



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT VOI
CRIMINAL APPEAL NO. 15 OF 2019

JULIUS MWAREMO MALALO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment of Hon. Karimi Njeru, Resident Magistrate, delivered on 26th September 2019 in Voi Principal Magistrate's Court Sexual Offence No. 3 of 2019).

J U D G M E N T

1. The Appellant Julius Mwaremo Malalo was an accused in Voi Magistrates Court Sexual Offence Case No. 3 of 2019 where he was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006.
2. The particulars were that Julius Mwaremo Malalo on the 4th day of February 2019 at around 6.00pm in Voi Sub-County within Taita Taveta County caused his male organ namely penis to penetrate the female genital organ namely vagina of VM a child aged 11 ½ years.
3. The Appellant was also charged with alternative count of committing an indecent act with a child contrary to Section 11(i) of the Sexual Offences Act No. 3 of 2006.
4. The trial Magistrate upon analyzing the evidence by prosecution witnesses as against the appellants defence found the prosecution had proved their case against the appellant beyond all reasonable doubt and convicted the appellant for the offence of defilement. Subsequently the appellant was sentenced to serve 30 years imprisonment.
5. The appellant being aggrieved by the conviction and sentence preferred like appeal herein on the following grounds:-
 - i. That the learned Magistrate erred in law and fact is failing to appreciate that the essential ingredients/elements of the offence as charged were not proved.
 - ii. That the learned trial Magistrate erred in law and fact by convicting the appellant on evidence of PW 3 contrary to the provisions of section 124 of the Evidence Act.
 - iii. That the learned trial Magistrate erred in law and fact's in disregarding the defence by the Appellant.
 - iv. That the sentence was excessive given that it did not take into account the number of days the accused had been in custody.
6. The appellant prayed that the appeal be allowed conviction quashed and sentence set aside.
7. The prosecution's case was that on 4th February 2019 at around 7.00pm PW 1 the mother to the complainant returned home and her son HK aged 14 years told her that the complainant came to the house at about 7.00pm. That when she served the children with food and the complainant refused to eat she got suspicious and when she discovered that the child was lying that she had eaten while with her friends she took a cain and caned her. That finally she revealed that she came home late because a man by the name Julius called her to his house and gave her potatoes to eat and that the said Julius escorted her to his room undressed her and defiled her.
8. PW 1 reported to the village elder and together they went and reported to police at Voi Police Station and to the Children's Officer Voi. At the police station they were referred to Moi Hospital where the child was examined, treated and P3 form filled. PW 1 said that the complainant had washed her panty and that the bike she wore was producing foul smell as well as her private part was producing foul smell.

9. On 5/2/2019, PW 1 led police to appellant's house as she knew him as he had been their landlord before they moved to their own house. PW 1 produced the complainant's certificates of birth – EXP5. In cross examination, PW 1 said that the complainant told her that the appellant had threatened to her with a knife, if she told anyone what happened.

10. She said the complainant was diagnosed with gonorrhoea in August 2017 and it was alleged that it was the complainant's father who defiled her. She said the complainant said she had sex with Julius several times. She said Julius had the habit of calling children to his house. She said at one point Julius asked her to sleep with him and she refused. She said Julius lured V with food and that week V had been coming home late than usual.

11. PW 2 Raphael Kitawi testified that he was a village elder Embakasi village in [particulars withheld]. He said that he was called to get the children officers office in Voi when he found the complainant and her mother as well as the childrens officer. He learnt that the Complainant had been defiled. That the Children's Officer asked him to escort the complainant and her mother to the Voi Police Station where they were referred to the Hospital. He said he learnt it was Julius the appellant who defiled the Complainant. He said that Julius was known to him as he hails from same village.

12. PW 2 said he was present on 5/2/2019 when the appellant was arrested at night. On cross examination he said the Complainant told them that she passed by the appellants house and that the appellant defiled her. He said that the appellant's house could be seen from the road but from the other houses nearby. PW 2 said that he heard the complainant had been defiled earlier by the father.

13. The complainant testified when she was 12 years old on 9th April 2019 after *voire dire examination* had been conducted. She said that on 4/2/2019 while she was on the way home from school at 5.00pm the appellant who was known to her called her to his home and he asked her to enter the house and went to his bedroom. That inside the bedroom he asked her to remove her clothes and get on top of the bed and he started doing bad manners on her.

14. The complainant described what happened in the appellant's bedroom in detail. That the appellant bought potatoes for the complainant. She said when entering appellant's house there was one person known as Dan in the compound but she didn't see anyone when she was leaving. That when she went home she took a bath.

15. That when she arrived home her brother HK and her sister D were at home and the brother asked where she had been and she said she had been sweeping. That when the mother came back, the brother reported that complainant returned home late. That when the mother took a stick to beat her she said she was with F and M who had money. That the mother still beat her and she revealed that the appellant called her to his house and defiled her.

