



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 73 OF 2013

B K N APPELLANT

VERSUS

REPUBLICRESPONDENT

**(APPEAL ARISING FROM THE JUDGMENT OF THE PRINCIPAL MAGISTRATE’S COURT
AT GICHUGU (M. ONKOBA – AG. S.R.M) IN CRIMINAL CASE NO. 434 OF 2012
DELIVERED**

ON 7TH FEBRUARY, 2013)

JUDGMENT

The appellant herein B K N was convicted by the Acting Senior Resident Magistrate Gichugu Court (M. ONKOBA) for the offence of Sexual assault contrary to **Section 5 (1) (a) (i) and (2) of the Sexual Offences Act** and sentenced to ten (10) years imprisonment on 7th February 2013. The case against him was that on 7th May 2012 in Kirinyaga East District within Kirinyaga County he unlawfully used his right hand index finger to penetrate the vagina of LRWK a child aged 6 years.

He has now filed this appeal in which he states, inter alia, that the trial magistrate relied on the evidence of a single witness. The complainant was aged six (6) years at the time of the incident and was therefore a child of tender years. The trial magistrate did perform a voire dire examination and allowed her to give sworn evidence having found that she understood the nature of an oath. She then narrated how on the material day while watching Television (TV) with the appellant, he has asked her to go join him where he was seated but when she refused, he went to where she was, lifted her up and placed her on the sofa set whereupon he removed her pants and started inserting his finger into her private part. Then he left her and she went home where her mother (LK) (PW1) noticed that she was feeling pain during bathing and it was not until the following morning that she noticed blood in her private part and upon further enquiries, she told her that appellant had inserted his fingers in her private parts as they watched T.V the previous night at her grandmother’s house. When the complainant was examined by Dr. KAROMA GITHANGU (PW5) on 8th May 2012, he noticed that the complainant’s genitalia was swollen with lacerations. The complainant was therefore the only witness to this incident and although it happened in her grandmother’s house, it is instructive to note that she was not called as a witness. Indeed during cross-examination by the appellant’s counsel, Ms Thungu, the complainant’s mother confirmed that her grandmother was in the house at the time. It is not known why she was not called as a witness by the prosecution yet she was an important witness. In such circumstances, the Court can only presume that if she had been called as a witness, her evidence would have been unfavourable to the prosecution case – see **KINGI VS REPUBLIC 1972 E.A 280**, and **BUKENYA & OTHERS VS UGANDA 1972 E.A 594** as affirmed in **NGUKU VS REPUBLIC 1985 K.L.R 412**. It is also

instructive to note that the complainant did not tell her grandmother, who was in the house, that the appellant had inserted her fingers in her private parts. Indeed it took some cajoling before she told her mother the following morning about the incident. All the above taken together ought to have created some doubt in the mind of the trial magistrate about the credibility of the complainant bearing in mind that she was the only eye witness to the event.

The trial Court did carry out a *voire dire* examination on 25th June 2012 before receiving the sworn statement of the complainant who, as I have already stated above, was aged six (6) years at the time. The said *voire dire* examination does not set out the questions that were put to the complainant. All we have on the record is her answers. That examination did not meet the standards set out in the case of ***KINYUA VS REPUBLIC 2002 1 K.L.R. 256*** as to how a *voire dire* examination ought to be carried out. Indeed in the ***KINYUA*** case (*supra*), the Court of Appeal held that in appropriate cases, a failure to strictly follow the rules as to how a *voire dire* examination ought to be carried out would ***“vitiare a conviction and result in allowing the appeal”***.

The trial magistrate, being alive to the fact that the complainant was the only witness to the sexual assault did correctly state the law under ***Section 124 of the Evidence Act*** and indeed reproduced the provisos to that Section as follows:-

“Provided that where in a Criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the Court shall receive 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” emphasis mine.

The above provision which was introduced through Legal ***Notice No. 5 of 2003*** basically means that even in sexual cases involving children, the Court can convict on the un-corroborated evidence of a minor if satisfied, ***“for reasons to be recorded in the proceedings”*** that the said minor is ***“telling the truth”***. The trial magistrate’s observation about the complainant was that she was ***“elaborate and comprehensive”*** and gave a ***“consistent, chronological and detailed account of the events leading to the indecent act done on her”***. No where in the proceedings did the trial magistrate record that he was ***“satisfied”*** that the complainant was ***“telling the truth”***. That was fatal. A witness may give evidence in a ***“consistent”*** or ***“chronological”*** manner, as the magistrate observed, and yet still be untruthful or dishonest in her testimony. It was important in a case such as this one where the only evidence connecting the appellant with the crime is evidence of a child of tender years, that the record of the proceedings clearly shows that the trial Court was satisfied that the said witness was ***“telling the truth”***. That was not done in this case and in my view, was fatal to the prosecution case.

Another issue that has concerned me is that in the course of the proceedings on 10th December 2012, the appellant informed the Court that he had attained eighteen (18) years of age on 29th May 2012 i.e. some two weeks after he had been arraigned in Court on 10th May 2012. That would mean that he was a child when he was alleged to have committed this offence. That issue having been raised in the course of the trial, it was important for the trial Court to investigate it further by either calling for the appellant’s birth certificate or ordering for his examination by a Medical practitioner to ascertain his age because that would have serious implications on the whole trial. However, in his judgment, the trial magistrate dismissed that claim saying the appellant had, among other things, been remanded in prison as an adult and also the charge sheet described him as an adult and in any case, the issue of his age was raised late in the trial. The magistrate then addressed himself as follows on the issue of appellant’s age:

“In the end, properly directing my mind to the evidence on record and the circumstances obtaining in this case, I am of the view that the issue of age of the accused was raised so much late unto these proceedings. Indeed I must say, it was raised as an afterthought”.

While it is true that the issue of appellant’s age was raised late in the trial, it was an extremely important issue as it would have a bearing on the trial and in a case such as this where the appellant even gave his date of birth, it was important that the issue as to his age is addressed and settled particularly bearing in mind that not every Kenyan obtain a birth certificate.

Ultimately therefore, having considered all the evidence in this case as I should, I am not satisfied that this conviction was on sound basis. I accordingly allow the appeal both on conviction and sentence. The appellant shall be released forthwith unless otherwise lawfully held.

B.N. OLAO

JUDGE

11TH DECEMBER, 2013

11/12/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Appellant – present

Mr. Sitati State Counsel – present

Language – English/Kiswahili

COURT: Judgment delivered in open Court this 11th day of December, 2013.

Mr. Sitati State Counsel present

Mr. Muriithi Court clerk present

Appellant present

Right of appeal explained.

B.N. OLAO

JUDGE

11TH DECEMBER, 2013