



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 10 OF 2020

SAMMY NZOMO KIEMA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. T. A. Sitati

in Makindu Senior Principal Magistrate's Court PMCR (S.O) Case No.2 of 2019

pronounced on 8th November, 2019).

JUDGMENT

1. The appellant was charged in the magistrates' court with defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on 24th June 2019 at Kivuthini Village, Nzambani Location, Makueni County intentionally and willfully caused his penis to penetrate the vagina of M.K a child aged 1⁶/₁₂ years.

2. In the alternative, he was charged with indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of offence were that on the same date and at the same place intentionally touched the vagina of M.K a child aged 1⁶/₁₂ years using his penis.

3. He denied both charges. After a full trial, he was convicted of the offence of sexual assault contrary to section 5 of the Act and sentenced to serve life imprisonment.

4. Dissatisfied with the conviction and sentence of the trial court, the appellant has come to this court on appeal relying on the following supplementary grounds of appeal –

1) The learned trial magistrate erred by convicting him in failing to subject him to a fair trial contrary to section (Article) 25(c) and 50(2) (c) and (j) of the Constitution.

2) The learned trial magistrate erred both in law and fact by conducting a flawed trial in violation of his Constitutional right to information as per section (Article) 50(2) (g), (h), (j) and (k) of the 2010 Constitution.

3) The learned magistrate erred both in law and fact in convicting him by failing to appreciate that essential witnesses were not summoned to clear the air on what actually transpired during the time in question contrary to section 124 of the Evidence Act.

4) The learned trial magistrate grossly erred in law and fact by admitting indirect evidence (hearsay) in convicting him.

5) The learned trial magistrate faulted in law and fact by convicting him while failing to evaluate the prosecution's material contradictions, inconsistencies and incoherence that left the whole matter wanting thus full of deficiency.

6) That the life sentence imposed on the appellant herein is harsh and unconstitutional.

5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the written submissions of the appellant and those of the Director of Public Prosecutions. I note that the appellant relied on a number of decided court cases.

6. This being a first appeal, I am duty bound to reconsider the evidence on record and come to my own independent conclusions and inferences – see **Okeno –vs- Republic (1972) E.A 32.**
7. In proving their case, the prosecution called four (4) witnesses. The alleged victim did not testify as she was a girl of just over 1 (one) year.
8. Pw1 was MMA boy of about 14 years. It was his evidence that on the material day he met the appellant holding the victim on his lap and inserting his finger into her genitals. When Pw1 arrived there, the appellant laid the child on the ground and asked Pw1 to insert his penis, and the appellant then gave the child alcohol to drink. However, Pw1 ran away and informed J about the incident, and the incident was thus reported to the police.
9. Pw2 was MTM the mother of the victim. It was her evidence that the victim was one of her children and that on that day she left the children playing and went to look for food, only to come back and be told about the sexual assault. She then took the child to hospital and the matter was reported to the police. She knew the appellant before as a neighbour.
10. Pw3 was PC Margaret Mwihaki the Investigating Officer who received the report on 25/6/2019. She conducted investigations and charged the appellant with the offences.
11. Pw4 was Sylvester Makau a Clinical Officer who testified about the medical tests conducted on the victim and produced the P3 form and treatment notes. The medical evidence is that there were tears in the vagina of the victim and hymen was broken.
12. When put on his defence, the appellant tendered sworn defence testimony. He denied committing the offence. He said that on that day he was grazing livestock, and heard a child crying and when he went there, he saw 8 children playing. He then left to go and graze his livestock and later in the evening he took the livestock to his employer's homestead.
13. The prosecution was required to prove all the ingredients of the offence beyond any reasonable doubt.
14. In my view, the age of the victim was proved beyond any reasonable doubt on the basis of the evidence of Pw2 MTM, the mother of the victim, as well as the evidence of Pw4 the Clinical Officer, based on medical the age assessment report. I find and hold that the prosecution proved beyond reasonable doubt that the victim was a child aged one year and six months.
15. The alleged sexual assault was also in my view proved beyond reasonable doubt through the evidence of Pw1 MMan eye witness, and the medical evidence produced by Pw4 Sylvester Makau the Clinical Officer. It was clear from the lacerations found in the vagina and broken hymen of the victim that sexual assault was proved. I find and hold that the prosecution proved beyond any reasonable doubt that sexual assault on the victim did occur.
16. As for the culprit, it is clear to me that Pw1 and Pw2 knew the appellant well before. There was thus no possibility of mistaken identity as the incident occurred in broad daylight. I find that the appellant was the culprit. I will thus uphold the conviction.
17. I will add that though the appellant claims violation of constitutional rights, I find no such violation.
18. With regard to the sentence, in my view the sentence imposed is justified as the appellant being a man of advanced age at 65, did a very inhuman act to a small helpless child. In my view, children need to be protected from such predators. I thus will also uphold the sentence.
19. Consequently and for the above reasons, I dismiss the appeal and uphold both the conviction and sentence.

Delivered, signed & dated this 22nd day of February, 2022, in open court at Makueni.

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George Dulu

Judge