



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mohamed v Republic (Criminal Appeal E037 of 2024)  
[2025] KEHC 4940 (KLR) (28 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4940 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL APPEAL E037 OF 2024  
JN ONYIEGO, J  
APRIL 28, 2025**

**BETWEEN**

**GAKAR MOHAMED ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence by Hon. J. Omwange (P.M). Garissa  
Chief Magistrate's Court Criminal Case No. E449 of 2023 delivered on 26.09.2024)*

**JUDGMENT**

1. The appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006(count I). Particulars were that on 06.09.2023, at around 1300hrs at [Particulars Withheld] in Bangale Sub – County within Tana River County, he willfully and intentionally touched the breasts of F.H. a girl child aged 17 years old with his hands without her consent.
2. Count II, he was charged with offensive conduct contrary to section 94 (1) of the *Penal Code*. Particulars of the offence were that, on 06.09.2023, at around 1300hrs at [Particulars Withheld] in Bangale Sub – County within Tana River County, he willfully and intentionally uttered abusive words, Nitakutomba' while showing off his penis to F.H.
3. The appellant pleaded not guilty to the said charges and the matter proceeded to full trial with the prosecution calling a total of four (4) witnesses in support of its case against the appellant.
4. Briefly, PW1, FKM stated that she was aged 17 years at the material time and eked a living as a pastoralist. She stated that she is not related to the appellant in any way in as much as she knew him. She reiterated that on the material day, she was amongst a group of people who were grazing cattle when the appellant appeared before her. She told the court that, when the appellant approached them, he appeared to be removing something which according to her, she thought to be a penis but only



- realized that he was removing his leg as he is disabled. She further stated that she was informed that the person who touched her breasts was the appellant herein. On cross examination, she stated that it was the appellant who touched her breasts and the same happened before many people.
5. PW2, Faudia Mohamed Ibrahim, a business woman from Bangale testified that she knew the complainant as she was a daughter of her inlaws. That on 06.09.2023 at 1300hrs, she was at Bangale in her vegetable shop when the appellant approached her stall in a bid to buy vegetables. To her shock, the appellant started abusing her together with her sister and then proceeded to touch the complainant's breasts. The appellant took his disabled leg then swag it in a way that it appeared like a penis. That they made noise against the appellant and thereafter reported the matter.
  6. PW3 Khali Issack Ibrahim, a milk vendor from Bangale stated that he knew both the appellant and the complainant. He told the court that on the material day, the complainant left their vending business station. On the way, she met with the appellant who proceeded to touch her breasts. On cross examination, he stated that at that time, the appellant supported himself with his clutches as he touched the complainant.
  7. PW4, No. 113815 PC Bonface Omondi testified that he was the investigating officer in this matter. That on 06.09.2023 at 1.11p.m., the complainant reported the incident leading to the commencement of investigations. That he also recorded statements from the witnesses and then took the complainant for age assessment which revealed that she was 17 years. He arrested the appellant and charged him with the offence herein.
  8. At the close of the prosecution's case, the trial court found that the prosecution had established a prima facie case against the appellant and placed him on his defence.
  9. On his defence, he denied committing the offence and further averred that in as much as he could not remember the date, he had gone to town at 1.00 p.m., That he was told that he was required at the police station where upon going, he met PW4 who informed him of the complaint by PW1. He urged the court that he was simply framed.
  10. At the close of the trial, the court found that the prosecution had proved its case against the appellant in regards to Count I to which he was convicted and consequently sentenced to serve 9 years' imprisonment. The court however, acquitted him of Count II under section 215 of the [\*Criminal Procedure Code\*](#).
  11. The conviction and sentence precipitated the filing of the present appeal via a petition of appeal dated 14.10.2024 citing the following grounds:
    - i. That the learned trial magistrate erred in law and fact when he failed to note that the ingredients of the offence were not proved beyond reasonable doubt.
    - ii. That the learned trial magistrate erred in law and fact by failing to interrogate the inconsistencies and contradictions in the prosecution's case.
    - iii. That the learned trial magistrate erred in law and fact by failing to consider the appellant's defence.
  12. The appeal was canvassed by way of oral submissions.
  13. The appellant urged that he lives with a disability in that he only has one leg. He argued that there was no way he could have committed the offence alleged as he only stands on one leg. He submitted that he was not at the scene of crime on the day the offence allegedly took place. He urged this court to quash his conviction and set him at liberty.



14. The respondent argued that the appeal was not worth the salt for the reason that the prosecution proved its case to the required standard. That the offence took place during the day before several witnesses and therefore, the appellant was positively identified. It was submitted that the complainant was a child aged 17 years at the time when the offence was allegedly perpetrated. The learned prosecutor contended that the appellant indeed touched the breasts of the complainant as the same was proved by the evidence of the prosecution witnesses who witnessed the same happen. In the end, counsel urged this court to dismiss the appeal and uphold the finding of the trial court.
15. I have considered the trial court's record, the grounds of appeal and the parties' submissions. In my opinion, I find that the issues for determination are as follows:
- i. Whether the prosecution proved its case beyond any reasonable doubt.
  - ii. Whether the sentence preferred against the appellant was manifestly excessive, harsh and severe.
16. The accused person was charged with committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006. The Act defines a child by reference to the *Children Act* 2022 which defines a child as any human being under the age of eighteen years. On the other hand, 'indecent act' is defined to mean 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) exposure or display of any pornographic material to any person against his or her will;
17. On the issue of age, the Court of Appeal in the case of *Richard Wahome Chege vs Republic* (2014e KLR) held as follows;
- “On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant herself”.
18. In this case, the complainant testified that she was 17 years and further, the same was corroborated with Pex1, the age assessment report which showed that she was 17 years of age at the time when the offence was allegedly committed. Noting that the same was not contested by the appellant, it is my finding that the complainant was a child.
19. On identification, the Court of Appeal in the case of *Cleophas Wamunga vs Republic* (1989) eKLR expressed itself as follows:
- “Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification”.
20. In the present case, PW1, PW2 and PW3 all testified that the appellant was a person known to them. The appellant did not raise the issue of identification when cross examining the prosecution witnesses.



The same notwithstanding, the offence herein allegedly happened during the day and therefore, there was enough light to enable proper identification. Equally, the amount of time spent between the appellant and the three prosecution witnesses was long enough to aid identification. In their evidence, they corroborated each other that they saw the appellant touch the complainant's breasts before walking away. As such, there was no doubt that identification in this case was proper and as such, I find the same sufficiently proved.

21. The appellant urged that the prosecution evidence was riddled with inconsistencies and further, that his defence was not considered. From the record, the appellant appeared having knowledge of the charge before court. He even urged that he was simply framed as he did not commit the offence. I have considered the appellant's defence and what strikes me is the fact that he alleges that he was framed.
22. The question that arises is that who exactly wanted him framed and for what purpose. It was not urged that there existed a grudge between the parties for the complainant or for PW2 and PW3 to frame the appellant. At least more was expected of the appellant to wish away the prosecution's accusations. In short, it is my humble view that the appellant's defence did not displace the evidence of the prosecution witnesses who placed him at the scene of crime. The evidence by pw1-pw3 was well corroborated and consistent. I have no reason to doubt the same.
23. Although the appellant did not submit on his sentence, he prayed that his conviction be quashed and sentence set aside.
24. As already noted, the appellant was charged with the offence of indecent act with a child under section 11(1) which stipulates that: 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 *Bernard Kimani Gacheru vs Republic (2002) eKLR*, the Court of Appeal stated that: -

“It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist”.
26. From the record, I note that the trial magistrate noted that given that the appellant had already spent one year in custody during the time when the matter was being heard, he thus sentenced him to 9 years' imprisonment. In the given circumstances, I hold the view that the finding by the trial court on conviction and sentence was thus safe.
27. As such, I uphold the finding of the trial court on both conviction and sentence and dismiss the appeal herein for lack of merit.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28<sup>TH</sup> DAY OF APRIL 2025**

**J. N. ONYIEGO**

**JUDGE**

