



**EM v Republic (Criminal Appeal E022 of 2025)
[2025] KEHC 9282 (KLR) (30 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9282 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E022 OF 2025**

**DR KAVEDZA, J
JUNE 30, 2025**

BETWEEN

EM APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered
by Hon. A. Mwangi (CM) delivered in Chief Magistrates' court
(Kibera) S.O. Case No. E024 of 2024 on the 18th day of November 2024)*

JUDGMENT

1. The Appellant was charged with the Subordinate Court of the offence of incest contrary to section 20(1) of the *Sexual Offences Act* No. 3 of 2006. After a full trial, he was convicted on the alternative charge of committing an indecent Act with a child contrary to section 11 (1) of SOA. The particulars were that on diverse dates between March 2023 and 5th February 2024 in Nairobi County, he intentionally and unlawfully touched the vagina of T.M.C., a child aged 7 years old with his penis. He was sentenced to serve 7 years' imprisonment.
2. Aggrieved, he filed an appeal challenging his conviction and sentence. In his appeal, he challenged the totality of the prosecution's evidence against which he was convicted. He urged the court to quash his conviction and set aside the sentence imposed.
3. 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 before the trial court and come to its conclusions without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
4. The



5. The thrust of the grounds of appeal is that the prosecution failed to prove its case beyond reasonable doubt.
6. Section 2 of the SOA defines an indecent act as: -
 - 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;
7. Following voir dire examination, PW2, the minor complainant aged six and in Grade 2, gave evidence. She identified the appellant as her father ("Dada"). She averred that on days he did not work, he would apply oil to her genital area, offer her money, and then commit acts constituting bad manners upon her vaginal area on the bed, instructing her not to inform anyone and threatening to kill her if she did so.
8. PW2 further testified that the appellant touched her chest and committed penile penetration of her vagina. The complainant stated she informed her mother only upon experiencing pain whilst bathing.
9. In her testimony, the trial court noted that PW2 provided clear and graphic testimony regarding her ordeal. Her identification of the appellant as the perpetrator was unequivocal, based upon her familial relationship with him as her father and the location of the assaults within their home. Consequently, the complainant's evidence was found credible.
10. As discussed in the Kenya Judiciary Criminal Procedure Bench Book 2018 paragraphs 94-96 no corroboration is necessary for the evidence of a child taken on oath although cross-examination is available for sworn or unsworn evidence of a child in the usual way:
 - “ 94. No corroboration is required if the evidence of the child is sworn (Kibangeny arap Kolil v R 1959 EA 92). Unsworn evidence of a victim who is a child of tender years must be corroborated by other material evidence implicating the accused person for a conviction to be secured (Oloo v R (2009) KLR).
 95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, *Evidence Act*). The reasons for the court's satisfaction must be recorded in the proceedings (Isaac Nyoro Kimita v R Court of Appeal at Nairobi Criminal Appeal No. 187 of 2009; Julius Kiunga M'birithia v R High Court at Meru Criminal Appeal No. 111 of 2011).
 96. The evidence of a child, sworn or unsworn, received under section 19 of the *Oaths and Statutory Declarations Act* is subject to cross-examination pursuant to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (art. 50(2)(k), CoK”
11. PW2'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 reasons to believe that the child was telling the truth. In this regard, PW2 testified with the innocence of a child and that the evidence as to what



- transpired remained consistent throughout. While I acknowledge that PW2's testimony was tendered with the innocence of a child, her grasp of the events was quite clear.
12. Regarding the additional corroborating evidence, EN(PW1), the minor's mother and the appellant's wife, testified. She stated they had two children, separated, reunited after five years, disagreed again, and separated once more, before reuniting again. The complainant minor, born 1st January 2017, was conceived during a separation period and was aged six at the time of the reunion.
 13. She told the court that on 10th February 2024, whilst bathing her daughter, the minor complained of vaginal pain. Upon persistent questioning, the minor informed PW1 that the appellant, promising a monetary reward, would apply oil to her vagina and rub her with his fingers. He would then remove his clothes, lie on top of her, and insert his penis into her vagina. The minor stated this occurred on four occasions, typically on Mondays when the appellant did not work. Due to the minor's swollen condition, PW1 took her to the hospital and reported the incident to Kabete Police Station.
 14. PW1 further testified she did not confront the appellant due to fear he would kill them. The appellant ignored after being informed of the minor's swollen state. PW1 denied framing the appellant due to their prior differences.
 15. RO, a friend of PW1, corroborated that PW1 contacted her when the child reported pain in her genital area. Owino contacted the chief, was advised to proceed to Kabete, and subsequently took the child to the hospital. She further stated that she had no reason to frame the appellant.
 16. A medical officer from Nairobi Women's Hospital testified he examined TMC, presenting with a history of multiple sexual assaults by her stepfather. The minor was calm on examination, exhibiting no bodily or genital injuries, no vaginal discharge, and intact genitals without injury.
 17. PW5, PC Nancy Wamae, the investigating officer, recorded witness statements, arrested the appellant, and issued the P3 form. She produced the minor's Health Monitoring Form, confirming her date of birth as 1st January 2017, establishing her age as seven years.
 18. In his defence, the appellant testified that he was off duty and arrested on Monday, 5th January 2024. He stated he had resided with EN(PW1) and their two children for eight months preceding his arrest. Informed of the offence at the station, he asserted his relationship with PW1 was marked by conflict and averred she framed him to appropriate his belongings. He denied touching or defiling the complainant.
 19. DW2, Evelyne Qlusa, the appellant's sister, testified she was informed of his arrest by a neighbour whilst at work. She noted her brother had no prior criminal involvement.
 20. The appeal was canvassed by way of written submissions which have been duly considered and there is no need to rehash them. This court must therefore determine whether the prosecution adduced sufficient evidence to prove beyond reasonable doubt that the appellant committed an indecent act with the child complainant.
 21. Section 11(1) of the *Sexual Offences Act* provides 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.
 22. The complainant's age, seven years, was confirmed by her Health Monitoring Form (birth date 1st January 2017), satisfying the legal definition of a child.



23. From the evidence on record and the notes of the trial court, PW2's testimony was consistent and credible, detailing repeated acts by the appellant involving the application of oil and penile penetration. She maintained this account during cross-examination and disclosed the abuse to her mother (PW1), RO (PW3), and the investigating officer (PW5), enhancing reliability. The evidence was corroborated by PW1, PW3, and PW5 confirming PW2's consistent allegations.
24. In his defence, the appellant's denied the allegations and advancing unsubstantiated allegations of coaching by PW1, lacked credibility, and did not undermine PW2's detailed testimony or the multiple disclosures.
25. In addition, in section 124 of the *Evidence Act* (Chapter 80, Laws of Kenya), the trial court, having found PW2 truthful and recorded sound reasons, required no further corroboration. The prosecution's evidence sufficiently established a commission of an indecent act with a child under section 11(1) of the *Sexual Offences Act* and the appellant's culpability.
26. The appellant's grounds of appeal are unsustainable. The appellant's conviction was proper and is upheld.
27. Regarding sentence, the trial court imposed seven (7) years' imprisonment. While section 11(1) mandates a minimum of ten years, the court lawfully exercised discretion, considering the appellant's mitigation and having deducted the ten months he spent in custody pre-trial. The sentence is lawful and proportionate. No basis exists for appellate intervention.
28. In the premises, the appeal is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 30TH DAY OF JUNE 2025

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Mogere for the Respondent

Tonny Court Assistant.

