

REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 414 OF 2000

(Being an Appeal Against Conviction and Sentence in Criminal Case No.
1253 of 1999 by the Senior Resident Magistrate's Court at Kwale – L.
Mbatia)

KIMUYU MWISA MWANGE APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G E M E N T

The Appellant was charged and Convicted for Defilement of a Girl Contrary to Section 145(1) of the Penal Code and Sentenced to 10 years imprisonment plus 4 strokes of the cane. He has preferred an Appeal on the grounds that the evidence of the complainant was not sworn and no reasons were given and all witnesses were from same family. He further submitted that there was no further evidence to connect him with the offence as he was never examined by the Doctor though it was confirmed the complainant suffered from a Sexually Transmitted Disease. The State Counsel Mr. Gumo supported the Conviction and Sentence and though conceding the omission by the court to swear the complainant and the failure to have Appellant examined by the Doctor. He submitted this was not Fatal to the final finding.

The evidence as appears on the record is that the complainant whose age was disclosed by uncle after an age assessment was done as aged 14 years at the time of the Trial had accompanied her friend whose age is also not given to the market when they met the Appellant who is their neighbour and well known to them on the way. The Appellant then asked the complainant to accompany her to the shops where he would buy her some burns and at that point they parted with the other girl. The Appellant however lead her to the church compound behind the Toilet where she proceeded to Defile her. She did not scream and once he was through he told her to go home and not to report the incident to anyone. She complied but was discovered because she walked with signs of pain and her Grand mother N.K (PW2) and her mother B.M.N (PW4) wanted to know where she had been between 10.00 a.m. to 2.00 p.m. as her friend had reported to her grand mother she had gone with the Appellant. She reported what had happened and was taken to the police station to report after reporting to the Chief. She explained how the Appellant had lured her into the church compound and Defiled her. She was later taken to Msabweni District Hospital the next day on 26/9/99 where she was examined and treated. The Hospital notes produced in evidence confirmed she was treated with some drugs. She was again seen on 8.10.99 when the Doctor found she had an infection.

The Appellant was arrested on 1.10.99 and handed in to the police but the accused was not examined by a Doctor. This I would presume is because when the complainant was first seen on 26.9.99

she was put on drugs but the nature of infection was clarified as directly connected to sexual conduct. This leaves the evidence of the complainant who is a minor and therefore not sworn. Section 124 of the Evidence Act provides as follows:

“Notwithstanding the Provisions of Section 19 of the Oaths and Statutory Declarations Act which 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”.

I have already found that there is no other Independent evidence available in this case to corroborate that by the complainant. It is in the light of this observations that I find the Conviction herein was not proper and consequently it is quashed and the sentence set aside. The Appellant shall be set free unless lawfully held for other reasons.

Dated and Delivered at Mombasa this 1st day of August, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE