Wakarindi v Republic (Criminal Appeal E072 of 2024)
[2026] KEHC 1998 (KLR) (18 February 2026) (Judgment)

Neutral citation: [2026] KEHC 1998 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E072 OF 2024

AK NDUNG'U, J

FEBRUARY 18, 2026

BETWEEN

MICHAEL NDIRANGU WAKARINDI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Sexual Offences Case No. E007 of 2024– E.D. Deche, RM)

JUDGMENT

1. The Appellant, Michael Ndirangu WakarindI was convicted after trial of indecent act (count I) contrary to section 11(1) *Sexual Offences Act*, No 3 of 2006. He was also convicted of threatening to kill contrary to Section 223(1) of the Penal Code. On 07/11/2024, he was sentenced to 10 years for each count. The sentences were however ordered to run concurrently.

2. The particulars for count I were that on 02/01/2024 at around 1400hrs at [Particulars Withheld], Gakawa location in Kieni East Sub-county within Nyeri County unlawfully and intentionally touched the buttocks and breast of E.W.K a child aged 16 years with his hands. The particulars for count II were that on diverse dates between 10/02/2024 and 16/02/2024 at the same area, without lawful excuse uttered words 'ukiambia mtu iyo maneno, nyama za mwili wako hazitapatikana', ukijaribu kuambia mtu tutaonana na wewe' which were directed to E.W.K.

3. Being dissatisfied with the conviction and the sentence, he lodged this appeal vide an undated Petition and filed amended grounds of appeal accompanying his submissions. The conviction and the sentences are being challenged on the following grounds;

    i. The learned magistrate erred by failing to note that essential ingredients of the two counts were not proved.

ii. The trial magistrate erred convicting and sentencing him yet there were no documentary or expert witness to prove the age of the victim.

iii. The learned magistrate erred by failing to note that no contact of any body part defined under section 2(a) of *Sexual Offences Act* was proved.

iv. The learned magistrate erred by relying on section 124 of *Evidence Act* without adhering to the set parameters and without appreciating that the victim was a hostile witness, dishonest which dented her credibility.

v. The learned magistrate erred convicting him on uncredible, unreliable and dishonest evidence of the victim.

vi. The learned magistrate erred convicting him yet the prosecution failed to prove that he uttered and directly and indirectly caused any person to receive threat.

vii. That the prosecution failed to avail key and material witnesses and material evidence.

viii. The learned magistrate erred convicting him without adducing circumstantial evidence contrary to section 33 of *Sexual Offences Act*.

ix. The learned magistrate erred convicting him on a defective charge sheet without considering the particulars therein and weighing evidence adduced by prosecution's witnesses.

x. The learned magistrate erred by passing her judgment on assumption and guesswork as her judgment was full of open bias by taking sides and misapplication of section 199 of the Criminal Procedure Code violating Article 127, 28 and 50(2) of *the Constitution*.

xi. The learned magistrate erred by shifting the burden of proof to him by believing the prosecution's witnesses while disregarding his evidence and evidence of DW2 which she said was influenced, rehearsed and exaggerated yet there was no evidence to support such holding.

xii. That the sentences were not only illegal but were based on a case not proved to the required standard.

xiii. The learned magistrate grossly misdirected herself causing incalculable miscarriage of justice to the Appellant's great detriment.

4. The appeal was canvassed by way of written submissions. In his written submissions, the Appellant argued that age was not proved as no documentary evidence was availed to support the complainant's testimony that she was 16 years old. Her mother did not corroborate or mention her age. That the prosecution retained the burden to avail credible and reliable evidence instead of placing full reliance on the complainant's unverified statement concerning her age. That when one encounters a victim who is 16 to 18 years, it is hard and almost impossible to tell their age by the way they talk unlike a child of tender years. Hence, gauging the victim's age by common sense or by the way they talk may depend on the circumstances of the case. Reliance was placed on the case of Eliud Waweru Wambui vs Republic (2019) eKLR that the court expressed the difficulty in telling the differences between a 16 and 18 years old.

5. He submitted that the complainant's evidence was not specific and was vague as to the act of contact with any body part since her evidence of having been tapped did not prove that contact with any body part took place. What was used to tap her was not known as she did not see what tapped her as she was bending down. That it was necessary for the complainant to provide vivid or graphic details of the

body part that tapped her to establish indecent act. Further, it is not always that tapping and touching are synonymous with contact of body part as it can include other objects.

