Kwemoi alias Matiba v Republic (Criminal Appeal E006 of 2024)
[2025] KEHC 17625 (KLR) (14 November 2025) (Judgment)

Neutral citation: [2025] KEHC 17625 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E006 OF 2024

MS SHARIFF, J

NOVEMBER 14, 2025

BETWEEN

KEN KWEMOI ALIAS MATIBA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence in Sexual Offences Case No. E027 of 2023 at the Senior Principal Magistrate's Court at Kimilili by Hon. W. K. Onkunya-PM delivered on 16th October 2023)

JUDGMENT

Background

1. The Appellant was charged with committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. The particulars are that: -

> "On 9th March 2023, at (particulars withheld) Village in Mt. Elgon Sub-County within Bungoma County, the appellant intentionally touched the buttocks and breast of T.N, a child aged 12 years using his hands".

2. The Appellant pleaded not guilty. The Respondent called three (3) witnesses.

3. When placed on his defence the Appellant denied the charges levelled against him and termed them as a fabrication. He had whoever admitted during cross examination, that he had touched the victim indecently.

4. At the conclusion of the trial the Appellant was convicted and sentenced to serve Ten (10) years imprisonment.

Appeal

5. Aggrieved by the conviction and sentence, the Appellant filed his undated Petition of Appeal, in which he premised the following grounds : -

    a. That, the trial magistrate grossly erred in law and facts to convict the Appellant on contradictory, inconsistency and uncorroborated evidence which meant that the witness was not credible.

    b. That, the Hon. Court contravened Article 50(2) by not educating the Appellant on the magnitude of the offence.

    c. That, the Appellant was not understanding the language which was used in the Court for the Appellant doesn't understand Kiswahili nor English. The Appellant is illiterate.

    d. That, the Appellant is requesting this Hon. Court to give an order of retrial so that the right enshrined in Article 50 (2) can be exercised.

Evidence

6. As a first appellate Court I am duty bound to re-evaluate and re-scrutinize and re-analyze the evidence on record and reach my own independent conclusion, while taking into account the fact that unlike the trial court, I did not have the advantage of seeing the witnesses as they testified wherefore I lack the opportunity to gauge their demeanour. I thus find guidance from the case of David Njuguna Wairimu V Republic [2010] where the Court of Appeal held: -

> " The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

7. PW1 (Complainant) was an 11 years old student. She recalled on 9th March 2023, at 7.52 a.m. she was heading to school when upon reaching a bushy area, then Appellant herein whom she knew as "Matiba" popped out of the bush and grabbed her buttocks and back. This act prompted her to rush back home screaming while the Appellant returned to the bush. On reaching home, her mother instructed their house help to escort her to school. She told the Court that she knew the Appellant very well and knew him as "Matiba" as he was the one who ordinarily herded cattle in a neighboring farm. She told the Court that he had dreadlocks. On cross-examination, she told the Court that it was the Appellant who grabbed her buttocks and breast. She maintained that this ordeal occurred on her way to school.

8. PW2, NPW, testified that PW1 returned home in tears a few minutes after leaving for school and reported that one "Matiba" who had been hiding in a bush jumped out therefrom and grabbed her buttocks and breast while she was heading to school. This witness told the Court that while in a company of her colleague, she traced the Appellant, apprehended him and handed him over to the police. She told the Court that the Complainant was 11 years old. On cross-examination, she told the Court that the Complainant informed her that the Appellant had touched her on her buttocks.

9. PW3, No. 118370 Patrick Otieno Omondi, testified that on 11th March 2023, PW2 in the company of the Complainant (PW1) had lodged a complaint against the Appellant herein, whom PW2 had apprehended and handed over to the police. That PW1 had complained that she had been accosted by the appellant while enroute to school in a bushy area and had touched her buttocks and breasts and that the Complainant stated the appellant had on several occasions done that same act. This witness sated that he duly recorded their respective statements. He produced the Complainant's birth certificate as PEXH1; it revealed her date of birth as 19th August 2011.

Determination

10. Upon considering the grounds of appeal, the evidence adduced in the lower court and the rival submissions of parties, the issues that emerge for determination are as follows:

    a. Whether the Appellant's rights under Article 50 (2) of *the Constitution* were violated.

    b. Whether the Respondent proved its case to the desired threshold

    c. Whether the sentence meted upon the Appellant was appropriate.

Whether the Appellant's rights under Article 50 (2) of *the Constitution* were violated.

11. Article 50 (2) of *the Constitution* provides as follows:-

> " Every accused person has the right to a fair trial, which includes the right—
>
> g. to choose, and be represented by, an advocate, and to be informed of this right promptly;
>
> h. to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
>
> i. to remain silent, and not to testify during the proceedings;
>
> j. to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."

12. It has been held by the Supreme Court of Kenya that the right to legal representation, although critical in criminal proceedings, is not absolute. In the case of Republic v. Karisa Chengo & 2 others [2017] eKLR, the said Court set out the parameters that should be considered by the Court in determining whether the legal representation at the expense of the State should be considered. The factors to be taken into consideration include the seriousness of the offence and the attendant sentence, the literacy of the accused, whether or not the accused is a minor, the complexity of the charges facing the accused, and the ability of the accused to hire Counsel.

13. In the case of Meshack Juma Wafula v. Republic [2019] eKLR, the Court of Appeal cited the case of Pett v. Greyhound Racing Association (1968) 2 ALL E.R. 545 (P.549) where Lord Denning said:-

> " It is not every man who has the ability to defend himself on his own. He cannot bring out the point in his own favour or the weakness on the other side. He may be tongue tied, nervous, confused or wanting in intelligence. He cannot examine or cross examine witnesses. We see it every day a magistrate says to a man; you can ask any questions you like; whereupon the

man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for that task."

14. Having re-evaluated the proceedings of the primary case, I find that at no point prior to the trial or during the trial, did the Appellant state that he could not follow the proceedings. The Appellant ably cross-examined the Complainant and the other witnesses, and also tendered his defence which was in the form of an alibi. Although there is no record of the Appellant being informed of his right to legal representation, it is my finding that he was not prejudiced by the said omission.

15. In ground (3) of the Petition, the Appellant alleges that he is illiterate, thus did not understand the proceedings. The record before me reflects that the witnesses testified in Kiswahili which language the appellant had told the trial Court that he understood and was not foreign to him. Once again, I note that the trial went on for a number of days yet at no time is the Appellant recorded to have raised the issue that he could not understand the language of the court. At the risk of sounding redundant, I reiterate that the appellant duly cross-examined the respondent's wherefore is estopped from feigning illiteracy at this stage. This ground of appeal is nothing but an afterthought and it must therefore fail.

16. In the end, I make the finding that the Appellant has failed to demonstrate that there was violation of his rights to a fair trial as enshrined under Article 50 of *the Constitution*.

Whether the Respondent proved its case to the desired threshold

17. Section 2 (1) of the *Sexual Offences Act* defines indecent act as: -

> " Indecent act means an unlawful intentional act which causes: -Any contact between any part of the body of a person with the genital organ, breast or buttocks of another, but does not include an act that causes penetration;
>
> Exposure or display of any pornographic material to any person against his or her will."

18. Any touch or contact by any part of the body against a person's genitals, breasts or buttocks is indecent. Thus, to establish the offence of committing an indecent act on a child, the Respondent had to establish the age of the victim, the indecent act and the positive identification of the perpetrator.

19. The Children's Act, No. 29 of 2022 defines a child as an individual who has not attained the age of 18 years. The Complainant was at all material times aged 11.

20. On the issue whether the appellant committed an indecent act and whether he was positively identified as the perpetrator, I do find that the victim's evidence was credible as she gave a vivid account of what had transpired and PW2 was categorical that the complainant had returned home immediately after the incident and had reported to her mother. PW 1 knew the appellant as a herdsman by the name Matiba. She recognized him and she had told the investigating officer that the appellant had repeatedly been accosting her and touching her indecently.

21. In this case, the Appellant herein admitted to touching the Complainant's private parts during cross-examination by the Respondent. The admission was duly made before a trial magistrate pursuant to the dints of Section 25 A (1) of the *Evidence Act* and the trial Court was proper in finding the Respondent had proved its case against the Appellant herein.

22. I therefore find that all the elements of the offence were proved beyond all reasonable doubt and the evidence tendered was sufficient to sustain a conviction.

Whether the sentence meted upon the Appellant was appropriate.

23. The first appellate Court can only interfere with the sentence imposed by the trial court if it is satisfied that; the trial Court did not exercise discretion judicially in that;

    i. in arriving at the sentence, the trial court did not take into account a relevant fact or that it took into account an irrelevant factor; or

    ii. that in all the circumstances of the case, the sentence is harsh and excessive (Wanjema v Republic (1971) EA 493).

24. The penalty for committing an indecent act with a child under Section 11(1) of the *Sexual Offences Act* is prescribed 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."

25. In passing sentence, the Court takes into account the individual circumstances of the case. I note that the trial magistrate duly considered the Appellant's mitigation: he had pleaded for leniency. The Appellant is a child molester and the trial court had the option of imposing any sentence above the statutory prescribed minimum sentence of 10 years. I therefore find that the sentence of 10 years imprisonment that was meted upon the Appellant by the trial Court was neither harsh nor excessive considering the aggravating factors of the case.

26. In conclusion I am satisfied that the Appellant was properly and I do not find any fault with the decision of the trial court. I therefore find no merit in this appeal. In the result, I confirm the conviction and I uphold the sentence of the trial court.

It is hereby so ordered

DATED AND DELIVERED AT BUNGOMA THIS 14TH DAY OF NOVEMBER 2025.

M.S.SHARIFF

JUDGE

In the presence of:

Appellant

Ms Kibet for the Respondent

Peter Machoni – Court Assistant