REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 268 of 2004

ALI ABDALLA TANGURI……. …….APPELLANT

VERSUS

REPUBLIC ……..……..PROSECUTOR

JUDGMENT

The Appellant was arraigned before the Principal Magistrate's Court at Kwale for the offence of defilement of a girl contrary to Section 145(1) of the Penal Code. Upon conviction he was sentenced to ten years imprisonment with hard labour. He has now appealed to this court against both that conviction and sentence and listed 10 grounds of appeal which his advocate Mr. Magolo condensed to two. They are that the offence was not proved and that the sentence imposed is harsh.

On conviction Mr. Magolo raised several points. The first one was that the trial magistrate failed to write a judgement as required by Section 169 of the Criminal Procedure Code (CPC). He submitted that that section requires the court to set out the issues raised in the case and then decide on them. The trial magistrate having failed to do that renders her judgment illegal and the appeal should be allowed even on that score alone. The second one was on the nature of the evidence tendered at the trial. Short of demanding corroboration for the complainant's evidence he said that the evidence tendered was unreliable and that it should have been examined along with other evidence. This is because the complainant said that she reported her ordeal to the Deputy Headmaster and her father when she did not do that. PW2, he further argued, said that when she got to the office the complainant was unable to talk.

As regards the evidence of the other girls, Mr. Magolo submitted that it was not only contradictory in that they said they had gone to fetch water for the Appellant and later said they had gone to call PW1 but it was also irregularly taken. He said PW1, PW2, and PW3 were all children of tender years. Before their evidence was taken the court should have strictly complied with the provisions of Section 19 of the Oaths and Statutory Declarations Act Cap 15 of the Laws of Kenya by conducting a vire dore examination. He said under that Section the court was supposed to determine if the children understood the nature of an oath and the importance of speaking the truth. Instead of doing that the court embarked on a "preliminary test" which is not provided for by law. This irregularity, he said, rendered the proceedings illegal. He said if he is upheld on that then the evidence of the three girls should be ignored and if that is done then the appeal must be allowed as the conviction will have no legs to stand on.

Mr. Magolo also criticized the trail court for failure to appreciate the effect on the complainant's mind of her fellow pupils singing wedding songs for her. The implication of that, he said, was that the complainant had been defiled when that was not the case. The truth of the matter was, he said, that the complainant being sick was unable to fetch water for the Appellant and he allowed her to rest on the verandah.

The other point Mr. Magolo raised was that there was no medical evidence to prove that the complainant had been defiled as no spermatozoa was seen in her private parts. The fact that her hymen had been broken, he said, is no proof that the Appellant had defiled her as she confessed she had had sexual relations with a certain boy previously. The last point raised by Mr. Magolo was that the plea having been taken with a police constable as the prosecutor rendered the whole trail a nullity.

On sentence Mr. Magolo submitted that the same was harsh and that the trial magistrate failed to take into account the circumstances of the case. In reply Mr. Monda learned state counsel submitted that this appeal has no merit and should therefore be dismissed. He said that the prosecution evidence was credible and watertight. The fact that the trial magistrate did not strictly comply with Section 19 of Cap 15 does not render the evidence inadmissible.

On medical evidence Mr. Monda said that the absence of spermatozoa does not change the position. The doctor observed some whitish substance and blood in the complainant's genitals. And on the plea being taken with a police constable prosecuting he said the Court of Appeal has held that that is not fatal. He said if, however, the trial is declared a nullity then a retrial should be ordered as the witnesses are available to testify once again.

I would like to start with Mr. Magolo's last argument that because of the prosecutor being a police constable at the time of taking plea the trial was a nullity. Although he did not cite it Mr. Magolo must have had in mind the Court of Appeal decision in **Elirema & another –vs- Republic [2003] 1 EA 50** in which it was held that police officers below the rank of Assistant Inspector have no powers to conduct prosecutions.

I am unable to agree with Mr. Magolo. A plea is not a trial. My understanding of Section 85(2) of the Criminal Procedure Code is that it forbids a police officer below the rank of an Assistant Inspector from presenting evidence before court. If the Appellant had pleaded guilty and the constable had outlined the facts to the court upon which a conviction was based that of course would have rendered the proceedings a nullity. In **Penginepo Hassan Kurua –vs- Republic Mombasa Criminal Appeal No. 131 of 2004(C.A)** the Court of Appeal held that a plea being taken with a police constable as a prosecutor and the accused pleads not guilty does not render the proceedings a nullity. It made it clear that that is an irregularity curable under Section 382 of the Criminal Procedure Code. Mr. Magolo's argument on that point is therefore rejected.

Mr. Magolo's other argument that the trial magistrate did not write a judgment as required by Section 169(1) of the Criminal Procedure Code must also fail. That section requires every judgment to contain the point or points for determination, the decision thereon and the reasons for the decision. I have carefully read the learned trial magistrate's judgment. More than once she stated that the issue before her for determination was whether or not the Appellant defiled the complainant. She then considered the evidence adduced by both the prosecution witnesses and the Accused. She believed the prosecution evidence and rejected the Accused's defence and gave her reasons for doing so. This argument therefore has also no basis and is rejected.