6. He submitted that it was clear that the complainant was accompanied by three friends from Lucy's place. Lucy did not mention the complainant's friends. She testified that he was not there whereas PW3 testified she found him there. Prosecution failed to avail Elizabeth Wanjiku and Josephine Kinyua to shed light in the case. PW1 testified that he arrived at around 2:00pm whereas he testified that he received a call from complainant's mother at around 4:30pm and DW2 testified that they arrived at around 4:30 to 5:00pm. That the complainant was a dishonest and hostile witness as she changed her testimony regarding her former statement which shows that it was a frame up. That it was not logical that she could have forgotten the touching of breasts and what touched her. Further, PW4 testified that she reported that he touched her buttocks, breast and waistline and PW2 testified that the complainant told her that he pulled her shirt and touched her buttocks. The complainant however testified that he tapped her on her buttocks. Therefore, the trial court ought to have tested her integrity before relying on section 124 of the *Evidence Act*. Further, the court failed to record the reasons of believing PW1's evidence and there was no indication of her truthfulness.

7. He further submitted that the complainant was not reliable since she testified that her mother asked the Appellant to look after her and her younger brother whereas PW2 testified that the mother told the Appellant that she would leave her home in his hands and his children will stay with his wife and not him.

8. It is submitted that the complainant testified that she ran to Lucy's home where she borrowed her phone and called her mother while Lucy testified that she went to her salon and borrowed her phone. The alleged call was once yet PW2 testified that she had not gotten to Kirinyaga when she received the call from the complainant. She also testified that she was at Samson corner when she was informed and also that she was in Kirinyaga when she was informed of the incidence. The complainant reported a third incidence of threatening to kill to her mother but she did not testify of a third incidence.

9. That PW3 testified that the complainant informed her that the pastor tried to take her by force yet the complainant testified that she did not inform PW3 who was only informed by her mother. The court was informed that he was threatening the complainant and his bail was sought to be cancelled whereas the investigating officer informed the court that she was not informed of any other further threat after the matter was taken to court. PW3 testified that she saw him at the gate alone and PW1 was crying and shaken but she recanted her statement on cross examination as she testified that she was told everything. That the alleged phone call from PW1 through PW3's phone was not proved as no call data was produced.

10. As to the charge of threating to kill, he submitted that the evidence by PW2 and investigating officer was hearsay. Further, it was the duty of the prosecution to avail material witnesses and evidence to collaborate and prove PW1's allegation. That PW1's brother who was alleged to be with her on 10/02/2024 was a material witness as it was alleged he was at the scene hence, he could have strengthened PW1's credibility. Further there was doubt whether she ran away from home and how she reached Naromoru. Prosecution ought to have availed independent prosecution witnesses, alleged good samaritan and a call data from her father to prove that she had ran away.

11. He submitted that the charge sheet was defective as it was alleged in the particulars that he touched her buttock and breast with his hands whereas the complainant testified that he tapped her buttocks. The complainant did not mention breasts and did not mention touching by hands hence this did not form the offence of indecent act. Hence, he was convicted on the evidence that did not tally with the particulars of the charge.

12. He argued that the trial court failed to record PW1's demeanour in the proceedings in line with section 199 of the Criminal Procedure Code but only captured it in the judgment which was 7 months after her testimony. That the trial court stated that he was insolent in the judgment which was not raised during the proceedings. That he was naïve on court process and if at all he was insolent, the court had a duty to record or warn him. That this was aimed to secure a conviction at whatever costs and this was taking sides without considering the evidence in totality.

13. That there was need for adducing circumstantial evidence in determining whether the offence occurred. That it beats logic how he could have assaulted her in broad day light knowing that they knew each other. There was also no mention that he had previously asked for sexual favours and that they had lived as friends. There was no evidence that he was intoxicated. That in his pastoral duties, he has met women and has never indecently assaulted or threatened to kill anyone. Also, it beats logic why the complainant did not raise alarm or call for help at the material time. She was clam and reserved when she was testifying and never portrayed any sign of trauma. That he never portrayed guilty conscious and was not a flight risk because he did not offend the complainant as it was alleged. Therefore, there was no circumstantial evidence linking him to the offence.

14. He submitted that the trial court rejected his defence without cogent reasons and the prosecution failed to rebut his new evidence. The trial magistrate rejected the evidence of DW3 and shifted the burden of proof to him. She failed to consider that DW3 was a headteacher and a teacher to PW1 so he could not have gone and testified against his own student. On the sentence, he submitted that the sentences were harsh and failed to consider his mitigation, that he was a first time offender and non-aggravating nature of the offence. That mandatory minimum sentences have been frowned upon by our superior courts.

15. In rejoinder, the Respondent's counsel submitted that Appellant did not seek leave to amend the petition of appeal in line with section 350(2) of the Criminal Procedure Code and he urged the court to disregard the amended grounds of appeal. Age was sufficiently proved as PW1 testified that she was 16 years old and in form 3 at (particulars withheld) secondary school. The trial court conducted voir dire and established that she was 16 years old. DW3, the head teacher confirmed that she was his student. Further, it is common that majority of students in high school are below the age of eighteen years. Therefore, age was sufficiently proved.

