REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 4 OF 2004

FRANCIS MWANGI KARIUKI……APPELLANT

VERSUS

REPUBLIC……...……...…….RESPONDENT

(Appeal from the original conviction and sentence in Criminal Case 289 of 2003 in Kangema Resident Magistrate's Court by R. N. Muriuki (Miss) – R.M.dated 11th December 2003)

J U D G M E N T

Francis Mwangi Kariuki hereinafter referred to as the Appellant was tried and convicted by the Resident Magistrate Kangema for the offence of attempted defilement of a girl contrary to ***Section 145 (2)*** of the Penal Code as read with ***Section 389*** of the Penal Code. He was sentenced to serve 5 years imprisonment and hard labour. Being dissatisfied the appellant has now appealed against his conviction and sentence. In his petition of appeal the appellant has raised 7 grounds, however they all boil down to two main grounds, that, is that the evidence of the prosecution witnesses was inconsistent, and that the prosecution evidence was insufficient to sustain a conviction.

During the trial in the lower court 5 witnesses testified for the prosecution. Their evidence was briefly as follows: -

On the 3rd May 2003, B.W.K. a minor aged 7 years *(hereinafter referred to as the complainant)* was with other children when the Appellant gave one of the children B.W.K (P.W.3) *(hereinafter referred to as W.)* some money to buy sweets. Thereafter He asked W. to allow him to touch her but Wamaitha refused. The Appellant then asked the complainant to go with him into the bush to eat fruits. He took the complainant into the bush, removed her underpants and also removed his underpants and in the words of the complainant the Appellant "slept" on her. The Appellant then gave the complainant Kshs.6/= to go and buy sweets and also warned her not to tell anyone of what had happened. The complainant put on her underpants. She went and bought sweets with the money that she was given.

G.N. *(P.W.2 hereinafter referred to as N.)* the complainant's grandmother saw the complainant giving sweets to other children. She became interested in knowing where Complainant had got the sweets from. She learnt of what the Appellant had done. N. reported the matter to the complainant's mother A.N. (P.W.4) who in turn reported the matter to Kangema Police Station. P.W. 4 was advised to take the complainant to Kangema Health Centre. At the Health Centre, they were referred to a private clinic at Kanyenyaini where the complainant was examined but no spermatozoa was seen. On the 5th May 2003 the Appellant went to Kangema Police Station demanding to know details of the complaint made against

him. He was arrested by P.C. Zachary Nyariki (P.W.5) and later charged.

In his defence the Appellant denied having committed the offence. He explained how on 3rd May 2003 sometime at 7.00 p.m. He was attacked by a group of people including one K.M. who claimed that He (i.e. the Appellant) had defiled his 5 year old daughter.

The Appellant was taken to Tuthu Hospital where the complainant had been taken. However, the doctor who examined the complainant explained that He had not noted anything. He advised that the child be taken to a Hospital where there was a laboratory. In the meantime the Appellant was released. The next day He learnt that the complainant's father had gone to his house in the company of an Administration Police Officer. The Appellant therefore went to Kangema Police Station to inquire about the matter. It was then that the Appellant was locked in and later charged.

I have reconsidered and evaluated the above evidence as I am expected to do in this first appeal.

I note that the basis of the prosecution's case was the evidence of the minor complainant and that of her playmate W. The two witnesses being aged 7 and 8 years (as per their own evidence) were children of tender years. Before each of these witnesses testified the trial magistrate carried out a *voir dire* examination and in each case made a finding that the minor neither understood the meaning of an oath nor was able to differentiate the difference between speaking the truth or lies. The trial magistrate then proceeded in each case to take unsworn evidence from the minor witness.

In carrying out the *voir dire* examination, the trial magistrate was in effect complying with ***Section 19*** of the Oaths and Statutory Declarations Act (Cap 15). As I observed recently in the case of ***Joseph Kariuki Karobia v Republic, High Court Criminal Appeal (Nyeri) 209 of 2003***, that Section requires the court before accepting the evidence of a minor to satisfy itself of the following: -

"1) That the minor was a child of tender years.

2) That the minor understands the nature of an oath.

