



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Lajoine v Republic (Criminal Appeal E022 of 2023)  
[2025] KEHC 14369 (KLR) (9 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14369 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL APPEAL E022 OF 2023  
NIO ADAGI, J  
OCTOBER 9, 2025**

**BETWEEN**

**DANIEL LAJOINE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence in Criminal Case No. E056 of 2022 at Chief Magistrate's Court at Mavoko delivered on 16/06/202 before Hon. Kandie, RM)*

**JUDGMENT**

**Introduction**

1. The Appellant was charged with the offence of defilement contrary to Section 8(1)(2) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the charge were that on 29<sup>th</sup> day of September 2022 at around 1500 hrs in Athi River Sub-County within Machakos County, intentionally and unlawfully caused his penis to penetrate the vagina of PMM (name withheld) a child aged 3 years in violation of Section 8(1) as read with Section 8(2) of the Sexual Offence Act No. 3 of 2006.
2. In the alternative 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 charge were that on 29<sup>th</sup> day of September, 2022 at around 1500 hrs in Athi River sub county within Machakos intentionally and unlawfully committed an indecent act by touching the female genital organ vagina and anus of one PMM (name withheld) a child aged 3 years with his penis contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006.
3. The Appellant pleaded not guilty to the main charge and the alternative charge and the matter was set down for hearing. The prosecution called five witnesses in proving its case. The Appellant was convicted of the alternative charge of Committing an Indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) and was sentenced to 10 years in prison on 22<sup>nd</sup> June 2023.



4. Being dissatisfied with the decision of the trial court, the appellant has lodged the instant appeal against both the conviction and sentence. The Appellant filed an undated Petition of appeal raising nine grounds of appeal as follows:-
- i. the learned trial magistrate erred in matters of law and facts by convicting the appellant while relying the prosecutions' evidence which was doubtful and contradicting, fabricated evidence, insufficient and uncredible;
  - ii. the trial magistrate erred both in law and facts by failing to consider the appellants firm and plausible defence;
  - iii. the learned trial magistrate erred in matters of law and facts by failure to demonstrate whether or not the Prosecution proved its case beyond reasonable doubt as far as the alternative charge of indecent act was concerned;
  - iv. the learned trial magistrate erred in both law and facts by convicting the appellant without considering that proper investigations were never conducted by the prosecution deficient by the finding of the facts thus the danger of convicting the appellant on uncorroborated evidence of the complainant;
  - v. the learned trial magistrate erred in both law and facts by failing to consider the prosecution had not proven its case to the required standards;
  - vi. the learned magistrate erred in both law and facts by failing to observe that no offence was committed by the appellant herein but was framed;
  - vii. the trial magistrate erred in both law and facts by to failure by the trial court to consider that there was a grudge between the appellant on one side and the complainant's mother on the other and shifting the burden of proof to the appellant;
  - viii. whether or not the circumstances of this case, the sentence that was meted upon the Appellant by the trial court was lawful and/or warranted;
  - ix. the learned trial magistrate erred in matters of law and fact by drawing an inference of guilt to the appellant in a case where penetration was not proved to the required standard
5. The appeal is opposed by the Respondent/State who argues that the trial court properly evaluated the evidence and came to the right conclusion thus the appeal lacks merit and ought to be dismissed.
6. The appeal was canvassed by way of written submissions. The Appellant's submissions are dated 16th October 2024 while the Respondent's submissions are dated 8th November 2024 filed by Ms. Agatha Prosecution Counsel.

### **Analysis and Determination**

7. In determining this appeal, this court is fully aware of its duty as the first appellate court as espoused in the case of *Okeno Vs R (1972) EA 32* where the court stated:-

“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's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion”.



8. Having carefully re-evaluated and re-analysed the evidence on the trial court's record, the grounds of appeal and the Parties' rival submissions on the appeal, the issue for determination by this court is whether the Appellant has made a case for this court to interfere with the conviction and sentence imposed by the trial court.
9. To prove the offence of indecent act the following ingredients must be met, Section 2 of the Sexual Offence Act provides that:
  - "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;
10. To prove the offence of indecent act with a minor the following ingredients must be met:
  - a. unlawful intentional act of contact between any part of the body of a person with the genital organs, breast or buttocks of another but does not include penetration
  - b. Age of minority;
  - c. Identity of the accused/assailant;

