IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Gachuhi, Gicheru & Cockar JJ A)

CRIMINAL APPEAL NO 111 OF 1992

GERISHOM OMBAKA ………...………….APPELLANT

VERSUS

REPUBLIC………………………………RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa

(Justice Shields) dated 20th November, 1991

in HC CR A No 413 of 1991)

JUDGMENT

Gerishom Ombaka the appellant, was charged before the Resident Magistrate's Court in Mombasa with two counts of indecent assault on a female contrary to section 144 (1) of the Penal Code. He was convicted and sentenced to serve 5 years' imprisonment with hard labour and to receive six strokes of the cane on each count. On appeal to the High Court his appeal on conviction was reduced to a term of three years' imprisonment and one stroke of the cane on each count. The terms of imprisonment were to run concurrently.

The facts of the case are that PW3, the mother of the complainant in count 1 (PW1) gave evidence that on 5th March, 1991, as she was making beds for the children, she noticed pus stains on the sheets. She enquired from her daughter aged 10 years whether she had a wound but the daughter denied. On 11th March, 1991, as they were taking supper she sensed a foul smell from her daughter. She told her to bathe. On 12th March, 1991, while she was washing clothes she noticed pus on her daughter's knickers. When she questioned her daughter about what she saw, the daughter (PW1) introduced into the matter PW2 the complainant in count 2 aged 9 whom she wished to be present before she could say anything. She inspected PW2's knickers and found it had pus also. Both complainants refused to disclose how the presence of pus was on their knickers. The father of PW2 was called and the mother of PW1 went to Nyali Police Station. The children were escorted to hospital where they received treatment because the doctor had said that they were infected. The complainants accompanied by their parents pointed out the appellant to the police and he was arrested. The appellant on being arrested was also taken to a doctor for examination.

Both complainants gave evidence on oath after the trial magistrate conducted *voire dire*. They stated that on a Saturday, which date they could not remember, PW2 was washing utensils at the outside tap. PW1 went to assist her friend there. The appellant who is a neighbour called PW2 to his house to take his utensils. The appellant held PW2 and pulled her to the bed. PW2 screamed. PW1 went to check why PW2

screamed. The appellant closed the door with the two girls inside and threatened to slaughter them with a knife if they screamed. The appellant had sexual intercourse with PW2 and PW1 in turn. He later released them with a warning not to mention the matter to anybody. It was after the persistence of PW3 (PW1's mother) that the girls disclosed what had happened.

This being a second appeal, it must be on a point of law, and the law is on corroboration. The appellant submitted that the charges were framed up with no truth in the matter at all. He stated that he intended to produce documentary evidence to indicate that at the alleged time, he was on duty and he could not have been at home but he was not given chance to do so. He also wished to call a doctor who examined him to testify that he had no disease but he was also not allowed. He also submitted that he was convicted on uncorroborated evidence of the children.

The principal state counsel submitted that where evidence was given on oath corroboration is not necessary. He relied on *Archibold 37th Edition* para 2905 which reads:

"where the evidence of a child is given not on oath, corroboration in a material particular implicating the prisoner is required by statute. Where the evidence is given an oath, corroboration is not essential in law, but is in practice always looked for and it is the established practice to warn juries of the danger of convicting in the absence of corroboration:-"

The High Court on first appeal relied on *Archibold* and stated that there was corroboration and upheld the trial magistrate. The passage in *Archibold, supra*, relates to the law in England. The Evidence Act (cap 80) is not in line with it because section 124 of the said Act provides:

"124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of a child of tender years is admitted in accordance with that 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 support thereof implicating him."

The evidence of the complainants needed corroboration. They could not corroborate each other. From the evidence of PW3 the complainants were escorted to hospital where they received medication. Neither medical reports were produced nor the doctor called to give evidence for the prosecution that the complainants were suffering from a communicable disease or that the appellant suffered from such disease. That evidence not being available, the appellant's conviction on uncorroborated evidence is unsupportable. Accordingly, we allow this appeal, quash the conviction and set aside the sentence. We further order that the appellant shall be set free forthwith unless lawfully held for any other cause.

That is the order of this Court.

Dated and Delivered at Mombasa this 27th day of January, 1993

J.M. GACHUHI

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JUDGE OF APPEAL

J.E. GICHERU

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JUDGE OF APPEAL

A.M COCKAR

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JUDGE OF APPEAL