



REPUBLIC OF KENYA



KENYA LAW
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**Sila v Republic (Criminal Appeal E031 of 2020)
[2022] KEHC 12655 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12655 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E031 OF 2020
GMA DULU, J
JULY 27, 2022**

BETWEEN

GABRIEL KASYOKI SILA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. B. Ireri in Makindu Senior Principal Magistrate's Court PM (S.O) Case No.43 of 2020 pronounced on 17th December 2020)

JUDGMENT

1. The appellant was charged in the magistrate's court with defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars of offence were that on 4th June 2020 at about 14:00 pm in Nzau Sub-County within Makueni County intentionally and unlawfully caused his genital organ namely penis to penetrate into the female genital organ namely vagina of MWM (name withheld) a child aged 17 years, a child with mental disability.
2. In the alternative, he was charged with committing indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of offence were that on the same day and at the same place intentionally and unlawfully touched the vagina of MWM a child aged 17 years using his penis a child with mental disability.
3. He denied both charges. After a full trial, he was convicted of the main count of defilement and sentenced to 15 years imprisonment.
4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal relying on the following grounds –
 - 1) That he had no trust in the intermediary used by the court.



- 2) That there was false allegation of rape or the same complainant in 2016.
 - 3) That there was some coaching on the complainant on the use of gestures.
 - 4) That the probation report on him was not true.
 5. That he did not stay at home most of the time.
 - 6) That he prays that his sentence starts from the date of arrest 05/07/2020.
 - 7) That if found guilty, he prays for non-custodial sentence or what the court deems fit.
5. The appeal was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by the appellant and those filed by the Director of Public Prosecutions.
 6. This being a first appeal, I am duty bound to evaluate all 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. In his defence, the appellant tendered sworn defence testimony and did not call any additional witness.
 8. The elements of the offence were age of the victim, the mental status of the victim, penetration of a sexual nature, and the identity of the victim.
 9. With regard to the age of the victim, I note that the victim was dumb and could not talk in court. She did not identify the birth certificate. She could not even write her name well. However, AMM her guardian who lived with the victim, said that she was 17 years old. She relied on a birth certificate which was produced in court.
 10. In my view, the prosecution proved beyond reasonable doubt that the victim herein was 17 years of age.
 11. With regard to the mental status of the victim, the victim appeared in court and could not talk and the magistrate allowed her to talk through an intermediary, and in addition medical evidence was relied upon. The victim was also registered in a special school and the school registration documents were relied upon in evidence.
 12. In my view, it was proved by the prosecution beyond reasonable doubt that the victim was mentally retarded, had mental disability.
 13. With regard to penetration, it is of note that the intermediary AMM Pw1 testified as if she was giving her own evidence and did not testify in a way that would show that she was answering questions from a prosecutor. Instead, her version of the evidence was a rehearsal of a story but not a response to questions put to the victim in court.
 14. In my view, there was an error in the conduct of the proceedings, with regard to tendering the evidence of the victim on the incident. Questions should have been put to the victim, for the victim to respond, and the intermediary to interpret the same. Besides, there is no record or indication of any particulars signs used by the victim in court, to demonstrate what gesture the intermediary was interpreting.
 15. I find no evidence recorded from the victim herein. I also find that what was on record was merely the testimony of AMM Pw1 and Pw2 RMM, not the evidence of the victim with regard to what happened.
 16. In the absence of the primary evidence of the victim on what happened, and the medical evidence not being conclusive on whether penetration did occur that day, I find that the prosecution did not prove



beyond reasonable doubt that penetration of a sexual nature did occur to the victim on that day as alleged.

17. On the identity of the culprit, my view is that, merely showing the picture of the appellant in a laptop screen, alone without any other person appearing therein, cannot constitute positive identification; as such arrangement does not avail the victim another option, but merely to point at that single picture. Thus in my view, there was no evidence on record of positive identification of the appellant as the culprit herein.
18. I thus find that the prosecution did not prove beyond reasonable doubt that the appellant was the culprit.
19. I will thus allow the appeal on conviction and also set aside the sentence.
20. Consequently and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DELIVERED, SIGNED & DATED THIS 27TH DAY OF JULY 2022, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE

