



REPUBLIC OF KENYA



KENYA LAW
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**Njuru v Republic (Criminal Appeal E037 of 2024)
[2025] KEHC 13565 (KLR) (1 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 13565 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E037 OF 2024
JN NJAGI, J
OCTOBER 1, 2025**

BETWEEN

ROBERT KINYUA NJURU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence by Hon. R.C. Mwashii, RM, in Mpeketoni PM's Court Sexual Offence Case No. E014 of 2023 delivered on 31/1/2024)

JUDGMENT

1. The appellant was convicted for the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No.3 of 2006 and sentenced to serve 10 years imprisonment. The particulars of the offence were that on 19th August, 2024 at around 1500 hours at [Particulars Withheld] Mpeketoni Sub County within Lamu County he committed an indecent act with a child namely S.N (herein referred to as the victim/complainant), a child aged 4 years by touching her private parts, namely vagina with his fingers.
2. The Appellant was aggrieved by the conviction and the sentence and lodged this appeal. The grounds of appeal are:
 1. That the learned magistrate erred in law and facts by failing to consider that the prosecution did not prove their case beyond reasonable doubt as required by the law in breach of Section 109 and 110 of the *Evidence Act*.
 2. The learned trial magistrate erred in law and fact by falling to consider sharp contradictions by the prosecution in contravention of Section 163(1)(c) of the *Evidence Act*.
 3. That the trial magistrate erred in law and fact by failing to consider both conviction and sentence were against the weight of the evidence adduced by the prosecution.



4. That the learned magistrate erred in law and facts by failing to adequately consider his defence evidence.
3. The case for the prosecution is that the victim was at the material time aged 4 years and was living with her parents, her mother PW1 and her father PW2. The Appellant was their neighbor in the same rental house. His house was two rooms away from the room of the victim.
4. The evidence of the victim (PW2 in the case) was that she was on the material day playing outside her parents' house. That the appellant called her into his house. She entered into his house and found some toys in the house. She started to play with them. That the Appellant then placed her on the bed and touched her private parts and on the shoulders. Her mother called her and she came out of the Appellant's house.
5. The girl's mother PW1 testified that her family had stayed in the plot for about 2 weeks. That on the material day she was doing her house hold chores and her daughter, the victim, was playing outside their house. That the father to the victim arrived home from work and found the victim's shoes outside the door of the appellant. She, PW1, called the victim and she came out of the house of the Appellant. The appellant told her that the victim had been looking for toys to play with. The appellant brought a toy and gave it to the girl. The Appellant also gave toys to 2 other children who were there.
6. That at around 4 pm PW1 called the child and started to bathe her. She then saw rashes on her pelvic region. She asked her about them and she told her that the Appellant had put her on the bed and started licking her vagina. That he then forced her to suck his penis. That the appellant had told her to maintain silence on it and he would buy her sweets. That she gave the same narration to her father. They went and made a report to the police. They were referred to hospital for examination.
7. The victim's father PW3 testified that he on the material day arrived home from work and did not find his daughter, the victim. He asked his wife PW1 where the child was. His wife came out of their house and called at the child. He then heard his wife asking the Appellant what the child was doing in his house. He came out of his house and saw the victim coming out of the Appellant's house. That his wife saw rashes on the girl's pelvic region She heard the victim tell her mother that the Appellant had licked her private parts and that he had given her his dudu (penis) to lick. They went to the police station and made a report.
8. The child was examined by Dr. Marion Muli PW4 of Mpeketoni sub county Hospital. Nothing significant was found on the child as the hymen was intact. The doctor filled a P3 form.
9. The case was investigated by PC Dorcas Wandia, PW5 of Mpeketoni police station. She recorded statements of witnesses. The appellant was arrested and she charged him with the offence. During the hearing PW5 produced the girl's Birth Notification Card as exhibit, P.Exh.6.
10. When placed to his defence, the appellant stated in sworn statement that he was living in a room one door away from the house of the complainant. That he on the material day returned home and found 2 children playing a few meters away from the door to his house. The victim herein was seated separately from the children who were playing. He asked her why she was not playing with the others. She said she did not have anything to play with. He opened the door to his house. He has junk items in his house. He called the girl into his house and told her to look for something to play with. The other two boys followed her into the house. The boys found playing items and they started to leave the house. He found something for the girl to play with. As he gave it to her, her mother called at her by which time they had come out of his house. He told her mother that he was looking for something for the girl to play with. The girl left with her mother and he went back to his house. That 2 days later policemen



went to his house and arrested him. He was told that he was a suspect of defilement. He was later arraigned in court.

