



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 20 OF 2020**

**SAMUEL MALONZA MULI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being An appeal from the decision of Honourable D.W. Mbuteti, Resident Magistrate, in Chief Magistrate's Court Criminal Case No. 44 of 2019)**

**JUDGEMENT**

1. This is an appeal arising from the decision of D. W. Mbuteti, Resident Magistrate Garissa in Criminal Case No. 44 of 2019, where the appellant 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 of the offence are that on the 21<sup>st</sup> day of September 2019 at around 9 am at Bulla Adan area in Garissa Township within Garissa County, the Appellant caused his genitals to penetrate the genital organ of ME a child aged 4 years.

3. The Appellant pleaded not guilty and the matter proceeded to trial. Upon hearing the case the trial court found the Appellant guilty, convicted him and sentenced him to 30 years imprisonment.

4. Dissatisfied with the conviction and sentence the appellant preferred this appeal on grounds summarized as follows:

- **There was no credible evidence as PW2 was the victim's mother.**
- **The appellant's rights under Article 27(a) and (b) of the Constitution, Sections 109 and 110 of the Evidence Act were violated.**
- **The court failed to take into account that the appellant was framed.**
- **The appellant was not tested.**

5. This is the first appellate court and it has a duty to consider the evidence afresh, examine and analyze the same in order to arrive at its own independent decision bearing in mind that the trial court heard the evidence first hand, and saw the witnesses. See the case of **Okeno vs R [1972] EA at 32.**

6. The prosecution case was that the victim, a child of 4 years together with her siblings were left by PW2, their mother asleep at 5 am when she left for work on the 1<sup>st</sup> day of September 2019. Also left in the house was their mother's boyfriend the appellant herein.

Returning home at 11 am PW2 did not find the children. Shortly thereafter the victim returned home, informed PW2 that she wanted to urinate but was unable to as she had pain in her genitalia. PW2 checked the victim and confirmed that she had been defiled. PW2 questioned the child who in turn pointed at the appellant as the person who had defiled her. In the words of the victim, **"ni huyu baba."**

PW2 decided to ask the appellant who cried on being questioned.

PW2 then decided to take the child to a local hospital and where she was referred to the Provincial General Hospital. All this while the appellant was in toe. It is at the General Hospital that the clinical officer (doctor) attending to the victim called the police who in turn arrested the appellant.

7. **PW4 Geoffrey K. B. Okanda** a clinical officer at Provincial General Hospital produced the P3 form relating to the victim on behalf of his colleague of 5 years McDonald Kathambi whose handwriting he was familiar with and who had attended to the victim.

According to the P3 form the victim had a ruptured hymen with a fresh scar, vaginal bleeding, severe bruises and tears on the vaginal opening, and there was hyperemia on the labia minora.

According to the said witness the above injuries indicated the victim had been defiled.

8. **PW5 P.C. Michael Ndambiri** in his evidence stated that he escorted the victim to hospital, further he recorded the statement of the victim who pointed at the accused as the person who did something to her.

Though not a confession as such he stated that the accused admitted to him that he had committed the offence.

9. At the close of the prosecution case, the trial court found the Appellant had a case to answer. The Appellant was placed on his defence, he gave a sworn statement where he denied committing the offence. He attempted an alibi stating that he was away the morning of the incident due to differences he had with PW2 but returned home at 11 am having received a reconciliatory phone call from her. After sometime PW2 informed him that she needed to take the victim to hospital and he accompanied her, later to be arrested and faced with the charge.

10. There is no doubt from the evidence on record that the victim was defiled. However, like in most sexual offence incidents there was no eye witness to this incident. PW1 a child of 4 years pointed at the appellant as the one who defiled her.

11. Section 124 of the Evidence Act provides:

**“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declaration Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that Section on behalf of the prosecution in proceedings against any person for the offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.**

**Provided that where in a criminal offence involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall record the evidence of the alleged victim and proceed to convict the accused person if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”**

12. It is the view of this court that the victim though so young is believable. She severally and to different persons at different times pointed at the same person as the defiler. Indeed, though too young her evidence of the incident was consistent. Further her evidence of defilement was corroborated by the clinical examination.

13. Further the court believes PW2 when she states that the accused was quite when the victim accused him in his presence. And that when PW2 questioned him, he cried. Could this could have been a sign of regret?

14. The court also believes the testimony of PW5 who informed the court that the appellant confirmed to him that he committed the act.

15. In contrast the court does not believe the evidence of the appellant that PW2 framed him due to a domestic grudge. Even if this was to be considered as true, why would PW5 and the clinical officer cook up a story against the Appellant? No justification was placed before court.

16. All in all, the court finds that the prosecution proved its case beyond all reasonable doubt and though the trial court did not give reasons why it believed the evidence of the victim, this court has done so and finds the appellant guilty of the offence of defilement.

17. There was no violation of Sections 109 & 110 of the Evidence Act as alleged by the Appellant.

The trial was conducted fairly and within the confines of the law.

The Appellant did not elaborate on his allegation that there was violation of Article 27 of the constitution, neither did this court see any semblance of unfair treatment or discrimination against him.

18. Sentencing is a discretion of the trial court and ought not to be interfered with unless it is too excessive. The Sexual Offences Act No. 3 of 2006 in Section (2) provides for a maximum sentence of life imprisonment for the offence of defilement. Using his discretionary powers, the trial magistrate meted out 30 years imprisonment.

19. The act of defiling a child of tender years who looked up to the appellant as a father was inhuman and barbaric. The appellant and those of his type deserve to be punished severely and locked away from society at large.

This court therefore affirms the conviction and the sentence of 30 years imprisonment.

The appeal stands dismissed.

**DATED, DELIVERED AND SIGNED AT GARISSA THIS 1<sup>ST</sup> DAY OF JULY, 2021.**

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**ALI-ARONI**

**JUDGE**