



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 42 of 2006**

DANIEL WAWERU KIMANI.....APPELLANT

V E R S U S

REPUBLICRESPONDENT

J U D G E M E N T

The appellant, Daniel Waweru Kimani was charged for the offence of defilement of a girl contrary to Section 145 of the Penal Code that on 17th day of February, 2005 at Kiambu District, Central Province, jointly with another not before court, had carnal knowledge of M W N, a girl under the age of sixteen years. He faced an alternative charge of indecent assault on a female contrary to Section 144 (1) of the Penal Code that on 17th day of February, 2005 at the same place, jointly with another not before court, unlawfully and indecently assaulted, MN by touching her private parts. He pleaded not guilty. The learned trial magistrate upon hearing the evidence then convicted appellant on the charge of defilement and sentenced him to a prison term of five (5) years, which he now appeals.

W N (P.W.1) testified that on 17/2/05, the appellant who was known to her as Waweru, removed his clothes, then did bad things to her, having also removed his clothes. She said she did not bleed but felt a lot of pain in her private parts (**which she pointed at**) and that she did not scream as appellant held her mouth. She had found the appellant sitting on stones and the incident took place during the day. She said it is Waweru and one Muikamba who defiled her then beat her up. She went to school and reported the incident to her teacher. P.W.2 M N is the complainant's mother and says on the material date at about 4.00 pm, she was told by teachers who had brought P.W.1 home, that she been defiled by two young men. She took P.W.1 to hospital, but the Doctor was not present and was referred to Kiambu hospital but there were no vehicles, so they spent the night at the hospital and P.W.1 was examined the following morning. Thereafter on Monday as they were going back to hospital, P.W.2 saw appellant and P.W.1 told her, he was the person who had defiled her. She reported to police and appellant was arrested.

P.W. 3 is the medical Doctor (**ie. Doctor Nguire**) who examined P.W.1 and says she appeared retarded and had no major injuries at the labia but the hymen was torn and there was a tear at the posterior. A vaginal swab showed no spermatozoa – though she was examined 72 hours after the incident. The P3 form was produced as exhibit. P.W.4 Alice Wangechi Ndegwa is a teacher at K S School and testified that on 17/2/05 at 9.00 am, P.W.1 (**who was one of her students**) walked into class looking unhappy and by about 10.30 am P.W.4 noticed that P.W.1 was crying. Upon asking her what was wrong P.W.1 told her two men had caught her and did bad things to her – which P.W.4 understood to mean that she had been defiled. P.W.6 Police Constable Peter Muli investigated this case and confirms that P.W.1 said she had been defiled by two men while on her way to school and that she knew the two men. P.W.6 instructed the Administration Police Officer at Thigio to arrest the suspect and that is how P.W.2 took the

note to P.W.5 to authorize the arrest of the appellant to be charged.

On being put to his defence, the appellant elected to give sworn evidence and call one witness. He said he woke up as usual, did his daily chores on the farm where he was employed, then delivered milk at a dairy which was about 10-20 metres away. He said he did not see the complainant on that day and that she lied to court that he had raped her. He said that P.W.1's mother worked on the same farm as a casual worker and when he started insisting that those who reported on duty like P.W.2 wouldn't be given work, then she became unhappy. He stated that he did not leave the compound at any other time other than when he went to take the milk. His defence witness Jacinta Waithera also worked at the same farm as appellant. Her testimony was that she reported on duty at 6.45 am on 17/2/05 and found the appellant preparing to take milk to the dairy – he did so and after a short while of not more than five minutes, he was back and they worked together until 11.30 am.

In her judgement the learned trial magistrate stated as follows-

“The questions now are whether or not, the complainant was defiled, if she was defiled whether it has been proved that it is the accused who defiled her.”

At the hearing, P.W.1 told the court that she did not know her year of birth, but the learned trial magistrate was guided by the evidence of the Doctor who estimated P.W.1's age at 14 years as at the time of the offence and said-

“She narrated to the court how two men removed her clothes and then did bad things to her, one after the other. She said she felt pain and pointed at her private parts. It was clear to the mind of the court, that she was sexually assaulted. The complainant though a slow learner and slow in speech was able to testify in court and give cohesive and consistent evidence. Her evidence on the point was supported by the doctor's evidence.... that evidence shows that there was tampering of the complainant's vagina and there was penetration as explained by the tear and loss of hymen.”

