REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 471 of 2001

(From original conviction(s) and Sentence(s) in Criminal case No. 4528 of 2000 of the Senior Principal Magistrate's Court at Kibera (Miss Mwangi – PM)

BEN MAINA MWANGI....……....….................................……………….……..…..APPELLANT

VERSUS

REPUBLIC……………..........................………..……………..……………....RESPONDENT

J U D G M E N T

BEN MAINA MWANGI was found guilty and convicted for the offence of **DEFILEMENT OF A GIRL UNDER 14 YEARS** contrary to **Section 145(1**) of the **Penal Code**. He was sentenced to serve 4 years imprisonment. He has served the sentence but still wished to prosecute his appeal which is now before me.

The Appellant through **KAMAU KINGA & CO. ADVOCATES** filed a memorandum of appeal (mistakenly so called) in which he raised three grounds of appeal as follows: -

(a) The learned trial magistrate erred in sentencing the Appellant for an offence that was not proved.

(b) There was no evidence adduced against the Appellant in connection with the offence.

(c) The sentence was manifestly excessive.

The brief facts of the prosecution case was that the Appellant took the Complainant in his house and removed her pant and also his pants and that both of them lay on a mattress. Thereafter, the Complainant was taken to her mother who reported to the police and also took the Complainant for treatment. The P3 form was filled by **Dr. Kamau,** PW4, who testified that the Complainant's hymen was absent and that her anus was lacerated.

The Appellant denied the offence and called witnesses who were not qualified clinicians, to say that they checked the Complainant at the hospital and found "nothing".

In this appeal, **Mr. Kamau Kinga** appeared for the Appellant while **Miss Gateru**, State Counsel represented the Respondent.

It was **Mr. Kamau's** contention that the evidence adduced could not support the conviction. That the only evidence before court was that of a minor who was 4 years old. That despite that fact, the learned trial magistrate did not warn herself of the danger of relying on such evidence. Further that the Complainant's mother, to whom the Complainant child was taken by the Appellant's wife, did not herself

witness the incident but merely stated what she had been told. Counsel submitted that the Complainant's evidence was not corroborated and at the time the case was heard corroboration was required.

Mr. Kamau also submitted that the Doctor's evidence did not support the charge.

Miss Gateru, learned counsel for the State opposed the appeal and submitted that the prosecution had proved its case as required. Counsel submitted that the prosecution case comprised the direct evidence of the Complainant who described what transpired on the day in question. Counsel submitted further that the Complainant's mother corroborated the Complainant's evidence to the extent that she said she saw sperms on the Complainant. Counsel submitted that the evidence of the Doctor also corroborated the Complainant's evidence that she had been defiled, as the Doctor's finding was that the Complainant's hymen was broken and that she had a laceration in the anus. Counsel submitted further that despite the fact that the Appellant's wife was not a witness, the evidence adduced was sufficient to sustain the conviction.

I carefully analysed and evaluated afresh the evidence before the court by both sides, bearing in mind that I neither saw nor heard any of the witnesses and giving due allowance. See **OKENO vs. REPUBLIC 1972 EA 32**. I will start at the very beginning and consider how the learned trial magistrate took the Complainant's evidence. The Complainant was a child of 4 years. The learned trial magistrate recorded answers to questions she put to the Complainant without recording the questions themselves. In addition, after carrying out the *voire dire* inquiry the learned trial magistrate did not make a ruling to state why she opted to take the Complainant's evidence without having her sworn. The learned trial magistrate did not also state whether she was satisfied that the Complainant understood an oath, or the duty to tell the truth or whether she formed the opinion that she was possessed of sufficient knowledge to justify taking her evidence, giving reasons for the decision thereon. This failure is material. In the case of **JOHN MUIRURI vs. REPUBLIC [1983] KLR 445**, **Madan, Porter JJA** and **Chesoni Ag. JA** they held that:

"***1. Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.***

2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

4. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.

6. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to the conviction.

9. The correct procedure for the court to follow is to record the examination of the child witness as to the sufficiency of her intelligence to satisfy the reception of evidence and understanding of the duty to tell the truth."

The holding in **Muiruri case**, supra, clearly shows that the learned trial magistrate did not carry out the *voire dire* inquiry in the expected manner.

