REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 280 of 2004

MICHAEL ODHIAMBO………...……..…………..APPELLANT

VERSUS

REPUBLIC……………………...……….……….RESPONDENT

JUDGMENT

The appellant was charged with defilement of a girl contrary to Section 145(1) of the Penal Code. The particulars of the offence were that on the 18th day of March, 2003 at [*particulars witheld*] School in Nakuru District within Rift Valley Province, had unlawful carnal knowledge of MO, a girl under the age of 14 years. He also faced an alternative charge of indecently assaulting the said girl on the same date as above by touching her private parts. The appellant was also charged in count two with indecent assault on a female contrary to Section 145(1) of the Penal Code, the particulars of the offence being that on the 24th day of March, 2003 at [*particulars witheld*] School he unlawfully and indecently assaulted CWM, a girl under the age of fourteen years by touching her private parts. He was tried and convicted and sentenced to twenty (20) years imprisonment in count one and ten (10) years for count two, both sentences to run concurrently. He was dissatisfied with the conviction and sentence and appealed against the said conviction and sentence.

This being the first appellate court it is mandated to look at the evidence adduced before the trial court afresh, re-evaluate and re-assess it and reach its own independent conclusion. However, it has to warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell what their demeanour was (see ***Njoroge vs Republic*** [1987] K.L.R. 19. I therefore wish to consider afresh the evidence that was tendered before the trial court.

The complainant in count one, PW1 was a girl aged 10 years. She knew the appellant as a cook in their school. She testified that on 18/3/2003 at about 3.30 p.m. she went to the dinning hall to take tea together with her friends. As she was taking the tea, it poured on the floor when the cup fell down. She decided to walk out without having cleaned up the table and the appellant asked her to clean up the table. She did so and she claimed that as she was returning the duster in the kitchen the appellant held her two hands together from behind and put her on a table then he removed his penis and pulled her pants down to the knees. He then put his penis into her private part. She claimed that he did it for about 30 minutes, that is as per the typed proceedings although in the judgment of the learned trial magistrate it appears as 3 minutes. In cross-examination she said that the ordeal took approximately 5 minutes. She then started crying and the appellant wiped her tears then he left her and she put on her pants and went to class and took her bag and waited for the van that dropped her home. Upon arriving home, she decided to take a bath and then she noticed that the pants were torn by the waist and had blood. She further stated that she stayed for about one week and a girl by the name C told other pupils in the school that she was taking tea when the appellant indecently assaulted her. PW1 had a twin sister who went and told her mother about

the issue relating to C As she narrated the story, PW1 looked sad and then her mother called her to her bedroom and asked her what was causing her sadness. PW1 then told her mother what had been done to her. The following day she was taken to the police station to make a report and thereafter was referred to Nakuru Provincial General Hospital for treatment.

The torn pants were produced before the court as an exhibit and PW1 said that she did not scream when the appellant was defiling her as she was scarred. She said she did not tell her mother immediately after the ordeal because the appellant had threatened to kill her if ever she told anybody about it.

In cross examination, she stated that she had never had sex before and also admitted that she had never told anybody about the incident until she spoke to her mother about it. She said that when she went to take tea there was nobody else in the kitchen except the appellant; the other pupils were playing in the field. She said she was wearing her physical education (P.E.) kit and the appellant was wearing a white trouser and a white shirt.

PW2, LW was also a 10 year old girl. She testified regarding count two and said that on 24/3/2003 while they were playing in a field the appellant called C while he was in the kitchen. She assisted him in cleaning the tables and then he touched C. breasts. In cross examination, she said that C reported the matter to Mr. Njogu but that was four days thereafter.

PW3, CW was initially declared a refractory witness under Section 152(1) of the Criminal Procedure Code and the court ordered that she be remanded in a Juvenile Remand Home from 14/8/03 to 21/8/03 but her mother executed a bond of Kshs.20,000/- and she was released on 15/8/03. When she was released and appeared before the court on 21/8/03 she was still uncooperative and the court ordered her remand again until 28/8/03. However, on 22/8/03 she was released again after her mother executed another bond for Kshs.20,000/-. She testified that on 24/3/2003 she went to the dinning hall alone and she asked the appellant for tea and he gave her. She said that the appellant touched her on her face and chest then told her to go away. Later she reported to her teacher, Mr. Njogu, PW5, what the appellant had done then PW5 called the police who went to the school and she wrote a statement on what had happened. She said she did not see PW1 on that day. She also said that PW2 indicated that she saw the appellant touching her.

In cross examination, she said that the reason why she had hesitated to testify in court was that her mother had told her not to talk. She further stated that she talked to PW1 at the end of the first school term that year and PW1 told her that she knew what had happened to her and PW3 in turn told PW1 that she also knew what had happened to her. She said that PW1 told her that she had been raped. She further testified that herself and six other girls went and reported the appellant to their teacher, Mr. Njogu.

PW4, LAO was the mother to PW1. She testified that on 28/3/2003 she arrived home from work at about 7.30 p.m. and as the children were doing examinations she talked to them to find out how they had performed and they showed her their examination papers. She then asked how the school was and N., PW1's twin sister told her that there was a case in school where the appellant had indecently assaulted C, (PW3) and she told her friends and then they went and reported the matter to their teacher. PW4 then noticed that PW1 was disturbed over the story yet she was more talkative than her twin sister. When the mother asked her why she was not talking she kept quiet then PW4 called PW1 to her bedroom to inquire what was wrong. PW1 told PW4 she would tell her if PW4 promised to keep the secret. She then narrated to her mother how she had been defiled by the appellant. Her mother then checked her private parts and saw that there was some enlargement compared to her twin sister. The following day PW4 went and reported to the police and they were sent to hospital so that PW1 could be examined. The mother realised that PW1 had some pain but was not bleeding.

In cross examination, PW4 said that PW1 had told her that she did not tell anybody about the defilement because the appellant had threatened her with death.

PW5, Patrick Njogu Gakundo was a teacher at [*particulars witheld*] School where the complainants were attending school. He told the court that on 28/3/03 at about 4 p.m. a group of girls were outside his

office and among them were PW2 LW and PW3, C He called them inside his office and they pushed each other as to who would speak and eventually C spoke. She told Njogu that the appellant had tried to touch her breasts that day but on 25/3/03 he had actually touched her breasts. PW5 then recorded that in the school discipline book. He then asked the girls to go back as he investigated. He asked the appellant about it but he denied and since the Headmaster was not in on that day, PW5 decided to keep the matter pending until the following Monday of 31/3/03. On that day, early in the morning, he reported to the Headmaster and they agreed to deal with the matter at 3.30 p.m. However, before the appointed time, PW4 and two police officers went to the school and PW4 complained that her daughter, PW1 had been defiled by the appellant. PW5 recorded the complaint in the discipline book and the appellant was called to the office and asked about the allegation but he denied and the police arrested him. They all went to the kitchen and PW1 showed them a short table near the entrance to the dinning hall on which she had been defiled.

PW7, Lilian Wachira was a Police Officer at Nakuru Police station when PW4 went to report about the alleged defilement and stated that PW4 was issued with a P3 form and PW1 was taken to Nakuru Provincial General Hospital where the P3 form was filled and since it showed that the complainant had been defiled, the appellant was charged accordingly. She then visited [*particulars witheld*] School with others and PW1 showed them the table on which she had been defiled in the dinning hall. She further told the court that apart from PW1, other complaints against the appellant were also made at the police station but they related to indecent assault.

PW8, Dr. Kogutu Vitalis examined PW1 on 31/3/03. He said that she looked anxious and slightly depressed. He found that she had a broken hymen and a whitish discharge. He carried out various tests but they were all negative due to the lapse of time, 11 days from the date of the alleged defilement. He told the court that it was not easy to say whether PW1 had been defiled. In cross-examination, he said that it was difficult to tell when the rapture of the hymen occurred. He further said that the hymen heals very fast, even within 2 days. He continued to say that if there had been defilement other injuries could have been noted and according to him, he could not conclude that the rapture was caused by defilement since other reasons could cause it in small girls.

In his sworn defence, the appellant denied having committed the offences as charged with. He said that on 17/3/2003 there had been an annual general meeting and they worked as usual and there was no unusual incident at all that took place on 18/3/2003.