16. He submitted that the complainant testified that he tapped her on the buttocks, forcefully hugged her and tried to kiss her. That the court was empowered to convict solely on her evidence in line with section 124 of the *Evidence Act*. Therefore, contact and specific body parts were proved. Identification was proved as he was their neighbour and a family friend, a fact he admitted. The offence took place during the day. With regards to the charge of threatening to kill, he submitted that he threatened her on two occasions which made her to be afraid for her life since she was scared on what he would do to her. That she escaped from home due to fear. Her mother also observed that when she returned home, the complainant appeared shaken.

17. With regards to his defence, hit is submitted that his defence that there was a grudge as he had refused to have sex with PW2 was an afterthought as it was not an accruing theme during cross examination. Nothing showed during the prosecution's case that there was an existing grudge as PW1 considered him as an uncle and PW2 considered him as a close friend to the family. She even left him to take care of her household when she was away. He also testified that on 10/02/2024 he attended a meeting and even signed the minutes and contributed for merry go round but no evidence was presented in court.

18. Regarding sentence, counsel submitted that sentence is at the discretion of the trial court and the Appellant did not demonstrate any factor for the interference of the same. The trial court also followed

the procedure while sentencing by considering his mitigation and that he was a first time offender. Therefore, the sentences were lawful but lenient in the circumstances.

19. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court.

20. This duty was set out in Okeno vs. Republic [1972] EA by the Court of Appeal as follows;

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a 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 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 vs. Sunday Post [1958] E.A 424."

21. Similarly, in Kiilu & Another vs. Republic [2005]1 KLR 174, the Court of Appeal stated thus:

> " 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 to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
>
> It is not the function 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; 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.

22. A summary of the evidence at the trial court was as follows. The complainant in her sworn testimony testified that she was 16 years old and was born on 17/11/2007. The Appellant went to their home on 02/01/2024. She knew him as a pastor and he was like a big brother in their family. Her mom was contacted and was informed that her dad was not feeling well. She asked the Appellant to look after her and her small brother. She also contacted Appellant's wife who agreed to stay with her. She left and at around 2:00pm, the Appellant returned and they fed the cows. He left and after a while, there was a sound on the gate and she realised that he was back. He went to the kitchen and tapped her on her buttocks as she was bending down. She asked him if he wanted something but he did not respond. He forcefully hugged her and tried to kiss her. She pushed him back and moved away. He pushed her, she fell and sat on the chair. He kept approaching her but she pushed him away twice and she then ran to Lucy, who was their neighbour. She called her mother and informed her what had happened and she told her to stay at Lucy's and she asked Lucy to stay with her until she returns.

23. On 10/02/2024, her mom sent her to the shop with her brother and when going home, they met the Appellant and his wife. He stopped and greeted them. His wife and her brother walked away. He asked her if she had told anyone what had happened and she said no. He told her that if she told anyone, he would kill her and her body parts would not be found. She did not tell her mom. On 16/02/2024, there was an event at school and the principal sent her home to fetch a jerrycan and she met him at the

gate. He did not greet her but he asked her if she had told anyone what happened. She said no and he told her that if she told anyone, she would face consequences. That she had a poem but she could not recite it as she was afraid since he was seated at the front. She tried to stand but when she saw him, she was afraid. When she went home, she told her mother what had happened.

24. On 19/02/2024, she left as she kept hearing his threats in her ears. She wanted to go to Ruiru to her aunt's. On the way, she saw a house and a woman sitting outside and she borrowed her phone and contacted her father who asked her why she was not in school. She told him it was because of the Appellant. They picked her up and reported the matter at Naromoru police station.

25. On cross examination by Appellant's counsel, she testified that he tried to kiss her but did not manage to. She did not inform Lucy of the incident but she was informed by her mum. That when she met him at the gate, there were only scouts who were facing a different direction so she was not sure whether they saw him talking to her. She did not tell her mom of her plans to go to Ruiru. She did not know the woman of where she took refuge. That there was no plan between her and her mother to falsely accuse him. That on 10/02/2024, he told her that her life was in danger and that her body parts will not be found. They were walking home when they met him with his wife. His wife left them talking and her brother walked and waited for her at a distance. He was not aware that she had told anyone and he kept asking her mother if she had told her anything.

26. PW2, complainant's mother testified that on 02/01/2024, she received a call that her husband was unwell. The Appellant who was a close friend had visited and she told him that she was would leave her home in his hands and that her children would stay with his wife and not him. He called to ask whether she had arrived and after 10 minutes, she received a call from Lucy but it was the complainant calling. She was crying and she asked her what she should do for the Appellant to leave their home as he had attempted to take her by force. She asked her 3 times if he had done something and she said no. She told her that she managed to get away. She told her that he tried to take her by force. She told her that the Appellant pulled her shirt, touched her buttocks and tried to kiss her. She pushed him away. She told the complainant not to go to his house to sleep there but stays at Lucy's. She spoke to Lucy and asked her what had happened but she said she did not know because the complainant only went to her place and borrowed her phone. She stayed at Lucy's. She testified that the Appellant kept calling her saying that her daughter was spoilt. He asked her if the complainant had told her anything and she said no and asked him if there was anything to tell but he said no.

