REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

(*Coram: Azangalala, J*)

CRIMINAL APPEAL NO. 100 OF 2010

BETWEEN
REUBEN KISUCHA KAKA::::::::::::::::::::::::::::::::APPELLANT
AND
REPUBLIC::RESPONDENT

(Being an appeal from the decision of the Resident Magistrate Hon. J. Owiti dated 25th June, 2010 in Eldoret Chief Magistrate's Court Criminal Case No. 5944 of 2009)

JUDGMENT

Reuben Kisucha Kakai (hereinafter "the appellant") has lodged this appeal to contest his conviction and sentence by the Resident Magistrate sitting at Eldoret Chief Magistrate's Court. The appellant was arraigned in court on 28th September, 2009 and 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. It was alleged that on 26th September, 2009 at Lugari District within Western Province, the appellant unlawfully and intentionally caused penetration with his genital organ namely penis into the genital organ namely vagina of G.N.W (herenafter "the complainant") a child aged 4 years.

The appellant also faced an alternative count of committing an indecent act contrary to Section 11 (1) of the same Act, the allegation being that on the same date and at the same place the appellant unlawfully and intentionally committed an indecent act with a child namely G.N.W aged 4 years by touching her genital organ namely vagina.

The appellant denied both charges and his trial commenced on 24th February, 2010 at which the prosecution led by **SP Manuni** called five (5) witnesses in support of their case. In summary its case was that on 26th September, 2009, D.W.N (PW3), the mother of the complainant, sent her for cooking oil from the local shop. When the complainant failed to return after 40 minutes, PW3 decided to look for her. On the way she met the complainant crying. In the immediate vicinity she saw the appellant leaving the scene. The complainant told PW3 that the appellant had injured her on the stomach. She observed that the complainant was bleeding from her vagina. PW3 immediately raised alarm, **Ronald Kumbo** (PW4) was attracted to the scene by the alarm and saw the appellant running away with PW3 in hot pursuit. He joined the chase and apprehended the appellant.

The appellant was taken to the AP Camp and later escorted to Lumakanda Police Station where he was re-arrested by **PC Edward Rotich** (PW5).

PW3 took the complainant to Lumakanda District Hospital where she was examined and treated by **Peter Wenani** (PW1) a Clinical Officer. He filled a P3 form in respect of the injuries sustained by the complainant. He observed blood stains on the pant and skirt which the complainant had. He also observed that her hymen was torn and that the vaginal tract was discharging blood. In his view there was physical penetration of the complainant's Vagina.

PW1 also examined the accused and filled a P3 form for him.

The accused was then charged as already stated.

At the close of the prosecution case, the Learned Resident Magistrate found that the appellant had a case to answer and placed him on his defence. He gave a sworn statement in which he denied the charges stating that he was arrested for no reason on the material date, the 26th September, 2009 as he worked on his shamba. He added that PW3 awed him Kshs. 1000/- which she had refused to refund. On 25th July, 2010 the Learned Resident Magistrate delivered her judgment in which she convicted the appellant on the main charge of defilement of the complainant and sentenced him to life imprisonment.

Being aggrieved by both conviction and sentence the appellant filed this appeal before me. **Ms. Mufutu**, Learned Counsel appeared for the appellant and argued the appeal on his behalf. **Mr. Oluoch,** Learned Senior Deputy Prosecution Counsel who appeared for the Republic made his oral submission in opposition to the appeal.

I have perused the amended grounds of appeal filed by Learned Counsel for the appellant. In my view three broad issues are raised. The first issue is raised in grounds 1(a) 2(a) and 3(a). It is whether the charge was proved to the required standard. The second issue is raised in ground 4(a) that is whether the Learned Resident Magistrate, misapplied the doctrine of corroboration and the 3rd issue is raised in ground 5(a): whether the appellant's fair-trial rights under the constitution were breached.

On the 1st issue, the prosecution relied on the testimonies of the complainant (PW2), her mother (PW3), **Ronald Kombo** (PW4) and the medical evidence which was adduced by **Peter Wenani** (PW1). The complainant, a child then aged 4 years testified at the trial. She told the court that the appellant had hurt her. In her own words:-

"I met Reuben on the way. He is
Reuben Kisuchi .....
He dragged me to a nearby. He removed
his pair of trousers. He blind folded my
eyes with a handkerchief. He slept on me.
I felt pain on my private parts (vagina). He
slept on me after removing my pants.
I cried. Reuben escaped....."

The testimony of the complainant was direct and not circumstantial. The incident occurred at about mid morning or early – afternoon. It was therefore in broad daylight. The appellant was not a stranger to the complainant.

Then there is the testimony of her mother (PW3). In her own words:

"I met her on the way. She was crying.
I saw Reuben leaving the scene where
G was. She told me that Reuben
injured her on the stomach. She was
5 meters away from Reuben. She was
bleeding from her vagina.
I raised alarm ....."

