REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 139 of 2006

(From original conviction and sentence in criminal case No. 662 of 2005 of the Senior Resident Magistrate's court at Molo - R. K. Kirui [SRM])

REUBEN KIPLANGAT KIRUI.............................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

JUDGMENT

The appellant, Reuben Kiplangat Kirui was initially charged with the offence of attempted defilement contrary to Section 145(2) of the Penal code but the charge was later substituted under Section 214 of the Criminal Procedure Code to the offence of defilement of a girl under the age of sixteen years contrary to Section 145(1) of the Penal Code. The particulars of the offence were that on the 13th March 2005 at ***[Particulars withheld]*** farm Rongai in Nakuru District, the appellant unlawfully had carnal knowledge of **F C** a girl of eight *(8)* years. He was alternatively charged with the offence of indecent assault on a female contrary to Section 144(1) of the Penal Code. The particulars of the offence were that on the same day and in the same place, the appellant unlawfully and indecently assaulted **F C** by touching her private parts. The appellant pleaded not guilty to both counts. After a full trial, he was found guilty as charged on the alternative count of indecent assault and sentenced to serve five *(5)* years imprisonment. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

In his petition of appeal, the appellant raised four grounds of appeal challenging the decision of the trial magistrate to convict him. He was aggrieved that the trial magistrate had convicted him based on the evidence of the prosecution witnesses that did not establish his guilt to the required standard of proof beyond reasonable doubt. He was aggrieved that the trial magistrate had not considered the totality of the evidence adduced which raised doubt that indeed the appellant indecently assaulted the complainant. He was further aggrieved that the trial magistrate had not accorded him an opportunity of a fair trial. He was finally aggrieved that the trial magistrate had sentenced him to serve a harsh and excessive custodial sentence taking into account the circumstances of the case.

At the hearing of the appeal, the appellant's counsel Mr. Machage submitted that the prosecution had not proved the charge to the required standard of proof beyond reasonable doubt. He submitted that no one saw the appellant defile the complainant. He took issue with the fact that the mother of the complainant had canned the complainant before she implicated the appellant. He submitted that the trial magistrate had failed to conduct *voire dire* to establish the intelligence of the complainant before she offered her testimony. He submitted that the trial magistrate had not complied with the provisions of Section 211 of the Criminal Procedure Code when he put the appellant on his defence. The appellant was thus denied an

opportunity of chosing the best way to defend himself. He further submitted that the underpant which was produced in evidence by the prosecution was not subjected to forensic examination by a government chemist to establish if the wet substance that was allegedly found in the said underpants was spermatozoa.

Mr. Machage further submitted that the trial magistrate had erred when he failed to find that the testimony of the complainant, a child of tender years, had not been sufficiently corroborated and therefore the trial magistrate ought not to have relied on the said testimony to convict the appellant. Learned counsel for the appellant took issue with the fact that the trial magistrate had relied on the evidence of the P3 form which was produced by a clinical officer who had examined the complainant eight *(8)* months after the alleged defilement. He submitted that a clinical officer was not authorized in law to produce any medical report in evidence in a trial before a competent court. He finally submitted that the sentence which was imposed by the trial magistrate was harsh and excessive taking into account the circumstances of the case. He urged this court to allow the appeal.

Mr. Koech learned state counsel opposed the appeal. He urged this court to find that the prosecution had adduced sufficient evidence to prove the main charge of defilement and not the alternative charge of indecent assault. He submitted that the mother of the complainant had frantically looked for the complainant for sometime before she found her in the company of the appellant. She became suspicious and upon confronting the complainant she established that indeed the complainant had been defiled. She immediately made a report to the police and took the torn underpants as an exhibit. Mr. Koech submitted that the fact that the mother of the complainant beat up the complainant before she could disclose what had been done to her should not be evaluated against the prosecution's case because her reaction was a normal reaction of a parent who was apprehensive that harm could have been done to her child.

Mr Koech submitted that after the mother of the complainant made the report to the police, the complainant was taken to the hospital where she was examined and it was confirmed that she had indeed been defiled. He submitted that there was no requirement that the testimony of the complainant be corroborated. In his view, the testimony of the complainant was of such a sufficient detail and description that it was obvious that it was the truth of what transpired. He argued that the evidence of the torn underpants and the evidence of the mother of the complainant corroborated the testimony of the complainant. He submitted that the totality of the evidence adduced established that the complainant had indeed been assaulted by the appellant. He urged the court to dismiss the appeal.

This being a first appeal this court is mandated to reconsider and to re-evaluate the evidence adduced before the trial magistrate's court so as to arrive at its own independent decision whether or not to uphold the conviction of the appellant. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any decision as to the demeanour of the witnesses *(See* Njoroge -vs- Republic [1987] KLR 19). I have heard the submissions made by Mr. Machage on behalf of the appellant and the response thereto made by Mr. Koech on behalf of the State. I have carefully re-evaluated the evidence that was adduced before the trial magistrate. The issue for determination by this court is whether the prosecution proved its case against the appellant on the charge of indecent assault to the required standard of proof beyond reasonable doubt.

It was the prosecution's case that on the 13th March 2005 at ***[Particulars withheld***] village, the appellant was found with the complainant in circumstances that suggested that he had defiled the complainant. On the material day at about 6.45 p.m., PW1 **G C**, the mother of the complainant returned to her house after escorting some visitors. She did not find the complainant **F C**, her daughter who was then aged about eight (*8)* years old. She frantically looked for the complainant within the neighbourhood. She went to the house of the appellant which was about 100 metres from her house. She found the wife of the appellant. The wife of the appellant told her that the appellant had escorted the complainant back home. PW1 went back to her house but did not find the complainant. She went towards another direction of the village while calling out the name of the complainant. It is at that point that she found the complainant in the company of the appellant.

She took the complainant home and beat her up. She was suspicious that the appellant had done something to the complainant. After a thorough beating, the complainant disclosed that she had been

defiled by the appellant. It is at that stage that PW1 examined the underpants of the complainant and saw that it was torn. She immediately made a report to the police who arrested the appellant. From the charge sheet, it is evident that the appellant was arrested on the 18th March 2005 but he was not taken to court until the 18th November 2005. This was exactly eight months after the arrest of the appellant. The complainant was seen by PW4 David Kipcherop a clinical officer based at Rongai Health Centre on the 9th November 2005. He concluded that although the hymen was intact, there was evidence that the complainant had been defiled because there was tenderness on her *labia minora* and her *labia majora.* There was a sticky discharge in the vaginal canal. The P3 form was produced in evidence by the prosecution. PW3 PC David Kamuren testified that he received a torn underpant from the mother of the complainant on the 15th March 2005. He was told that the said underpant was the one which the complainant had worn on the material day that it is alleged that she was defiled. The said torn underpant was produced in evidence by the prosecution. The appellant when put on his defence denied that he had defiled the complainant. He stated that he had been framed up by the family members of the complainant.

I have re-evaluated the evidence adduced by the trial magistrate in light of the submissions made before this court on this appeal. Mr. Machage complained that the testimony of the complainant was taken by the trial magistrate in utter disregard of the provisions of Section 19(1) of the Oaths and Statutory Declarations Act (Cap 15 Laws of Kenya

Court of Appeal in Michael Muriithi Kinyua vs Republic CA Criminal Appeal No. 38 of 2002 (Nyeri) *(unreported)* held at page 10 of its judgment as follows:

"The passages we have quoted from the Nyasani s/o Gichana case and in the Kibangeny arap Kolil case deal with the procedures which a trial court should follow when receiving evidence of a child of tender years. We summarise the position as thus. There are two steps to be borne in mind. The first step is for the court to ascertain whether the child understands the nature of an oath. An investigation to this effect must be done by the court immediately the child witness appears in court The investigation need not be a long one but it has to be done and has to be directed to the particular question whether the child understands the nature of an oath. If the answer to this question is in the affirmative, then, the court proceeds to swear or affirm the child and take his or her evidence upon oath. On the other hand, if the child witness does not understand the nature of an oath, he or she is not necessarily disqualified from giving evidence. The second step then follows. The court may still receive his evidence if the court is satisfied, upon investigation, that he is possessed of sufficient intelligence and understands the duty of speaking the truth. Again investigations in this respect need not be a long one but it must be done and when done, it must appear on record. Some basic but elementary questions may be asked of the child to assess the level of his intelligence and whether he understands the duty of speaking the truth or otherwise. When the court is so satisfied, then, the court will proceed to record unsworn evidence from the child witness."

In the present appeal, it is clear that the trial magistrate did not follow this laid down procedure and instead, without establishing whether the complainant could give sworn evidence or understood the meaning of telling the truth, took the unsworn testimony of the complainant. The trial magistrate, after the conclusion of the case reached a decision that the complainant was telling the truth. It is the finding of this court that the trial magistrate could have reached such conclusion when he did not in the first place establish on record whether the complainant was sufficiently intelligent to understand the meaning of the truth. This court is aware that Section 124 of the Evidence Act gives discretion to a trial court, in sexual offences, to convict an accused person based on the uncorroborated testimony of a child of tender years if the trial court is for sufficient reasons satisfied that the child was telling the truth. In the circumstances of this case, it would be impossible for this court to reach a conclusion that the complainant was telling the truth, in the absence of necessary legal directions given by the trial magistrate before he took the evidence of the complainant. I do therefore hold that the appellant's appeal on this ground has merit.

Secondly, it is clear that eight *(8)* months expired between the time the case was reported to the police to the time the appellant was taken to court. The delay of eight months was not explained by the prosecution. The trial magistrate, rightly in the view of this court, reached the conclusion that the evidence of PW4, the clinical officer, could not be relied on as he had examined the complainant eight *(8)*

months after the alleged occurrence of the said event. The mother of the complainant testified that she beat up the complainant in a bid to make her disclose what had taken place when she was in the company of the appellant. It is impossible for this court to reach a conclusion that what the complainant told the court was not influenced by the fact that the complainant feared that if she told the court contrary to what her mother expected her to tell the court, she would suffer the same consequences that she had suffered when she initially failed to tell her mother what her mother expected the child to tell her.

Upon re-evaluating the totality of the evidence adduced, I do hold that reasonable doubt was raised on the circumstances on which it was alleged that the appellant committed the offence. PW4 testified that he examined an underpant which was allegedly worn by the complainant which had silky wetness. The examination was done on the 9th November 2005. This court wondered how an underpant could be wet for eight months after the occurrence of the alleged defilement. It is clear therefore that the underpant which PW4 saw was not the same underpant which was produced in evidence by the prosecution and which was allegedly worn by the complainant on the day she was alleged to have been defiled. The evidence of the torn pant therefore does not help the prosecution's case.

The sum total of the above reasons is that the prosecution failed to prove its charge on the charge of indecent assault against the appellant to the required standard of proof beyond reasonable doubt. The appeal by the appellant has merit and is hereby allowed. His conviction on the charge of indecent assault contrary to Section 144(1) of the Penal Code is hereby quashed. The appellant is acquitted of the charge and is set at liberty forthwith and ordered released from prison unless otherwise lawfully held. It is so ordered.

DATED at NAKURU this 9th day of March 2007.

L. KIMARU

JUDGE