REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VIHIGA

CRIMINAL APPEAL NO E022 OF 2024

WILLIS MUSINGO ADONGO…… APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(Being an Appeal from the Judgment of Hon M. Ochieng (SPM) delivered at Hamisi in the Senior Principal Magistrate's Court in Sexual Offence Case No 7 of 2022 on 11th March 2024)

JUDGMENT

INTRODUCTION

1. The Appellant herein was charged with the offence of attempted defilement contrary to Section 9(1) as read with Section 9(2) of the Sexual Offences Act No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.
2. The Learned Trial Magistrate, Hon M. Ochieng (SPM) did not find him guilty of the main charge of attempted defilement but convicted him of the alternative charge of the offence of indecent act and sentenced him to ten (10) years imprisonment.
3. Being dissatisfied with the said Judgement, on 23rd April 2024, he lodged an appeal herein. His Petition of Appeal was dated 23rd April 2024. He set out eight (8) grounds of appeal.
4. His undated Written Submissions were filed on 20th May 2025, while those of the Respondent were dated 10th September 2025 and filed

on 17th November 2025. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

LEGAL ANALYSIS

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of **Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify, and thus make due allowance in that respect.
7. Having looked at the Appellant's Grounds of Appeal, his Written Submissions and those of the Respondent, this court noted that the issues that had been placed before it for determination were as follows:-
    a. **Whether or not the Charge Sheet was defective;**
    b. **Whether or not the Prosecution proved its case beyond reasonable doubt; and**
    c. **Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted**.

8. The court therefore dealt with the said issues under the following distinct and separate heads.

I. CHARGE SHEET

9. Although the Appellant did not raise a ground of appeal under this head, he submitted on the same, thus, this court found it prudent to determine the same.

10. He submitted that he was convicted on the alternative charge when there was no evidence to prove the main charge and the alternative charge. On its part, the Respondent submitted that the Charge Sheet was not defective as the Appellant was charged with an offence known in law and that the particulars of the charge laid out clearly the details he was called to answer to and that the evidence proved the said particulars of the alternative charge beyond reasonable doubt. It added that as per Section 382 of the Criminal Procedure Code, there was no error, omission or irregularity that occasioned a failure of injustice to warrant this court to reverse the Judgment by the Trial Court.

11. Notably, Section 134 of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides as follows:-

“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."

12. In addition, it was held in **Sigilani vs Republic (2004) 2 KLR**, that the principle of the law governing charge sheets was that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.

13. Applying the test above and upon keenly perusing the Charge Sheet, this court found that the particulars of the offence of defilement were clearly spelt out, and these included the provision of the law creating the offence, the date of the offence, the place of the offence, the act constituting the offence and the name of the victim.

14. The Appellant did not raise any objection before the Trial Court or any contention that the Charge Sheet was defective. He fully participated in the trial in clear demonstration that he understood the charge. He cross-examined the witnesses and was able to put an appropriate defence. This was sufficient indication that he understood the particulars of the charge he faced. The offence was disclosed and stated in a clear and unambiguous manner, there was no allegation that because of the way that the Charge Sheet was drafted or framed, he was unable to plead to a specific charge that he could not understand or that he was unable

to prepare his defence. In the circumstances, the Appellant could not be said to have been prejudiced.

15. Even assuming that there was some defect or omission in the Charge Sheet, the same was still curable under Section 382 of the Criminal Procedure Code which provides as follows:-

“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.”

16. In the premises foregoing, the Appellant’s assertion that he was charged unlawfully was rendered moot.

II. PROOF OF PROSECUTION

17. Ground of Appeal No (1), (2), (3), (4), (5), (6) and (7) of the Petition of Appeal were dealt with under this head.

18. The Appellant placed reliance on the case of **Kioko Kilonzo & Others Criminal Appeal No 82.88 of 2011** (eKLR citation not given) where the Court of Appeal considered the importance of a first report and submitted that he was framed by the mother of the Complainant, ZF (hereinafter referred to as "PW 1") so that she could win the congregation to her newly began fellowship. He asserted that PW 1 stuck on his mother's couching and joined his mother in saying lies. He blamed the Prosecution for failing to avail the children that were mentioned by PW 1 to shed light on the evidence.

