REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 109 of 1998

AHMED SHEIKH ABDILAHIM ..... APPELLANT

versus

REPUBLIC..... RESPONDENT

(From Original Conviction and Sentence in Criminal Case No.888 of1998 of the Chief Magistrate's Court at Mombasa - Mrs. S. Muketi,SRM)

JUDGEMENT

The Appellant Ahamed Sheikh Abdirahim was charged with defilement contrary to section 145(1) of the Penal Code in that on10-3-98 at[particulars withheld] within Mombasa District of the Coast Province he had carnal knowledge of A.M a girl under the age of 14 years or in the alternative he was charged that on 10-3-98 at [particulars withheld]Within Mombasa District he unlawfully and indecently assaulted A.M by touching her private parts. PW.2 a young girl in Standard 5 said how the appellant defiled her twice. First in his bedroom at night and second time at the place where she slept. In both occasions she felt great pain. She told her mother the next day and she took her to the police and to the doctor where PW.2 Dr.Michael Mwitea examined her and found injury on the vagina and also 2 found her hymen broken. He also found the child to have been infected with gonorrhea. The appellant was found to be having H.I.V.

PW.3 the father confirmed what the child said. She screamed at night on 10-3-98 and the father came and found her naked. She did not tell the father what had happened for fear but she informed her mother the next day when she came from duty. She also said that it was the appellant who defiled her. PW.3 says the appellant was a tenant staying with them and sometimes even eating together with the family and the mother PW.4 S.M corroborated the same.The complainant is a child of 8 years of age.

The appellant in his sworn statement confirmed that he was atenant in the house and that they lived together very well and that PW.3$_7$ the mother used to work at the hospital but of the offence he said he knew nothing about it.

The learned Snr. Resident Magistrate accepted this evidence and convicted the accused on the principal count of defilement contrary to section 145(1) of the Penal Code and acquitted him of the alternative charge and sentenced him to 14 years imprisonment plus 5 strokes of the cane.

On this the Appellant through Mr. Magolo advocate has preferred 5 grounds of appeal which he argued on two main grounds.First he said sentence was excessive. Secondly he called upon this court to disregard evidence of complainant PW.2 because she was achild and that it was not in evidence that she understood the nature of the oath and secondly there was no material corroboration of that evidence so it is worthless and cannot be convicted on but Mr. Ng'eno State Counsel did not however support the sentence but

supported the conviction saying the learned magistrate directed herself correctly with regard to the offence relating to children.Evidence of young children is a chapter on its own in the lawof evidence and follows really from stand point of common sense inthat it is crucial to ascertain that whoever is giving evidenceknows that he should say not only what he knows but that what hesays is true. Children are competent witnesses except where the court thinks they are prevented from understanding questions put 'to them or from giving rational answers to those questions because oftender years. Cap 15 and S.124 of Evidence Act deal withChildren's evidence under our statute law.

The Oaths and Statutory Declarations Act Cap. 15 at S. 19provides as follows:-

"Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witnessdoes not, in the opinion of the court, or such person as aforesaid, understood the nature of an oath, his evidencemay be received, though not given upon oath, if, in the opinion of the court or such person as aforesaid, 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 inaccordance with the provisions of S.233 of the Criminal Procedure Code , shall be deemed to be a depositionwithin the meaning of that Section."

What formerly appeared in Subs (1) to S.19 of the Act, nowappears in S.124 K.E.A. which says:

"Not withstanding the provisions of Section 19 of theOaths and Statutory Declarations Act, where the evidenceof a child of tender years is admitted in accordance withthat 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 supportthereof implicating him."

What is required here is for the Court to be satisfied that the child understands that he should speak the truth when he takes oath. The Court can do this by investigating so before swearing the child and the questions should be directed to elicit his understanding of an oath other than his general intelligence. It must be recorded in the proceedings, that the court has taken this step. The cases of Nyasani s/o Bichana v. R. (1958)EA 190 and Kibangeny v. R [1959)EA EA 92 both enforce these requirements.There is no definition of "tender years" but in Kibangeny's case the court said ---- " But we take it to mean - in the absence of

Special circumstances - any child of an age or apparent age ofunder fourteen years" but normally the Court has a wider and directsay.

