REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 93 OF 2000

BAYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant faced the main charge of defilement of a girl under the age of 14 years contrary to section 145(1) of the Penal Code and in the alternative, indecent assault of a female contrary to section 144 (1) of the Penal Code. He was acquitted on the main charge for lack of evidence but was convicted on the alternative charge and sentenced to serve 4 years imprisonment plus hard labour.

The particulars of the alternative charge were that the appellant did on diverse days between 12.2.98 and 2.2.1999 at Muyeye village, Malindi, unlawfully and indecently assault S A A, a girl under the age of 14 years by touching her private parts namely vagina.

The prosecution evidence came from 7 witnesses including the complainant.

Once again the procedure for receiving evidence of a child of tender years takes centre stage. A child of tender years as was stated in *Kibangeny Arap Kolil v Republic* [1959] EA 92 is taken to mean, in the absence of special circumstances, any child of an age or apparent age of under 14 years. The Court however appreciated the statement of Goddard CJ in *Republic v Campbell* [1956] 2 All ER 172 that:

> "Whether a child is of tender years is a matter of the good sense of the Court".

A trial court must therefore in the absence of proof of age, express its "good sense" in determining the apparent age of a child.

In this case the complainant testified on 6.7.99 and said she was aged 14 years. She was infact 13 since she said she was born on 22.8.1986. Her mother (PW2) said the birthday was 16.5.1986. She was not turning 14 as the learned trial magistrate found. When the alleged offence was committed she was 11 or 12. She went to school up to Std 5 and dropped out. Her mother says she went up to Std 4 and "refused school". It is clear on the evidence and the law therefore that the complainant was a child of tender years and the reception of her evidence ought to have been taken in accordance with the law. I considered a similar situation in HCRA No 109/97 Kazungu Yaa Mangi (UR) where I stated:

> "The first glaring flaw was the reception of the evidence of the complainant D who was a child of tender age without complying with section 19 of the Oaths and Statutory Declarations Act Cap 15.

It states *para materia*:

> (1) "Where, in any proceedings before any Court …, any child of tender years called as a witness does not, in the opinion of the Court…, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the Court…, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section".

The Court of Appeal as recently as 19.1.2000 underscored the mandatory procedure that has to be followed under that section. That was in CA 91/ 99 *Joseph Apondo –vs- Republic* (Chunga CJ, Gicheru & Shah JJ A) where the Court stated:

> "There are two stages which must be followed and must appear on the record of the trial court. First, the examination must, endeavor to ascertain whether the witness understands the meaning, nature and purpose of an oath. The question or questions by the Court must be directed to that. If the Court, from the answers it receives from the witness is satisfied that the witness understands the meaning, nature and purpose of an oath, the witness must then be allowed to give sworn evidence.
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> Stage two of the matter does not then come into play. Where however, the witness does not understand the meaning, nature and purpose of an oath, stage two of the examination then follows. The witness is examined by the Court to ascertain whether the witness is possessed of sufficient intelligence to justify reception of his or her evidence though not upon oath. This examination must, equally, appear on record. Simple elementary questions would normally be asked like the date, the day, the school the witness is attending and other matters. If the Court is satisfied from the answers to such questions, that the witness is possessed of sufficient intelligence, the Court will allow the witness to give unsworn evidence."

Nowhere on record does it show that the learned trial magistrate followed that procedure.

The Court of Appeal also held in the same case and it is indeed trite as the law currently stands, that the evidence of a child of tender age required corroboration for two reasons. Firstly because in sexual offences the evidence of the complainant (of whatever age) is necessary as a rule of practice or prudence. Secondly under section 124 of the Evidence Act which provides:

> "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 persons 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."
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> Apprehensions may be raised, particularly by the gender sensitive, as to why we should have such stringent legal provisions and guidelines in our statutes, which militate against the interests of the weaker sex. The straight answer I suppose would be that the Court administers the law as it is, not as it ought to be; and Parliament which has the constitutional mandate to change our laws, must now come to terms with current thinking on sexual offences and punishment for them. In England for example, the Criminal Justice Act 1988 was amended in 1991 to remove the requirement that an accused would not be convicted on the uncorroborated evidence of a child or of the complainant in a sexual offence."

The Court of Appeal decision is binding on me and the lower court. The learned trial magistrate did not follow the procedure laid out particularly in conducting the *voire dire*. She did not also, with respect, direct her mind to the central issue of corroboration.

Corroboration is independent evidence of material particulars confirming the commission of an offence and connecting or tending to connect the appellant with the commission of the offence. The evidence of the complainant that required corroboration was itself found confusing. If the confusion was only limited to variance between the dates referred to in the charge sheet and the evidence, then a cure may be found in section 214(2) of the Criminal Procedure Code. But it extended to other material particulars and that is why the main charge of defilement could not stand. It may well be that the complainant was no speaking the truth. The complainant had been exposed to sex with persons other than the appellant. When she testified on 6/7/99 she was still being treated for gonorrhea which the appellant was not or was not shown to be suffering from.

Her mother PW2 said she started becoming rude on 23.1.99 and she decided to investigate her. Her investigator was her brother PW5. He acted on a rumour that the girl was having a love affair with the appellant.

The only confirmation he made of the love affair however was that he passed near his sister's house one day at noon and saw the appellant pacing up and down while looking at the house. He did not wait to see what happened next. He went and told his sister to go and see for herself. The sister (PW2) went and found the appellant and the complainant. The room where they were found had no bed. They were dressed up. In her words "I did not find anything going on". In the same breath she says she found the appellant having folded up his "*kikoi*" . Not even the complainant says he did such thing.

The rest of the prosecution witnesses were neighbours who were called by the mother and her brother to question the appellant on the allegations of sexual involvement with the complainant. The appellant denied any involvement and explained himself. He is an elder in the village and was incharge of water sales for the Village Communal Water Supply. He even called his own elders as witnesses to confirm that the mother of the complainant had confessed that she was forced to testify falsely against him. She sought reconciliation. Letters to that effect were exhibited but the learned trial magistrate erroneously thought it was the appellant who was seeking pardon from the mother.

In my considered view there is more than meets the eye in the whole saga and I would not be prepared to say that the case was proved beyond reasonable doubts against the appellant.

I would allow the appeal, quash the conviction and set aside the sentence. The appellant shall be set at liberty unless he is otherwise lawfully held.

Dated and Delivered at Mombasa this 23rd day of August 2000.

P.N.WAKI

JUDGE