REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL NO 103 OF 1993

COLUMBUS KIPTUM KIPRONO ……..APPELLANT

VERSUS

REPUBLIC ……..……..RESPONDENT

(From the Original Conviction and Sentence in Criminal Case

No 6039 of 1991 of the Principal Magistrate's Court at Eldoret -

M A Opondo (Mrs), RM)

JUDGMENT

In the case subject to this appeal the appellant was charged with defilement of a girl contrary to section 145 (1) of the Penal Code, in that on 27th August 1991 at Macharia Estate in Uasin Gichu District of the Rift Valley Province he had carnal knowledge of V K, [particulars of her real name withheld] a girl under the age of 14 years; hereafter referred to as "the complainant."

According to the complainant who gave her evidence not on oath due to her tender age, she told the Court that on the day in question at around 2 pm she went to fetch some water at a communual tap. That the appellant went there and extended his hand to greet the young girl and that when the girl gave him her hand he never let it go but instead pulled her to bath room where he had carnal knowledge of her after covering her mouth with his hand.

Because the appellant threatened to beat her up if she revealed this incident to anybody, she did not do so until next morning when she informed her mother Hellen (PW2) about it. The matter was also revealed to the complainant's father who tried to find out from the appellant about it but the latter denied.

The appellant was arrested on 11th September 1991 and charged in Court with the offence subject to this appeal on 12th September 1991. He denied the offence in Court and said that on the date he is alleged to have defiled the complainant he had actually gone on duty at Rivatex just about the time of the incident where he worked until 11 pm.

The magistrate who heard this case wrote a long judgment in which she found the appellant guilty, convicted and sentenced him to two years' imprisonment, hence the present appeal.

The complainant was taken to the doctor for medical examination on 4th September 1991 and in his evidence in Court Dr James Benard Abuuga (PW4) stated that there was a virginal discharge in form of pus but no spermatozoa.

The issue for decision by the learned Resident Magistrate and which was crucial to the case was whether it was the appellant who had defiled the complainant. This issue depended solely on the evidence of the complainant, a young girl of 10 years whose said evidence required corroboration. Reading through the evidence there was no corroborative evidence to the complainant's testimony although the learned Resident Magistrate found that it was a universally known fact that whether there was consent or not in sexual intercourse normal human beings do not do this in public and that people would come across these acts by accident.

The complainant testified that apart from herself at the scene nobody else was present. That she was threatened with beatings if she told anybody about the incident and yet according to the evidence the appellant never used to live with the complainant in the same house and that after the act she felt pains and sickly in which case she should have immediately revealed this incident to her mother and father which she never did.

There was also evidence from the complainant herself that after her father was informed about the incident and he confronted the appellant, the latter denied. It was even revealed that the appellant himself went to the police station where he also denied this incident.

In his defence the appellant said that he was at home up to 1.30 pm when he went to take a bath and then went on duty at Rivatex at 2 pm. He even went to the extent of calling a witness from Rivatex where he works. It was one Francis Karari (DW5), a security officer who produced a clocking in card for the appellant to confirm that he reported on duty at 2.27 pm on the day in question. Given the fact that the appellant had to walk from Macharia Estate to Rivatex, it was not difficult for him to account for the time between 2 pm when he left his home to Rivatex where he arrived at 2.27 pm.

Between 1 pm and 2 pm the complainant's mother and father were at home for lunch. This was elicited from the complainant on 15th May 1992 when there was unusual *viva voce* examination of the complainant after she was recalled for the purported re-examination, see page 9 of the typed copy of the proceedings. If this be so then there could have been a doubt as to the time 2 pm which the complainant alleged she was defiled by the appellant.

There is no doubt that the complainant attempted to give details of her attacker as the *Mnandi* cripple who lived near them but was this sufficient to rebut the appellant's alibi? I do not think so.

In all sexual offences even where the complainant is an adult it would be unsafe to convict the appellant solely on the evidence of the complainant without corroboration. See *Chila and Another v Republic* [1967] EA page 722. In this case it was held that the judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside, unless the appellate court is satisfied that there has been no failure of justice (page 723).

The warning required here is not a formality and it must not degenerate into a purely technical exercise, or worse, into mere utterances of words: *Margaret v The Republic* [1976] KLR 267 at page 269.

The warning the learned Resident Magistrate gave in the case subject to this appeal seems to have squarely fallen in this trap.

The position was even more delicate in the case subject to this appeal because the complainant was a young girl of tender years where corroboration was even more desirable. That she reported this matter to another girl by the name Helida (PW3), a Standard six pupil, did not remedy the situation because Helida's evidence could not be said to be corroborative of that of the complainant because that evidence

too required corroboration: See *Margaret's* case – *ibid*.

The magistrate warned herself about the importance of corroboration in sexual offences but the warning alone was not sufficient because such warning should be accompanied by other words which must show that the evidence adduced by the complainant is fully supported by other evidence implicating the appellant.

In the case subject to this appeal where the appellant went out of his way to prove his alibi more caution had to be taken before convicting him on the complainant's uncorroborated testimony the warning notwithstanding because she, the complainant may have made up her story for some other reason, say remorse, fear of consequences, perjury, shame or some such other reason. That the learned magistrate thought this complainant was a truthful witness could not have been sufficient to sustain the appellant's conviction.

I am afraid the conviction of the appellant in the case subject to this appeal cannot be allowed to stand. It was not proved beyond any reasonable doubt that it was the appellant who defiled the complainant given the evidence and circumstances of the whole case.

The appeal is allowed, conviction quashed and the sentence set aside.

Dated and Delivered at Eldoret this 15th day of June, 1993,

D.K.S. AGANYANYA

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JUDGE