27. She testified that he threatened her three times. The first time he went and called her and asked her if she had told anyone and what she wanted in return so they could settle the matter. The complainant said she did not want anything. The second time was when the complainant met him and his wife and the 3rd time is when she was sent home to fetch a jerrycan and she met him at the school gate. When she got home, she was visibly shaken and when she asked her what was wrong, she said that either her or the Appellant would have to move and when she asked her why, she said she will tell her later. In the evening, she told her what had happened. She informed her husband that a month had passed and the Appellant was still threatening the complainant. Her husband advised that they should call some elders. On Sunday, she ran away but it got late and she had nowhere to go. On Monday, she ran away again and they then reported the matter to the police.

28. On cross examination, she testified that it was not written in her statement that the complainant told her that she met the Appellant at the school gate, that she told her that either her or the Appellant had to move, that her husband said that the matter should be discussed by elders and that she went and took a jerrycan. She testified that she was not lying since the Appellant even threatened the complainant in the presence of the police. That she stayed in Kirinyaga for a week and 2 days and the Appellant was still taking care of her home and cows. She was in Kirinyaga when the complainant informed her about

the incident. The Appellant did not visit them as he used to visit every 3 days. He used to call her mum. He was like a family to them and yet he never returned. Lucy informed her that the complainant went to her shop and after the customer left, she asked for her phone. She was the first person she informed. She testified that she had no reasons to lie.

29. On re-examination, she testified that she did not write everything in her statement and the purpose of her report was that he tried to rape her daughter and threatened her life.

30. PW3, Lucy, testified that on 02/01/2024, the complainant went to her house. Complainant went to her house where she stayed with her daughter. The complainant later went to her salon and borrowed a phone to call her mother. She went away and called her mother. She heard her crying and when she returned, she did not ask her what was wrong and she did not inform her what was wrong. She then left with her daughter to the house but they left and went to PW2's home. PW2 called her and asked her what was going on but she told her the complainant did not inform her anything. PW2 told her that the complainant said that the Appellant tried to rape her. She told PW2 she would go check on the complainant and after she was done with a customer, she went and found the complainant and her daughter and the Appellant at the gate. She told the complainant to go home with her and asked her why she did not inform her and she said she wanted to tell her mum first. She asked her what happened and she said that the Appellant tried to take her by force, that he tried to rape her. She stayed with her until her mother returned.

31. On cross examination, she testified that she did not hear the conversation but the complainant was crying. Her mother is the one who informed her about the incident as the complaint did not inform her at first. She found out after the incident that the Appellant had been asked to take care of their home. That she was told everything.

32. PW4, the investigating officer testified that the complainant informed her that they were left under the care of the Appellant and while at the kitchen washing utensils, he went and started touching her inappropriately. She said he touched her breast, waistline and buttocks and hugged her tightly and attempted to kiss her. She managed to escape and went to Lucy's place. On 10/02/2024, the complainant was going home from the shop when she met the Appellant who threatened her by saying; 'ukijaribu kwambia mtu hiyo maneno nyama za mwili wako hazipatikana'. On 16/02/2024, she was sent home by a teacher to get a jerrycan and met the Appellant at the gate who threatened her by saying that 'ukujaribu kwambia mtu tutaonana na wewe'. That on 19/02/2024, she felt that her life was in danger and she ran away from home walking on foot to Naromoru town and came across a good samaritan who gave her a phone. She called her parents who picked her up and took her to police station.

33. On cross examination, she testified that she was threatened when she was from the shop with her brother and while at the school gate. Her brother did not record a statement. There might have been other people at the gate but they did not hear the threats as the complainant and the Appellant were close to each other. The good samaritan did not go to the station. According to the complainant, the Appellant tried to kiss her. That in the cause of her investigation, she did not discover any difference between the Appellant and complainant's mother.

34. In his sworn testimony, the Appellant testified that the complainant was a neighbour. He was at home with his mechanic when he received a call at around 4:30pm from PW2 who asked him to look after her home as the cow was difficult to milk. Together with his mechanic, they arrived at her home at 5:00pm and he asked the complainant to warm water and he milked the cow and gave the milk to the complainant. She said she was to take it to Lucy's house where she had been told to stay. They left with his mechanic. He denied touching the complainant and threatening her. He testified that he did

not even enter the house. That on 10/02/2024, he was at Ngerachu self help group from 8:00am to around 6:00pm. He even signed the minutes and contributed money. The chairman was to bring the records but he was yet to arrive. On 16/02/2024, he went to the school for a meeting but did not see the complainant. There were scouts at the gate who were waiting to welcome the MP. That he could not have threatened her in presence of his wife and her brother was not called as a witness. That the case was due to PW2 as she had asked him they have sex but he refused. There was a wedding committee being planned and he was to tell the committee and she brought this case to remove him.