Regarding the second complainant, he said that she went to the dinning hall and asked for tea. He said he was with the school driver and a fellow worker, Hellen Odingo. He told her that there was no tea and she went away but went back later and asked for water. He said that Hellen gave her some water which she took but spat some on the floor. He denied having touched her breasts as was alleged. The appellant called three (3) defence witness (his workmates) who also disputed the charges that were levelled against the appellant.

The trial magistrate in her judgment said that she found PW1 to be a truthful witness and she believed her. The trial magistrate also referred to the evidence of the Doctor who had also said that PW1 was truthful but anxious and depressed. The magistrate found that the evidence of PW1 was corroborated by that of the Doctor and she convicted and sentenced the appellant as aforesaid.

The appellant’s learned counsel raised five (5) grounds of appeal. I wish to start by considering ground number 3 which related to count two but before I do so, it is appropriate to state that Mr. Gumo, Assistant Deputy Public Prosecutor stated that the state did not support the conviction on both counts. In his view, the scene where the alleged offences were committed was the most unlikely place, particularly with regard to count one since there were people all the time. He further stated that the evidence of PW8 created serious doubts as to whether the offence of defilement ever occurred and said that the court should have given the accused the benefit of doubt.

Mr. Gumo was also of the view that the evidence of PW1 was suspect because of the manner in which she behaved after commission of the alleged offence. With regard to the evidence of PW3, Mr. Gumo said

that she was very hesitant in testifying before the court and only did so after she had been remanded in custody.

The court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure that it subjects the entire evidence tendered before the trial court to a close and fresh scrutiny and reassess it and reach its own determination based on the evidence and nothing else. It has to consider all the submissions that are made before it by both the appellant and the state.

In ground number 3 of the appeal, the appellant's counsel stated that:-

(a) The evidence that was adduced did not support the charge of indecent assault.

(b) That the evidence adduced did not show that the appellant touched PW3's "***private parts*".**

(c) PW3 was forced and induced by the court to adduce evidence and hence her complaint is doubtful.

In count two, it was stated that the appellant indecently assaulted PW3 by touching her private parts. It was alleged that he touched her breasts. PW3 herself said that the appellant touched her face and chest. She testified in a very reluctant manner. When she first appeared before the trial court on 14/8/03 the prosecution examined her briefly and not being satisfied with her answers, prayed that she be declared a refractory witness under Section 152(1) of the Criminal Procedure Code. The court remanded her at a Juvenile Remand Home for a short while. When she was released and brought to court, she said that she could not remember that she had been before the court on 14/8/03 and that did not seem to have been taken kindly by the trial magistrate who on her own motion decided to remand her again upto 28/8/03. However, after one day, her mother signed a bond of Kshs.20,000/- and her daughter was released. That was the background upon which she told the court that the appellant had touched her face and chest. It is PW2 who testified that the appellant touched the breasts of PW3, a fact that was denied by the alleged victim. The trial court did not give any consideration to the evidence of PW2 and PW3 save the observation made that:-

"I know the evidence of minors need corroboration but I have no doubt the kids were truthful and I believed all of them."

The trial court then found that the second count had been proved and sentenced the appellant to 10 years imprisonment with hard labour.

Even assuming that there was sufficient evidence that the appellant touched the breasts of PW3, that would not have been sufficient to convict him on the charge of indecent assault.

In ***ISAAC OMAMBIA VS REPUBLIC*** Criminal Appeal No. 47 of 1995 (unreported) the Court of Appeal stated that the term "***private parts*"** with reference to sexual offences meant a person's genital organs that is the external sex organs. As per that decision which is binding upon this court, one cannot be convicted on a charge of indecent assault on a female if it is alleged that he touched a woman's breasts. Such a person may be guilty of any other offence but cannot be said to have touched a woman's private parts.

With specific reference to this appeal, the evidence of the complainant PW3 was completely at variance with that of PW2 since the complainant herself said that the appellant touched her face and chest whereas PW2 said that the appellant touched the breasts of PW3, yet PW2 and PW3 were not together at the material time. PW3 said she was alone in the dinning hall and PW2 was outside. The conviction of the appellant on the second count cannot stand and I hereby quash it and set aside the sentence of 10 years imprisonment that had been handed down.

I now turn to grounds 1 and 2 of the appeal against conviction and sentence with regard to count one. As per the evidence of PW1, the offence was committed in the dinning hall. There was no eye witness

available. The complainant did not cry, scream, or make any noise to attract the attention of other cooks or workers, or pupils. She did not tell anybody immediately thereafter of the alleged defilement. She said the appellant had threatened to kill her if she ever told anybody about the incident.

Ten (10) days thereafter when her twin sister was telling her mother regarding the alleged incident of indecent assault to PW3 by the appellant is when, according to PW4, the complainant appeared to have been disturbed by the story. Her mother (PW4) then called her to her bedroom and requested the complainant to tell her what was wrong. The complainant told her mother of the alleged defilement. She had not told anybody else before about it. There was no evidence that between the date of commission of the alleged offence and the date when she told her mother about it, PW1 behaved in any unusual manner or appeared disturbed, tense, anxious or angry either in school or at home. Neither her twin sister nor her mother had noticed any peculiar change in her disposition.

PW1 was examined by **Doctor Kogutu Vitalis (PW8)** 11 days after the alleged defilement. He found that she had a broken hymen and a whitish discharge. He took her blood sample for P24 and VDRL testing but the results were negative. According to him, it was not easy to say that she had been defiled. In cross-examination, he said that if there had been defilement, other injuries could have been noted but there were none. The rapture of the hymen ***per se*** was not conclusive proof that PW1 had been defiled. The Doctor testified that rapture of hymen in small girls could be caused by other factors. He said that vigorous play could not cause complete rapture.

The trial magistrate in her judgment found that the evidence of PW1 was corroborated by the Doctor's evidence but a close scrutiny of the Doctor's evidence does not show that.

Section 124 of the Evidence Act states as follows:-

"***124.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 hereof implicating him;***

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."

The Oaths and Statutory Declarations Act does not define who a "***child of tender years"*** is. In ***<u>KIBANGENY VS REPUBLIC</u>*** [1959] E.A. 92 at Page 94 the Court of Appeal held that such a child was one whose apparent age was under fourteen years. However, the Children's Act, 2001 defines a child of tender years to mean a child under the age of ten years.

PW1 was born on 30/7/1992 and the alleged offence was committed on 18/3/2003 and so she was over ten years at the time she testified. She was not therefore a child of tender years as defined under the Children's Act, 2001. That notwithstanding, it was still desirable that the evidence of PW1 be corroborated by some material evidence.

Where a Judge or a Magistrate has to convict an accused person on uncorroborated evidence of a complainant, he has to warn himself of the danger of so doing but having done so, he may convict in the absence of corroboration if he is satisfied that the complainant is truthful. See ***<u>THUO VS REPUBLIC</u>*** [1988[KLR 763.

In ***<u>R VS CHEROP A. KINEI AND ANOTHER</u>*** 3 EACA 124 the Court of Appeal for Eastern Africa cited its own decision in ***<u>Rex Vs Ramazani bin Mawingu</u>*** reported in the same volume where it was stated that:-

"the practice of this court is to require corroboration in sexual cases"

Such corroboration, in my view, is a matter of practice but is not a mandatory legal requirement. What is corroboration? In ***REPUBLIC VS MANILAL ISHWERLAL PURCHIT*** [1942] 9 E.A.C.A. 58 at Page 61 the Court of Appeal stated as follows:-

"…***..the corroboration which should be looked for is, as laid down in R VS BASKERVILLE ….some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. It must be independent evidence which 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 it. It is of course not necessary to have confirmation of all the circumstances of the crime. Corroboration of some material particular tending to implicate the accused is enough and whilst the nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged, it is sufficient if it is merely circumstantial evidence of his connection with the crime. Corroboration may also be found in the conduct of the accused."***

The trial magistrate warned herself of the danger of convicting on evidence of minor children and went ahead to convict the appellant for the charge of defilement. She did not warn herself of the danger of acting on the uncorroborated evidence of the complainant since in her view the complainant's evidence was corroborated by that of PW8, the Doctor. With respect to the trial magistrate, she misdirected herself because the entirety of the Doctor's evidence neither pointed to the appellant in any way nor did it show that the crime was committed.

In the circumstances, the conviction of the appellant was unsafe. I therefore allow grounds 1 and 2 of the appeal. The end result is that appeal is allowed in its entirety, the conviction quashed and the sentence set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED & DELIVERED at Nakuru this 29th day of April, 2005.

D. MUSINGA

JUDGE

29/4/2005