REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO.222 OF 2001

(From Conviction and Sentence of the Snr. Resident Magistrate, H. Njiru in Criminal Case No.1759 of 2000 of the Chief Magistrate's Court at Mombasa delivered on 23 May 2001)

P.M.E …….. APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

J U D G M E N T

Q.A (Complainant) was at all material times to this case aged ten (10) years. This is reflected in the medical examination report (P3) tendered into evidence as Exhibit 1. At the time of giving evidence on the 13th February 2001 she said she was eleven (11) years old, was a pupil in Std.[particulars withheld] Primary School, Mombasa. She is the daughter of P.A (PW.1) who was by then cohabiting with P.M..E (the appellant) either as lovers or husband and wife, at [particulars withheld], here in Mombasa.

The complainant's sister is B.A (PW.2) who was at the time of this case aged 16 years and was in primary school in Std[particulars withhheld].

It can therefore be said that the appellant, PW.1, PW.2 and the complainant lived together at [particulars withheld] at all time material to this case. They were one family. Appellant even admitted that he and PW.1 have a daughter of their own. So it was a large family.

The appellant submitted that he has another wife living at [particulars withheld] with their five children, two boys and three daughters. He said he is however a technician, running a workshop within[particulars withheld], where he used to repair TVs/Radios. His workshop is near to the house where he was staying with PW.1 and her children.

On the 14th May 2000 PW.1, PW.2 and the complainant went to the [particulars withheld] Church Likoni. The complainant attended Sunday School and left for home at about midday earlier than her mother and sister. She said she found the appellant sitting on the verandah of their house. She however got into the house, and drunk water. She came out again. The appellant told her to go back into the house to make tea for him. She obliged. Immediately she entered the house the appellant followed her, held her and threw her to the bed. He then left her on the bed and went to close the windows. The complainant got a chance and ran out of the house. The appellant then got out of the house and went to his workshop.

At 4 p.m. the appellant again called her to him. He was by then sitting on the verandah of the house. He told her to take the Sh.100/- note which he was holding and give it to her mother (PW.1). As she held the sh.100/- note, the appellant grabbed her hand and dragged her into the house and threw her to the bed. He closed her mouth with a sheet and threatened to beat her if she shouted. He then removed her under pants, removed his own trouser and defiled her.

The complainant went on to say that, while he was still on top of her he heard footsteps of people approaching the house. He got off her and went towards the door which was wide open. There was however a sheet separating the bed from the rest of the room. It was that sheet which the appellant pushed aside a little and he saw PW.2. Appellant then told the complainant to leave quickly. Complainant came out of the house to the verandah and was seen by her mother (PW.1) and her sister (PW.2). She was crying on the verandah. Her mother and sister went into the house and found the appellant inside. Her mother questioned the appellant about what he had done and then took her to Likoni Police Station after checking her genitals.

I have already stated herein above that the complainant was aged ten (10) years at all times material to this incident and she was eleven years old when she gave evidence. The trial magistrate examined her to see whether she was competent to give evidence on oath or not, though he did not record the questions which he had posed to her. He only recorded the answers which the witness gave. I have read through these answers and I am satisfied that, despite her age, the complainant was possessed of sufficient intelligence to justify the reception of her evidence, that she understood the duty of speaking the truth and understood the meaning of an oath. In my view the trial magistrate acted properly by allowing her to give sworn evidence.

The appellant was charged and convicted of a sexual offence. In such sexual cases corroboration is necessary as a matter of practice to support the testimony of a complainant. This has been held to be so by the Court of Appeal and the High Court in numerous cases, both reported and unreported.One of the latest decisions on this by the Court of Appeal was **Mombasa Cr. Appeal No.227 of 2002 JOHN MWACHIDADI MUKUNGU VS. REPUBLIC** where, in a judgment of the Court delivered on 30th January 2003 Kwach, Bosire and O'Kubasu JJA observed –

> *"Corroboration is in effect other evidence to give certainty or lend support to a statement of fact. In sexual cases corroboration is necessary, as a matter of practice, to support the testimony of the complainant. However, there have been instances, as in **RV CHEROP A KI NEI AND ANOTHER (1936)3 EACA 124 AND CHILA V.R. (1967) EA 722,723 (CA**) in which the courts held that a conviction on uncorroborated evidence may be had if the court or jury, as the case may be, is satisfied after duly warning itself of the dangers of convi cting on uncorroborated evidence, the truth of the complainant's evidence."*

KWACH, BOSIRE and O'OKUBASU JJA went further, however in the same **JOHN MWASHIGADI MUKUNGU VR (SUPRA)** to observe that the need for corroboration of a woman's or girl's evidence only in sexual offences was based on the assumption that women and girls sometimes tell entirely false stories about sexual attacks on them but which are extremely difficult to refute. There was a need for a trial Judge or magistrate to be cautious when evaluating such evidence and only be able to convict when he is certain that the woman or girl is speaking the truth.(See **MAINA V REPUBLIC (1970) EA 370) KWACH, BOSIRE and O'KUBASU (JJA)** noted that the same caution was not required of the evidence of women and girls in other nonsexual offences. Besides they observed that there is neither scientific proof nor research finding that, as a general rule, women and girls give false testimony or fabricate cases against men in sexual offences. They therefore held that such a requirement contravened section 82 of the Constitution of Kenya which makes provisions against discriminatory treatment on the basis of race and sex. They therefore observed that the requirement for corroboration in sexual offences affecting adult women and girls is unconstitutional to the extent that the requirement is against them qua women or girls.