The learned trial magistrate then took into account the evidence of P.W.3, the complainant's teacher with regard to what state P.W.1 appeared to be in that morning and her report to the teacher as to what had happened to her, and the learned trial magistrate said it was quite evident that complainant was defiled.

The learned trial magistrate then considered whether the prosecution was able to prove that it was the appellant who defiled the complainant. She noted that complainant identified appellant in court as the man who defiled her and he was someone known to her, even by name. The trial magistrate also recognized that P.W.1 later pointed out appellant to her mother when she saw him. Further that the offence took place in the day time and so it was possible for P.W.1 to see appellant and that-

“The act itself must have taken some time enough for her to see the assailant clearly.”

Appellant's defence was considered and the learned trial magistrate observed that the court was told that one could pass appellant's place of work, while going to the complainant's school, and so the complainant's claim that she was going to school was corroborated and that in fact the five minutes he took to deliver the milk to the dairy must be the time he and the other man, saw the complainant and decided to defile her. As for appellant's claim that the matter had been instigated by the complainant's mother, the learned trial magistrate's view was that these claims were unsupported by any evidence and that in any event, the child first reported the incident to the teacher and the mother only got to learn about it from third parties and that no such issue of a grudge arose in the course of the prosecution case and the learned Trial Magistrate's concluded that the defence was brought up to mislead the court.

In this appeal, Mr. Muturi appeared for the appellant and submitted that the entire evidence adduced by prosecution did not support the prosecution case. The grounds of the appeal were that –

(1) *The learned trial magistrate failed to warn herself accordingly, in taking the evidence of the child complainant.*

- (2) ***The learned trial magistrate convicted the appellant on evidence of the complainant child which was not corroborated.***
- (3) ***The learned trial magistrate erred in finding that appellant broke complainant's hymen.***
- (4) ***The trial magistrate erred in relying on evidence of P.W.2 and P.W.4.***
- (5) ***That there was contradiction in the evidence of P.W.1, P.W.2, P.W.3 and P.W.4.***

Mr. Muturi in his submissions stated that the evidence was not corroborated in the material particulars given that the complainant was a child of tender years, within the meaning of Section 124 of the Kenya Evidence Act and that this being a sexual offence, then penetration had to be proved, and this was not done.

Mr. Makura for the State, opposes the appeal saying that P.W.1's evidence was corroborated by her mother (P.W.2) who examined her and found her to have been defiled. Further, that the Doctor who examined complainant confirmed complainant's hymen was torn and there was a posterial tear. I have read through the evidence in Chief by P.W.1 and also the cross-examination – there is nothing in evidence stating that P.W.2 examined P.W.1 and found her to have been defiled, upon receiving the information, she simply took P.W.1 to hospital. It is P.W.2's evidence that Mr. Muturi brands, as hearsay evidence and says P.W.4's evidence and that by the Doctor can also not be said to corroborate P.W.1's and that even P.W.4's evidence is hearsay. I would say that P.W.4's evidence would not be regarded as hearsay because P.W.1 stated what had befallen her and she confirmed receiving such a report. It further shown that complainant's conduct was consistent with the allegations. Mr. Muturi seeks to rely on the decision of ***Njoki –Vs- Republic*** which held that a child of tender years' evidence required corroboration and that a court ought to warn itself of the danger of convicting on uncorroborated evidence of a child. In reply to this Mr. Makura submitted that there was a misapprehension of the law by the learned counsel as the decision in ***Njoki –Vs- Republic*** had been overtaken by events following the amendment of Section 124 of the Kenya Evidence Act which now recognizes that a conviction can be secured even on the evidence of a child alone. Indeed the provisions of Section 124 of the Kenya Evidence Act was amended by Legal Notice No. 5 of 2003 to read-

“Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act, where the evidence of a child of tender years is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating. 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.”

So the situation that Mr. Muturi alludes to has been taken care of by the amendment. Did the trial magistrate in the present case record in the proceedings, the reasons why it was satisfied that the child was telling the truth? The learned trial magistrate in her judgement recorded this-

“The complaint, though she is a slow learner and slow in speech, was able to testify in court and give cohesive and consistent evidence. Her evidence was supported by the Doctor's evidence.”