16. That the following day she went to school and the Deputy Headteacher called her and they went to the Headteachers office where she was interrogated and she narrated what happened. She said when she left school she was with her friends F and M but then they went separate routes as she used the upper road recommended by the mother. She was taken to children's office and was referred to the police and to hospital where she was examined and given an injection and medicine to swallow

17. That the next day at night police came and she was told Julius had been arrested. In cross examination PW 3 said that she used a route alone. She said appellant's house is about one hours walk from school. She said she found the appellant outside his house which is about 20 metres from the road. That the appellant called her and she went to his house. She said that one Mama Mwachia a shopkeeper must have seen her enter the appellant's house. She said Maina Mwachias shop is among the appellant's houses.

18. She said she was not coached to testify. She said that the appellant threatened to cut her with a panga if she testified against him. She said no one else has ever defiled her from the appellant. She admitted that her father had also done to her the same thing Julius did to her and that when she was taken to hospital she was found to be sick.

19. She said when they were living in the appellants compound she used to enter his house. She said on the day appellant defiled her she was wearing a petticoat and not biker. She said she didn't scream when appellant defiled her as he warned her that he would beat her up. She said she didn't know why her father was not charged when he defiled her the same way that appellant defiled her. She said she had been defiled twice in her life.

20. PW 4 Nyawa Chibunda Joto Clinical Officer at Moi County Referral Hospital Voi produced PRC form in respect to complainant filled on 5/2/2019. He testified that the complainant informed him she knew the perpetrator with whom she had had sexual intercourse severally. He said there was inflammation of the labia minora which was tender and painful on examination. He said the hymen was missing. He said tenderness of the labia minora showed evidence of penetration. The complainant was put on prophylaxis treatment for sexually transmitted diseases. The P3 form filled and produced. He said the hymen seemed to have been broken earlier than the incident in question.

21. PW 5 P.C. Mercy Njoroge investigated the offence and preferred charges against the appellant. When placed on defence the appellant gave unsworn statement and said the charges against him are false as the complainant did not go to his house on the material day. He said the complainant and her parents used to be her tenants in 2015. He said they had no quarrels and by April 2017 allegations emerged that the complainant had been defiled by the father. He said report was made to him as one of the Nyumba Kumi elders and together with the village elder and overall village elder Mr. Mshilla they deliberated on the allegations as the complainants, mother wanted to be paid Kshs.30,000/= as compensation and the man refused. That when the father of the complainant was arrested and both taken to hospital it was found the girl had venereal infection which the father didn't have and he was released.

23. That when the complainant was interrogated she insisted her father defiled her. That the complainant's father left her and the mother in appellants rental houses. That the complainant's parents separated and that the complainant's father could give upkeep money to complainant's mother through the appellant. That with time complainants mother alleged that appellant was stroking prostitutes for her husband. He said that complainant's mother framed him and that he didn't commit offence. He said he had no grudge with the

complainant. He said the family of the complainant left his house in 2017 and he had not interacted with her.

24. This appeal was canvassed by way of written submissions. The appellant in submissions argued that according to certificate of birth the age of the complainant at the time of the allegedly offence was 12 years and not eleven and half years (11 ½) as alleged in the charge sheet.

25. In regard to penetration it was submitted that there was doubt if there was penetration which doubt should be resolved in favour of the appellant. The appellant relied in the holding in **Langat Dinyo Domokonya vs Republic [2017] KLR** and **Queen vs Manuel Vincent Quintella 1999 ABQB769** and **PKW vs Republic HCCR. Appeal No. 331 of 2008** to support his position.

26. The appellants counsel submitted that the complainant gave unsworn statement whereas from the record of the trial court upon *voire dire examination* being conducted the complainant gave sworn evidence and was cross examined by the appellant's advocate.

27. The appellant counsel submitted that the evidence of PW 3 was uncorroborated and therefore the trial court ought to have warned itself of the danger of convicting without corroboration unless it was convinced that the victim was telling the truth. The appellants counsel submitted that the complainant was not a truthful witness as she lied to her mother as to why she came home late. That she claimed she had worn a petticoat on the day of alleged defilement whereas her mother PW 1 said she had worn a biker.

28. That in 2019 PW 3 accused her father of defiling her but police investigations revealed that she was not telling the truth as investigations showed she was infected with gonorrhoea while her father was not suffering from the disease. That she lied she was with her friend M but when investigating officer – PW 5 interrogated M it was established she was lying.

29. That she told the doctor she had no other medical history but the truth was that she had previously suffered from gonorrhoea. The appellants counsel submitted that the reason given by the trial Magistrate why she believed the complainant was because she was confident and understood what she was saying but that was dangerous as untruthful witnesses can also exude confidence.