**a. unlawful intentional act of contact**

11. The complainant PMM was to testify as PW1. The record shows that she was a minor aged 3 years old and could not understand the meaning of an oath and therefore she gave unsworn evidence with the assistance of the mother (PW2). The trial court also noted that the minor could not testify well. She hid her face whenever she saw the Appellant and cried whenever she was asked where she feels pain. Probably the minor was traumatised or scared and did not understand the court process.
12. PW2 testified that on the material day, the children were playing, then went silent. She sent Mercy (PW3) to look for them who then in turn called her to go and see what the Appellant was doing. PW2 went and found the Appellant sitting with his penis outside. PW3 was in shock. PW2 asked her not to bath her, PW1 was feeling pain at her vagina. PW2 checked her and noted a tear at her vagina and blood oozing out. PW2 took the minor to hospital where she was examined. The doctor noted a fresh wound and she was treated.
13. PW3 testified that when she went to look for the children she found the Appellant at the shade with the minor child on his lap and she was facing in front. The Appellant's penis was outside his trousers. She then called PW2 and they started shouting. The minor told her that the Appellant touched her private parts by stating "huyu mtu aliniweka mikono yake kwa matako yangu, pia aliniweka mikono yake ya kusu kwa susu yangu, nilisikia uchungu". The trial court noted that considering the age of the minor, the probability of her knowing what a penis is was low. The Appellant was found holding the minor on his lap. PW3 saw the Appellant wear his clothes properly and returned his private parts inside his trousers.
14. Farah Mohammed (PW5) a doctor at Mama Lucy Hospital examined PW1. She stated that there was general body examination with injuries. There were fresh bruises with mild bleeding, the vagina was okay, hymen was intact and the anal was okay. He proceeded to produce the P3 Form and the PRC



Form as PExt.I(a) and PExt.I(b) respectively on behalf of Dr. Joshua who prepared the report and whom she had worked with for 3 years and was familiar with his handwriting. The testimonies of PW2 and PW3 corroborated each other and it was consistent and also corroborated the evidence of PW5 the doctor. The evidence adduced thus proved the ingredient of unlawful act of contact.

#### **b. Age of minority**

15. PW2 testified that the minor was 3 years old and had the birth notification (PMFI.2) in court. PW4 the Investigating Officer produced the Birth Notification (PExt.2) which showed that the minor was 3 years old. PW5 the doctor also testified that the minor was born on 28/6/2019. At the time of the offence, she was aged 3 years 2 months and 17 days. The proof of age of minority was therefore solid.

#### **c. Identity of the accused/assailant**

16. PW3 testified that when she went to look for the children, she found the Appellant at the shade with the minor on his lap and she was facing in front. The Appellant's penis was outside his trousers. She then called PW2 and they started shouting. The Appellant was arrested by members of the public and was handed over to the police. She also referred to him as "Maasai". PW4 the Investigating Officer stated that she rearrested the Appellant who was arrested by members of the public. It is clear that from this evidence that identity of the Appellant was by way of recognition which is the best form of identification.
17. In light of the foregoing, I find that the prosecution discharged its burden of proof and that the Appellant was properly convicted of the offence of Committing and Indecent act with a child. The evidence by the prosecution witnesses was credible, consistent, reliable and well corroborated. All ingredients of the offence were established beyond reasonable doubt.
18. As regards whether the learned trial magistrate erred in both fact and law by not considering the Appellant's sworn defence. I have perused the trial court's proceedings and I observe that the Appellant gave sworn evidence where he alleged that on 29/9/2022 he went to one house to get a drink. He got there at 11.00am. The house belonged to Mama Ngau. He went to the house to get a drink. He met Mercy PW3 who served him the drink. He stated that the PW2 sells alcohol. He stated that he stayed there, it is a busy place because of human traffic. Later at about 3.00pm Mercy came and accused him of defiling the minor. He testified that the evidence of the prosecution witnesses was not truthful. He denied defiling the minor whereas he was caught red handed with his penis out and with the minor on his lap who had fresh injuries and with mild bleeding.
19. With due respect, I find this defence to be unbelievable and not strong enough to rebut the prosecution's evidence as against the Appellant. The trial court was therefore right in rejecting the Appellant's defence.

#### **Whether sentence imposed on the Appellant's was lawful**

20. The Appellant was sentenced to 10 years in prison on 22<sup>nd</sup> June 2023. Before sentencing, the Appellant was given a chance to mitigate and he stated that he had people who depended on him, his health is not okay and he prayed for leniency. The prosecution informed the court that the Appellant was a first offender and had no records. Section 11(1) of the [Sexual Offences Act](#) provides that:

“ 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”.



21. The 10-year sentence imposed on the Appellant was the minimum mandatory and lawful sentence at the time. By virtue of the supreme court judgment in Republic v Joshua Gichuki Mwangi the courts are bound by the minimum mandatory sentence as provided for by law.
22. Before I pen off, I have perused the trial court's proceedings on the Appellant's sentence and I note that the trial Magistrate did not take into account the period the Appellant had been in custody pending trial pursuant to the proviso to Section 333 (2) of CPC which obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.
23. Appellant was arrested on 29/9/2022 and was in custody throughout pending trial until when he was convicted on 15/6/2023 and sentenced on 22/6/2023.
24. Accordingly, I made the following orders:-
  - a. I hereby find that this appeal lacks merit and is dismissed.
  - b. The Appellant's sentence will be altered to comply with the provisions of Section 333(2) of the Criminal Procedure Code in that the period from when the Appellant was arrested on 29/9/2022 to when he was convicted on 15/6/2023 being about nine (9) months shall be taken into account.
25. Right of Appeal 14 days.  
It is so ordered.

**JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 9TH OCTOBER 2025**

**NOEL I. ADAGI**

**JUDGE**

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 9TH OCTOBER 2025

In the presence of :

In person..... for Appellant

Ms. Agatha..... for Respondent

Milly..... Court Assistant