35. On cross examination, he testified that he informed his wife about the sex advances. PW2 told him not to tell her husband. He did no see PW2 the day she requested him to take care of her home. Only the complainant was in the house. He did not enter the house and he denied touching her and threatening her. He never slept there. That he would find the complainant there and he would give her the milk after milking. On 10/02/2024, the party was at Peterson Mureithi's house. He did not see the complainant on that day. The complainant was told to lie by her mother to protect her wedding plans. PW2 had asked for sex favour on 11/01/2024 after she requested for milking favour. She called him on that 11th asking they have sex. He was with Paul and they left together. He told the investigating officer that he was with Paul but no one listened to him. On 11/01/2024, PW2 asked they have sex when they were together in the house. He told the investigating officer but no one listened. He did not tell anyone else apart from his wife.

36. On re-examination, he testified that PW2 asked for sex while they were in her house. It was just the two of them.

37. DW2, Paul Wanjoki testified that on 02/01/2024, he was at the Appellant's house repairing his car. He was there the whole day. They went to withdraw money at an Mpesa and they proceeded to PW2's house to milk the cow. They arrived there at around 4:30/5:00pm and after milking, they left. They had meat and soup at a butchery and separated at about 7:00pm. They did not enter PW2's house.

38. On cross examination, he testified that he knew the complainant who was a neighbour. That he did not know why the complainant did not mention seeing him. They called her outside and the Appellant gave her the milk. That there were there for about 2 hours and he could not leave since the Appellant was yet to pay him. He assisted the Appellant in tying the cow. They went there at around 4:30/5:00pm and they left at 6:00pm.

39. DW3, the principal at Mlima Kenya school testified that the Appellant was the chair of parent association. On 16/02/2024, there was a function at the school and the Appellant arrived at around 8:00/8:30am. He was at the gate with some scouts and the Appellant went and stood there. The complainant was not one of the scouts and there were many students around the gate. He could not say whether he saw her. He directed the Appellant to go and have tea. When he went back to the office, he was informed that they did not have a jerrycan and the complainant was sent to go pick one.

40. On cross examination, he testified that they were at the gate with the Appellant for about 30-40 minutes. They were many students and could not remember seeing the complainant. He did not see the Appellant talking to any student. He was in his sight the entire time and he left the gate to go take tea.

41. On re-examination he testified that he requested the Appellant to accompany him to go take tea. The students were about 10-15 metres away.

42. I have had occasion to consider the evidence at trial. In so doing, I have taken cognisance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have had due regard of the submissions made and case law cited. I have taken into account the applicable law. The broad issue for determination is whether the prosecution proved its case to the required degree. To answer this

question, the court will have to scrutinize the evidence to find whether each ingredient of the offence was proved.

43. The Appellant raised a preliminary point of law to wit, the charge sheet was defective in that it was stated in the particulars that he touched her buttock and breast with his hands whereas the complainant testified that he tapped her buttocks. The complainant did not mention breasts and did not mention touching by hands hence this did not form the offence of indecent act.

44. The substantive law on a defective charge sheet is section 134 of the Criminal Procedure Code. The said section provides:

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

45. Indeed, the charge sheet read that he touched the complainant's breast and buttocks whereas the complainant testified that he tapped her buttocks. She then testified that he forcefully hugged her and tried to kiss her. She pushed him back and moved away but he pushed her and she fell and sat on the chair. He kept approaching her but she pushed him away and ran.

46. From the definition of indecent act under section 2(a) one need to only prove that he either touched the breasts, buttock, or genital organs. Section 2(a) of the Act does not depict that all parts must be touched. This was an error that is curable under section 382 of the Criminal Procedure Code which provides;

> " Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

47. There was no prejudice occasioned as he understood the charge and he was even represented by a counsel. As to the term used by the complainant, 'tapped', the word tap is defined by Oxford Advanced Leaner's Dictionary as;

    a. "To hit somebody/something gently with a quick light blow.

    b. To strike something against something else."

    It is also defined as a 'quick light blow or the sound of one.'

48. Therefore, when the complainant testified that he tapped her buttocks I understand she meant he hit her on her buttocks and this means that he indecently touched her buttocks.

49. As to whether the charge of indecent act was proved, it is trite that for the charge of indecent act with a child to stand, the prosecution must prove the age of the victim (must be a minor), contact of one's

body part to either the genitalia, breast or buttocks of another, and that contact was done intentionally. This is defined under section 2(a) of the *Sexual Offences Act* thus;

> " 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;

50. The court in Dwalo v Republic [2024] KEHC 2219 (KLR) held that;

> " Therefore, the main ingredients of the offence of committing an indecent act with a child are: -
>
> a) The victim is a child, as prescribed in law;
>
> b) Intentional contact by the accused with the genital organ, breast or buttocks of the child victim. The act must not be an act that caused penetration; or
>
> c) exposure or display of any pornographic material to a child; and
>
> d) Absence of any lawful justification for the act(s) complained of."