She also found that the complainant's evidence was supported by the Doctor's findings and that of her teacher. Would that fulfill the requirements of Section 124 or was the trial magistrate required to specifically record. “I believe the child is telling the truth because....”? I don't think there is any fatal outcome in the manner that the court indicates its satisfaction of the child's evidence, and from what is quoted above, it is plain that the trial magistrate was satisfied that the child was truthful hence the

consistency and her alluding to that evidence being supported by the evidence of Doctor and the teacher.

The meaning of corroboration was defined in the case of *Mutonyi -Vs- Republic* (1982) KLR 203 as follows-

“an important element in the definition of corroboration..... is that it affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular, not only the evidence that the crime has been committed, but also that the accused committed.”

To this extent then the evidence of the Doctor’s evidence would only corroborate the fact of the sexual act having taken place, but not corroborate the identity of the perpetrator. However I think the issue as to whether convicting on uncorroborated evidence of a child in sexual offences has been addressed in the earlier part of the judgement and my re-evaluation of the evidence plus the comments by the learned trial magistrate in her judgement indicate her decision to rely on the child’s evidence.

Another ground raised by Mr. Muturi is that the court should not have based the conviction on circumstantial evidence citing the decision in *Kariuki Karanja –Vs- Republic 1986 KLR.*

The learned State Counsel’s response to this was that this was ***NOT*** circumstantial evidence at all, the conviction was based on direct evidence adduced by the complainant supported by the Doctor and so relying on *Kariuki’s case* was irrelevant. It is not entirely true that this case was based purely on circumstantial evidence – indeed there was the direct evidence of the complainant who reported consistently to her teacher and her mother that the person who had defiled her was Waweru (***the appellant***) and she even had occasion to meet him whilst in the company of her mother and point him out to her. That is not circumstantial evidence, it is direct evidence. The only circumstances used to test whether it was really the appellant who committed the offence were in relation to opportunity *visa vis* appellant’s defence and the learned trial magistrate found – (*rightly so*), that the opportunity arose when he went to deliver milk and had an opportunity to sight the complainant and make good his mischief. In fact contrary to what Mr. Muturi submits, the learned trial magistrate considered the defence evidence quite analytically and came to the conclusion that it simply confirmed the evidence tendered by prosecution as regards opportunity.

Then there is the question of penetration which Mr. Muturi insists is such a vital ingredient for an offence of this nature, that lack of it renders the prosecution case a failure. From the evidence by the Doctor there were no injuries at the labia but the hymen was torn and there was a posterior tear. A vaginal swab revealed no spermatozoa. The P3 form indicated as much: I think one ought to recognize that the presence or absence of spermatozoa does not rule out sexual intercourse. Spermatozoa would only be present if there was ejaculation, one can penetrate without unnecessarily ejaculating sperms, so the absence of spermatozoa is not *prima facie* evidence that there was no penetration. The hymen and posterior wall were torn – which would suggest a forceful but directed entry, and there is nothing to suggest that for every penetration the labia must be injured. The fact that the labia minora and majora were not injured does not prove non-penetration, indeed in the absence of any suggestion that the hymen and posterior tears was caused by any other source, then the learned trial magistrate was well guided in accepting that as evidence of penetration. Appellant was arrested a week later and that explains why he was not medically examined.

The offence was committed during the day, so P.W.1 had excellent opportunity to identify. Further appellant was known to her physically and by name – there can be no question of mistaken identity. The complainant’s conduct was totally consistent with her allegation – from her late arrival to class, the general demeanour as observed by P.W.4, her report to P.W.4 and P.W.2 and the finding by the Doctor. Of course there was some bits of hearsay evidence to the extent that she was reporting to P.W.2. and P.W.3 what was done to her and who did it – but even if that bit were to be excluded, it would not materially affect the totality of the prosecution evidence at all. The conviction was safe.

Subsequently, my finding is that the appeal has no merit and is dismissed. The conviction is upheld and sentence is confirmed.

Delivered, dated and signed at Nairobi this 25th day of April, 2008.

H.A. Omondi

Judge