



REPUBLIC OF KENYA



KENYA LAW
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**Ndungu v Republic (Criminal Appeal 53 of 2024)
[2025] KEHC 7067 (KLR) (27 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7067 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 53 OF 2024**

DR KAVEDZA, J

MAY 27, 2025

BETWEEN

BENSON NDUNGU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered
by Hon. Kabuya I.M (SPM) on 16th April 2024 at Kibera Chief
Magistrates' court S.O. Case No. E046 of 2023 Republic vs Benson Ndungu)*

JUDGMENT

1. The Appellant was charged and convicted before the Subordinate Court for the offence of sexual assault contrary to section 5(1)(a) as read with section 5 (2) of the *Sexual Offences Act* No. 3 of 2006. He was sentenced to serve 10 years imprisonment.
2. Aggrieved, he filed the present appeal challenging his conviction and sentence. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He argued that the ingredients of the offence charged were not established. In addition, the trial court failed to consider his defence. He urged the court to quash his conviction and set aside the sentence.
3. The appeal was canvassed by way of written submissions which I have duly considered.
4. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It 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 but bearing in mind that it never saw the witnesses testify.



5. The offence of sexual assault is created by Section 5 of the *Sexual Offences Act* which provides that:
 - (1) Any person who unlawfully:
 - (a) penetrates the genital organs of another person with—
 - (i) any part of the body of another or that person; or
 - (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;
 - (b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.”
6. The Court of Appeal in the case of *John Irungu v Republic*, [2016] eKLR pronounced itself on the essential ingredients of the offence of sexual assault as follows:

“ 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.”
7. From the foregoing, it is clear that in order to establish the offence, the prosecution must prove that there was penetration into the genital organs of the victim by any part of the body of the person accused of the offence or any other person or objects manipulated by the accused person for that purpose.
8. The essential elements of the offence therefore are, proof of penetration and positive identification of the assailant.
9. The complainant PW2 A.S. testified that she recognised the appellant from her neighbourhood. While returning from her aunt's house, the appellant stopped her, asked her name, and persuaded her to accompany him home. In his bedchamber, he inquired about her boyfriend and attempted to kiss her. When she resisted, he forcibly kissed her, pushed her onto a mattress, removed her underwear, and inserted his finger into her vagina. As he began unbuttoning his trousers, the complainant pushed him away and demanded to leave. The appellant complied, but neighbours had locked the gate. Community policing members escorted them to Kibra Police Station. During cross-examination, the complainant denied any prior interaction with the appellant or fabricating the incident.
10. In her testimony, the complainant gave clear and graphic testimony of how the appellant sexually assaulted her in his house. Despite being subjected to rigorous cross-examination, the complainant remained steadfast that it was the appellant, who committed these acts against her. The appellant spent a considerable amount of time with the appellant and could properly identify him. She could not have possibly pointed fingers at the wrong person for acts against her. I therefore hold that the Appellant is the one who committed the act of sexual assault.
11. PW1's testimony did not require corroboration in accordance with the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if there are recorded reasons why she believed the child was telling the truth. In his judgement, the trial magistrate recorded that his observation of the



- demeanour of the minor as she testified was satisfactory and that she was truthful and credible. I have also thoroughly gone through the testimony of PW1 and noted that she was consistent all through, and her evidence was unshaken on cross-examination by the appellant.
12. Regarding additional corroborating evidence, WO (PW1) testified that his daughter, A.S., left home at 9:00 AM to collect food from a family friend's residence. At 2:00 PM, Kibra Police Station contacted PW1, stating that A.S. was in custody. Shocked, PW1 confirmed with the friend that A.S. had left her house earlier. At the station, A.S. reported that the appellant, a neighbour, took her by the hand to his residence and touched her breasts. Neighbours raised an alarm, leading to her rescue.
 13. Jane Moraa (PW5), the appellant's neighbour, testified that at noon, she saw the appellant enter his house with A.S. and lock the door. Aware of his history of concealing minors, she alerted community policing members, who rescued A.S. During cross-examination, PW5 denied fabricating the case due to rejected romantic advances.
 14. At Nairobi Women's Hospital, John Njuguna (PW3), a clinician, examined the complainant, A.S., and found no injuries to her private parts, consistent with attempted defilement, as no physical injuries were expected due to the nature of the assault. He produced medical documents as exhibits.
 15. Kagera (PW6), the investigating officer at Kibra Police Station, testified that the accused and A.S. were brought to the station at 3:00 PM on 1st April 2022. A.S., initially too distressed to speak, later disclosed the sexual assault to her father, Wilfred Odera (PW1). She was subsequently treated at Nairobi Women's Hospital.
 16. Regarding A.S.'s age, PW6 produced a birth notification confirming she was born on 15 February 2008, making her 15 years old at the time of the incident. Thus, A.S. was a child under the law.
 17. In his defence, the accused claimed he intervened in an argument involving A.S. and another man. A.S. followed him home, they spoke briefly, and she left. Neighbours locked the gate and interrogated A.S., who remained silent. Despite this, both were taken into custody. The accused alleged that Jane Moraa (PW5), a neighbour, fabricated the case due to a personal vendetta over rejected romantic advances. During cross-examination, he maintained he acted as a good Samaritan and denied any ill will towards the witnesses.
 18. The trial court rejected the appellant's defence as a mere denial. This court similarly finds that the prosecution proved their case beyond reasonable doubt. A.S.'s testimony was truthful, and the prosecution's evidence was sufficient. Accordingly, the conviction for sexual assault is upheld.
 19. On the sentence, section 5(2) provides that a person who commits an offence of sexual assault is liable to imprisonment for a term of not less than ten (10) years which may be enhanced to life imprisonment.
 20. During the sentencing proceedings, the trial court considered the appellant's mitigation, the pre-sentence report, and the fact that he was a first offender before imposing the sentence. The sentence imposed was also lawful and I see no reason to interfere.
 21. For the above reasons, the appeal is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 27TH DAY OF MAY 2025

D. KAVEDZA

JUDGE

In the presence of:



Appellant Present

Mutuma for the Respondent

Tonny Court Assistant.

