REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
Criminal Appeal 10 of 2009

(From original conviction and in Criminal Case No. 199 of 2008 sentence of the Senior Resident Magistrate's Court at Kaloleni before Hon. F. Andayi – SRM)

MATANO NGAO NZUMA …..……..…….APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

J U D G M E N T

Matano Ngao Nzuma (appellant) was convicted on a charge of defilement of a child contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. He denied the charge, and after due trial where prosecution called three witnesses, he was sentenced to serve thirty years imprisonment.

The charge stated that on 5th day of May 2008 in District within the Coast Province, he unlawfully and intentionally committed an act which caused penetration of his genital organ into the female genital organ namely vagina of a child aged 6 years. He had faced an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

At the hearing after voire dire examination the complainant (PW1) told the trial magistrate that on 5-5-08 while playing inside their house with her other siblings namely M, E and S, she saw the appellant approaching and told him not to come as her mother was not present, having gone to buy school books for them. She knew the appellant and gave his name as, Matano, saying he used to be their tenant. Appellant got into the house, and PW1 went to the toilet. He took her siblings who were younger than her, and locked them in a room – she heard them crying out for her to open for them as Matano had locked them up. Appellant went up to her in the toilet where she was already relieving herself, and covered her mouth. He pushed her back, then removed his male organ (which the child referred to as insect) and lay on her, and did "bad manners" to her. Her mother arrived to find appellant leaving the toilet as PW1 was cleaning herself. Appellant beat and pushed her mother, who fell down, and he ran away. Her mother ran after him, but did not get him. PW1 was taken to the health centre for examination and treated and a report made to police.
It was her testimony that:-

> ***"When mum came, Matano had finished his bad manners with me and was putting on his trousers."***

On cross-examination PW1 stated:

> ***"We all knew you well, we used to stay in the same plot…you came for me in the toilet…. When you came in you removed my panties in the toilet. The toilet is at the end of the house…I was putting on my panties as you pulled down. I did not defend myself. You had stepped on both my palms…you covered my mouth with your left hand. You used the other to pull down your trouser and remove your insect."***

She referred to lewd jokes that appellant usually told her sibling such as ***"do you admire that I sleep with you to put water into you"***

PW1 then described the sexual act, saying to appellant.

> ***"You did it till I bled. I felt pain. The blood had come from my thing"***

C.L.S (PW3) mother of PW1 told the trial court that PW1 was born on 22-4-99 and she had left her with her siblings so as to go and get books for them. When she got back home she found one child E, crying and saying that Matano had come and she dashed to the door while calling out PW1's name. PW1 responded crying from the last room near the toilet, and PW3 saw the appellant emerging form the same room pulling his trouser zip to close. On asking him where he was from and her child was crying, he said he was from another room where the child wasn't in. The child came, crying saying Matano had done to her bad manners by sleeping with her and that he had torn her panties and removed her "faeces"

PW3 held appellant with one hand and asked the child to lie down for examination and PW1 noticed that the mid part of her genitalia was torn, and her clothes were blood stained. Pw2 called to a painter nearby for help to take the appellant to the police station, but the appellant pushed her, she fell down and he fled. She ran after him shouting, thief, thief, he ripped and fell at the door, but eventually fled. She took the child to hospital and reported to police and eventually appellant was arrested.

On cross-examination Pw3 denied that she had fabricated evidence due to prior differences she had had with the appellant and maintained that on arrival, she saw the appellant putting on his trousers and that the child had a blood stained panty.

The child was examined by a clinical officer (PW2) at Mariakani District hospital.

He noted that the child had difficulty in walking and was in great pain. She had a blood stained panty and her hair and hands were soiled. There were pus cells and a high vaginal swab indicated presence of infection. HIV test was negative. Further examination could not reveal much as she had taken a shower. She needed to undergo rectification of the recto-vaginal fistula and he assessed the degree of injury as main (sic).

On cross-examination PW2 stated that it was possible the infection was as a result of a sexual act, having examined her, one day after the act.

In his unsworn defence, appellant told the trial court that he had gone to work on the morning of 5-5-04 and stayed until 1.00pm. He passed through PW3's house to talk to a technician there. While on his way home for lunch he met the complainant's mother who started shouting thief, thief and appellant explains that he took off because there were people coming from the video café who would not understand even if he explained how he had entered that house to talk to the technician.

While at his home, police arrived and arrested him and he was taken to hospital only to find complainant and her mother

there. It was his testimony that he had previously differed with PW3 and the charge stemmed from her ill will.

In his judgment the learned trial magistrate took into account that the person who was painting a room nearby, was not called as a witness but found that this was not fatal to the prosecution case. He also considered the fact that the medical personnel who examined the appellant did not testify but held that even this was not fatal to the prosecution case.

The learned trial magistrate then noted that there was some discrepancy as to where the offence took place, whether it was in a toilet or in a room adjacent to the toilet and he indicated

> ***"I am inclined to believe PW3 rather than PW1 that the incident took place in the room adjacent to the latrine."***

He also considered the fact that PW1 made some claims about offers of money made to her by appellant, which did not form part of her statement to police and observed that:

> ***"PW1 was not entirely honest on some issues. I have no doubt that PW1 is very young child, but having had opportunity to watch her as she gave evidence in chief, I am inclined to say she may be a little mature for her age. I do not mean to justify any untoward conduct either on her part or on the part of any person who may take advantage of her. She is a child, but I do not think this incident happened entirely the way she described it. For instance I do not understand how she would have failed to close the toilet door when she got inside. I do not understand why she could not have screamed for help considering that there was some other person in the building. There is no indication that the accused person threatened her in any way other than her allegation that he forced her into the act. I find that, in the strict sense, the accused person may not have forced her into the act."***

He however found that PW3's evidence corroborated PW'1s evidence to the extent that she found appellant emerging from a room, while adjusting his trouser zip and from that same room, her child came out crying and immediately told her that appellant had done bad manners to her.

He also took into account the physical state PW3 observed on PW1, appellant's rush to zip up, as well as the injuries noted by the clinical officer and concluded that the tear to her vagina/rectum could only have been caused by appellant penetrating her using his genital organ. The trial magistrate was convinced that appellant was disrupted from his act by PW3 calling out for her other children and that is why he left the room before he had fully adjusted his trouser zip. The trial magistrate also took into account appellant's conduct of pushing way PW2 and taking off as a pointer to one with a guilty mind and held that appellant's allegation that he ran for fear that there was a likelihood of mob justice is not true as at the time, those present were only appellant, complainant's mother and the painter who would have held him. The trial magistrate observed that the painter seemed to have shown little concern for what was taking place as there was no indication that he interfered in any way. The trial magistrate also observed that there was some flaw in the medical evidence of PW2, as the P3 form appeared to have some additional writings besides those initially there, due to the difference in the ink used to write, and those additions were not countersigned nor did the prosecution offer an explanation through PW2 – he found it difficult to rely on that evidence and rejected it.

The trial magistrate excused PW1 for not being all together truthful as to how the incident occurred saying she may have feared being reprimanded for accepting to do bad manners with the applicant and he believed that appellant enticed and

lured her into the act. The trial magistrate then stated as follows:

> ***"The evidence of the complainant is not entirely worthless. I believe it to the extent that the act did take place."***

The appellant filed written submissions in which he points out that PW1 is not altogether a credible witness – she had said appellant followed her to the toilet, covered her mouth and lay on her, and that her mother came just as appellant left the toilet while zipping up his trouser and she wiped herself. Yet according to her mother, he found them leaving the last room adjacent to the toilet. This contradiction, he argues shows that this was a set up as a result of a grudge existing between him and the complainant's mother, as was supported by his evidence – having interfered in a quarrel involving PW3 and one Mama R. On this account, he says the same raised reasonable doubt as to his guilt and cited the decision in **Sekitoleko v Uganda 1967 EA pg 531**.

He also pointed out that a very essential witness, the mason who was painting a room two doors away from the scene was not called to testify. Appellant urged this court to infer, that the only reason this witness was not called is because he would have given evidence adverse to prosecution case. Appellant has cited the case of **Bukenya v Ugand Cr. App. No. 68 of 1972 EACA pg 549** which held that:

1)The prosecution must make available all witnesses necessary to establish truth even if their evidence may be inconsistent with the prosecution case.

(2) When the evidence called raises adequate doubt, the court may infer that the evidence of the uncalled witness would tend to be adverse to the prosecution.

Appellant submitted that in this instance, apart from the parties, the investigating officer was not called.
He also wondered why the trial magistrate accepted the medical evidence, when he at the same time had rejected it saying it had been interfered with by additions and cancellation which were not countersigned and for which no explanation was given.

The learned counsel for the State, Mr. Ogoti informed the court that he supported the conviction but the sentence was not proper because under the Sexual Offences Act, appellant ought to have been sentenced to life imprisonment. He urged that if the conviction is found to be proper, then sentence should be corrected Mr. Ogoti's argument was that PW1's evidence was not controverted as all through she insisted that she was in the process of relieving herself when appellant attacked her. He asked the court to consider that PW1 gave a detailed account of what happened and that her evidence was corroborated by that of PW3 (the mother) he also sought to draw from the evidence of PW2 (the clinical officer) whose findings ere that complainant had been defiled. Counsel submitted that the evidence clearly showed that the appellant was at the scene and besides being in contact with the complainant, he also came into contact with PW3 and he could not explain what he was doing there. Further that the trial magistrate considered the failure to call the named witnesses referred to by appellant in this appeal and found that such failure was fatal to the prosecution case.

Mr. Ogoti also drew to this court's attention the circumstances in the proceedings and submitted that the learned trial magistrate did infact consider these and reconciled them by holding that they were not fatal to the prosecution case.

