



**SOLOMON MUNGAI
KANYAGO.....APPELLANT**

**VERSUS
REPUBLIC.....RESPO
NDENT**

(An Appeal from original conviction and sentence in Nyahururu C.M.CR.C.NO.28 of 2010

by Hon H. M. Nyaga, Senior Resident Magistrate, dated 18th December, 2007)

JUDGMENT

The appellant was charged in count 1 with **defilement** contrary to **Section 8(2)** of the **Sexual Offences Act**. In the alternative to that count, he was charged with **indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. In count II he was charged with the offence of **making a child to be in need of care and protection** contrary to **Section 127(b)** of the **Children's Act**.

Regarding count 1 it was alleged in the charge sheet that on 4th day of January, 2010 at {*particulars withheld*} in Nyandarua District within Central Province, the appellant unlawfully and intentionally caused his penis to penetrate into the vagina of D.M., a child aged 7 years.

In count II it was alleged that on the same day at {*particulars withheld*} in Nyandarua District within Central Province, the appellant caused D.M. a child aged 7, to be a child in need of care and protection.

It was the case for the prosecution that the complainant lived with her uncle PW3 and aunt PW1. The appellant was visiting the couple (PW1 and PW3) during the period in question and was staying with them in their two-roomed house. The couple would sleep in the bedroom while the appellant and the complainant would sleep in the living room with the former sleeping on the couch while the latter in one corner in the living room.

The complainant testified that on the day in question PW2 and PW3 left her washing utensils. The appellant called her but she refused to go to where he was. He walked to where the complainant was washing the utensils and literally carried her to the kitchen where he proceeded to defile her. She reported the incident to PW1 and PW3. PW1 examined the complainant's private parts and noted traces of sperms. Her under pants were also sperm stained. The appellant was arrested.

The complainant was examined by Dr. Karanja Linet (PW4) who noted that her vaginal membrane was inflamed with tenderness and hymen broken, she also noted the presence of white cells, which signified an infection. The doctor concluded that in her opinion there was evidence of penetration.

In his unsworn evidence the appellant confirmed that PW1 and PW3 were known to him and that as a matter of fact he had visited them on 17th December 2009, a few weeks before the incident. He however maintained that on the 5th January 2010 he was staying with his grandfather at Busara. On the day he was

arrested he had gone to work at Ndaragwa. He was not informed why he was arrested.

The trial court considered both the evidence of the prosecution witnesses and that of the appellant and found that the charges were proved beyond reasonable doubt. She sentenced the appellant to life imprisonment in the count 1 and to two years imprisonment in count II. That finding and the sentence aggrieved the appellant who has preferred this appeal on the following condensed grounds:

1. that his fundamental rights were violated by keeping him in police custody and being beaten while in police custody;
2. that the trial magistrate erred in law and facts in relying on the inconsistent and contradictory evidence of prosecution;
3. that essential witnesses were not called to testify;
4. that some of the relevant documents (treatment notes) were not produced;

Before me the appellant also pointed out that the learned trial magistrate had no jurisdiction to impose life sentence. Learned counsel for the respondent opposed the appeal on the ground that it lacks merit, the prosecution having proved the charges beyond reasonable doubt.

This being a first appeal the appellant is entitled to expect this court to analyse the evidence on record afresh in order to arrive at an independent conclusion. In doing so the court must bear in mind that it neither saw nor heard the witnesses. The complainant was the only eye witness. The complainant gave an account of the ordeal thus:

“Solomon called me, but I refused. He came to where I was, he carried me to the kitchen, he applied some cooking oil on his penis. He laid me on the floor and lied on top of me. He removed my clothes. He also removed his clothes half way. He inserted his penis onto (sic) my vagina (child pointing to her private parts). I felt a lot of pain.”

There is evidence that a few hours later when PW1 and PW3 returned home they noticed that the complainant appeared unwell and looked sad. She could not eat properly; she was vomiting; she screamed when passing urine; her legs were paining. The next day she informed PW1 and PW3 what the appellant had done to her the previous evening.

