



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 27 OF 2020

MM.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence

of Hon. Ogombe L.D (S.R.M) in Makueni Chief Magistrate's

Court CMCR Case No. 116 of 2017 issued on 21st March, 2019).

JUDGMENT

1. The appellant was charged in the magistrate's court with incest contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on 3rd March 2017 in [Particulars withheld] village within Makueni County being a male person intentionally and unlawfully caused his penis to penetrate the vagina of MK (*name withheld*) a female child aged 8 years who was to his knowledge his niece.

2. In the alternative, he was charged with committing an 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 place touched the vagina of MK a female child aged 6 years with his penis.

3. He denied both charges. After a full trial, he was convicted on the alternative count of indecent act and sentenced to 20 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 was convicted and sentenced to 20 years imprisonment though he did not plead guilty.

2) That his sentence should have been made to commence from date of arrest.

3) That he was a young person and all his years would be wasted in prison.

4) That his sentence be reduced to the period served and non-custodial sentence be granted; as he had been fully rehabilitated through education skills gained during time spent in custody.

5. The appeal proceeded through filing of written submissions. I have perused and considered the submissions of both the appellant and the State.

6. This being a first appeal, I am required to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see **Okeno –vs- Republic [1972] E.A 32.**

7. I have re-evaluated the evidence on record both for the prosecution and the defence. In proving their case, the prosecution called 7 witnesses. The appellant on his part tendered unsworn testimony and called no other defence witnesses.

8. The appellant was convicted of the offence of indecent act with a child. It was thus for the prosecution first of all to prove the age of the alleged victim. From the evidence on record, the prosecution relied on a birth certificate produced by CKM(Pw2) which was not contested and the trial court found that the victim was aged 8 years at the time of the incident. In my view the prosecution proved beyond any reasonable doubt that the complainant (victim) was aged 8 at the time of the alleged incident.

9. Did the prosecution prove commission of an indecent act against the victim? Indecent act is defined under section 2 of the Sexual Offences Act as follows –

“Indecent act” means an unlawful intentional act which causes -

(a) Any contact between any part of the body of the 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.”

10. With regard to the incident, the evidence of Pw1 CM, Pw2, CKM, Pw3 the victim, and Pw4 JK, was consistent. Pw2 was the victim. Pw1, 3 and 4 actually saw the culprit in broad daylight lying on the victim in the room on a mattress on the floor, with his trousers pulled down. In my view therefore, an indecent act on the victim was proved by the prosecution beyond any reasonable doubt.

11. With regard to the identity of the culprit, the same 4 witnesses above were all consistent in their evidence that the culprit was the appellant herein. Pw4 JK in fact witnessed the appellant pull the victim into the room and locked the door. Shortly thereafter, Pw1 and Pw3 saw the appellant through the window lying on the victim. In my view therefore, it was proved by the prosecution beyond any reasonable doubt that the appellant was the culprit. The conviction of the trial court will thus be upheld.

12. With regard to sentence, I note that from the proceedings on record that the appellant was not remorseful and refused to ask questions to some witnesses. He also chose to say nothing in mitigation. He now says that he has reformed in prison, and that section 333(2) of the Criminal Procedure Code (Cap.75) should have been taken into account by the trial court in sentencing him.

13. The minimum sentence for the offence was 10 years imprisonment, and the trial court meted out a sentence of 20 years imprisonment due to the gravity of the offence and the mental condition and age of the complainant. The trial court noted that the appellant escaped conviction for incest only on a mere technicality, but that penetration was proved. In my view, in light of the unremorseful conduct of the appellant during trial, and the fact that he took advantage of a mentally challenged orphan girl and elected not to say anything in mitigation, it cannot be said that the trial court did not take into account the provisions of section 333(2) of the Criminal Procedure Code in sentencing him. The appellant also chose not to mitigate at the trial, thus the magistrate could not consider mitigating factors. I thus find no reason to interfere with the sentence imposed.

14. Consequently, I find no merits in the appeal and dismiss the same. I uphold both the conviction and sentence of the trial court.

DELIVERED, SIGNED & DATED THIS 22ND DAY OF SEPTEMBER, 2021, IN OPEN COURT AT MAKUENI.

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George Dulu

Judge