



Joel v Republic (Criminal Appeal 3 of 2024) [2025] KEHC 9246 (KLR) (30 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9246 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 3 OF 2024**

DR KAVEDZA, J

JUNE 30, 2025

BETWEEN

HAMISI KEYA JOEL APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered on
14th December 2023 by Hon. Maroro (SPM) at Kibera Chief Magistrates’
Court Sexual Offense Case No. E025 of 2021 R v Hamisi Keya Joel)*

JUDGMENT

1. The Appellant was charged and after a full trial convicted by the Subordinate Court of both the main charge and alternative count. The main charge was sexual assault contrary to section 5(1)(a)(i) as read with section 5(2) of the *Sexual Offences Act* No 3 of 2006, whereas the alternative count was committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006. She was sentenced to serve thirty (30) years imprisonment and ten (10) years imprisonment respectively to run concurrently.
2. Aggrieved, he filed an appeal challenging the totality of the prosecution’s evidence against which he was convicted. He contended that the learned trial magistrate erred in his verdict as he was not properly identified as the perpetrator of the said offences, that the prosecution failed to prove their case beyond reasonable doubt, and that his conviction was based on the sole testimony of the complainant.
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 analyse and re-evaluate the evidence which was before the trial court and 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.
4. The prosecution presented six witnesses. PW2, AO, the complainant, gave an unsworn statement, testifying that while sent by PW3, Rose Atieno Otieno, to buy potatoes, the appellant dragged her



- to his house, removed her clothes, took photographs with his phone, and inserted his finger into her vagina. She reported this to PW3, who confronted the appellant. Upon his denial, PW3 informed PW1, EA, the complainant's mother.
5. PW1 corroborated PW2's account, stating she returned home, questioned her daughter, and took her to Nairobi Women's Hospital. PW4, John Njuguna, a clinician, produced PW2's P3 and PRC forms, noting no physical injuries but a non-intact hymen with bruising and tenderness, indicating blunt vaginal penetration.
 6. PW5, Peris Makhio Mghanga, the investigating officer, arrested the appellant, recovered his Tecno phone, and prepared an exhibit memo, which she presented in court. PW6, Inspector Kennedy Karanja, testified that forensic analysis of the phone revealed images of an infant with her panty partially down, exposing her private parts. He produced the exhibits and a certificate.
 7. In his defence, the appellant claimed that on the day of the offence, while heading to his mother's house, he was accosted by two women and three unfamiliar men, one of whom directed him to the Chief's office. He was then taken to Lang'ata Police Station, charged, and brought to court.
 8. Section 5 of the *Sexual Offences Act* provides the offences under which the appellant was charged as follows:
 5. Sexual assault
 - (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.
 - (2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.
 9. The evidence adduced by the prosecution duly substantiated the elements of the main charge. The testimony of the complainant revealed that the appellant forcefully dragged her into her house, took her clothes off, took photos of her while she was nude, and further inserted his finger into her vagina. This was corroborated by the medical evidence tendered by PW4, who stated that her hymen suffered a bruise and tenderness, indicating blunt vaginal penetration. Moreover, PW6 recovered these very photos from the appellant's phone.
 10. With regard to the age of the complainant, the complainant's birth certificate in court indicated that she had been born on 15th January 2013. Therefore, the complainant was 8 years old at the time the offence occurred, and a child within the meaning of the law.
 11. Aside from objections made to the evidence by the prosecution, the appellant contended that he was not identified as the perpetrator of the offense. It is worth noting that while the evidence on record makes scarce mention of whether or not the complainant, her mother, and her aunt were familiar with the appellant, circumstantial evidence significantly contributes to his culpability. The Court of



Appeal in *Musii Tulo v Republic* (2014) eKLR outlined the principles observed when considering circumstantial evidence as follows;

To ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of *Musoke v R* (1958) EA 715 citing with approval *Teper v R* (1952) AL 480 thus: -

'It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'

12. Looking at the facts presented, it is clear that photographs of the complainant were recovered from the appellant's mobile phone. This was not only confirmed by the complainant's testimony but was also supported by the evidence of PW6, the forensic expert, who conducted an analysis of the phone and produced the images and certificate in court. The recovery of these images directly links the appellant to the offence and strengthens the prosecution's case by demonstrating that the complainant's account was credible.
13. This, taken together with the medical evidence and the consistent testimonies of the prosecution witnesses, sufficiently discharges the burden of proof placed on the prosecution. Accordingly, the conviction on the principal charge of sexual assault is well founded and is hereby affirmed.
14. However, the trial court convicted the appellant on both the main charge and the alternative charge. In doing so, the trial court fell into error. It is trite law that a conviction cannot be made on both the main charge and the alternative charge. This position was stated by the Court of Appeal in *David Ndumba v Republic* [2013] eKLR thus:-

“On the issue of the alternative charge, we find that nothing turns on the fact that the trial court did not make a pronouncement on the same. In *M.B.O. v Republic*, Criminal Appeal No 342 of 2008, this Court held,

‘The practice of charging offences in the alternative is one of abundant caution and that is why no finding is made on such charge once there is ample evidence to support the main charge.’”
15. The charge is an alternative to and not an addition to the main charge and therefore, once the trial court found that the prosecution had proved the main charge of defilement, the trial magistrate had no business in proceeding to convict the Appellant on the alternative.
16. For that reason, I partially allow the appeal on conviction by setting aside the conviction on the alternative charge of the offence of committing an indecent act with a child, contrary to Section 11(1) of the *Sexual Offences Act*, No 3 of 2006.
17. With regard to the sentence imposed, the appellant was sentenced to serve thirty (30) years imprisonment for the main charge. During sentencing, the court considered the appellant's mitigation, the time spent in custody, and the fact that the appellant is a first-time offender.
18. However, in my view, the sentence of thirty (30) years imprisonment was excessive under the circumstances. I hereby set aside the sentence of thirty (30) years imprisonment and substitute it with a sentence of twenty (20) years imprisonment. The sentence shall run from the date of arrest on 5th



February 2021 the date of the appellant's arrest pursuant to section 333(2) of the *Criminal Procedure Code*. The sentence on the alternative count is set aside.

Orders accordingly.

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

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Ms. Maina h/b for Makori for the Appellant

Mogere for the Respondent

Tonny Court Assistant.