19. To buttress his point, he relied on the cases of **George Mbugwa Gitau vs Republic[2011]eKLR** where it was held that no particular number of witnesses were required for proof of any fact unless the law so required and **Bukenya vs Uganda (1972) EA 549** where it was held that the prosecution had to avail all witnesses necessary to establish the truth even if their evidence was inconsistent.

20. He argued that when PW 1 was asked where he had come from, he said from school but that his mother fabricated her own case. He urged the court to admit his defence of alibi. He further relied on the cases of **Karanja vs Republic (1983) KLR 501, Ndugu Kimani vs Republic (1979) KLR 282** and **Peter Mbugua Miringo vs Republic HCCRA No 66 of 2016** (eKLR citation not given) without highlighting the holding he relied therein.

21. On its part, the Respondent placed reliance on the case of **Joseph Ochieng vs Republic Criminal Appeal No E139 of 2023** (eKLR citation not given) where it was held that to prove the offence of committing an indecent act on a child, the prosecution had to establish the age of the victim, the indecent act and the positive identification of the perpetrator. It submitted that the evidence adduced was sufficient and the case was proved beyond reasonable doubt.

22. It asserted that on the age of the victim, a birth certificate showed that PW 1 was eleven (11) years old at the time of the incident. It argued that the indecent act was proved regardless of the Charge Sheet indicating of the penis and not finger. In this regard, it relied on the case of **Jackson Mulwa Kioko vs Republic** (eKLR citation not given) where it was held that the failure to indicate the correct part of the offender's body that came into contact with the victim was not fatal to the prosecution's case and did not prejudice the appellant.

23. It further submitted that PW 1 knew the Appellant before the alleged incident and that there were no contradictions in the Prosecution case which created doubt. It added that it called a total of five (5) witnesses whose evidence was credible, cogent and consistent. It cited the Ugandan Case of **Twehangane Alfred vs Uganda Criminal Appeal No 139 of 2001 (2003) UGCA, 6** where it was held that it was not every contradiction that warranted rejection of evidence.

24. It contended that the Trial Court correctly directed itself in evaluating the Appellant's alibi defence as was held in the case of **Juma Mohammed Ganzi & 2 Others vs Republic[2005]eKLR**, alongside the totality of the evidence on record and that the Appellant's defence could not dislodge the Prosecution's case.

25. As the Appellant did not challenge proof of the other ingredients of age and identification, this court did not belabour to canvas the same. It delved into the issue of the indecent act.

26. In his evidence, PW 1 testified that on the material day of 6th September 2021 at 5.00 pm, he met the Appellant on his way from school. He said that the Appellant took him to the Church, put the table against the wall, removed his clothes forcefully, removed his short, put him on the table facing up and laid on him.

27. It was his further testimony that the Appellant told him not to make noise which he complied with because he was afraid. He said that the Appellant touched his private parts, the anus, kissed his mouth, continued to touch him and when he finished, he left. When the Appellant came back, he found that he had already worn his clothes, gave him sugarcane and warned him not to tell anyone of what had transpired.

28. PW 1's mother, Grace Chemtai Ruto (hereinafter referred to as "PW 2") testified that on the material day of 6th September 2021, PW 1 arrived home from school few minutes to 7.00 pm and told them that the preacher from Salvation Army would call him, hold him and touch him saying that he knew his parents. She said that

PW 1 later said that the preacher would pick him, put him on the table and lay on him and that he had done that six (6) times.

29. Jackson Adembesa Memba (hereinafter referred to as “PW 3”) testified that on the material day of 6th September 2021, he saw the preacher standing with PW 1 at the gate of the Church at around 5.30pm and were getting into the Church.

30. Notably, in determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases was proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.

31. It is now settled that the ingredients of the offence of defilement are proof of complainant’s age, proof of penetration and identification of the perpetrator as was held in the case of **George Opondo Olunga vs Republic [2016] eKLR**.

32. However, in an offence of attempted defilement, the prosecution must prove the other ingredients of the offence of defilement except penetration. It must prove the age of the complainant, positive identification of the assailant, and then prove steps taken by the assailant to execute the defilement which did not succeed. Attempted defilement was as if it were a failed defilement, because there was no penetration.

