REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 128 of 2006

MUNYAO MULI……..……..APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(*Being an appeal from the original conviction and sentence in Kangundo Senior Resident Magistrate's Court Cr. Case No. 187/2005 by Hon. D. Mochache, SRM on 4/10/2006*

JUDGMENT

The appellant was charged before the Senior Resident Magistrate's Court at Kangundo with the offence of defilement of a girl contrary to Section 145 of the Penal Code. It was alleged that on the 7th April 2005 at K Village he had carnal knowledge of **S.M,** a girl under the age of sixteen. The appellant denied the charge and was soon thereafter tried.

Evidence was given by PW1, **V.K.M,** the mother of the complainant that on the material day she had sent the complainant to go and grind maize at the appellant's posho mill. She came back and told her that the posho mill was out of order. Later in the afternoon when they heard a posho mill operating, she once again went back to grind the maize. This is when she later came back home crying and told her that the appellant had grabbed and forcefully had sex with her in the posho mill. She was carrying Kshs. 65/= which she alleged that the appellant had thrown at her after the ordeal to go and buy herself slippers because one of her slippers got cut during the struggle. PW1 proceeded to the appellants' home and confronted the appellant. Later she reported to the police after informing her husband and took the complainant to the hospital for treatment.

The complainant who testified as PW3 stated that the appellant dragged her into his posho mill and locked the door. He then pushed her pants to one side and defiled her. During the encounter, he covered her mouth with one hand and warned her not to tell her parents about the incident. However, on reaching home, she immediately reported to her mother what had transpired. The mother in turn informed her father (PW2). When confronted with the allegation, the appellant denied whereupon she was taken for treatment at Kangundo Hospital and then to Nairobi Women's Hospital and the medical examination revealed that she had indeed been defiled. However, the doctor who filled the P3 form never testified in this case despite being bonded many a time. The complaint was reported to **P.C. (w) Nancy Chepkurui** of D.S Police Station who re-arrested the appellant who had accompanied the complainant, and her mother to the police station.

In his defence the appellant refuted the allegations and said that all along he was with **Mr. George (DW2).** Otherwise his defence was that PW1 had colluded with her daughter, the complainant to frame him because of disagreement/grudge that existed between him and PW1's husband. The said **George** also testified and confirmed that the complainant had gone to grind there and that he left the appellant's home at 2.00pm. The appellant's wife also testified but of importance, she told the court that she had given out

3000/= to the girl's father upon his request to settle the matter.

The learned magistrate having evaluated the evidence carefully, found that the prosecution case had been proved beyond reasonable doubt and found the appellant guilty of the offence, convicted him under section 215 of the Criminal Procedure Code and sentenced him to 20 years imprisonment.

Aggrieved by the conviction and sentence aforesaid the appellant through **Messrs Mwania Mbithi & Co.** Advocates lodged the instant appeal on 7 grounds, to wit:-

"1a) The learned trial magistrate erred in law and fact in convicting the appellant on a charge of defilement when it was not sufficiently proved and demonstrated that the complainant was in fact a girl of or below the age of 16 years which is a prerequisite material fact to be proved by medical or documentary proof of actual age so as to found basis for the charge.

b) ***The learned trial magistrate erred in law and fact, when, on proceeding on the basis that complainant is a child of tender years, she failed to conduct any or sufficient preliminary or other examination to confirm that the complainant understands the nature of an oath and the need to speak the truth whilst on oath and proceeding to believe her evidence on no confirmed basis that it was safe and free from any errors or influenced by coaching from her parents.***

2) ***The learned trial magistrate erred in law and fact and misdirected herself in convicting the appellant upon the medically uncorroborated evidence of the complainant when the circumstances were less than satisfactory that she may not have been telling untruths as –***

a) ***Her evidence was not the only evidence available but prosecution had merely failed to adduce medical evidence and the matter did not fall within the provisions of L.N. 5/03 and the need for corroboration was not lessened in the circumstances of this case.***

b) ***There was no sufficient material before the court to demonstrate that the child was infact defiled by the applicant and there was a possibility however small, that she may not have been telling the whole truth.***

c) ***Evidence by the prosecution that the complainant's clothes and the accused were not medically examined and no medical evidence was forthcoming tending to confirm that defilement and the circumstances allegedly defilement pointed to a possibility that it may have been a frame up at the instigation of the complainants parents and PW4 gave no particulars of any alleged investigations.***

3. The learned trial magistrate erred in law in convicting the appellant on the medically uncorroborated evidence of the complainant and in further relying upon the incompetent evidence of PW1 and PW4 on medical matters unsupported by any medical opinion on record.

4a) ***The learned trial magistrate erred in law in convicting the appellant on the basis of evidence that was grossly insufficient and did not establish the prosecution case beyond releasable doubts which infact raised serious doubts on the credibility of the prosecution evidence.***

b) ***The learned trial magistrate erred in law in rejecting the defence case and in failing to note and hold that the defence case did in law and fact raise a reasonable doubt that was sufficient to dispose of the case in favour of the appellant***

5) ***The learned trial magistrate erred and misdirected herself on the law in holding that medical evidence was not required in the circumstances of this and further by relying on extraneous irrelevant matters and disregarding relevant defence evidence and thereby reached a wrong decision prejudicial to the appellant.***

6) ***The conviction and sentence is not based upon sufficient, doubt free evidence free from the possibility of error or mistake or possible, clever coaching of the complainant by her parents.***

7. ***The sentence is manifestly excessive and wrongly influenced by extraneous and irrelevant factors and un-corroborated considerations.***

When the appeal came before me for plenary hearing on 28th June, 29012, **Mr. Mbithi** and **Mr. Mukofu,** learned counsel for the appellant and State respectively agreed to canvass the same by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them alongside cited authorities.

This being a first appeal, this court is mandated to reconsider and to re-evaluate the evidence adduced before the trial court so as to arrive at its own independent decision whether or not to uphold the conviction of the appellant. In reaching such determination this court is required to consider the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any decisions to their demeanour. (**See** *Njoroge vs Republic [1987] KLR 19.*

The appellant was charged with the offence of defilement under Section 145(1) of the Penal Code. That section then provided that;-

"any person who unlawfully and carnally knows any girl under the age of 16 years is guilty of a felony and is liable to imprisonment with hard labour for life."

Thus this offence has 3 ingredients that must all be proved beyond reasonable doubt. Those ingredients are that they must:-

- Unlawfully
- Carnally know a girl
- Under the age of 16 years

I have looked at the charge sheet and the particulars thereof. The particulars of the charge are that, on the 7th day of April, 2005, at K village he had carnal knowledge of **S.M,** a girl under the age of sixteen years.

From the foregoing particulars, it is pretty obvious that the first ingredient is missing; thereby rendering the charge fatally defective. The charge sheet does not say that the appellant "*unlawfully"* had carnal knowledge of the complainant. The charge cannot stand without the ingredient of unlawfulness; otherwise there would be no criminality involved. That is to say that the unlawful nature of the offence is the principle component. The prosecution failed to present a complete charge and to discharge its burden of prove and the appellant therefore was wrongfully convicted on an incompetent charge sheet.

The 2nd ingredient is of course one of carnally knowing the complainant. In this regard medical evidence is absolutely necessary. Defilement is all about penetration. There was no shred of evidence regarding penetration apart from what the complainant said. The complainant talked of having attended medical facilities at both Kangundo and Nairobi Women's Hospital as a result of the encounter. However no witnesses were called from these institutions to confirm penetration or lack of it. Even the doctor who allegedly filled the complainant's P3 form was never called to testify and tender in evidence the P3 form. What was before court therefore were bare allegations in the absence of a single document to proof allegations of treatment at those institutions. In the absence of any evidence of penetration of the female genital organ by the appellant's genital organ, it cannot be said that the offence of defilement had been committed. As it were no one had seen or heard the complainant being defiled. It was her word against the appellant. There was no material before the trial court that lessened the need for material corroboration of the complaint's and other witnesses' evidence. The fact of the appellant having seen the complainant early in the morning was not corroboration of alleged defilement later in the afternoon as the magistrate seems to suggest. Section 124 of the evidence cannot be invoked to cure this fatal omission by the prosecution to adduce medical evidence in support of the charge. That section is not invoked *Willy Nilly.* It is only invoked where no such medical evidence is available. In these circumstances, that evidence was available, only that the prosecution did not endeavour to avail it. The trial magistrate as

correctly observed by counsel for the appellant, desperate to convict, and in the absence of medical evidence or any other independent evidence to corroborate the evidence of the complainant shifted the burden of proof to the appellant accusing him of being the hand behind the unavailability of the doctor who examined the complainant to testify. The appellant had no duty to avail the doctor so as to produce the P3 form; it was the prosecution's duty to do so.

At the time the complainant was testifying she was aged 12 years or thereabouts. She was therefore a child of tender years. Her evidence could only have been taken following *voire dire* examination by the trial court. At the very mention that the complainant was 12 years old, without any further proceedings or step, the trial magistrate became forthwith obligated to undertake and conduct a *voire dire* examination to establish the intelligence of the complainant and whether she understood the nature and meaning of the oath and the duty to tell the truth before her evidence was taken. This procedure must be taken when a child appears in court as a witness, without it and a record thereof duly made, a court can never have a basis to believe the child's evidence.

The trial court therefore acted in blatant breach of Section 19 of the Oaths and statutory Declarations Act, Cap. It should not have even started or taken the complainant's evidence without the mandatory preliminaryexamination of her so that the court could;-

"...Ascertain whether the child understands the nature of an oath. An investigation to this effect must be done by the court immediately the child witness appears in court. The investigation has to be done and has to be directed to the particular question whether the child understands the nature of an oath."

After this first step the court must still undertake step 2 of further examination of the child to determine whether she understands the duty of speaking the truth. This examination must be undertaken by the trial magistrate and must appear on the court record, as basis on which the court treats the evidence.

It is well known that children may be mischievous and or convincing or pathological liars and can collude with parents to concoct a web of a story that may sound true or may be unduly influenced either by promises of advantages or threats of punishment and this examination is intended to guide the court to confirm that the child is being truthful.

The court's opinion thereon must be on record. In the instant case, the trial court did not undertake this process as it clearly appears on the court record. The court straight away put the complainant on oath yet she was a child who claimed to be 12 years without any preliminary *voire dire* examination and without actual proof of her age beyond peradventure or reasonable doubt and without making any note on the complainants apparent age. Despite the foregoing the learned magistrate reached an unsupported conclusion that she was telling the truth when the court did not have before it any evidence or material that the complainant understood the nature of an oath and the duty to speak the truth and consequences of not telling the truth and the reasons for believing her evidence.

Indeed there was no basis upon which her evidence was directly taken an oath and yet at conclusion of the case, the trial magistrate concluded that the child was telling the truth when in fact and in law, the court did not have any evidence or basis for this conclusion yet she could have been coached on what to say or may have colluded with other witnesses or influenced by promises or threats on what to say and say it very convincingly. Notwithstanding any detailed narratives by such a child, it would still be fatal if the court fails to comply with such a procedure.

It is still a mystery to-date on what basis the court reached the conclusion that the complainant was telling the truth. There were no sufficient reasons or justification on record that could have lawfully satisfied the trial magistrate that the child was telling the truth in the absence of this examination which must be on record and court must state at that stage before taking the evidence that it is satisfied the child understands the nature of oath and need to tell the truth.

It would be grossly impossible for this court, as an appellate court, to reach a conclusion that the complainant understood the nature of an oath and duty to talk the truth and that she was telling the truth,

in the absence of necessary legal directions on record by the trial magistrate before she took the evidence of the complainant. This was a fatal mistake by the trial court. What then remains, without any corroborative independent or medical evidence is her word against the appellant on the question of alleged defilement, and there is no basis to believe her.

These grounds are sufficient to dispose of this appeal. Accordingly, the appeal is allowed, conviction quashed and sentence imposed set aside. The appellant should be set at liberty forthwith unless otherwise lawfully held

DATED at **MACHAKOS** this **22ND** day of **NOVEMBER, 2012.**

ASIKE-MAKHANDIA
JUDGE

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **30TH** day of **NOVEMBER, 2012.**

GEORGE DULU
JUDGE