



REPUBLIC OF KENYA
PETER MAINA WACHIRAAPPELLANT
Versus
REPUBLIC.....RESPONDENT
JUDGMENT

Peter Maina Wachira, was tried on a charge of attempted defilement of a girl aged 4 years contrary to section 9(1) of the Sexual Offences Act. No. 3 of 2006. He also faced the alternative charge of indecent assault on a female contrary to section 11(1) of the Sexual Offences Act. No. 3 of 2006. After undergoing a trial he was acquitted of the main charge. He was however convicted on the alternative charge and sentenced to 10 years imprisonment. Being dissatisfied he filed this appeal.

On appeal the appellant listed the following grounds in his petition:

1. *That I pleaded not guilty to the charge.*
2. *That the learned trial magistrate erred in law and fact by failing to consider that when P.W.1 was cross-examined by me she told court that she was advised to say they were going to police, she also continued to answer a question from court prosecutor and I be podding her head agreeing being told to testify so in court by her mother.*
3. *That the learned trial magistrate erred in law by failing to find that prosecution side did not prove this case beyond any reasonable doubt as there was no evidence touching me.*
4. *that the trial magistrate erred in law fact by failing to find that the complainant was coached of how to testify in court just to frame me with the alleged offence.*
5. *The trial magistrate erred in law by failing to find that we had grudge with complainant's mother which made me be taken to the chief after he house was broken into and stolen.*
6. *That I wish to be present during the hearing of this appeal.*

Miss Ngalyuka, learned State Counsel opposed the appeal. She was of the view that the prosecution had proved the case against the appellant beyond reasonable doubt.

Let me set out the case that was before the trial court before embarking on the appeal. The prosecution's case was supported by the evidence of three witnesses. The particulars of the offence in the alternative count are that in the months of August and September 2006 at YK Village in Murang'a District within Central province unlawfully and indecently assaulted E NM (P.W.1) a girl aged 4 years by touching her private parts. P.W.1 said she had visited the house of the appellant whom she knew as Baba Ngendo. She claimed that the appellant inserted his finger into her vagina without removing her underpants. MWM (P.W.2) told the trial magistrate that on 12/09/2006 she noticed that her daughter (P.W.1) was passing urine with some difficult .P.W.2 said she was told by P.W.1 that she was feeling pain because the appellant touched her private parts using his fingers. P.W.2 took the child to Nyagiti police post where they were issued with a P3 form and referred to Murang'a District Hospital. P.W.2. said she took P.W.1 to Murang'a District Hospital and to Nairobi Women Hospital for further treatment. Gerald Marigo (P.W.3) said he booked the report of the complainant on 12/09/2006 at 8.00 p.m. at Nyagiti police post from P.W.2.

When placed on his defence the appellant gave an unsworn statement in which he denied committing the offence. He alleged that he was framed up by the complainant's family.

On appeal, the appellant has urged this court to allow the appeal because the prosecution had not

proved its case beyond reasonable doubt. It is also alleged that there was no cogent evidence to prove the charge. I have carefully examined the evidence on record. There is no doubt that the complainant (P.W.1) is a child of tender age. At the time of the trial, she was aged 4 years. The record shows that the trial magistrate carried out the preliminary inquiry required under S. 19 of the Evidence Act before receiving the evidence of P.W.1. At the end of that inquiry the trial magistrate stated that the complainant did not understand the meaning of testifying under oath. With great respect to the learned Ag. S.R.M., that was not sufficient. In such circumstances the court must be satisfied that the child witness appreciates the importance of telling the truth. The court must also be satisfied that the child witness possessed sufficient intelligence to testify. From the above reasons I do not think the evidence of P.W.1 was properly received. In my view, P.W.1's evidence is of no evidential value where the provisions of S. 19 of the Evidence Act is not fully complied with. Even if the provisions of S. 19 had been fully complied with, still the evidence of P.W.1 needed some form of corroboration. It is a requirement under the proviso to S. 124 of the Evidence Act that corroboration of the evidence of such a witness will be dispensed with for reasons to be recorded that shows that the court is satisfied that the victim told the truth. In this case. The trial magistrate merely warned himself. He did not state that the minor told the truth. There was no medical evidence nor any other form of evidence to corroborate the evidence of P.W.1. It is on record that P.W.1 said that she was told to go and testify by her mother (P.W.2). The evidence of P.W.2 shows that P.W.1 was taken for treatment at Murang'a District Hospital and later at Nairobi Women Hospital. There was no medical reports from the above medical institutions which were presented in evidence. Could the prosecution have withheld that evidence because they were injurious to their case? In a nutshell doubts have been raised in my mind. I agree with the appellant that the prosecution's case was not proved to the standard of beyond reasonable doubt.

In the end I allow the appeal. The conviction is quashed and the sentence is set aside. The appellant is hereby set free forthwith unless lawfully held.

Dated and delivered this 13th day of January 2010.

J.K. SERGON
JUDGE

In open court in the presence of the appellant and Mr. Makura learned State Counsel.

J.K. SERGON
JUDGE