33. Section 9(1) of the Sexual Offences Act defines attempted defilement as follows:-

“A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.”

34. On the other hand, Section 2 of the Sexual Offences Act defines “penetration” as follows:-

“‘penetration’ means the partial or complete insertion of the genital organs of a person into the genital organs of another person”.

35. Notably, under Section 124 of the Evidence Act Cap 80 (Laws of Kenya), a trial court could convict a person on the basis of uncorroborated evidence of the victim if it was satisfied that the victim was telling the truth. The proviso of Section 124 of the Evidence Act states that:-

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for

reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth (emphasis)**."**

36. Even so, a trial court was required to exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person's word against the other. Other corroborating evidence could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful.

37. The Trial Court found and held that there was no evidence that the Appellant was undressed at the time of the incident and that his intent did not point to attempted defilement and, therefore, convicted him on the alternative charge of the offence of indecent act with a child.

38. The term indecent act has been interpreted as "...**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..."

39. Indecent was not a straight forward offence to prove especially if no other person witnessed the indecent act. This was because it was the victim's word against that of the perpetrator since there is no physical injury. In his evidence, PW 1 stated that the Appellant touched him "huko nyuma" (anus). When he was cross-examined, he stated that he said that the Appellant got the

table “huko nyuma” (from behind). The Prosecution did not seek to clarify this discrepancy during re-examination.

40. Going further, PW 1 stated that it was on 6th September 2001 at about 5.00 pm that he met the Appellant who took him to the Church. PW 1 added that the Appellant had indecently touched him six (6) times. He said that other children told their parents that the Appellant used to take them to Church. He did not appear to have told his parents. He only told his father about what had happened after his father asked him.

41. Although the Prosecution reserved the right to determine the number of witnesses it could call in a matter, failure to call critical witnesses could be fatal to its case. It is important to note that PW 1’s father was not called as a witness to testify yet he was the person to whom PW 1 disclosed what had happened to him. He was a critical witness. In this case, failure to call PW 1’s father or mother was fatal to the Prosecution’s case.

42. PW 2 was a passerby. He said that PW 1 was his niece yet PW 1 was a boy. He also said that he saw the Appellant with PW 1 at the gate entering the Church. During cross-examination, he said that he saw them standing at the Church gate. Doubts were raised in the mind of this court on what really transpired on the material date.

43. In view of the doubts, this court was not satisfied that the Prosecution had proved beyond reasonable doubt that the Appellant was guilty of the offence of indecent act as the same had not been satisfactorily proved.

44. In the premises foregoing, Grounds of Appeal No (1), (2), (3), (4), (5), (6) and (7) of the Petition of Appeal were, therefore, merited and the same be and are hereby allowed.

I. SENTENCE

45. Ground of Appeal No (8) of the Petition of Appeal was dealt with under this head.

46. The Appellant did not submit on this issue. On its part, the Respondent submitted that the sentence meted on him was provided under the law. It relied on the case of **Republic vs Mwangi Gichuki Petition No E018 of 2023** (eKLR citation not given) where it was held that the mandatory sentences under the Sexual Offences Act were legal.

47. The Appellant was convicted under Section 11(1) of the Sexual Offences Act Cap 63A (Laws of Kenya). The said Section 11(1) provides 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.”

48. If the court had found the Appellant to have been guilty, it could not have faulted the Trial Court for having sentenced him to ten (10) years imprisonment as that was lawful. As it had found the Appellant not to have been guilty of the offence that he had been charged with, this court did not consider the period that he spent in

custody while computing his sentence in line with Section 333(2) of the Criminal Procedure Code.

DISPOSITION

49. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal dated 23rd April 2024 and filed on 24th April 2024 was merited and the same be and is hereby allowed. The conviction and sentence that was meted out against the Appellant herein be and are hereby set aside and/or vacated as they were both unsafe.

50. It is hereby directed that the Appellant be and is hereby released from custody forthwith unless he be held for any other lawful cause.

51. It is so ordered.

DATED and **DELIVERED** at **VIHIGA** this **19th** day of **March** 2026

J. KAMAU
JUDGE