3) If the minor does not understand the nature of an oath, that the minor is possessed of sufficient intelligence to testify and understands the importance of speaking the truth."

This is important as the above facts determine whether the minor can give evidence and if so whether that evidence should be received as sworn or unsworn. Where the minor understands the nature of an oath the matter is simple as she will give sworn evidence where the minor does not understand the nature of an oath but is possessed of sufficient intelligence to testify and understand the importance of speaking the truth her evidence may be received as unsworn but where the minor does not understand the nature of an oath, and is not possessed of sufficient intelligence to testify or cannot understand the importance of speaking the truth, the evidence of the minor ought not to be taken as the same cannot be relied upon.

In this case the trial magistrate having examined the minor complainant concluded as follows: -

"Court – I have examined the witness and I find that she does not understand the meaning of an oath or differentiate between the truth and false. The witness will give unsworn evidence."

As regards W. the trial magistrate also made a similar conclusion after carrying out a voir dire examination. In effect therefore the trial magistrate found that the two minors were not possessed of sufficient intelligence to justify the reception of their evidence nor could their evidence be relied upon since they could not differentiate the truth from lies and would not therefore appreciate the importance of speaking the truth. Having so found the trial magistrate ought not to have received the evidence of the minors and even more so relied upon it as the sole basis for the appellant's conviction.

Section 124 of the Evidence Act as amended by Act Number 5 of 2003 and Act Number 3 of 2006, provides a leeway to the court to convict on the evidence of a minor in a sexual offence "provided for

reasons to be recorded in the proceedings, the court is satisfied that the victim is telling the truth." In this case having formed the impression that the minors were incapable of understanding and differentiating truth from lies, the trial magistrate's reasoning that the minor complainant adduced evidence which "the court had no reason to doubt as truth" cannot hold.

There was sufficient reason to doubt the evidence of the minor complainant as she claimed that the Appellant had slept on her. The implication is that the Appellant was in the process of attempting to have sexual intercourse with her. Since there is no evidence of any factors that interrupted the commission of the offence, the purport of the complainant's evidence is that the Appellant accomplished his mission, and yet neither the Doctor to whom the complainant was taken nor the complainant's mother noticed anything confirming the defilement or attempted defilement. Given that the Appellant is an adult of no small physique and the minor complainant only 7 years, there is no doubt that He could not sleep on the minor complainant without leaving any tell tale signs. There was no other witness who saw the Appellant remove the complainant's underpant or lie upon her. All the witnesses relied on the allegations made by the minor complainant. Given the finding of the magistrate that the minor did not appreciate the importance of speaking the truth, it was not safe to rely on her evidence alone.

Further the trial magistrate failed to comply with ***Section 208 (2) and (3)*** of the Criminal Procedure Code. Although the Appellant was represented by counsel the record does not show the counsel having been given the opportunity to cross-examine the complainant and W. There is no record of any demand or complaint raised by the defence counsel during the trial as regards this failure. It may well be that even the defence counsel was under the mistaken belief that the witnesses having given unsworn evidence they could not be subjected to cross-examination. This confusion may have resulted from ***Section 211*** of the Criminal Procedure Code under which an Accused person who elects to give unsworn evidence cannot be subjected to cross-examination. Section 211 of the Criminal Procedure Code does not however apply to witnesses. It is ***Section 208 (2)*** of the Criminal Procedure Code which applies to all witnesses called to testify in proof of the prosecution case, and it was for the trial magistrate to ensure that this right to cross-examine all the witnesses was accorded to the Accused.

Since the Appellant's conviction was based solely on the evidence of the two witnesses whom He did not have the opportunity to cross-examine, the failure to accord the Appellant an opportunity to cross-examine these witnesses caused him prejudiced and resulted in a miscarriage of justice.

For all the above reasons I find that the Appellant's conviction is not safe and cannot be upheld.

Accordingly I allow this appeal, quash the Appellant's conviction and set aside the sentence imposed. The Appellant shall be set free unless otherwise lawfully held.

Dated, signed and delivered this 31st Day of January 2007.

H. M. OKWENGU

JUDGE