



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 132 OF 2018
SAMUEL ASUTZA.....APPELLANT
VERSUS
REPUBLIC..... RESPONDENT

(An appeal from the judgment of Hon. D. Mochache, Senior Principal Magistrate, delivered on 1st day of December 2017 in Shanzu Principal Magistrate's Court Sexual Offence Case No. 36 of 2017).

J U D G M E N T

1. The appellant Samuel Asutza was accused in Shanzu SPMC. Sexual Office No. 36 of 2016 with the offence of defilement contrary to Section 8(1) & (4) of the Sexual Offences Act.
2. Particulars were that the appellant on 5th day of March 2016 in Mtwapa within Kilifi County intentionally and unlawfully caused his penis to penetrate the vagina of NM a child aged 16 years who had mental disability.
3. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.
4. The trial Magistrate considered the evidence of 4 witnesses for the prosecution as well as the appellant sworn statement and the appellants witness evidence and weighing against each other found appellant guilty and convicted him. The appellant was sentenced to serve 10 years imprisonment.
5. The appellant was aggrieved by the conviction and sentence and he preferred appeal on the following grounds:-
 - i. That the learned trial Magistrate erred in law & fact by convicting him without considering that there was a grudge between him and the mother of the Complaint.
 - ii. That the trial Magistrate erred in law & fact by convicting the appellant without considering that the prosecution was full of material discrepancies and the witnesses doubtful.
 - iii. That the trial Magistrate erred in law & fact by convicting the appellant without considering his defence when the Appellant filed his submissions on 7/7/2021 he filed it with a notice of motion seeking to amend grounds of appeal as follows:-
 - a. That the learned trial Magistrate erred in law and fact by failing to consider his mitigating circumstances.**
 - b. That the learned trial Magistrate erred in law & fact by failing to consider pre-conviction period in custody pursuant to Section 333(2) of the Criminal Procedure Code.**
6. The appellant's submissions were based on the amended grounds of appeal. He submitted that he had informed the court he had a son to look after and that his son was now living in bad situation following his incarceration. He said he was a 1st Offender and the trial court did not consider his mitigation.
7. The appellant also urged the court under Section 333(2) of the Criminal Procedure Code to take into account one year and 7 months he was in remand custody during trial as part of his sentence.

8. The Respondent in their submissions stated that the 10 years imprisonment was within the law and it was the minimum sentence under the law and the court should not interfere with it as it should be noted that the Complaint was mentally challenged.

9. This court has considered the section of the law under which the appellant urged this court to consider his sentence that is Section 333(1) of the Criminal Procedure Code which provides; that where the person sentenced under subsection (1) has prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

10. The Respondent did not deny that the appellant was in custody for a period of one year and 7 months during his trial and he is therefore entitled to the benefit of the proviso to section 333(1) of the Criminal Procedure Code.

11. The appellants appeal on sentence is allowed. The sentence of 10 years shall therefore run from 4th April 2016. Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 14TH DAY OF OCTOBER, 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel – Court assistant

Mr. Mulamula for Respondent

Appellant – Present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE