



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO 102 OF 2009

CHARLES MOMANYI ONCHWARI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeal from the original judgment and conviction in the Senior Resident magistrate's court at Nyamira in Criminal case No. 591 of 2006 by L.KOMINGOI (SRM))

The appellant, **Charles Momanyi Onchwari**, was charged before the Senior Resident Magistrate's Court at Nyamira with the offence of defilement of a girl under the age of sixteen years contrary to section 145(1) of the **Penal Code**. The Particulars of the offence alleged were that on 27th May, 2006 in Nyamira District of Nyanza province, he unlawfully had carnal knowledge of **N.M.O**, a girl under the age of sixteen years. He was also charged in the alternative with indecent assault on a female contrary to section 144(1) of the **Penal Code**. It was claimed that on the same day and place, the appellant unlawfully and indecently assaulted **N.M.O** by touching her private parts namely, the vagina. He pleaded not guilty to both counts.

The brief facts of the case as can be gathered from the evidence tendered were that **N.M.O**, the complainant was on her way to visit her grandmother at about 5 p.m. She encountered the appellant who was walking behind her. The appellant caught up with her and suddenly held her by the neck and demanded to have sex with her. Incidentally the complainant was aged ten years then. He threatened to strangle her if she resisted his advances and screamed. He tripped her and she fell down. He then tore her underpants and had carnal knowledge of her for about an hour. When done he ran away. She noted that the appellant was wearing black trousers, Akala Sandals and stripped shirt. He was also tall with small folded eyelids and abit brown. She could not scream during the ordeal as he had held her by the neck. The complainant went and immediately told her aunt who in turn told her husband, **S.M** (PW2). Piecing together the description of the assailant, PW2 was able to determine that the description fitted the appellant. As he went looking for him, he advised his wife to report the incident to the local Assistant chief. PW2 found the appellant and took him to Magombo APS post. The complainant was able to positively identify him as the person who had sexually assaulted her earlier, though he had now changed his shirt. The appellant was together with the complainant escorted to Nyamira police station and they were received by **Sgt Jane Mutoya**, the investigating officer. The complainant and accused were then taken to Nyamira District Hospital for treatment and examination. **Juliet Wanjiru Manyaya** (PW4) examined both of them. With regard to the complainant, she formed an opinion that there was evidence of defilement and penetration. From the examination of the appellant together with his laboratory results she

noted few immobile spermatozoa and few epithelial cells. The appellant was later charged with the offence.

Put on his defence, the appellant opted to give an unsworn statement. He stated that on the material day, he was arrested from his place for an offence he knew nothing about. Upto the date he was testifying he did not know why he was arrested in the first place. He categorically denied having committed the offence.

The learned magistrate having carefully analysed and evaluated the evidence tendered by both the prosecution and defence found the case of the prosecution proved. Accordingly, she convicted the appellant and sentenced him to twenty (20) years imprisonment. She made no finding on the alternative count and that is how it should be.

The appellant was aggrieved by the conviction and sentence. He therefore lodged this appeal. He complained that the identification relied on to nail him was not tested and found to be beyond pre-adventure, medical evidence was insufficient, there was no corroboration of the prosecution evidence, he was denied a chance to mitigate and his defence was erroneously rejected.

When the appeal came up for hearing before me on 24th November, 2010, the appellant opted to canvass the appeal by way of written submissions. I have carefully read and considered them.

On his part, **Mr. Gitonga**, learned state counsel opposed the appeal by submitting that the appellant was positively identified in the act by the complainant. The appellant defiled her for over an hour which was enough time for the complainant to acquaint herself with the appellant. The incident happened at about 5 p.m when naturally there is reasonable light to allow for positive identification. Therefore the complainant was honest and unmistakable in her identification of the appellant. The clinical officer confirmed that the complainant had been defiled.

The key witness who testified for the prosecution was the complainant, a girl aged 10 years. Section 19 of the **Oaths and Statutory Declarations Act** deals with reception of evidence of Children of tender years by a court or any adjudicating authority. Subsection (1) thereof provides interalia :-

“...Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section.....”

Who is then an child of tender years? . The section above does not give such definition nor does the Act itself. I would say the same of the interpretation and General Provisions Act. However in the case of **Kibageny .v. Republic (1959) E.A;92**. The then court of appeal attempted such an exercise. It stated ***“.....there is no definition in the Oaths and Statutory Declarations Ordinance of the expression Child of tender years, for the purpose of section 19. But we take it to mean, in the absence of special circumstances, any child of an age, or apparent age of under fourteen years.*** How about the Children Act? Section 2 thereof defines a Child of tender years as meaning ***“a child under the age of ten years.....”*** The offence was allegedly committed on 29th May, 2006 when the Children Act was already in force. Following the foregoing definitions, the complainant was clearly a child of tender years. The trial court was therefore duty bound to comply with the requirements of that section before receiving her evidence.

In the case of **Sakila .v. Republic (1967) E.A 403**, the court of appeal for Eastern Africa then, said, that the first duty of the court is to ascertain and record accordingly, whether or not the witness is a

child of tender years. Thereafter the trial court has to investigate whether the child understands the nature of the Oath. This investigation is intended for the trial court to satisfy itself that the child understands the meaning of the Oath and if not to investigate, further, whether the child is possessed of sufficient intelligence for her evidence to be received at all. See generally: **Nyasani S/O Bichana .v. Republic (1958) E.A 190 and Fransisio Matovu .v. Republic (1961) E.A.260.**

It is only after the trial court is satisfied that the child understands the meaning of an Oath that it will proceed to swear the child. If the court is not satisfied, it undertakes a second inquiry to find out whether the child is possessed of sufficient intelligence and the need to tell the truth. According to section 19 above, after the second inquiry, the child can only be allowed to testify if she understands the duty of telling the truth in which case, she may testify but not on oath. All the foregoing is what is referred in legal parlance as ***Voire Dire*** examination.

From the record it is a quite apparent that the learned magistrate did not conduct ***Voire Dire*** examination of the complainant before she allowed her to testify. This was a gross-misdirection and fatal omission on her part. There was therefore no recording of the finding by the trial magistrate on the two aspects, namely, whether or not the complainant understood the meaning of an oath, or whether or not she was possessed of sufficient intelligence and understood the duty of telling the truth before she was allowed to testify. It may well be that the learned magistrate did conduct ***Voire Dire*** examination for how else would she have allowed her to testify on oath. It is difficult to imagine how such a Senior judicial officer would have overlooked such elementary requirements in the receipt of the evidence of a minor. That is, however, conjecture, I have to take the record as it is. I am therefore satisfied that there was non-compliance with the mandatory provisions of section 19 of the Oaths and Statutory Declarations Act. The evidence of the complainant was therefore irregularly received and is therefore of no evidential value. Thus if the same is rejected as it should have been then there is no other evidence linking the appellant to the crime. Indeed even the evidence of the clinical officer does not point irresistibly to the appellant as being the one who sexually assaulted the complainant.

This appeal is therefore allowed, conviction and sentence imposed set aside. The appellant should be released forthwith from prison custody unless otherwise lawfully held.

Judgments dated, signed and delivered at Kisii this 17th January, 2011.

ASIKE-MAKHANDIA
JUDGE