



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CRIMINAL APPEAL NO E041 OF 2021**

**BRIAN NYACHIO alias DADDY.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an Appeal from the Judgment of Hon P. N.**

**Gesora (CM) delivered at Kisumu Chief Magistrate's**

**Court in Sexual Offence No E002 of 2021 on 9<sup>th</sup> March 2021)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) and (2) of the Sexual Offences Act No 3 of 2006. He had also been charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006.
2. The Learned Trial Magistrate, Hon P. N. Gesora, (CM) was not satisfied that the Prosecution had proved the offence of defilement beyond reasonable doubt and on 9<sup>th</sup> March 2021, he acquitted the Appellant on the main count but convicted him of the alternative charge and sentenced him to ten (10) years imprisonment.
3. Being dissatisfied with the said Judgement, on 30<sup>th</sup> September 2021, the Appellant lodged the Appeal herein. His Petition of Appeal was undated. He relied on four (4) grounds of appeal. In his Amended Grounds of Appeal that were filed on 8<sup>th</sup> February 2022, he indicated that his grounds of Appeal were solely on the sentence of ten (10) years imprisonment that was imposed on him.
4. His undated Written Submissions were filed on 8<sup>th</sup> February 2022 while those of the Respondent were dated and filed on 10<sup>th</sup> February 2022.
5. This Judgment is based on the said Written Submissions which parties relied upon in their entirety.

**LEGAL ANALYSIS**

6. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
7. This was aptly stated in the case of **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
8. Although the Appellant did not submit on the question of whether or not the Prosecution had proved its case against him beyond reasonable doubt. He appeared to have abandoned the same. Nonetheless for completeness of record, the court looked at the Prosecution's case as the Respondent had submitted on the same.
9. Indeed, looking at the two (2) sets of the Appellant's Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-

a. Whether or not the Prosecution proved its case beyond reasonable doubt as far as the alternative charge of indecent act was concerned.

b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant by the Trial Court was lawful and/ or warranted.

10. The court dealt with the two (2) issues under the following distinct and separate heads.

### **I. PROOF OF PROSECUTION'S CASE**

11. Grounds of Appeal Nos (1) and (2) of the undated Petition of Appeal filed on 30<sup>th</sup> September 2021 were dealt with together under this head as they were both related.

12. The court noted the Respondent's Written Submissions in this regard and found and held that the Learned Trial Magistrate did not err in having convicted the Appellant for the offence of committing an indecent act based on the evidence that was adduced during trial. Notably, despite the P3 Form having indicated that the Complainant, RAO (hereinafter referred to as "PW 1") had suffered grievous harm, the probable type of weapon that caused the injury she sustained was not shown therein.

13. In the premises, Grounds of Appeal Nos (1) and (2) of the undated Petition of Appeal filed on 30<sup>th</sup> September 2021 were not merited and the same be and are hereby dismissed.

### **II. SENTENCE**

14. Grounds of Appeal Nos (3) and (4) of the Petition of Appeal and Amended Grounds Nos (1), (2), (3), (4), (5), (6), (7) and (8) of the Amended Grounds of Appeal were dealt under this head.

15. The Appellant submitted that he was rightly before this court by virtue of Article 165 of the Constitution of Kenya 2010, guided by the provisions of Section 361(1)(a) of the Criminal Procedure Code which empowers courts to deal with severity of sentence and reduction of sentence imposed thereof.

16. He invoked Sections 364 (1)(b)(2)(3) and 354(3)(1) of the Criminal Procedure Code and Article 23(f) and 50(2)p of the Constitution of Kenya, and argued that this court ought to deal his case with mildness and tranquility and exercise leniency without occasioning prejudice.

17. He urged this court to consider the period he had already served in custody under the provisions of Section 333(2) of the Criminal Procedure Code that obligates courts to take into account the period already served in custody during trial while considering the merits of the appeal. He added that failure to do so may result in an excessive punishment. He was emphatic that the Prosecution had communicated to court that he was a first offender and was remorseful. He urged this court to allow his appeal and reduce the sentence.

18. On the other hand, the Respondent submitted that the sentence was commensurate with the offence the Appellant had committed. It urged this court not to interfere with the same but instead to uphold the sentence as it was not harsh in any way. It pointed out that he was arraigned in court on 1<sup>st</sup> February 2021 and convicted on 11<sup>th</sup> March 2021 and conceded that the time he spent in custody be taken into account.

19. In the Sexual Offences Act, "**an indecent act**" is defined as follows:-

**"indecent act" means 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."**

20. Section 11(1) of the Sexual Offence Act provides as follows:-

**"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 (emphasis court)."**

21. Notably, the use of the word "**liable**", connotes that the trial court has discretion to impose a lesser sentence where the circumstances so dictate. This was the holding in the case of **Daniel Kyalo Muema vs Republic [2009] eKLR** where the Court of Appeal stated that the words "**shall be liable to**" did not in their ordinary meaning require the imposition of the stated penalty but merely expressed the stated penalty which could be imposed at the discretion of the court.

22. Guided by the above decision, a person convicted of the offence of committing an indecent act with a child '**is liable**', upon conviction to a sentence of ten (10) years imprisonment under Section 11(1) of the Sexual Offences Act. As the same does not stipulate a mandatory minimum sentence, the court has discretion to impose a lesser sentence, or a fine.

23. Whereas the sentence of ten (10) years imprisonment that was imposed upon the Appellant herein was lawful, the Learned Trial Magistrate did not give reasons for imposing the maximum sentence. In the absence of extraneous circumstances, this court took the view that the Appellant ought to have benefitted from a lower sentence.

24. In the premises, Grounds of Appeal Nos (3) and (4) of the undated Petition of Appeal filed on 30<sup>th</sup> September 2021 and Amended Grounds Nos (1), (2), (3), (4), (5), (6), (7) and (8) of the Amended Grounds of Appeal were merited and the same be and are hereby upheld.

**DISPOSITION**

25. For the foregoing reasons the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 30<sup>th</sup> September 2021 was partially merited and the same be and is hereby allowed. Although this court hereby upholds the conviction as it was safe to do so, it hereby substitutes the sentence of ten (10) years imprisonment with five (5) years imprisonment.

26. It is hereby ordered that the time the Appellant spent in custody during trial be taken into consideration when computing his sentence as provided in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

27. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF APRIL 2022**

**J. KAMAU**

**JUDGE**