51. The Appellant submitted that age was not proved as no documentary evidence was produced to corroborate the complainant's testimony that she was 16 years old.

52. The complainant testified that she was 16 years old born on 17/11/2007. During voir dire examination, she told the court that she was in form 3. There was no documentary evidence that was produced to support her evidence as to age. Her mother did not also mention how old was the complainant.

53. The learned magistrate was satisfied that age was proved as she held that there was nothing on record to place doubt on her age hence the same was established. She was also alive to the fact that where there is no documentary evidence to prove age, the same can be established through other evidence, provided that such evidence is credible.

54. It is trite law that, where the actual age of the victim is not proved, it has been held that the apparent age of the victim shall suffice. The Court of Appeal in Jackson Mwanzia Musembi v Republic [2017] eKLR held that:-

> " Consequently, where actual age of a minor is not known, proof of his/her apparent age is sufficient under the *Sexual Offences Act*."

55. The Court of Appeal in Ali v Republic [2025] KECA 1004 (KLR) stated that;

> " The prosecution cited cases that were on point regarding this issue. The cases of Mwolongo Chichoro Mwanyembe vs. Republic, Mombasa Criminal Appeal No.24 of 2015 (UR) (cited in Edwin Nyambaso Onsongo vs. Republic [2016] eKLR) where concerning age, this Court stated:"...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, baptismcard or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, amongst 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."Also, Francis

Omuroni vs. Uganda, Court of Appeal Criminal Appeal No. 2 of 2000, the court held:"In defilement case, 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... "

56. In E K v Republic [2018] eKLR the court held that;

> "As I had expressed earlier, Birth Certificate, Clinic Card and any other reliable and undisputed document, can ascertain the age. In its absence, the age given by the parents, if uncontradicted by any other evidence is also reliable evidence as they are the most appropriate persons who would know the age of their child. The complainant herself, if can establish how she's certain of her age, and the court has no reason to doubt it, the evidence is also reliable. Any other evidence need be treated with a lot of caution. Medical evidence would require a disclosure of the procedure applied, and the margin of error disclosed by the witness for the court to determine where to place it..."

57. As to whether the act of indecent act was proved, as seen earlier, the complainant gave detailed and graphic testimony as to what unfolded. She testified that the Appellant tapped her buttocks. The trial court found her testimony to be believable and found her to be truthful. In doing so, the trial court relied on Section 124 of the *Evidence Act* and observed that the complainant maintained her testimony and was unshaken, she was consistent in her answers. That she observed her demeanour and she struck her as a child who was out to tell the truth and there was no indication that her aim was to frame up the Appellant especially for the reasons that the Appellant had rejected the complainant's mother's sexual advances. She was satisfied that she was truthful and answered the questions well. That her evidence coupled with that of PW2 and PW3 showed that the offence took place as there was no inconsistency.

58. On my own evaluation of the evidence, I find, just like the trial court did, that the complainant was clear and truthful on what exactly transpired on the material day. She was firm even under cross examination. I find no reason, and indeed none was established in cross examination or defence evidence, that would lead the complainant to frame the Appellant. The assertion that the frame up was due to the Appellant's repulsing of the sexual advances by the complainant's mother is not only bizarre but unproven and unbelievable.

59. In his defence, the Appellant raised several issues in trying to discredit the prosecution's evidence. He implied that the prosecution's evidence was marred with contradictions and inconsistency that dented the complainant's credibility. He submitted that PW4 testified that she reported that he touched her buttocks, breast and waistline and PW2 testified that the complainant told her that he pulled her shirt and touched her buttocks. The complainant however testified that he tapped her on her buttocks. Therefore, the trial court ought to have tested her integrity before relying on Section 124 of the *Evidence Act*. He also noted other alleged contradictions in the testimony of the prosecution's witnesses as highlighted in his submissions.

60. When it comes to contradictions and inconsistencies, it is trite law as set out in numerous authorities that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case. (See Erick Onyango Ondeng' v Republic [2014] eKLR, the Court of Appeal cited Twehangane Alfred v Uganda, (Crim. App. No 139 of 2001, [2003] UGCA, 6,).

61. Further, it is well settled that where there are contradictions and inconsistencies in the evidence of witnesses, it is the duty of the court to weight the contradictions and consider whether they have any effect on the overall evidence in the case. The court in Njuki & Other Vs Republic (2002) 1 KLR 771 held that:

> " Where such allegations are raised, the obligation of the court is to determine as to whether the said discrepancies, contradictions and indisrepanincies are of such a nature as would create doubt as to the guilt of the accused. Where they do not they are curable under section 382 of the Criminal Procedure Code".

62. Also, the Court of Appeal in the case of Richard Munene –v- R Cr. Appeal No. 74/2016 (2018) eKLR the court stated:-

> " It is a settled principle of law however that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessary creates doubts in the mind of the trial court that an accused person will be entitled to benefit from it."