30. On whether defence by appellant was disregarded. It was submitted that the defence by appellant was consistent and soled but the on uses on the prosecution to prove its case and relied on the holding in **Benard Mumita Gakunga vs Republic [2014] eKLR**.

31. On whether the sentence was excessive given that it did not take into account the number of days the accused had been in custody, it was submitted that appellant remained in custody from 5th February 2019 to 30th September 2019 when judgment was delivered and he was sentenced. It was further submitted the trial Magistrate noted that the victim was naughty in engaging in sexual activities in exchange of goodies but passed an excessive sentence on the appellant. The appellant relied on the case of **Martin Charo vs Republic [2016] eKLR**.

32. The Respondents in submission argued that the prosecution proved all the ingredients of the offence of defilement handling age, penetrating and identify of the perpetrator and therefore the charge was proved beyond all reasonable doubt.

33. Concerning Section 124 of the Evidence Act, it was submitted that the trial court warned itself of the dangers of convicting on the evident of the minor only and gave reasons why she believed her evidence. It was argued that PW 3 – complainant's evidence was corroborated by Medical evidence presented by PW 4.

34. Concerning the appellants defence the Respondent submitted that the defence was merely a denial and did not rebut the watertight evidence by the prosecution witnesses. It was submitted that prosecution evidence on identification was corroborated by the appellant's evidence. It was submitted that the trial Magistrate analyzed the appellants defence.

35. On sentence the Respondent submitted that it was not merited as the trial court considered the mandatory statutory penal provision once an accused person is convicted. It was submitted that the sentence was lenient. The court was urged to uphold the conviction and sentence.

36. This being a 1st appeal this court has the duty to reconsider, re-evaluate and relook the evidence on record as well as the judgment of the trial court and make its own conclusion as to whether the appellant was properly convicted based on the evidence on record this was held in **Kiilu & Another vs Republic [2008] 1 KLR 174**.

37. I have considered the record of appeal and the grounds of appeal as well as the submissions by the respective parties on record and find that evidence in EXP 5 shows the complainant was born on 17th July 2001 and therefore by the time of the offence herein i.e. on 4/2/2019 she was 12 years old.

38. The age of the Complainant herein ought to have dictated the kind of sentence meted out against the appellant as it is provided for under Section 8(1) as read with Section 8(3) of the Act and that upon conviction one would be liable to imprisonment for not less than 20 years.

39. On whether there was penetration of the Complainants genital organs by the male genital organs of the perpetrator, the clinical officer PW 4 examined the complainant and found inner layer of labia minora was inflamed and tender on examinations. He found that the Complainant hymen was broken but it was not because of the current defilement.

40. This corroborated the evidence by PW 3 that she had been defiled and therefore the ingredient of penetration was proved. The fact that the Complainant was allegedly defiled by the father in 2017 and that she suffered a venereal disease cannot be used to vitiate the fact that on 4th February 2019 she was defiled again and it doesn't give an excuse for abuse of the minor sexually.

41. Whether it was the appellant who defiled the Complainant, the Complainants testimony was very clear. She said that she knew the appellant who was their former landlord. She said the Appellant saw her passing by his house on her way from school and called her into his

house where he defiled her. That when she arrived home her brother asked where she had been as she arrived late and she lied about where she had been. Her brother reported to the mother – PW 1 when she returned and again she lied about where she had been but when the mother became harsh with her she revealed it was the Appellant who called her into his house and defiled her thus occasioning her lateness in coming back home from school.

42. She described in details what happened in the appellants house and said in cross examination she had not been coached to fabricate the Appellant. The Complainant said she didn't scream because the Appellant warned her that if she made noise he would beat her. She said after defiling her the appellant bought for her potatoes. This was to lure and silence her. She also said that the Appellant had threatened to cut her with a panga if she testified against him. The reason for the Complainant lying to her brother and mother is explained in these threats by the Appellant. In any case it didn't come out in the evidence of prosecution witnesses and in their cross examination as well why the Complainant would have fabricated the appellant who stood in loco parentis to his father.

44. The defence by the appellant that PW 1 fabricated him because she claimed he was stroking prostitution for her husband did not arise in cross examination of PW 1 and as the trial Magistrate noted in the Judgement there was no grudge between the appellant and the Compliant family that would have led PW 1 & pw 3 to fabricate the appellant.

45. This court finds that the complainant properly identified the perpetrator as the appellant. She had known her as their former landlord and the offence happened in the evening when there was still sufficient light to enable her see the perpetrator. The appeal herein lacks merit and fails as far as conviction is concerned.

46. On sentencing, the appellant was liable to imprisonment for 20 years but the trial court sentenced him to 30 years imprisonment based on Section 8(2) of the Act. I do find that was too harsh and erroneous. The sentence meted out against appellant is therefore set aside and substituted with imprisonment for 15 years to run from 7th February 2019.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF MARCH, 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE