REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 209 of 2009

DANIEL KIMARU KURIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 217 of 2008 of the Senior Resident Magistrate's Court at Githunguri by A. Lorot– Senior Resident Magistrate)

JUDGMENT

The appellant, **DANIEL KIMARU KURIA**, was convicted for the offence of Defilement of a child aged 10 years **contrary to Section 8 (1) (2) of the Sexual Offences Act**. He was then sentenced to life imprisonment.

The offence was said to have been committed on 30th March 2008, at Kiambu District.

In his appeal to the High Court, the appellant raised six (6) issues, which can be summarised as follows;

(1) The offence of defilement was not proved beyond any reasonable doubt.

(2) The complainant's evidence was not corroborated, and she did not appreciate the consequences of misleading the court.

(3) The evidence of the complainant was inconsistent. It was not believable.

(4) The succeeding magistrate failed to sufficiently explain to the accused that he had a right to demand the recall of witnesses who had already testified before his predecessor.

(5) Because the succeeding magistrate had difficulty in relying on evidence recorded by his predecessor he should have given to the accused, the benefit of doubt.

(6) The life imprisonment was unwarranted when the age of the victim was not proved beyond any reasonable doubt.

When canvassing the appeal, Mr. Akech, the learned advocate for the appellant, submitted that the evidence tendered at the trial did not support the finding that the complainant was believable.

The appellant pointed out that whereas in her statement to the police, **PW 1** said that she was defiled on the appellant's bed, the complainant later testified that she was defiled on a seat.

The appellant also pointed out that the sequence of events, as illustrated by **PW 1**, was different from what her mother said.

In the appellant's understanding, **PW 1** said that she was defiled on 30th March 2008. She then went home and slept. On the next day, she went to school. After school, she informed her mother what had happened, and her mother took her to hospital on the same date (31st March 2008).

That sequence of events is said to have been spelt out in **PW 1**'s statement.

But when **PW 1** testified in court, the appellant understood her to be saying that she first informed her mother about the incident on 1st April 2008.

Another alleged inconsistency is that **PW 1** told the court that the accused tied her hands before putting clothes into her mouth. However, in her statement, **PW 1** is said to have said nothing about having her hands tied.

The appellant also pointed out that **PW 1** said that she was alone with the accused when she was defiled, yet in the Medical Report, it was indicated that the complainant was with another girl at the material time.

Considering that **PW 1** testified about 4 weeks after the incident, the appellant submitted that there should not have been so many inconsistencies between her oral testimony and her statement.

Furthermore, the evidence of **PW 1**'s mother is also said to be inconsistent with that of **PW 1**. She is alleged to have testified that **PW 1** informed her about the incident on 3rd April 2008. She then took **PW 1** to hospital on 4th April 2008.

As regards **section 200 of the Criminal Procedure Code**, the appellant faulted the succeeding magistrate for choosing to explain the provisions in English. That criticism stems from the fact that the appellant had made it clear that the language he understood was Kiswahili.

Secondly, the nature of the explanation given by the succeeding magistrate was not reflected on the record. In the circumstances, the appellant submitted that the succeeding magistrate did not comply with **section 200 of the Criminal Procedure Code.**

As regards **section 19 (1) of the Oaths and Statutory Declarations Act,** the appellant submitted that a conviction can only be founded on the un-corroborated evidence of the victim of a sexual offence if the court receives and believes only the evidence of the victim. The appellant said that once the court receives evidence of other witnesses, then the exception under **section 124 of the Evidence Act** ceases to apply.

In his view, once other witnesses testified after the victim of a sexual offence, then a conviction could only result if there was corroboration.

In this case, the succeeding magistrate is said to have expressed difficulty in relying on evidence recorded by his predecessor, as he did not observe the two principal witnesses when they testified. Therefore, the appellant believes that the trial court was wrong to have relied on the evidence of **PW 1** alone, to the exclusion of the evidence of the other witnesses.

On the question of the sentence, the appellant submitted that the prosecution should have proved the complainant's age beyond any reasonable doubt.

In his view, it was not enough to have the mother of the complainant state the age of her daughter. He submitted that there ought to have been medical assessment of the age, or a birth certificate.

I have re-evaluated all the evidence on record, and drawn therefrom my own conclusions.

The starting point for the process of re-evaluation is the charge sheet. It asserts that the offence was committed on 30th March 2008.

The complainant (**PW 1**) said that that is when she was defiled.

The offence was committed on a sofa seat. **PW 1** denied the suggestion put forward by the accused, that she was allegedly defiled on a bed. That suggestion was put forth during cross-examination of **PW 1**.

However, it is not clear, from the record, if in **PW 1**'s statement she had recorded that the defilement was on the bed of the accused.

It is important to bear in mind that statements which potential witnesses record with the police are not necessarily a part of the record of the proceedings before a trial court.

Some people record statements with the police, but they do not testify at the trial. In those circumstances, the statements are not deemed to be evidence.

And even when a person who has recorded a statement later testifies at the trial, his statement does not automatically become a part of his evidence.

Actually, the statement is a tool that can be used by the respondent and the court to test the credibility of the witness who recorded it.

In this instance, the appellant has made reference to contents of the statements which **PW 1** recorded with the police. Those statements ware not a part of the record before this court. Therefore, I am not able to verify the accuracy or otherwise of the submissions founded on the said statements.

In order to make contents of statements part of the record of a trial, the accused has to either seek the admission of the statements as exhibits or he can get a witness to confirm that some specific portions of the statements were within the body of the statement he recorded.

When the witness statement or contents thereof are not a part of the record of the proceedings it becomes an exercise in futility when, on an appeal, reference is made to the statement. That is the situation at hand.

On the other hand, the P3 Form for the complainant was produced at the trial. Dr. Caroline Njeri Ngunu testified that the complainant went to the Githunguri Health Centre on 4th April 2008.

His testimony was consistent with that of **PW 1**, regarding the fact that **PW 1** was alone with the appellant at the time when the incident took place. Both **PW 1** and **PW 3** (the doctor) said that the other children who had been watching television at the house of the appellant's father had left.

But that aspect of the evidence is at variance with what **PW 3** recorded as the history which she was given by the complainant. In the said history **PW 1** told the doctor as follows;

"Patient was at the house of the accused with other children watching TV. The other children left the room, as she was leaving, the accused called her and another girl, applied vicks to their eyes, and sprayed them with a substance in a white container that made them sleep and tied their hands, and stuffed her mouth. She woke up to find accused removing her panties and he inserted his (sic!) penis in her vagina severally, after threatening to cut her with a knife if she screamed."

In other words, when **PW 1** first talked to the doctor, she told him that there were 2 girls with the

appellant.

But the learned trial magistrate appears to have missed that aspect of the evidence, and concluded that **PW 1** was all alone with the appellant.

The question that was not addressed is why **PW 1** had earlier told the doctor that she was with another girl, and the appellant.

The next question that arises relates to the date when the incident took place and the date when the doctor examined her.

The doctor testified that she examined **PW 1** on 4th April 2008. That date was stated in the doctor's oral testimony, as well as in the P3 Form.

Part 1 of the form indicates that the incident was reported to the police on 4th April 2008. It also indicates that the police sent the complainant to hospital on 7th April 2008.

If the complainant was only sent to the hospital on 7th April 2008, it is not clear how come the doctor examined her on 4th April 2008.

The issue of dates gets even more complicated when it is noted that **PW 1** appeared to suggest that she was taken to hospital on 1st April 2008. The date of 1st April 2008 is derived by computing the dates from the evidence tendered by **PW 1**. She had said that the offence was committed on 30th March 2008. On that night she went home and slept. She did not tell her mother anything because of the threat made by the assailant.

On the next day **PW 1** went to school. By the time she returned home from school, her neck was paining. On the following day, she had a stomach-ache. She informed her mother what had happened, and her mother took her to hospital.

On the other hand, **PW 2** (who is the complainant's mother) said that **PW 1** informed her about the incident on 3rd April 2008, **PW 1** did so after she had been sent home from school. **PW 1** had complained of sickness when she was in school.

But these issues about dates need to be put in proper perspective. I say so because **PW 1** only made reference to one date, 30th March 2008. That is the date when she was defiled.

As regards the 1st of April 2008, when she was allegedly taken to hospital, that is a date that I have deduced or computed from the evidence of **PW 1**. On her part, **PW 1** actually said;

"I don't recall the dates when I was taken to the hospital."

