REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 335 of 2010

SOLOMON MAINA KARARI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from original conviction and sentence in Nyahururu C.M.CR.C.NO.2149 of 2010 by Hon A. B. Mongare, Senior Resident Magistrate, dated 29th July, 2010)

JUDGMENT

The facts in this appeal are fairly straight forward and largely uncontroverted. For instance, it is common ground that the complainant was 13 years at the time of the alleged defilement; that she was a standard seven pupil at {*particulars withheld*} and that the appellant was her Kiswahili teacher.

The events leading to the alleged defilement are also not in dispute. It is, for instance, conceded that the appellant was on duty on the night on 15th July, 2010. He called one pupil by the name L., P.W.3 and asked him to call the complainant from the class. When the two came, it is the prosecution case that the appellant sent L. for a ball-pen, leaving him and the complainant alone in the staff room. It is while the two were alone that the appellant is said to have defiled the complainant.

The complainant did not report the incident immediately, as, according to her, the appellant had warned her of dire consequences if she did. One month later, the teachers were concerned with the deteriorating performance of the complainant in class. From No.1, she dropped to No.14. Upon being questioned on this, the complainant revealed for the first time, to her teachers, LWM, P.W.5 and JNW, P.W.6, who were in charge of guidance and counseling, of previous attempts by the appellant to defile her and the subsequent event of 15th July, 2010 when he is alleged to have succeeded in doing so.

The complainant was examined by Dr. Linnet Karanja, P.W.2 at Nyahururu District Hospital, who noted that the complainant's hymen has been torn; that the age of the tear was "*weeks*" old. The appellant was arrested and charged.

In his defence, while admitting having sent L. to call the complainant on the fateful night, the appellant denied having been left with the complainant. He maintained that the complainant collected the books from him in the staffroom and left him with L. He denied committing the offence.

The learned trial magistrate considered the evidence presented before her and was persuaded that it proved beyond reasonable doubt that the appellant committed the offence of **defilement** contrary to **Section 8(3)** of the **Sexual Offences Act**. Upon convicting him, she sentenced him to fifteen (15) years

imprisonment.

The finding and sentence aggrieved the appellant who has brought this appeal on the grounds initially filed by himself and those subsequently filed by his counsel in a supplementary "M*emorandum of Appeal* ", namely:

i) that the learned trial magistrate erred by basing the conviction on a single witness evidence without corroboration;

ii) that the incident was reported one month after it was alleged to have happened;

iii) that the doctor did not see traces of spermatozoa in the complainant's private parts;

iv) that the appellant's defence was not considered namely that there was a grudge between him and P.W.5, LWM, a fellow teacher;

v) that **Section 19(1**) of the **Oaths and Statutory Declaration Act** on the receiving evidence of a child witness was not adhered to;

vi) that the medical evidence was contradictory and failed to specify the date of the alleged defilement; and

vii) that the learned trial magistrate did not comply with **Article 50** of the **Constitution** in failing to explain to the appellant of his right to counsel.

Being a first appeal, the evidence on record must be subjected to fresh scrutiny so as to enable the court to come to its independent conclusion. In doing so, the court must bear in mind that it has neither seen nor heard the witnesses. **Okeno** V. **Republic** (1972) EA 32.

I have already observed that there is uncontroverted evidence that the appellant called the complainant to the staffroom. The sole question that fell for the determination of the trial court and which question is the crux of this appeal is whether, on that night, the appellant defiled the complainant.

The complainant was 13 years at the time of the alleged defilement. She recalled the events leading to the charges in the following words:

"I went to the staffroom. I met Mr. Karari, our teacher in the staffroom. The teacher was alone. I was with my classmate K. The teacher sent L. K. to go and collect a ball pen. I was left with him. He asked me to move closer. I moved. He held me tightly like compressing me. I tried to talk. He showed me sign of keeping quiet. He removed my trousers and my pant. He also removed his trousers. He pushed me on the floor. He made me lie on my back. He all along warned me against making any noise. He pulled his male organ used to pie (sic). He pushed it into my private part normally used to pie (sic). I felt pain. After he was done, he told me to put on my clothes. He warned me against telling anybody. He would punish me."

The witness gave her evidence after being affirmed, the trial magistrate having been satisfied that she was:

"…brilliant enough to follow proceedings. She understands the importance of telling the truth."

By **Section 19(1)** of the **Oaths and Statutory Declaration Act (Cap 15**), if a child of tender years who is called as a witness does not, in the opinion of the court, understand the nature of oath, his evidence may nevertheless be received though not given on oath, if in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of such evidence and understands the duty of speaking the truth. The procedure to be followed at the trial before reception of the evidence of a child has been explained in many decisions of this Court. See for instance **Johnson Muiruri** V. **Republic**, KLR

445. and **Nyasani S/O Bichana** V. **Republic** [1958] EA 190.

I am satisfied that the learned trial magistrate duly complied with the provisions of **Section 19** aforesaid with regard to the evidence of the complainant and that of Laban. Although in terms of **Section 124** of the **Evidence Act,** there is no requirement for corroboration, the trial magistrate found enough supporting evidence. That Section provides that a conviction can be based on the uncorroborated evidence of victim of a sexual offence, if for reasons to be recorded, the trial court is satisfied that the witness is telling the truth.

In compliance with this requirement, the trial magistrate noted seven reasons why she believed the complainant was a truthful witness. For instance, she noted that there was no previous or any grudge between the complainant and the appellant, the latter being a new teacher in the school; that the evidence adduced by L., the doctor and two teachers corroborated that of the complainant; that the learned trial magistrate had the opportunity to see the witnesses and was satisfied as to their credibility.

For my part, upon evaluation of the evidence on record, I am satisfied that:

i) the appellant was on duty on the night in question with P.W.8, teacher MWM, who had left when the incident took place;

ii) the complainant joined him (the appellant) in the staffroom having specifically asked L. to call her;

iii) the appellant tactfully sent L. for a pen and while L. was away, he (the appellant) got the opportunity to execute his intention;

iv) the complainant gave a clear account of the events leading to the commission of the offence charged;

v) the doctor confirmed that indeed the complainant had been defiled.

The appellant's defence was duly considered and rejected by the trial court, obviously, on the basis of the overwhelming prosecution evidence. The fact that the offence was reported after one month does not affect the quality and credibility of the evidence. As a matter of fact, the complainant explained that she had been threatened by the appellant. It must also be borne in mind that the incident was in a boarding school, away from the people the complainant would have confided in, bearing her age in mind.

For the foregoing reasons, this appeal lacks merit and is dismissed accordingly.

Dated, Signed and Delivered at Nakuru this 2nd day of November, 2012.

W. OUKO
JUDGE