From my own re-evaluation of the evidence, it is apparent that there is no dispute that appellant was at PW1's house. The issue is – what did he do there?
PW1 said he defiled her inside a toilet and even offered her Ksh. 5/- which she threw away – this seemed to differ with the evidence of her mother as to where they were found. The trial magistrate took note of this – and decided that the

mother (PW3) evidence was more credible. The trial magistrate found that PW1 wasn't entirely honest on some issues and seemed a little too mature for her age and he had doubts as to how the incident took place as described by the complainant and he raised many queries as to her credibility and stated that due to that, her evidence required corroboration so was there corroboration? I think this requirement was in recognition of the provision of section 124 of the Evidence Act which allows a court to accept a child's uncorroborated evidence and even convict on such evidence after appropriate recorded caution, in this instance, it was desirable due to the anomalies noted by the trial magistrate. The vital corroboration was found in the evidence o her mother (not as to the place the act actually took place) but by the observation of physical injuries noted by PW3 upon immediate physical inspection of PW1's genitalia and the appellant's own conduct of zipping up his trousers, as he came from the same room where the crying child was – which suggested an interruption of events hence his zipping trousers as he moved away.

The trial magistrate also took into account the medical evidence – was there evidence of penetration?
The medical officer PW2 observed tears to the genitalia from the vagina right up to the rectum, and, noted that the child required corrective surgery.

The P3 form produced had the following findings, swollen labia majora, hymen perforated with a tear between the vagina and rectum (fistula). Spermatozoa could not be detected as the child had taken a shower and his answer on cross-examination was that the child had been defiled.

The alterations in the P3 form did not significantly alter these observations, there was a cancellation of 10 years, which seems to have been erroneously entered under nature of offence, so as to correct it and read "defiled".
The other alteration was on the paragraph 5 regarding degree of injury which had been circled as "harm: "main" and written "harm then crossed and countersigned to read "main" – those alterations were not fatal to the overall entries made in the P3 form.

It is not the presence or absence of spermatozoa which would prove that one has engaged in a sexual act – it is the penetration which under the Act is defined as the partial or complete insertion of the genital organs of a person into the genital organs of another person – it does not require ejaculation. In this instance, the little girl described how appellant inserted his organ (which she referred to as inset – infact most young Kenyan Kiswahili speaking children referring to the sexual organs as "*dudu*") into hers. That is why section 8(1) of the Act states that a person who commits an act which causes penetration with a child, is guilty of defilement.

My own finding is that the trial magistrate was keenly aware of the discrepancies in the evidence of PW1 as compared to that of PW2 and resolved those. My re-evaluation of the same is that the discrepancy does no touch on the material particulars which really is whether there was evidence of the child having been defiled – the answer is in the affirmative.

Then there is the question as to whether appellant was the culprit. It is significant that although the appellant was medically examined, the medical findings were not presented to the trial court and indeed the trial magistrate was alive to that fact. I take note that

(a) Appellant was not taken for medical examination immediately.

(b) Even if he could have been examined for a sperm check, that would not have assisted the prosecution case since the child had taken a shower and so no traces of spermatozoa were found.

The evidence was therefore circumstantial – which would require that it points to the guilt of the appellant, to the exclusion of anyone else.

Appellant was found inside the home, moving away from the room where PW1 was crying, he was zipping up his trousers, the child had visible injuries on her genitals, on being questioned, appellant pushed away PW1's mother and fled. All these acts point not only to the appellant as the offender but certainly disclose a guilty mind.
There was the mentioned painter/technician – was the failure to call him fatal?
There is no evidence to suggest that he heard or witnessed what was going on next door, it is not even in evidence that when PW3 called him for help, he responded in any manner, and indeed the learned trial magistrate properly observed that he seemed to be disinterested in what was going on. Then there was the investigation officer who doesn't seem to have done any investigation and it is not demonstrated that were he to have been called, he would have said anything different or adverse. I cannot fault the trial magistrate in holding as he did regarding those individuals – the failure to call them was not fatal to the prosecution case. Was it established that there existed a grudge between the appellant – even from appellant's own testimony, the situation he describes cannot amount to a grudge – if PW3 disagreed with Mama R and appellant intervened to separate them, how then does he become an enemy? I am satisfied that the trial magistrate took proper consideration of this and drew the appropriate conclusion. The upshot is that the conviction was safe and I uphold it.

The offence carries with it a mandatory life sentence. Evidence was presented to the trial court that PW1 was aged 10 years at the item of the offence – her date of birth was given by her mother on 22-4-99 – this has not been disputed and the same age was reflected in the P3 form. The sentence then was illegal – and I interfere with it by setting aside the 30 year jail term and substituting it with life imprisonment.
The appeal is dismissed.

Delivered and dated this **15th** day of **February 2010** at Malindi.

H. A. Omondi
JUDGE