Mr. Magolo strongly criticized the evidence of the complainant and the other two girls who testified is PW2 and PW3. He argued that instead of determining whether or not the girls understood the nature of an oath the learned trial magistrate embarked on testing their intelligence and allowed them to testify on oath.

This criticism is not entirely correct. Whereas the learned trial magistrate did not record in terms that the girls understood the nature of an oath, the record, however, shows that all the three girls said they were Muslims and that they knew it was bad to lie. Religious belief is fundamental in the determination of whether or not a witness understands the nature of an oath. In the words of the court of Appeal in **Oloo s/o Gai –vs Republic (1960) EA 86 at p. 88:-**

> **"Religious belief is fundamental to the understanding of an oath and we think it is to be inferred from the passage cited that the learned judge was satisfied that the witness's**

religious belief was such as to enable her to appreciate the nature of an oath."

It is of course well settled that it is the duty of the court under Section 19 of the Oaths and Statutory Declarations Act (Cap 15) to ascertain first, whether or not the child tendered as a witness understands the nature of an oath. If the finding on this question is positive, then the court does not need to go to the second stage of testing his intelligence. It should straight away swear the child and take his evidence. If, however, the court finds that the child does not understand the nature of an oath then it should move to the second stage and satisfy itself that the child is possessed of sufficient intelligence and understands the duty of speaking the truth before receiving his unsworn evidence.

This investigation, which should be recorded in the form of question and answer, **(Johnston Muiruri – vs- Republic [1983] KLR 445)**, should precede the swearing and the evidence and should be directed to the particular question whether the child understands the nature of an oath rather than to the question of his general intelligence. – **Kibangeny Arap Kolil – vs- Republic (1959) EA 92**

My understanding of the purpose of this investigation is to put the child's evidence in its proper legal perspective. If the child understands the nature of an oath and testifies on oath then his evidence does not require corroboration in order to found a conviction. If he does not but is found to be intelligent and is allowed to give unsworn evidence, then, save for sexual offences where the child witness is the victim, the legal necessity for corroboration by other material evidence implicating the accused arises. – See Gabriel s/o Maholi –vs- Republic [1960] EA 159. There is of course the rider that even where the evidence of a child of tender years is sworn (or affirmed), though there is no legal necessity for its corroboration as a matter of law, a court ought not to convict upon it, if uncorroborated, without warning itself of the danger of doing so

See Kibangeny Arap Kolil (Supra)

Although the learned trail magistrate did not conduct a vire dore examination as required, I am nonetheless satisfied that the girl's confession of their religious persuasion accompanied by their assertion that they knew it was bad to lie clearly shows that they understood the nature of an oath.

This was, however, all unnecessary in this case as the three girls were not children of tender years. In the **Kibangeny Arap Kolil Case (Supra**) the court of Appeal said this about who is a child of tender years:-

> **"There is no definition in the Oaths and Statutory Declarations Ordinance of the expression in 'child of tender years' for purposes of Section 19. But we take it to mean, in the absence of special circumstances, any child of an age, or apparent age, of under fourteen years; although as was said by Lord Goddard, C. J., in *Republic -vs- Campbell (1) (1956)2 ALL ER 272* 'where a child is of tender years is a matter of the good sense of the court …..' where there is no statutory definition of the phrase."**

In this case the complainant, PW1, said she was 15 years old, even though the clinical officer who examined her assessed her age to be 14 years. The other two girls, PW2 and PW3, said they were 16 years old. So all the three were clearly not children of tender years and the court should not have regarded them as so. Even if they were at least the evidence of PW1 who was the victim of the sexual assault, by virtue of Act No. 5 of 25th July 2004 amending the proviso to Section 124 of the Evidence Act, did not require any corroboration if the court was satisfied, as it was, of its truth. There was also ample corroboration, if any was required, by the complainant's presence in the Appellant's house with him, a fact which the Appellant himself admitted, and by the Appellant first denying her presence until he was pressed.

Having re-evaluated the entire evidence tendered before the trial court, I agree with the learned trial magistrate that the Appellant's defence was an afterthought. If the complainant was sick as the Appellant claimed, she could not have gone with him up to his house only to tell him that and be given a seat to relax on for three hours. Again like the learned trial magistrate, I find that the singing by the complainant's fellow pubils of the wedding songs or the absence of spermatozoa in her labia majora and labia minora did not make any difference. The appeal against conviction is dismissed.

As regards the appeal against sentence I find no merit in it. The appellant was sentenced to 10 years imprisonment for an offence that carries a life sentence. The same is therefore dismissed.

In sum this appeal is hereby dismissed in its entirety.

DATED and delivered this 30th day of November, 2005.

D. K. MARAGA

JUDGE