



**Luvanda v Republic (Criminal Appeal 141 of 2023)
[2024] KEHC 5967 (KLR) (28 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5967 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 141 OF 2023**

DR KAVEDZA, J

MAY 28, 2024

BETWEEN

ALEX VUDUKHU LUVANDA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered by
Hon. C.K Mwaniki (PM) on 11th July 2023 at Kibera Chief Magistrates'
court S.O. Case No. 100 of 2020 Republic vs Alex Vudukhu Luvanda)*

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. The particulars were that on 11th August 2020, at Kibera Soweto Area, within Nairobi County, he intentionally and unlawfully used his finger to penetrate the vagina of B.I.V. a child aged 17 years and 6 months. He was sentenced to serve 15 years imprisonment.
2. He appeals against conviction and sentence in line with his petition of appeal filed on 3rd August 2023. In his appeal, he 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. In response, the state filed grounds of opposition dated 25th March 2024. The grounds are that the appeal is an abuse of the court process. The appellant was properly convicted as the prosecution discharged their burden beyond reasonable doubt. The appeal lacks merit and should be dismissed.
4. The appeal was canvassed by way of written submissions which I have duly considered.



5. 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.
6. 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.”
7. 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.”
8. 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.
9. The essential elements of the offence therefore are, proof of penetration and positive identification of the assailant.
10. PW1, the complainant herein testified that on 11th August 2020, her step father the appellant herein was scolding her. She directed her to stand before him and undressed her. He unzipped his trousers exposing his penis. The complainant told the court that she closed her eyes and started crying at the sight. He then placed his hand on her shoulder while she was standing and put his finger into her vagina. She protested that he was hurting her and she ran away from the ordeal. She went to cry outside where she met her friend Linda (PW2). She informed her about her ordeal. The incident was reported to the police and she was referred to Nairobi Women’s Hospital for examination and treatment.
11. The complainant told the court that it was not the first time that the appellant had sexually assaulted her. That it had happened when she was in class 8, a few years back. She did not inform anyone because she was afraid of him.
12. In her testimony, PW1 gave clear and graphic testimony of how the appellant had been sexually assaulted in 2020. Despite being subjected to rigorous cross-examination, PW1 remained steadfast that it was the appellant, her stepfather who committed these acts against her. The appellant was well known to her. 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.



13. 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.
14. Regarding additional corroborating evidence, the prosecution called Linda Awino (PW2). She told the court at the material time, she found the complainant crying by a ditch which led to a river. She inquired what the was issue. The complainant informed her that she was afraid her father would beat her. She took PW1 home gave her food and she narrated her ordeal at the hands of the appellant. She reported the matter to the police and the appellant was arrested.
15. Additionally, the prosecution called John Njuguna, a clinical officer at Nairobi Women's Hospital, PW who produced the GVRC form, Post rape care (PRC) form, and P3 form on behalf of his colleague, Faith Mutisya, who was on unpaid leave at the hospital. He stated that PW1 underwent an examination on 10th August 202 after giving a history of being sexually assaulted by her father. Upon examination, there were no outward physical injuries noted. Her hymen was broken with an old tag. White vaginal discharge was noted. The findings were consistent with blunt penetration in the vagina. These medical findings corroborate PW1's testimony regarding penetration.
16. On the age of PW1, a birth notification was produced in evidence by PW4, the investigating officer. She was born on 10th February 2003 meaning that she was 17 years and 6 months at the time of the incident. There is therefore no doubt that PW1 was a child within the meaning of the law.
17. In his defence, the appellant gave sworn evidence. He acknowledged that the complainant was her stepdaughter. He maintained that it was his in-laws who had instigated the case against him. He explained how he was arrested and maintained his innocence.
18. The trial court considered this defence and found it to be mere denial. I make a similar finding that the prosecution proved their case against the appellant beyond reasonable doubt. The conviction on the charge of sexual assault is therefore affirmed.
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. The primary purpose of a sentence in a criminal case is to punish an offender for their wrongdoing, while also aiming to rehabilitate them and discourage future criminal behaviour, turning them into law-abiding citizens. Although the trial court's sentence in this case was lawful, being a first-time offender still has a chance for rehabilitation and a full life ahead. I therefore find that the sentence of fifteen (15) years was manifestly harsh and excessive.
21. For the above reasons, I hereby set aside the sentence of fifteen (15) years imposed and substitute it with a sentence of ten (10) years imprisonment. The sentence shall run from the date of conviction.

Orders accordingly.

Judgement dated and delivered virtually this 28th day of May 2024

D. KAVEDZA

JUDGE



In the presence of:

Ms. Okatch Sylvia for the Appellant

Ms. Tumaini for the Respondent

