

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. E022 OF 2023

ALEX NYAMAI MUTISYA

APPELLANT

VERSUS

REPUBLIC

RESPONDENT

(An appeal from the conviction and sentence in the SPM Magistrates Court at Makindu, Sexual Offence Case No. 44 of 2017, Judgment delivered on 25th January, 2023 by Hon. A. Ndungu, SRM)

JUDGMENT

1. The Appellant was charged with sexual assault contrary to **Section 5 (1) (a) (1)** as read together with **Section 5 (2)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that on the 1st day of October 2017, at

Masongaleni Sub-location in Kibwezi Sub-county within Makueni County, the Appellant intentionally and unlawfully used his fingers to penetrate the vagina of **PWM**. The Court found the Appellant guilty of the offence and convicted him. He was sentenced to serve 10 years' imprisonment.

2. The Appellant was dissatisfied with the Judgment and brought this appeal against both the conviction and sentence. The Appeal was canvassed by way of written submissions. Both parties filed their respective submissions, and the Court considered the same at length.
3. Having considered the Grounds of Appeal and the submissions made by the parties, I find that the issue for determination is whether the offence of sexual assault was proven to the required standard, thereby warranting a conviction.
4. This being a first Appeal, this Court has a duty to revisit the evidence tendered before the trial court afresh, evaluate, analyze it, and come to its own independent conclusion, but always bearing in mind that the trial Court had the advantage of observing the demeanour of the witnesses and

hearing them give evidence, and give allowance for that.
(See **Okeno vs. Republic (1972) EA 32** and **Mark Oiruri Mose vs. R (2013) eKLR.**)

5. The essential ingredients of the offence of sexual assault were restated by the Court of Appeal in **John Irungu v Republic [2016] KECA 516 (KLR)**, where the Court stated as follows;

“Sexual Assault on the other hand is provided for in section 5 of the Act. Unlike defilement, which can be committed only against a child, sexual assault can be committed against “any person”. That offence or its punishment is not tied to the age of the victim. The offence is constituted by committing an act which causes penetration of the genital organs of any person by any part of the body of the perpetrator or of any other person or by an object manipulated to achieve penetration. Thus, for purposes of sexual assault, the penetration is not limited to penetration of

genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose".

6. The Complainant testified that the Appellant assaulted her sexually on 1st October, 2017 at around 8 pm in the evening. She described how the defilement happened and stated that the Appellant managed to insert his fingers in her private parts. She stated that the Appellant inserted two fingers into her vagina, causing bleeding. She stated that she gave the police the dress, sweater, biker, and pants that she wore at the time of the incident.
7. I have seen a P3 Form dated 4th October, 2017. The P3 Form does not state whether the medical examination revealed bruises on the vaginal wall.
8. I note that the Complainant stated that she struggled with the Appellant as she tried to stop him. This meant that the penetration of the fingers was forceful. I also note that she told the medical officer that she bled as a result of the

incident and that she suffered bruises and lacerations. However, these claims were not corroborated by the medical evidence. This is because the P3 Form stated that the clothes she had given to the police, which she had worn at the time of the incident, did not have blood stains.

9. In addition, the medical examination, which was conducted within 24 hours of the alleged incident, did not reveal any bruises on the vaginal walls. Based on these facts, I find that the medical reports did not corroborate the element of penetration. This casts doubt, and for these reasons, I find that the element of penetration was not proved, and therefore, the conviction cannot stand. The same is hereby quashed.

Disposition

10. The Appeal succeeds.

11. The Conviction is hereby quashed and the sentence is set aside.

12. The Appellant be set at liberty forthwith unless otherwise lawfully held.

13. Orders accordingly.

DATED, DELIVERED and SIGNED at NAIROBI through the Microsoft Teams Online Platform on this 13TH day of APRIL, 2026

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HON. C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Appellant - present

Ms. Musango, ODPP