11. The appellant did not call any witness in the case.

Submissions

12. The appeal was canvassed by way of written submissions. The Appellant submitted that the complainant was not a credible witness. That the trial court failed to consider the contradictions and discrepancies in the evidence of the prosecution witnesses. That the case was not proved beyond reasonable doubt.
13. The Respondent on the other hand submitted that the prosecution proved the case against the Appellant beyond reasonable doubt. That the age of the complainant was proved by the production of the birth certificate. That the minor proved that the Appellant touched her vagina with his fingers. That the complainant's father saw the complainant's shoes outside the door of the Appellant and when her mother called her the Appellant informed them that the minor was in his house collecting toys. That the minor came out of his house. That the doctor confirmed that there was indecent act committed on the child.
14. It was submitted that the Appellant was a neighbor to the complainant and knew him very well. That she mentioned his nickname. That his defence that the minor had only gone to his house to collect toys did not hold water and should be dismissed.

Analysis and determination

15. This court being a first appellate court in this matter, I am alive to and is cognizant of the principles laid down in the case of *Okeno vs. Republic* (1972) EA 32 where the Court of Appeal for Eastern Africa stated the following on the duty of a first appellate court:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya V R* 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala V. R* [1957] E.A. 570. It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings 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, see (*Peters V Sunday Post* 1978) E.A. 424.”

16. The appellant was charged with the offence of indecent act with a child. The ingredients for the offence that the prosecution needed to prove are: the age of the complainant, identity of the perpetrator and the indecent act itself.
17. On the question of age, it is trite that the age of a person can be proved in various ways including documentary evidence, oral evidence of the parents or the child if the child is old enough to know her age or even by observation of the court. In the case of *Mwalongo Chichoro Mwajembe -Vs- Republic*, Msa Cr.App. No. 24 of 2015 (UR), the Court of Appeal held as follows:

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism



card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.”

18. The mother to the girl PW1 stated that the girl was aged 4 years. The investigating officer PW5 produced the girl's Birth Notification Card that showed that she was born on 28/12/2019. The said document is credible in proving the age of a person. That placed the age of the girl at the time the complaint was lodged at close to 4 years. It was therefore proved that the victim was a child for the purposes of the *Sexual Offences Act*.
19. On identification, there is no doubt that the appellant was a person well known to the victim as they were neighbours. In any case the appellant admits that the child was in his house at the material time. The question is whether committed an indecent act on her.
20. “Indecent act” is defined under Section 2 of the *Sexual Offences Act* as an 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.
21. It was the evidence of both parents of the child victim that the child told them that the appellant placed her on his bed and licked her vagina and that he made her to suck his penis. However, when the child testified in court, she said that the appellant only touched her private parts and shoulders. The child never stated that the appellant licked her vagina or that he made her suck his penis. What then is the correct version of the incident? Is it what she told her parents or what she told the court? Was she a credible witness?
22. The Court of Appeal in the case of *Ndungu Kimanyi v Republic* [1979] KLR 283, held the following on credibility of witnesses:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.
23. The fact that the victim told her parents a different thing from that which she told the trial court creates doubt on her credibility as a witness. It is important to note that the victim was barely 4 years. Children of such an age can easily forget things. It may not be that she was lying to the court but it could have been a matter of forgetfulness. What the victim told her parents was relevant in showing consistency in her evidence. In telling the court a different thing from what she told her parents would lead to the conclusion that she was not a witness worthy of belief. The law of evidence in such circumstances would give the benefit of doubt to the accused person.
24. It is also to be noted that the victim was of very tender age, barely 4 years and she gave unsworn evidence as she could not understand the meaning of an oath. Though the proviso to section 124 of the *Evidence Act* allows a court in sexual offences involving children to convict on the sole evidence of a child if the court is satisfied that the child is telling the truth, it is my finding that it was unsafe to convict on the unsworn evidence of the child in this case. The trial magistrate though believing the evidence of the child did not properly weigh the credibility of the child.



25. In the final end I find that the prosecution did not prove the charge against the appellant beyond reasonable doubt. The trial court erred in convicting the appellant. Consequently, the conviction is quashed and the sentence set aside. I order the Appellant to be set at liberty forthwith unless lawfully held.

JUDGMENT READ, DELIVERED AND SIGNED AT GARSEN THIS 1ST DAY OF OCTOBER 2025.

J. N. NJAGI

JUDGE

In the presence of:

Miss Mkongo for Respondent

Appellant: Present

Court Assistant - Rahma