When the medical doctor examined the complainant, she found clear evidence of defilement. The vulva had lacerations. The cervical OS was torn and the hymen was broken. The high vaginal swab revealed red blood cells, which was evidence of haemorhage. There were also pus cells.

Therefore, there was conclusive proof of defilement.

The doctor stated that the estimated age of the complainant was 10 years. Although the doctor was not questioned about the method she used to estimate the age of the complainant, the said piece of evidence tallied with what the complainant had said.

Of course, medical evidence of a person's age is perhaps better than the oral testimony of a witness. But then again, there is unlikely to be a better witness to a person's age than his biological mother.

Even birth certificates may be no better than the source of the information which was inserted in the said

certificates, unless the said source was the hospital at which the person was born.

In Kenya today, there are still very many children who are not born in hospital. Therefore, the notifications of their births is only as reliable as the person who later applies for the Birth Certificate. And in many instances, the first time when Birth Certificates are being sought for children born away from hospitals, is when the parents need to have the children enrolled for national examination.

The point I am striving to make is that each case must be treated on its own facts. There cannot be an insistence that the age of a person be proved either through medical examination or birth certificates.

There are instances in which one or a combination of factors will be deemed to provide reliable evidence of age. Baptismal Cards, school admission forms are examples of documents which may be useful. And in some instances, the testimony of traditional mid-wives or even local leaders such as Assistant Chiefs, can be very informative.

I therefore reject the appellant's contention that the age of the complainant was not proved.

As regards the exception to the requirement for corroboration, I hold the considered view that the appellant's understanding is inaccurate. The proviso in **section 124 of the Evidence Act** stipulates as follows;

"Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if,for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth."

That,in my considered legal opinion, does not mean that a conviction can only result if the child of tender years, who is the victim of the sexual offence, is the only witness.

But before I revert to that issue, I wish to make it clear that if any corroboration was required in this case, there was ample corroboration. The most significant corroborative evidence was produced by the doctor, who said;

"I concluded in the systematic clinical examination that this girl had been defiled."

However, if there had been no corroboration of the complainant's evidence, the trial court could still have been entitled to convict the accused person if the court was satisfied that the victim, who is a child of tender years, was telling the truth.

The law did not bar conviction of an accused person when other prosecution witnesses testified, but failed to provide corroboration to the evidence of the child victim of a sexual offence.

In this case, the complainant testified before one magistrate, and the appellant was convicted by a different magistrate.

Therefore, the succeeding magistrate could not rely on the demeanour of the witnesses, to choose who to believe between the appellant and the complainant. Yet the complainant said that it is the appellant who defiled her, whilst the appellant denied committing the offence.

The learned trial magistrate relied, not on demeanour, but on the critical analysis of the evidence on record. To my mind, the process undertaken by the succeeding magistrate cannot, in principle, be faulted. It cannot be right to argue, as the appellant did, that because a judicial officer did not observe one or another witness testifying, he cannot determine whether or not the evidence of that witness was admissible and valuable.

If that were the position, then there should never be any convictions in cases which are determined by

judicial officers who took over the conduct of trials from their predecessors. The very efficacy of **section 200 of the Criminal Procedure Code** would be put to question.

In many cases, the trial court's determination will not depend on the demeanour of witnesses, but on the content of the evidence. Therefore, just because the succeeding magistrate did not observe the demeanour of the complainant is not reason enough to fault his decision, which is partially informed by the evidence of the said complainant.

However, there is a very odd situation in this case. I say so because the complainant is on record as telling the court that she did not appreciate the consequences of misleading the court.

Therefore, it is difficult to know if in naming the appellant as her assailant, the complainant was telling the truth or not.

Another issue that is of serious concern is that the succeeding magistrate explained to the appellant about his rights under **Section 200 of the Criminal Procedure Code,** in the English Language.

Considering that the appellant had expressly stated, at the commencement of his trial, that the language he understood was Kiswahili, it is possible that the explanation tendered did not “reach” the appellant. He may therefore have been prejudiced.

For those two reasons, I find that it would be unsafe to sustain conviction. I do therefore allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi, this 25th day of February, 2013.

.....
FRED A. OCHIENG
JUDGE