The second issue I will consider next is the import of the Complainant's evidence. The evidence was short and comprised 11 lines as follows: -

"*I am called SA. I know the accused before court. He is called Ben. He does not live near us. He lives upwards us below. Ben found me playing and he had lied to me he has a small Girl I should visit her and he took me to a house that is taking. He took me there and laid me on the mattress and undressed me by removing my pant. He then removed his own pants and had mine removed. He turn (sic) me to lie down. I lay down on the mattress. He threatened me that he could put me into a hole that was in the house. Later I told my mother what had happened on the same day. I did not know where the accused went to after before took me to another Girl called Grace. He had had act with me.*"

I considered the evidence adduced and nowhere did the Complainant claim that the Appellant did anything that can be construed as defilement. She did not even express being caused any pain during the ordeal. All she said was that the Appellant undressed her by removing her under pant and then removed his before telling the Complainant to lie on the mattress which she did. The Complainant did not talk of an interruption or intrusion during the incident or tell how it ended. Bearing in mind she was a child of tender years being only 4 years at the time, for the offence to be proved there should have been evidence adduced to show that the Appellant used some force on her or something tending to show an assault or infliction of pain. At least some evidence needed to be adduced from which it could be construed that defilement took place. Considering the Complainant's age as compared to the Appellant, if any attempt was made to penetrate the Complainant's private parts it would be expected that the Complainant must have felt pain, if not excruciating pain. There is no way the Complainant would forget the experience or that detail in her evidence.

The next issue to determine is whether there was conclusive evidence given to show that the Complainant had been defiled. I was not happy with the Doctor's evidence. He was meticulous to record all his finding on the Complainant and even the Appellant. However, he overlooked the most important aspect of the examination which was to show the age of the injuries he found on the Complainant. It is unacceptable that the Doctor saw the hymen missing and presence of laceration on the anus but failed to give the age of these injuries. That appears to have been deliberate and in my view the learned trial magistrate should not have let the Doctor go free. At the end of the day the Doctor's findings were very important, were positive to findings of defilement but fell short of connecting the findings to the Appellant by failing to connect the injuries to the time of the offence. The Doctor's findings did not connect the date of the alleged defilement of the Complainant with the age of the injuries noted. It was worthless evidence for purposes of this case.

The other question is whether the evidence of the Complainant's mother, PW2 was of any material assistance to the Complainant's evidence or the charge. I do not agree with the learned trial magistrate's finding and indeed the submission of **Miss Gateru** that PW2's evidence was corroboration of the Complainant's evidence. It was not. The only significant part of PW2's evidence was her allegation that she saw sperms on her daughter's legs. Even if she saw sperms, was that evidence of defilement? I do not think so. There is no defilement if there is no evidence of penetration of the Complainant's private parts and that evidence was lacking in the Complainant's testimony. PW2 said her daughter was taken to her by another not called as a witness who also gave her some information. That information was hearsay and ought not to have been admitted in evidence. Further, the informant, said to be the Appellant's wife was a compellable witness given the circumstances of the case. She was the most important witness. Failure to call her adversely affected the prosecution case as it denied the court very vital evidence. PW2's evidence did not support a finding that the Complainant had been defiled prior to being taken back to her. Had PW2 examined the child and seen blood or a discharge on her private parts that could have formed strong evidence taken together with the Doctors finding, to support a finding that the Complainant was defiled immediately preceding the time she was handed back to her mother.

I must comment on another issue which comes out in the defence case. I found it quite disgusting that the defence witnesses comprising the Appellant's mother and his colleague at Kenyatta National Hospital where he worked, had the audacity to open up the legs of the child Complainant to check it. That was quite ridiculous. Even if they were medical staff, and evidence before court did not suggest so, they had no business checking the child. The Complainant was entitled to humane treatment and to consolation and not invasion of her person. I condemn in the strongest way possible the action of these two

witnesses. In my view, they were busy bodies, had an ulterior motive to protect the Appellant and were definitely worthless witnesses. Sadly, they were not ashamed of standing in court to give evidence for a crime they neither witnessed nor had any business with. As a mother, the Appellant's mother should have stood up not only to condemn any act of defilement but in solidarity with the Complainant. Not the other way round as happened in this case.

Given the evidence adduced in the court, my conclusion is that the fact that the Appellant stripped the Complainant of her pant, which I believe he did, was evidence sufficient to find that he had an intention to defile the Complainant. Had the trial been conducted as required, I would have found the Appellant **GUILTY OF ATTEMPTED DEFILMENT**. However, given the fact that the Appellant served the sentence in full and the defect in the proceedings and the failure by the trial magistrate to apply the necessary safeguards in the examination of the Complainant during the *voire dire* inquiry as demonstrated in **Muiruri vs. Republic,** Supra, and failure to write a ruling on the issues raised hereinabove, this rendered the proceedings a nullity. Since the Appellant has fully served the sentence, I will not consider a retrial appropriate. Instead, I will allow the appeal, quash the conviction and set aside the sentence.

Dated at Nairobi this 1st day of November 2006.

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LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant

Mr. Kamau Kinga for the Appellant

Miss Gateru for State

CC: Tabitha

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LESIIT, J.

JUDGE