63. It therefore follows that the contradictions and inconsistencies must be so grave as to lead to a conclusion that the witness was not truthful and create doubt as to the guilt of the Appellant. Am also alive to the fact that the nature of human recollection is such that no two witnesses will recall exactly the same thing the same way to the minutest detail. It is expected that there shall be some discrepancies due to the fallibility of human mind.

64. With respect to count II, the Appellant was charged with threatening to kill contrary to section 223(1) of the Penal Code. The elements that are to be established in the offence of threatening kill were set out by Kimaru, J. (as he then was) in Martin Ng'ang'a Kamanu v Republic [2020] eKLR as follows:

> " The prosecution was required to establish the following ingredients of the charge: that the Appellant without lawful excuse uttered words which amounted to a threat to kill the complainant. The uttering of these words must be made in the context that the complainant perceives that he is under threat of losing his life. The context must come out in the evidence that will be adduced by the prosecution witnesses and the explanation given by the accused in his defence."

65. It was stated in the charge sheet that he uttered words 'ukiambia mtu iyo maneno, nyama za mwili wako hazitapatikana' and ukijaribu kuambia mtu tutaonana na wewe' which were directed to the complainant. The complainant testified that he first threatened her when she was coming from the shop with her brother on 10/02/2024. They met him on the road with his wife and his wife walked away with her brother and that is when he asked her whether she had informed anyone and added that if she informed anyone, he will kill her and her body parts would not be found. The 2nd instance was at the school gate when she was sent home to fetch a jerrycan. She testified that he asked her again whether she had told anyone what had happened and she also said that if she told anyone, she would face consequences. She testified that she had even prepared a poem to recite it on that day but she could not as she was afraid as the Appellant was seated at the front. That she tried to stand but when she saw him, she was afraid.

66. PW2 also testified that the complainant reported the threats to her. On the 2nd instance, the complainant even informed her that either the Appellant or her had to move. She appeared shaken and

after school, she informed her what the Appellant had said. She contacted her husband and told him that it had been a month and the Appellant was still threatening the complainant and her husband advised her to report to the elders. It was also in evidence that the complainant tried twice to run away from home in fear of the Appellant. She testified that she kept hearing his utterances in her ears and so she decided to go to her aunt who was living in Ruiru.

67. The Appellant attacked the prosecution's evidence in that the words uttered differed from the prosecution's witnesses. As seen earlier, not all trifling contradictions will lead to a conviction being quashed. Also, when it comes to remembering uttered words, the likelihood of remembering the exact same words is not always possible. The inconsistencies cited by the Appellant are in my view minor and inconsequential and do not go to the root of the prosecution case. As such, they have not shaken the prosecution case that the Appellant did indeed utter the words in question.

68. The Appellant submitted that the Trial Court contravened Section 199 of the Criminal Procedure Code by failing to note the complainant's demeanour when she was testifying but only commented on her demeanour in the judgment which was written 7 months after the complainant had testified.

69. There is no way the Court would have forgotten the complainant's demeanour as she observed her while testifying. Section 199 also does not state that it is mandatory that the court must record the demeanour during the trial. The said section states;

> "When a Magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of the witness whilst under examination."

70. The court in KYG V Republic (2020) KEHC 7813 (KLR) held that;

> "Section 199 states that a Magistrate shall in addition to recording evidence also record such remarks, if any, as he thinks material respecting the demeanour of a witness. It is clear from the wording of the provision that the recording of remarks respecting the demeanour of a witness is discretionary and not mandatory. As such it cannot be said that there was a miscarriage of justice or that the trial was a nullity because the learned Magistrate in the present case made no remarks respecting the demeanour of the witnesses."

71. The Appellant also claimed that the surrounding circumstances under section 33 of the *Sexual Offences Act* were not considered. The section provides:

> "Evidence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced in criminal proceedings involving the alleged commission of a sexual offence where such offence is tried in order to prove –
>
> a) whether a sexual offence is likely to have been committed-
>
> i) towards or in connection with the person concerned;
>
> (ii) under coercive circumstances referred to in section 43; and
>
> b) for purposes of imposing an appropriate sentence, the extent of the harm suffered by the person concerned."

72. From a reading of Section 124 of the *Evidence Act*, it is clear that a trial court can convict an accused person on the evidence of the victim alone if it believes the victim is truthful and the trial court records

the reasons for that belief. In the instant case, the trial court convicted him after believing the testimony of the complainant.

73. As to failure to call material witnesses, it is trite law that the prosecution is not bound to call numerous witnesses to prove a fact. This is in line with Section 143 of the *Evidence Act* which provides that;

> " In the absence of a provision of the law, no particular number of witnesses is required to prove a fact."

74. In Bukenya and Others V. Uganda [1972] EA 349 it was held that;

> " While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."

75. There is no requirement that the prosecution has to call a number of witnesses to prove a fact. But, if it fails to call crucial witnesses, an inference can be made that their evidence would have been in adverse to their case. However, as per the above case, the inference can only be made where the evidence is barely adequate. Complainant's brother did not hear the words he uttered. Even though he would have corroborated the complainant that they met the Appellant, the prosecution's evidence was enough to find a conviction. Same also with the complainant's friends whom she claimed t were with her at their gate.

76. On the argument that his defence was not considered by the trial court, the evidence by the defence is that the Appellant denied committing the offence. He testified that after milking the cow, he gave the milk to the complainant and he left with DW2 who had accompanied him. DW2 testified that he had gone to his home to repair his car and he also accompanied the Appellant to PW2's home and after they were done milking the cow, they left together. The Appellant also denied threatening the complainant and he testified that on 10/02/2024, he had attended a meeting with Ngerechu self help group and even signed the minutes and contributed money for merry go round. On 16/02/2024, he was at school where there was an event and he denied meeting the complainant at the gate. The principal of the school, DW3 also testified that he was with the Appellant at the gate and he told him to go and take tea. He testified that he did not see the complainant. The Appellant also testified that the charges was a result of a grudge between him and PW2 as he had refused her sexual advances. That PW2 had asked him they have sex but he refused and since she was planning her wedding, she wanted him to be removed from the committee.

77. The trial court while evaluating his evidence termed it as an afterthought as the same was raised at the defence stage. The defence of alibi was also raised for the first time and he never cross examined PW2 on the alleged sexual advances. The trial court also noted that the evidence of DW2 appeared to be exaggerated and that of DW3 was not believable since he testified he did not take his eyes off the Appellant the entire time which was hard to believe considering all the activities he was supervising. That his evidence was contradictory as he could not decide whether he asked the accused to go have tea or whether they left together. The court also noted that the Appellant's demeanour was insolent since he even laughed when the prosecution witnesses were testifying. Indeed, this was noted by the court when PW2 was been cross examined.

78. I have considered the defence raised through the evidence of DW1, DW2 and DW3. The Appellant bore no burden to prove his innocence. Nevertheless, once a cogent case is established by the

prosecution like in this case, a duty arises to raise a scintilla of doubts through evidence in the prosecution's case.

79. It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution. In Karanja v R, [1983] KLR 501 the Court of Appeal held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.

80. Allegation of a Grudge as the Basis of Criminal Charges — Kenyan Jurisprudence.

81. Further, it is a settled principle that an accused person who alleges that criminal charges against him are motivated by a grudge, malice, or vendetta bears the burden of laying a factual basis for that allegation. Mere assertions from the dock, without supporting evidence, cannot displace an otherwise cogent prosecution case.

82. The Court of Appeal in Kiarie v Republic [1984] KLR 739 held that an accused person's defence must be weighed against the prosecution evidence, and where the defence raises allegations such as fabrication, malice, or grudges, there must be some evidence to support such claims. A defence based on mere allegations, unsupported by evidence, does not raise a reasonable doubt.

83. Similarly, in Muiruri v Republic [1980] KLR 70, the court stated that where an accused alleges a frame-up or personal grudge, he must demonstrate circumstances showing motive, conduct, or prior hostility on the part of the complainant or investigators sufficient to suggest fabrication of charges.

84. The prosecution is not required to disprove speculative claims of malice or grudges. In Joseph Maina Mwangi v Republic [2000] eKLR, the Court of Appeal emphasized that bare allegations of ill-will or grudges, without evidential backing, cannot be a basis for rejecting credible prosecution evidence.

85. In the instant appeal, and applying the parameters as set out hereinabove the defence put up by the Appellant did not displace the prosecution's evidence.

86. Regarding sentence, it is submitted that the sentences were harsh and failed to consider his mitigation, that the Appellant was a first-time offender and the non-aggravating nature of the offence. That mandatory minimum sentences have been frowned upon by our superior courts.

87. The sentence under section 11(1) of the *Sexual Offences Act* is ten years same as the offence of threat to kill under Section 223 of the Penal Code. He was sentenced to 10 years in each count which sentences were ordered to run concurrently.

88. It is trite law that sentencing is a discretion of the trial court and an appellate court will not easily interfere with the discretion of the trial court on sentence unless it is shown that in exercising its discretion, the court acted on a wrong principle; failed to take into account relevant matters; took into account irrelevant considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive. (Ogolla S/o Owuor v R {1954} EACA 270).

89. On the issue of the sentence under section 11 (1) of the *Sexual Offences Act* being unconstitutional, this has now been distinguished by the Supreme Court in R v Joshua Gichuki Mwangi & others Petition No. E018 of 2023 from the principle in Muruatetu case where the court clarified that Muruatetu case does not apply to minimum sentences under the *Sexual Offences Act*.

90. The sentences meted out were legal and the trial court exercised its discretion in sentencing properly.

91. With the result that the appeal herein lacks merit and is dismissed in its entirety.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 18 TH DAY OF FEBRUARY, 2026.

A.K. NDUNG'U

JUDGE