The Learned Resident Magistrate in this case conducted investigations which is recorded in the proceedings and formed an opinion that she understood the nature of the oath. She therefore had her sworn. I think this was in order and that the learned Snr.Resident Magistrate directed herself properly.

The second requirement was for corroboration. The practicerequires the Court to warn itself that it is dangerous for conviction to be based on evidence of a young child unless there is corroboration. The question to ask is whether there was corroborating evidence to that of the infant. What evidence amounts to corroboration was stated in R. v. Baskervill {1916}2 KB658 and accepted by the Court of Appeal in R v. Manilal IshwerlalPurohit {1942}9 EACA 58 it is:-

"Some additional evidence rendering it probable that the story of— is true and that it is reasonably safe to actupon it. It must be independent evidence which affects the accused by connecting him or tending to connect him with the crime confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it. It is not necessaryto have all the confirmation of all the circumstances ofthe crime. Corroboration of some material particulartending to implicate the accused is enough."

In this case the father of the child was awakened by the screams of the child and when he went to her bedside he found her naked, and of course the next day she told the mother about it and named the

appellant. The doctor found that her hymen was broken and there was a tear on her private part plus spermatozoa, she was found to be having gonorrhoea but the appellant tested HIVpositive.

Were these enough corroboration? One thing is clear and thatis that they corroborate the child's evidence regarding defilement,but does it point at the accused? Did they tend to connect him with the offence of defilement complained of? One thing I find curiously lacking in the doctor's evidence is whether he could connect the sperm found on the child's vagina with the accused's sperms. Dr. Muita is silent as to this. secondly, if the appellant defiled the child and supposedly transmitted the gonorrhoea bacteria found on her how come no gonorrhoea was diagnosed on the appellant? Instead appellant was found with HIV.Is HIV the same thing as gonorrhoea? and if so why call it gonorrhoea in the child and HIV in the appellant? Again only the Doctor would have discussed and explained this. On this doctor Dr. Muite) never said anything. So there is no other evidence other than the child that appellant defiled her. Then there is her hesitation in mentioning him to her father, so that in totality there seems to have been no direct nexus proved between the appellant and the complainant. However corroboration can be by conduct or circumstantial evidence. Here it is proved that appellant was sleeping in the same house also and was known to the family. He had the greatest opportunity for committing the offence. As the father woke in response to the screams of the girl he heard the appellant's door lock. There is no evidence that he came out. One would expect so of a neighbour. The child named him immediately there was opportunity to her mother. The learned magistrate found corroboration in this and I concur with her on this finding. I find in totality that there was corroboration, as not all the circumstances of the offence are to be corroborated anyway and in any case he was HIV positive while the girl had gonoreah and the girl was defiled.

I find that the offence was proved and the conviction is right. As for sentence, the court at the appeal stage can only interfere with the lower court's discretion as to sentence if it is shown that the lower court proceeded on a wrong principle or awarded too excessive sentence or too inadequate sentence. Mr. Magolo did not say that there was anything the matter with this onprinciple. Under S.145(1) defilement of a girl under 14 years is 14 years with hard labour with corporal punishment. She gave him the maximum sentence. The appellant himself said he had nolitigation. He seemed not to care for any leniency the court would see. The Court was not to be expected to do that for him.

However the State does not support the sentence but even Mr. Ng'eno did not show any breach of principle committed by the magistrate. However taking all into consideration, the fact that he is suffering from HIV, he is a first offender, I would reduce the period of 14 years to 7 years of hard labour and retain the corporal punishment. Appeal against conviction dismissed. Appeal against sentence allowed, the sentence is reduced by 7 yearsfrom 14 to 7 years imprisonment plus 5 strokes of the cane.

Right of appeal in 14 days.

Dated at Mombasa this 1st Day of March, 1999.

A.I.HAYANGA

JUDGE