REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL NO 206 OF 1993

JAMES MURIUKI……..……APPELLANT

VERSUS

REPUBLIC……..…….RESPONDENT

RULING

This Court allowed the appeal against conviction. The same was quashed and the sentence set aside. The accused/appellant is set at liberty.

The reasons for that decision is as herein stated is as follows. The appellant was charged with the offence of defilement of a girl contrary to section 145 (1) of the Penal Code.

Namely that on the 24th day of March 1993 at Kimunye village Kirinyaga district of the central province had carnal knowledge of R N a girl under the age of fourteen years. The main contention by the advocate for the appellant is the aspect that the trial magistrate failed to warn herself of admitting the evidence of a minor. Looking at the proceedings only four witnesses gave evidence. PW2 the mother of the child whom the complainant went to complain after the incident. PW3 a hair dresser she heard a young girl had been sexually assaulted and went to inquire.

Both these witnesses were not present when the offence was committed PW4 the arresting officer who arrested the accused upon identification of the accused being pointed out. He later produced the P3 form filled by the doctor. The complainant a 7 year old girl gave evidence of how he under pants were torn and had things done to her. She recalls being examined in hospital.

In this case the trial magistrate failed in her duty in not complying with the criminal procedure code in recording the evidence herein.

Looking at PW1's evidence, the trial magistrate examined her extensively as to her capability to give a sworn or unsworn statement and whether she knew what it is to tell the truth. She thereafter proceeded to record "the child understands the duty of speaking the truth and is possessed of sufficient intelligence. Unsworn statement" What she should have done is to go a further step concerning her as the trial magistrate. This was to warn herself as the presiding magistrate in admitting the evidence of a minor. She did not do so. The golden words are "this Court warns itself of admitting the evidence of a minor". This same statement should appear in the body of the judgment namely that though she is convicting she is doing so with caution and knowing that the evidence before Court is uncorroborated. It is due to this failure by the trial magistrate that the counsel for the appellant spent a considerable time arguing his part. She quoted the case of *Maganga Msigara versus Republic* [1965] EA at page 475 where the Court therein

and referring to the case of *Muoki Kioni versus Republic* (judgment of Spry JA) stated "Where coraborration is necessary and the trial court has neither directed itself tot he need nor has in fact looked for corroboration, this Court will not itself consider whether corroboration existed... Unless the circumstances are such that it is quite clear that there has been no failure of justice."

Justice Mwendwa CJ as he then was stated in the case of *Maina versus Republic* [1970] EA 370 at page 371 … "it has been said again and again that in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. It is dangerous because human experience has shown that girls and women do sometimes tell an entirely false story which is very easy to fabricate but extremely difficult to refute. Such stories are fabricated for all sorts of reasons and sometimes for no reaons at all". Although this judge would not agree entirely with the statement made, the point to bring out is that a warning on convicting on evidence of a minor and a single witness which is in this is dangerous to do unless the trial magistrate has warned herself and the aspect of corroboration if lacking will not be a miscarriage of law.

The other aspect is the evidence of PW4 the arresting officer. He arrested the accused but the period from the incident of the arrest of the accused was about 2 days. It was thus important that an identification parade be held. This was not. Even if there was no need for an identification parade it was imperative that the chain of events be recorded presently. This was never done by the trial magistrate. This witness should have described who made a report to him. Whether the report was booked in the occurrence book. Who he then accompanied to go and look for the accused and in whose company was he. Who actually identified the accused to him. The complainant, the mother or neighbour? At what time and place was he identified?

Thereafter was he then taken to the police and placed in the cells? Was there a charge and cautionary statement? All these would have gone along way in assisting in the conviction of this case. Unfortunately this evidence was never extracted by the prosecution.

The other aspect lacking from this very important witness is that of the PW3 form. The maker was not called. The advocate quoted extensively from the case of *Patrick Mwai Thuo versus Republic* CA at Nairobi Civil Appeal 26 of [1987] in which the appeal was allowed on the grounds that the maker of the P3 form namely the doctor was never called to give evidence. It is noted that section 77 of the Evidence Act has been amended to include doctors report having admitted though the authencity of the signature of the doctor as is in the case of Government Analysis report. There was an amendment to the said section in 1991.

This Court notes that the amendment defeats the cause of justice. The police officer producing the report does not state that he knows the doctors signature. He does not work with him as a fellow doctor and thus cannot produce the said report on behalf of the said doctor. It is thus imperative that makers of the P3 form are called to give evidence on their report. The police officer is further unstable to answer medical questions if raised.

PW4 did not state that he collected exhibits to take to the doctor. The relevant exhibits should be, the underpants of both the complainant and accused, the "spit" of the accused. This should have been forwarded through the doctor to the government analysist. The spit and sperm of the accused should match. There should have been evidence that the tests from the "accused spit" and sperm" are the same as found in the underpants. There is also required a blood sample.

The only thing that seems to occur in this case is that there was signs of defilement on the complainant and on the accused. There is lacking evidence of the very important test. One aspect that is also clear is that PW2 the mother washed the complainant. This meant that vital evidence was destroyed. It must be reminded to all women who have been encountered with a situation where their daughter have been defiled should not wash the child until necessary examination and exhibits collected by the police. The underpants with spermatozoa from the accused and complainant. Blood sample and spit from the accused. Clothings if possible having any form of stains. The proof lies humbly on the prosecution. This must be established failure to the accused must be set at liberty.

There was a claim by the accused that he was insane. If this was correct, he is entitled to plead it as his defence. The trial magistrate should have had the accused assessed as to his mental capacity and age. Full investigation / inquiry of the accused ought to be done before trial or after conviction in order to give a balanced decision.

This Court quashes the conviction sets the sentence aside and allows this appeal. The appellant is hereby released unless otherwise lawfully held – he is set at liberty.

Dated and delivered at Nyeri this 7th day of December, 1993

M.A. ANG'AWA

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JUDGE