Although the only evidence at the trial was that of a child, in terms of **Section 124** of the **Evidence Act**, the trial court was satisfied that the complainant was a witness of truth for the reasons that the complainant and the appellant had lived for nearly one week before the incident, and therefore there was no mistake as to the identity of the appellant. The learned magistrate found that the complainant's evidence was supported by medical evidence that concluded that there was penetration. A part from the fact that the learned trial magistrate was satisfied that the complainant said the truth and the fact that her testimony was supported by medical evidence, the complainant informed PW1 and PW3 without delay that she had been defiled by the appellant. The overwhelming prosecution evidence displaced the appellant's *alibi* defence. The appellant did not allege any bad blood with the complainant or with PW1 and PW3. If anything the latter had offered him accommodation.

The appellant has complained that his rights under **Articles 29(e) (d) (f) and 49(1) (f) (i) (ii)** of the **Constitution** were violated. The appellant has not demonstrated how the rights under **Article 29** of the **Constitution** were violated. Regarding **Article 49(1) (f) (i) and (ii)** the appellant submitted that he was unlawfully detained by the police between 5th January 2010 and 7th January 2010. This was before the promulgation of the present Constitution hence **Section 72(3) (b)** of the **former Constitution** was applicable. It is now settled that a violation of a constitutional right does not in a criminal trial avail to the victim an acquittal. Instead under **Section 72(6)** of the **Constitution** the victim can seek compensation from the person who so detained him.

It is also submitted that there were contradictions in the prosecution evidence regarding the name of the complainant, her age, where she came from, the date of the alleged offence; that there was no spermatozoa found in the complainant's private parts; that essential witnesses were not called; that the complainant's under pant was not produced; that the learned magistrate made up her mind to convict the appellant before the trial; that the trial magistrate did not permit the appellant to call witnesses to support his *alibi* defence.

The discrepancies in the names of the complainant, the date of the offence, where she came from are clearly typographical, are not material and curable under **Section 384** of the **Criminal Procedure Code**. All the other grounds raised in this appeal have no merit, except two which have concerned me.

After conducting a *voir dire* examination and finding that the appellant was intelligent enough to give unsworn evidence the learned magistrate made the following remarks before recording the evidence of the complainant:

Court:

I warn myself of the danger of convicting accused on uncorroborated evidence.”

These remarks have led the appellant to complain that the learned trial magistrate had predetermined his fate.

The remarks were irrelevant, unnecessary and premature. Until the enactment of the Sexual Offences Act, it was a requirement that in sexual offences under the Penal Code, it was incumbent upon the court to warn itself that it was not safe to convict the accused on the uncorroborated evidence of the complainant but having so warned itself, the court would nonetheless convict in the absence of corroboration where it was satisfied that the complainant's evidence was truthful. It was the law that where no such warning was given, the conviction would be set aside unless the appellate court found there was no failure of justice. See **Mwangi V. Republic** (1984) 595. This is no longer the case following the repeal of **Sections 139-141** of the **Penal Code** and the amendment to **Section 124** of the **Evidence Act** by the **Sexual Offence Act**. Today it is enough under **Section 124** aforesaid for the trial court to receive evidence and convict in a sexual offence case if, for reasons to be recorded, it is satisfied, that the alleged victim is telling the truth. This is done in the judgment and not before the commencement of the trial. I hold, however, that the aforesaid remarks by the trial magistrate amount to a misdirection, I however find that no prejudice or miscarriage of justice was occasioned to the appellant by the remarks.

The other issue raised in this appeal is with regard to the life sentence imposed. According to the appellant the trial court presided by a Resident Magistrate had no powers to impose life sentence. The answer to that contention is **Section 7(1) (b)** of the **Criminal Procedure Code** introduced by Act No.7 of 2007 which stipulates that:

“(b) a resident magistrate may pass any sentence authorised by law for an offence under Section 278, 308 (1) or 322 of the Penal Code or under the Sexual Offences Act, 2006.”

(Emphasis added)

That ground also fails.

The appellant was charged in count 11 with **making a child to be in need of care and protection** contrary to **Section 127(b)** of the **Children Act**. That section creates an offence against a person who has parental responsibility, custody, charge or care of a child. There is no evidence that the appellant was in any of the above capacities. He had only been provided accommodation by P.W.1 and P.W.3 for a few days. That count must fail and the conviction quashed and sentence set aside on that count.

Finally, on the defence witnesses, the appellant indicated that he would call two witnesses and was

indulged twice by the trial court but failed to avail them.

In the result, I find no merit in this appeal. It is dismissed.

Dated, Signed and Delivered at Nakuru this 16th day of July, 2012.

**W. OUKO
JUDGE**