

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. 50 OF 2017

H W.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

[Being an appeal against the conviction and sentence of the Senior

Resident Magistrate's Court at Tamu (Hon. E. M. Onzere SRM) dated

the 13th September 2017 in Tamu SRMCSCRC No. 11 of 2017]

JUDGMENT

The appellant was sentenced to life imprisonment for defilement of a child aged 5 years Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act and being aggrieved he filed this appeal against the conviction as well as the sentence. The grounds of appeal are that:-

- 1. "THAT the trial magistrate erred in law and facts by convicting and sentencing me based on insufficient evidence adduced by the prosecution which was marred with contradictions hence unreliable witnesses;**
- 2. THAT there was no any medical evidence adduced by the prosecution to link me to the said offence;**
- 3. THAT the trial magistrate erred in law by failing to consider that this matter was a family issue hence instigated by the grudge between us."**

At the hearing of the appeal he relied on his written submissions and urged this court to allow the appeal and acquit him.

As the first appellate court I have re-evaluated the evidence and come to the conclusion that the charge against the appellant was proved beyond reasonable doubt. There is proof beyond a shadow of doubt that the child was sexually assaulted. Her own mother saw that she was bleeding and took her to hospital. The Clinical Officer confirmed that during the examination tears were evident in the child's genitalia. The Police Officer (**PW3**) to whom the matter was reported stated that when he saw the child he observed she was walking with difficulty and had to be carried by her mother.

The child voiced that the person who assaulted her was the appellant. She vividly described how she went home and as usual did not find her mother. Then the appellant who she called Daddy and who was sleeping on her mother's bed undressed her and made her to lie on the bed before lying on her and inserting his "dudu" meaning penis into her "dudu which she uses to urinate" meaning her vagina. She left nothing to imagination and clearly what she meant was that he defiled her. The law does not require corroboration in sexual offences but in this case the testimonies of her mother, the police officer (**PW3**) and Clinical Officer (**PW4**) confirm that she was a truthful witness. She even went to the extent of accurately describing what she was wearing on that day. The accused's defence that he was framed is not convincing at all. It was his evidence that he left the house voluntarily after being confronted by the child's mother hence corroborating her evidence that he just packed and left. The child knew him well as he lived with her mother. She called him daddy. In fact he confirmed that he was in the house on that day and that the child spoke with her mother on that day. I do not find anything in the evidence to suggest that the child's mother or even the child had any reason to frame him. From the evidence there had been no acrimony between him and the child's mother even though the child claimed he had defiled her many times before. I am also not persuaded that the fact that he was charged with defilement instead of incest is fatal to the prosecution's case as the two offences carry the same sentence given the age of the victim. I find no merit in the appeal either against the conviction or the sentence and the same is dismissed.

Signed, dated and delivered at Kisumu this 22nd day of March 2018

E. N. MAINA

JUDGE