



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 46 OF 2013

DAVID NJOROGЕ WAINAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. This appeal is brought by the appellant David Njoroge who was convicted by the Principal Magistrate's court at Kilgoris in Criminal case No. 727 of 2012. At the said court, the appellant/accused was charged with committing an indecent act with the child contrary to section 11(1) of Sexual Offences Act where it was alleged that the appellant/accused caused his penis to penetrate the anus of the said minor victim. The appellant faced a second count of similar charge because the victims were two. Both victims gave similar testimonies how the appellant lured them to his house and committed the same acts on them. He said to have lured them by giving them guavas and mandazis. The court convicted the appellant and sentenced him to 15 years imprisonment. The court arrived at this sentence having taken into account that the appellant had previously been convicted of similar offence on 30th April, 2008. This appears on page 90, the prosecution indicated that the accused had indeed been convicted to 10 years imprisonment on the 30th April, 2008 for same offence under section 11(1) of Sexual offences Act. When asked if the records referred to were true, the appellant confirmed the conviction.
2. The appellant brought his appeal challenging the judgment and the conviction of the Kilgoris Principal Magistrate. He sets out his grounds as summarized herebelow:-
 1. *That the trial magistrate erred both in law and facts by basing a conviction on a verbal evidence without warning himself of the dangers involved.*
 2. *That the trial magistrate erred n law and fact by meting out such harsh sentence(punishment) on perjury evidence.*
 3. *That the trial magistrate erred in law and fact by not taking into account the medical report which had exonerated him.*
 4. *That the trial magistrate erred in law and fact by relying on the previous records of conviction which were dismissed the High Court.*
 5. *That the trial magistrate erred in law and fact by not relying on evidence by the prosecution's investigating officers.*
 6. *That the trial magistrate erred in law and fact by arriving at a conviction without warning himself over a perpetual shamba family conflicts/grudge between the appellant and the step mother.*
 7. *That the trial magistrate erred in law and fact giving a harsh punishment as a result of "paradox and ambiguous" sentencing by the witnesses.*
 8. *That the trial magistrate erred in law and fact in not appreciating the strong defence by the appellant.*

3. The respondent's submission were as follows:-

The accused-the appellant was charged with the offence of attempted defilement contrary to section 9(1) of Sexual Offences Act, but was, however, convicted on alternative count of committing an indecent act with the child contrary to section 11(1) of Sexual Offences Act where it was alleged that the accused caused his penis to penetrate the anus of the said child. The accused faced a second count of similar charge because the victims were two. Both victims gave similar testimonies, how the appellant lured them to his house and committed the same acts on them. He gave them guavas and mandazis.

4. The respondent said: it should be noted that PW1 corroborated the evidence of PW2 and vice-versa.
5. PW3, on the material day, saw the appellant walking towards his house with the two juveniles.
6. PW4, testified that she saw the children eating mandazi and the children told her what the appellant had done to them.
7. The evidence of the prosecution put the appellant put then appellant at the scene the appellant in his defence, gave an alibi testimony that on the material day, he was at his mother in-law's place to see his pregnant wife. The appellant refrained from calling his wife or his mother in-law, to rebut the evidence of the prosecution. The respondent further submitted that section 24 of evidence act, has a provision that the court can convict an accused person on sole evidence of a child in Sexual Offences. He thus submitted that despite that provision, the trial court in case, did not convict the accused on the sole evidence of one child because the two victims corroborated each other's" testimony. The court rightly found that the accused had committed an indecent act with the victims as provided for by the Sexual Offences Act.
8. The appellant in one of his grounds of appeal states that the court unnecessarily put weight on his previous convictions. Indeed the respondent submits that, the appellant/accused was, indeed, not a first offender, according to the records of the lower court, at page 90, the prosecution indicated that the accused had been convicted to 10 years imprisonment on 30th April, 2008 for the same offence under section 11(1) of Sexual Offences Act. When he was asked if the records were true, the accused confirmed the convictions.
9. The accused was sentenced to 15 years on two alternative counts. Under this provision, the minimum sentence is 10 years and the maximum is life sentence. Thus, the trial court, was within its powers to sentence the accused to 15 years imprisonment, having in mind that this was not the first offence by the accused.
10. It is the position of the respondent that the accused, for reasons above alluded to, was rightly convicted on strong evidence by the prosecution witnesses. The appellant/accused failed to rebut any of the testimonies of those prosecution witnesses.
11. The court finds that the appeal by the accused as no merit. It must but fail on basis of the respondent convincing submissions as stated above. The appellant, in any event, appears to be a habitual paedophile, a dangerous predator to society and must be locked out of it as young children are very vulnerable around him. The court therefore upholds the sentence of the trial court.
12. It is so ordered.

Dated and delivered at KISII this 6th day of January, 2015.

C.B. NAGILLAH,

JUDGE.

In the presence of:-

Appellant in person.

Clare for the respondent.

Edwin Mongare Court Clerk.