REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

Criminal Appeal 180 of 2006

(From original conviction and sentence of the Chief Magistrate's Court at Nakuru in Criminal Case No. 975 of 2005 – A. B. Mongare [S.R.M.])

DAVID TURUPON KIPRONO….....APPELLANT

VERSUS

REPUBLIC……..…….RESPONDENT

JUDGMENT

The appellant, David Turupon Kiprono was charged with the offence of attempted defilement of a girl contrary to Section 145(2) of the Penal Code. The particulars of the offence were that on the 5th April 2005 at ***[Particulars withheld]*** village, Mau Narok in Nakuru District, the appellant unlawfully attempted to have carnal knowledge of M N C, a girl under the age of sixteen *(16)* years. The appellant pleaded not guilty to the charge. After a full trial, he was convicted as charged and sentenced to serve seven *(7)* years imprisonment with hard labour. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

In his petition of appeal, the appellant has raised four grounds of appeal in support of his appeal. He states that the trial magistrate erred in law when she failed to appreciate the fact that the prosecution had not proved its case to the required standard of proof beyond reasonable doubt. He was aggrieved that the trial magistrate had ignored the appellant's defence and had instead shifted the burden of proof and thus erroneously convicted him. He faulted the trial magistrate for not giving reasons for her decision. He was finally aggrieved that the trial magistrate had meted out a custodial sentence on him that was manifestly excessive in the circumstances.

At the hearing of the appeal, Mrs Wanderi learned counsel for the appellant submitted that the prosecution had not proved its case on the charge of attempted defilement to the required standard of proof. It was her further submission that the age of the complainant was not indicated in the evidence adduced by the prosecution witnesses. And neither was the evidence by the complainant corroborated. She submitted that no medical evidence was adduced to support the prosecution's contention that the complainant had indeed been defiled. She argued that the evidence adduced by the prosecution was contradictory because of the fact that it was alleged by PW2 that he had seen the appellant putting on his trousers and walking at the same time. She argued that no one other than PW2 made the allegation that the complainant had screamed when he allegedly saw the appellant emerging from the forest. Mrs Wanderi took issue with the fact that the trial magistrate had shifted the burden of proof to the appellant and thereby convicted him. She complained that the investigating officer who testified before court did not investigate the case. She finally submitted that the appellant did not understand the language that was used during trial and further was not allowed to cross-examine the prosecution witnesses. She therefore submitted that the appeal ought to be allowed and the appellant acquitted of the charge since the charge

was not proved to the required standard of the law.

Mr. Mugambi for the State opposed the appeal. He submitted that the prosecution had proved its case to the required standard of proof beyond reasonable doubt. He submitted that it was clear from the charge sheet that the complainant was a girl aged less than sixteen *(16)* years. He further submitted that the appellant was known to PW2 and the complainant. He argued that the prosecution had established that the appellant had been seen emerging from the forest while he was putting on his trousers. PW2 was alerted to the fact that something unusual was taking place in the forest when he heard the complainant screaming. He submitted that there existed no grudge between the appellant and the prosecution witnesses and therefore it could not be said that the evidence adduced by the prosecution was incredible. He submitted that there was no need for the prosecution to adduce medical evidence because the charge was that of attempted defilement. He urged the court to disallow the appeal and uphold the conviction and sentence of the appellant by the trial magistrate.

This being a first appeal, this court is mandated to re-evaluate and to re-consider the evidence adduced in the trial before the magistrate's court so as to reach its independent determination whether or not to uphold the conviction. 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 could not make any finding as regard the demeanour of witnesses (*See* **Okeno –vs- Republic [1972] E.A. 32**). The issue for determination by this court is whether the prosecution proved its case on the charge of attempted defilement against the appellant to the required standard of proof beyond reasonable doubt. I have carefully re-evaluated the evidence that was adduced before the trial magistrate and also considered the submissions made by Mrs Wanderi on behalf of the appellant and by Mr. Mugambi on behalf of the State.

Three witnesses were called by the prosecution to testify in support of the charge of attempted defilement against the appellant. The first witness was a child of tender years. Although the age of the complainant was not indicated in evidence, it is clear that the trial magistrate was satisfied that the complainant was of such an age that she could not offer sworn evidence. It is unfortunate that the trial magistrate did not conduct *voire dire* to determine if the complainant was of sufficient intelligence to understand the meaning of an oath or that she understood the duty of speaking the truth. The Court of Appeal in **Michael Muriithi Kinyua –vs- Republic Cri. Appeal No. 38 of 2002 (*Nyeri*) (*unreported*)** in considering the application of **Section 19(1)** of the **Oaths and Statutory Declarations Act** as regards the evidence of children held at page 11 of its judgment as follows;

"***We would summarise the position 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 to 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. Where the court is satisfied, then, the court will proceed to record unsworn evidence from the child-witness."***

In a recent Court of Appeal decision *i.e*. **Peter Irungu Mukurathi –vs- Republic Criminal Appeal No. 132 of 2004 (Nyeri) (*unreported*)** the Court of Appeal held at page 5 as follows:

"***It is apparent that the trial judge made the inquiry pursuant to Section 19 of the Oaths and Statutory Declarations Act (Cap 15) which authorizes the reception of the unsworn evidence of a child of tender years who does not understand the nature of the oath, if, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence and also understands the***

duty of speaking the truth.

Section 124 of the Evidence Act provides:-

"***Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declaration 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 him."***

There is a proviso to that section introduced by The Criminal Law (Amendment) Act No. 5 of 2006 as further amended by the Sexual Offences Act – Act No. 3 of 2006 authorising the court to convict on uncorroborated evidence of a child of tender years (*now referred to as "alleged victim")* ***in criminal cases involving sexual offences if, for reasons to be recorded, the court is satisfied that the child (alleged victim) is telling the truth.***

In the absence of statutory definition, any child of the age or apparent age of under 14 years is generally considered as a child of tender years. By the definition in Section 2 of The Children Act – 2001 Act No. 8 of 2001, a child of tender years is defined as a child under the age of ten years."

In the present appeal, it is clear that although the age of the complainant was not stated, that the complainant was a child of tender years. She told the court that she was a pupil in top class. Presumably the complainant was in top class in a nursery school. She could not tell where she was when she was asked by the trial magistrate. The trial magistrate did not conduct *voire dire* to establish whether the complainant was sufficiently intelligent to understand the meaning of the truth. The failure by the trial magistrate to conduct such investigation as envisaged by the law is fatal to the prosecution's case if the evidence relied on by the trial magistrate to convict the accused person is solely that of such a child of tender years. In her testimony which was recorded by the court, she gave a dramatic description of how the appellant defiled her.

Upon re-evaluation of her testimony, it is evident that she alleged that she had been defiled. This fact could only be established after the complainant was examined by a medical doctor. This was not done. PW2's testimony to the effect that he heard the complainant scream in the forest and upon investigation saw the appellant emerging from the forest while putting on his trousers is not corroboration of the evidence of the complainant. No evidence was adduced by the prosecution witnesses to the effect that the complainant's private parts had been examined and it was indeed confirmed that the complainant was either defiled or an attempt had been made to defile her.

Both the complainant and PW2 testified that the father of the complainant was near the scene when the appellant is said to have defiled or attempted to defile the complainant. It is however strange that the father of the complainant was not called to offer testimony on behalf of the prosecution. The father of the complainant was a crucial witness whose evidence could have shed light on what actually took place. Since the prosecution did not deem it appropriate to call him, it can only be presumed that his evidence could have been in favour of the appellant. Further, it is clear that none of the prosecution witnesses testified on what transpired on the material day that the said attempted defilement is said to have taken place. PW3 PC Bernard Kiptoo based at Mau Narok police station arrested the appellant when he was taken to the said police station. He however did not investigate the case.

It is therefore apparent from the aforegoing that either due to sheer incompetence on the part of the investigating agencies or due to the fact that the appellant actually did not commit the offence that there was no sufficient evidence to sustain the conviction of the appellant on the charge of attempted defilement contrary to **Section 145(2)** of the **Penal Code**. The trial magistrate did not analyse the evidence as she was required to by the law and thereby reached the erroneous decision convicting the appellant for the said offence. The trial magistrate did not offer any opinion if she believed the testimony of the complainant which would have enabled her to convict the appellant without the necessity of corroboration as envisaged by **Section 124** of the **Evidence Act**.

The upshot of the above reasons is that, this court, upon re-evaluation of the evidence adduced before the trial magistrate's court and further having considered the submissions made by the appellant's counsel on this appeal, hereby allow the appeal in its entirety. The conviction of the appellant is hereby quashed and the sentence imposed set aside. The appellant is hereby ordered released from prison and set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED at NAKURU this 9th day of May,2007.

L. KIMARU

JUDGE