



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 180 OF 2019
CORAM: D.S. MAJANJA J.

BETWEEN
ZACHARY KIRAMUNYA ITIGO....APPELLANT
AND
REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon.G. Sogomo, PM dated 2nd July 2019 the Magistrate's Court at Tigania in Sexual Offence Case No. 7 of 2019)

JUDGMENT

1. The appellant, **ZACHARY KIRAMUNYA ITIGO**, was charged, convicted and sentenced to 10 years' imprisonment for the offence of committing an indecent act with a child contrary to **section 11(1)** of the *Sexual Offences Act* ("the Act"). The particulars of the charge were that on 5TH February 2019 at around 8.00pm at Kiiri Village, Akaiga Location in Tigania Central Sub-county within Meru County, he intentionally and unlawfully touched the breasts, vagina and buttocks of TG, child aged 8 years old, with his hands.
2. The appellant appeals against conviction and sentence on grounds set out in his petition of his appeal filed on 23rd August 2019. The thrust of that appeal is that the prosecution and the trial magistrate erred in law and in fact in finding that there was sufficient evidence to support the charge when the case was not proved beyond reasonable doubt. In particular, he stated that he was not identified as the assailant. He also complained that the sentence was harsh and excessive in the circumstances.
3. The respondent opposed the appellant and filed written submissions. It urged that the the prosecution proved every element of the offence and that the sentence was within the law and appropriate for the case.
4. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see *Okeno v Republic* [1972] EA 32).
5. The complainant, TG (PW 1), gave unsworn testimony after a *voire dire*. She stated that she was in Class 2 and was aged 9 years old. She knew the appellant as "Maanza" and recalled that on 5th February 2019 at about 8.00pm she was at her uncle's place when the appellant came and asked her to accompany him to his house promising to give her food. She stated that, "When I entered Maanza's house he told me to remove my clothes and I refused. He then touched my urinating thing with his hand". PW 1 then heard her uncle calling her whereupon the appellant told her to tell him that she had gone to his place for a short call. Instead, PW 1 told her father, PW 2, and uncle what had transpired.
6. PW 2 testified that on the material day he received a call from his nephew, informing him of what had happened to PW 1. He went to where she was, arrested the appellant and took him to the police station where he reported the incident. He told the court that he had known the appellant for many years as his friend.
7. The investigating officer, PW 3, confirmed that the appellant was brought to the police station by administration police officers on 6th February 2019. He took the statements of PW 1 and PW 2 and decided to charge the appellant.
8. In his sworn defence, the appellant denied the charge and stated that the case against him was a fabrication.
9. In order to succeed, the prosecution must prove that the accused person did the indecent act. The definition of an indecent act is found at **section 2(1)** of the Act which states as follows;

"indecent act" means any unlawful intentional act which causes:

- a) any contact between any part of the body of a 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. From the evidence I have outlined, there is no dispute that the appellant and PW 1 were known to each other. PW 2 knew the appellant as

a friend hence the issue of mistaken identity does not arise as the incident took place in the evening and the appellant lured her to his place. This close proximity and interaction leaves no doubt that the appellant was the one who committed the indecent act.

11. Although the appellant raised the defence that the case against him was fabricated, it is not clear on what basis. He did not put any facts to PW 2 to lay a basis of such a defence although he suggested that there may have been a land dispute to PW 1. In any case, PW 2 admitted that the appellant had been his friend. His defence therefore lacks merit.

12. The appellant also complained that the prosecution did not call an essential witness. When cross-examined, PW 2 stated that the appellant and another person were arrested together as PW 1 had told him that the two of them were together. The general principle was expressed by the court in **Keter v Republic [2007] 1 EA 135** is that, “*The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.*” In this case, the evidence was that it is the appellant who committed the indecent act. It was not suggested in cross-examination of PW 1 or in the defence that the offence could have been committed by someone else. I therefore dismiss this ground of appeal.

13. The age of a child is a question of fact. It may be proved by oral or documentary evidence. The prosecution did not produce any documentary evidence but PW 2, as a father, knew when the child was born and testified that the child was aged 9 years. Likewise, the child also testified that she was aged 9 years. I therefore find and hold that PW 1 was aged 9 years and therefore a child.

14. Having evaluated the evidence, I am satisfied that the prosecution proved all the elements of the offence of indecent act with a child. I affirm the conviction.

15. As regards the sentence, the appellant was sentenced to the mandatory minimum sentence under **section 11(1)** of the **Act**. However, the Court of Appeal has since declared the mandatory minimum sentences unconstitutional in several cases among them; **BW v Republic KSM CA Criminal Appeal No. 313 of 2010 [2019 eKLR, Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR** and in **Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014**.

16. In the circumstances, the trial magistrate is required to exercise discretion in sentencing bearing in mind the seriousness of the sexual offence reflected in the prescribed sentence. The appellant was a first offender. In mitigation he asserted his innocence and insisted that he was framed. Taking both aggravating and mitigating circumstances into account, I quash the sentence of 10 years’ imprisonment and impose a sentence of four (4) years imprisonment

17. I affirm the conviction and allow the appeal to the extent that the sentence of 10 years’ imprisonment is quashed and substituted with a sentence of **four (4) years** imprisonment to run from the date of arraignment that is 7th February 2019.

DATED and DELIVERED at NAIROBI this 14th day of MAY 2020.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Nandwa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.