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 3rd day of July 2021 at around 10:00 am at [Particulars Withheld] within Nairobi County, he unlawfully used his fingers to penetrate the vagina of FMH, a girl aged eight years. He was sentenced to serve 20 years' imprisonment less ten (10) months he was in custody during his trial.
2. Being dissatisfied, he filed an appeal challenging his conviction and sentence. In the petition of appeal and amended grounds of appeal, he raised the following main ground: He challenged the totality of the prosecution's evidence against which he was convicted.
3. This being the first appellate court, we are guided by the ruling in *Okeno v. R* [1972] EA 32. In this case, the court opined that a court of first appeal ought to re-examine all the evidence afresh and exhaustively, to come up with its own conclusions without overlooking the conclusions of the trial court, bearing in mind that it never saw the witnesses testify.
4. The offence of sexual assault is created by Section 5 of the Sexual Offences Act which provides that:



- “(1) Any person who unlawfully:
- (a) penetrates the genital organs of another person with—
 - (i) any part of the body of another or that person; or
 - (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;
 - (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.”
5. The Court of Appeal in the case of *John Irungu V Republic*, [2016] eKLR pronounced itself on the essential ingredients of the offence of sexual assault as follows:
- “... Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim’s genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose.”
6. From the foregoing, it is clear that in order to establish the offence, the prosecution must prove that there was penetration into the genital organs of the victim by any part of the body of the person accused of the offence or any other person or objects manipulated by the accused person for that purpose.
 7. The essential elements of the offence therefore are, proof of penetration and positive identification of the assailant.
 8. After undergoing a voir dire examination, the complainant, FMH (name withheld), gave her unsworn account of the incident. She explained that she was familiar with the appellant, whom she knew as “uncle.” He often invited her to his house, where each time, he made her watch pornographic videos.
 9. On the day of the incident, the complainant recalled that the appellant placed her on his lap. As he continued playing the obscene videos, he spread her legs and began inserting his fingers into her private parts. She immediately protested, telling him that she felt pain and threatening to report him to her mother. This angered the appellant, and in response, he pinched her private parts, shoved her away, and took back the 15 shillings he had earlier given her.
 10. The complainant ran home and told her mother everything that had happened. Her mother promptly took her to the hospital for medical attention, and together, they went to the police station to report the incident.
 11. During cross-examination, FMH clarified that on the day of the incident, the appellant had asked her to take the 15 shillings to her mother to buy tea. She denied the appellant’s claims that her mother had sent her to borrow money from him, asserting that no such request had been made.
 12. As discussed in the Kenya Judiciary Criminal Procedure Bench Book 2018 paragraphs 94-96 no corroboration is necessary for the evidence of a child taken on oath although cross-examination is available for sworn or unsworn evidence of a child in the usual way:
 - “94. No corroboration is required if the evidence of the child is sworn (*Kibangeny arap Kolil v R* 1959 EA 92). Unsworn evidence of a victim who is a child of



tender years must be corroborated by other material evidence implicating the accused person for a conviction to be secured (Oloo v R (2009) KLR).

95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, *Evidence Act*). The reasons for the court's satisfaction must be recorded in the proceedings (Isaac *Nyoro Kimita v R Court of Appeal at Nairobi Criminal Appeal No. 187 of 2009; Julius Kiunga M'birithia v R High Court at Meru Criminal Appeal No. 111 of 2011*).
 96. The evidence of a child, sworn or unsworn, received under section 19 of the *Oaths and Statutory Declarations Act* is subject to cross-examination pursuant to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (art. 50(2)(k), CoK)
13. The complainant's testimony did not require corroboration in accordance with the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if there are reasons to believe that the child was telling the truth. In this regard, the trial magistrate noted that the complainant was consistent and steadfast in his. In addition, their evidence which was subjected to cross-examination remained consistent throughout.
 14. Regarding additional corroboratory evidence, PW1 identified as JAW, the complainant's mother testified that the complainant was born on 18th December 2011 and was 10 years old at the time. She recounted that on 3rd July 2021, she was in her house on the material day when the complainant came back from the appellant's house and told her that she was feeling pain in her private area. Further, she told her of the pornographic material, the money he gave her, and the act of pinching her private area. They immediately proceeded to the hospital where they obtained a post-rape care form which she adduced in court. Additionally, she headed to Langata Police Station where she recorded a statement and got a P3 form which she also brought to court.
 15. PW3 named Alice Goru is a nursing officer at AMREF Kibera where the complainant was examined. Upon examination, the complainant had pain in her vagina at 12 O'clock. She also had redness and hyperemia from 6 to 8 and at 10 to 11 O'clock region. She was treated and booked for counseling. She concluded that there was penetration corroborating the complainant's evidence.
 16. On the age of the complainant, the trial court considered the evidence of PW1 the complainant's mother, and the medical evidence (P3 form and PRC form,) which all indicated that the complainant was born on 18th December 2011. The evidence on age was not disputed. My opinion is guided by the decision of the Ugandan Court of Appeal in the case of Francis Omuroni vs. Uganda, Criminal Appeal No. 2 of 2000 where it was held thus:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”
 17. In the instant case, the birth certificate of the complainant was not produced. The medical evidence on record informed the court that the complainant was born on 18th December 2011, this was in addition to the mother's testimony. This is sufficient evidence as proof of age. She was therefore 10 years old at the time of the incident and a child within the law.



18. In his defense, the appellant maintained his innocence, insisting that the allegations against him were fabricated. He testified that the complainant's mother had framed him with the intention of extorting money, as he had been financially assisting the family even before the accusation. He further claimed that while he was at the police station, the complainant's mother demanded Kshs. 100,000 from him. When he refused to comply, she allegedly proceeded to turn him over to the police.
19. The trial court, after considering the appellant's defense, dismissed it as a mere denial. I make a similar finding that the prosecution did not prove their case beyond reasonable doubt. The conviction against the appellant on the charge of sexual assault is affirmed.
20. On the sentence, section 5(2) provides that a person who commits an offence of sexual assault is liable to imprisonment for a term of not less than ten (10) years which may be enhanced to life imprisonment.
21. The primary purpose of a sentence in a criminal case is to punish an offender for their wrongdoing, while also aiming to rehabilitate them and discourage future criminal behaviour, turning them into law-abiding citizens. Although the trial court's sentence in this case was lawful, being a first-time offender still has a chance for rehabilitation and a full life ahead. I therefore find that the sentence of twenty (20) years less ten (10) months spent in remand custody is legal.
22. The upshot of the above analysis is that the appeal is found to be lacking in merit in dismissed in its entirety.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 14TH DAY OF OCTOBER 2024

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Maroro Present for the Respondent

Achode Court Assistant