Without sounding defiant or in any way questioning the authority of the Court of Appeal over the Superior Court, I think the above observations by KWACH, BOSIRE and O'KUBASU JJA were orbiter

and until adopted by a five bench or by a full bench of the Court of Appeal will remain to be so only. The said observations however make Constitutionally good sense.

I will however approach the matter before me in the manner held in **MWANGI V REPUBLIC (1984) KLR 595 where KNELLER JA, CHESONI and NTARANGI (AG JJA)** (as they were then) held on 19th October 1984 at page 596:

> *"In cases involving a sexual offence, it is incumbent upon the trial court to warn itsel f that it is not safe to convict the accused or the uncorroborated evidence of the complainant but having so warned itself, the court may nevertheless convict in the absence of corroboration where it is satisfied that the complainant's evidence is truthful .*
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> *Where no such warning is given, the conviction will be set aside unless the Appellate court is satisfied that there has been no failure of justice."*

In the appeal before me the trial magistrate Hon. H. Njiru, Senior Resident Magistrate, Mombasa looked for corroboration of the complainant's testimony and found it in the evidence of PW1 and PW2 who had testified that, when they returned from church, they found the complainant standing outside the verandah of their house, crying, that when they got into the house they found the appellant standing next to the bed, putting on his trouser; that the complainant told them the appellant had defiled her.

The trial magistrate also found further corroboration in the medical evidence adduced to the effect that there had been penetration of the complainant's genitals. Though no spermatozoa were found, there was however a whitish discharge from her private parts. Further examination revealed that the complainant was suffering from a venereal disease (Syphilis.) That examination was done on 25th May 2000. When the blood and urine of the appellant were tested, he was found to be suffering from venereal disease (Syphilis) as well. These findings are recorded in the P3 form exhibit 1 and in the lab report tendered into evidence as prosecution exhibits 3 and 4 by a Lab Technician Mr George Mbaabu Ogelo (PW5) who had actually tested the appellant for VDRL.

In his defence and before me the appellant protested his innocence but conceded that

> (a) indeed the complainant did return from church on 14.5.2000 alone and found him at home;
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> (b) That PW1 and PW2 found the complainant and him inside the house and he was subject to questioning by PW1, who even accused him there and then of refusing to love her and instead of loving her daughter, and that his blood and urine had been removed and tested by a doctor but that he was not told the result of the laboratory test.

He submitted that the P3 form had been tendered into evidence without his consent and that it was of no evidential value since its author had not been called to testify. He challenged the findings of the doctor endorsed thereon.

I have read the court proceedings of the 27th February 2002 when PC Benson Mutisia (PW4) gave evidence. The prosecutor did apply for the leave of the court to allow PW4 to produce the P3 as an exhibit because Dr Bajabs who had authored it had resigned from the Public Service and had left the country. The appellant is recorded to have had no objection.

Besides Section 77(1) of the Evidence Act, as amended by Act No. 14 of 1991, allowed the production of this P3 into evidence. This Subsection reads:

> *" 77(1) in criminal proceedings any document purporting to be a report under the hand of a Government Analyst, medical practitioner or of any ballistics e xpert, document examiner or*

geologist upon any person, matter or thing submitted to him for examination or analysis, may be used in evidence."

Besides, the prosecution had shown to the trial magistrate that the maker of the P3 form (Ex 1) Dr Bajabs had already left the country and in those circumstances his attendance as a witness could not have been procured without an amount of expense or delay which was unreasonable. Therefore the P3 filled in the ordinary cause of his professional duty was admissible in evidence under Section 33(b) of the Evidence Act.

For the above reasons I find the conviction of the appellant for defilement of the complainant to have been safe. Appeal against conviction is hereby dismissed.

On sentence, the appellant was sentenced to serve ten years imprisonment with hard labour and to receive six strokes of the cane. He now pleads for mercy. He has stated in mitigation that he is a father of one child with PW1, whom he had cohabited with for eight years. He also has his first wife at [particulars withheld] with five children, the eldest is 17 years now while the youngest is five years. He asks for leniency.

I will say this. The then ten-year-old complainant was the appellant's step-daughter, being his second wife's daughter or, put differently, the appellant defiled his lover's daughter. He also infected her with Syphilis, a very serious disease. These are the aggravating facts in the punishment of the appellant in this case. In agreement with both the trial magistrate and Mr Patrick Gumo, Principal State Counsel, the appellant deserved to be severely punished for this unlawful act. Appeal against sentence is also dismissed.

It is so ordered.

Dated and delivered at Mombasa this 9th May 2003**.**

A.G. A. ETYANG

JUDGE