That evidence was again direct. The mother of the complainant (PW3), met the complainant shortly after the attack on her. The complainant immediately identified the appellant who was a mere five 5 metres away. The complainant was in a distressed state.

The testimony of the complainant and her mother was buttressed by the testimony of PW4. In his own words:

"I heard Mama raising alarm.
I responded to the alarm. I heard
Mama saying that her child had
been defiled. Her daughter is calledG .
I saw Reuben running away from the scene.
His shirt and pair of trousers were blood
stained. Mama was running
after Reuben....."

That testimony too was direct. PW4 knew the appellant, the complainant and her mother. Mistaken identification was therefore out of the question.

Then there was the testimony of PW1, **Peter Wenani**, the Clinical Officer at Lugari District Hospital. He examined the complainant the same day and observed that her hymen was torn and blood was oozing out of her vagina. He was, categorical that the complainant's vagina had been physically penetrated. He produced the P3 form in respect of his observations.

With regard to corroboration the Learned Resident Magistrate rendered herself as follows:-

"The P3 form of PW2 confirms that
PW2 was defiled. P Ex.3 and 4 were
equally blood stained. They corroborate
PW3's evidence that PW2 was defiled
on 26th September, 2009. The evidence
on record confirms that PW2 was defiled
on 26th September, 2009 at 11:00am. Only
DW1 was seen fleeing from the scene
where PW2 was....."

There is a minor misdirection in the above passage. The Learned Magistrate stated that it was the testimony of PW3 which was corroborated. In reality however, the Learned Resident Magistrate did not lose site of the evidence which would have required corroboration (if any) i.e. that of the complainant.

On my independent evaluation and analysis of the evidence adduced before the learned Resident Magistrate there was amble corroboration of the complainant's testimony if the same was required. The medical evidence produced by the Clinical Officer (PW1) provided corroboration. The distressed condition in which PW3 found the complainant served the same purpose. Lastly the conduct of the appellant corroborated the complainants evidence. He attempted to escape from the scene and could have succeeded were it not for the effort of PW4.

This offence was committed after Legal Notice No. 5 of 2003 amended Section 124 of the Evidence Act. The proviso after the amendment is in the following words:

"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."

There was therefore no requirement for corroboration if the Learned Resident Magistrate was satisfied that the complainant was telling the truth. In that regard the following passage appears in her record.

"The court looked at the demeanour of PW2 herein. She is a child of tender years. It took the court two hours to get the evidence of PW2. She was scared of the court environment. She was in the company of PW3, PW4, DW1 and others as they went to AP Camp and later to Police Station. She could identify the assailant despite the fact that she was not certain of the name of the suspect"

And later on:

"The court believes that PW2 properly identified DW1 as the person who defiled her....."

So, the Learned Resident Magistrate clearly believed that the complainant was telling the truth and I gave her reasons for that belief. In the premises, she could still convict without corroboration.

In the premises the ground challenging want of corroboration and grounds 1(a) 2(a) and 3(a) are without merit and are dismissed.

The final ground of appeal is the alleged breach of the appellant's constitutional rights as he alleges he was detained in police custody in excess of 24 hours in contravention of section 72(3) of the Repealed Constitution. The charge sheet herein shows that the appellant was arrested on 26th September, 2009 and arraigned in court on 28th of the same month. According to PW5, the appellant was received at Police Station at 5:15pm of 26th September, 2009. The appellant could not therefore have been produced in court on that date.

There is then the testimony of PW1 that he examined both the complainant and the appellant on the same date: 26th September, 2009. He however filled their P3's on 27th of the same month. The P3's could therefore only be availed to the police on that date at the earliest. The appellant was then arraigned before the trial court the next day i.e. 28th September, 2009.

In those premises, I find and hold that the appellant's fair-trial rights under Section 72(3) of the Constitution were not contravened. In any event on the authority of the court of Appeal decision in **Mbugua -V- Republic (Nairobi CR Appeal No. 50 of 2010)** such breach should not lead to an automatic acquittal of the appellant since the breach was not trial related. The challenge based on breach of the appellant's fair-trial rights under the constitution is therefore without merit and is dismissed.

The upshot of the foregoing is that I am satisfied that the prosecution proved its case as required in law. The conviction of the appellant was sound as it was based on fact and law. I have no hesitation in upholding the same. The appeal against conviction is accordingly dismissed.

The appellant has not appealed against the sentence imposed upon him. In my view even if he had so appealed, I would have dismissed the same as the Learned Resident Magistrate had no discretion in respect of the sentence.

The appeal therefore fails in its entirety. The conviction and sentence of the Learned Resident Magistrate are hereby upheld.

DATED AND DELIVERED AT ELDORET
THIS 27TH DAY OF OCTOBER, 2011

F. AZANGALALA
JUDGE
READ IN THE PRESENCE OF:-
Mr. Manani for the appellant,
The appellant himself and
Mr.Kabaka for the Republic.

F. AZANGALALA
JUDGE
27TH OCTOBER, 2011