REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO 687 OF 1987

BETWEEN

NJOKI..... APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeal from conviction and sentence of the Resident Magistrate's Court at Kiambu, R K Mwangi Esq)

December 2, 1988 **Mbito Ag J, Shah CA** delivered the following Judgment.

The appellant was convicted of committing unnatural offence contrary to section 162 of the Penal Code and sentenced to 21/2 years imprisonment and six strokes of the cane. He now appeals against both conviction and sentence.

The prosecution's case was that on 7th February, 1987 at 3.00 p.m., the complainant was on his way home from *[particulars withheld]* Estate where he had been cutting grass, leaving behind his brother and other young boys. On his way, he felt tired and decided to rest. He then saw the appellant whom he knew well. He then states as follows:

> "He (meaning the appellant) came from where I had come from. He asked me to go and help him carry his luggage which was near the river. I agreed to go with him as I knew him. When we went to one place he sat down. He told me to go infront of him. I refused to do so. He then held me and pulled down my trousers. He put his penis in my anus after he unbuttoned his trousers. He then told me that if ever I tell anybody he will kill me."

The complainant then explained how he made a report to his mother and the police and how he was examined by a doctor. The doctor found some injuries and spermatozoa in the complainant's anus. The brother of the complainant, namely S M, also gave evidence as P.W 3 and confirmed that the complainant passed them while cutting grass and followed the same route which his brother, the complainant, had followed after cutting his grass. The complainant was however aged 12 years only and as such was still a child in accordance with the Children and Young Persons Act.

The appellant denied having committed the aforesaid offence. He however admitted having found some three boys cutting grass at the material time, but did not talk to them. He stated that after passing them he went to a football field where he stayed before going to his home. He thereby impliedly denied having

met the complainant and having done anything to him.

The learned trial magistrate after carefully evaluating the evidence found as follows:

> "There is the evidence of the complainant who narrated to the court about his encounter with the accused and he did not succumb to the accused's threats and he told his mother what the accused had done to him. I have noted that the anal swab taken from complainant was found to have spermatozoa. And therefore there is no doubt that the complainant had spermatozoa deposited in this anus. This finding corroborates the boy's story about sexual assault by the accused."

The appellant had challenged the above finding on several grounds. They can be summarized into three categories namely

> (1) That the trial magistrate erred in not considering the contradictions in the prosecution's evidence
>
> (2) That the learned trial magistrate erred in finding that the finding of spermatozoa connected him with the offence and
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> (3) That the learned trial magistrate erred in rejecting his defence.

The learned state counsel supported the conviction and sentence. He however properly, in our view, drew the Court's attention to the fact that he complainant was a child of tender age and that under section 124 of the Evidence Act, his evidence required corroboration as a matter of law.

He stated that in his view, the complainant's evidence had been corroborated by his brother's evidence, the complainant's evidence of consistency and the doctor's finding of injury and spermatozoa in the anus of the complainant, when taken together.

According to section 124 of the Evidence Act, and accused shall not be liable to be convicted on the evidence of a child of tender age unless such evidence is corroborated by other material evidence in support thereof implicating him. In determining this appeal therefore it is crucial for this Court to decide whether or not the complainant was a child of "tender years". If so this Court has also to decide whether or not the complainant's evidence was corroborated in a material particular as to implicate the appellant in the offence.

The learned trial magistrate found that the complainant understood the meaning of an oath and allowed him to give evidence on oath. He also found that he was aged about 12 years and was in standard v. Is such a person a child of "tender years" within the meaning of section 124 of the Evidence Act? Why does the section refer to a "child of tender years" rather than a child?

We have not been able to obtain a legal definition of the word "child" or a "child of tender years" of a general application. The Children and Young Persons Act defines a child for the purpose of that Act as a person under 14 years of age. The Evidence Act has no definition and the Penal Code has none also. However in the *Concise, Oxford Dictionary,* a child is defined as a person who has not reached the age of discretion, while "tender age" is said to be one who is immature.

Taking the two definitions together, a child of tender years seems to us to be a child who is legally immature and incapable of being responsible for own actions. According to section 14 (1) of the Penal Code all children under the age of eight years are said to be immature, are not a criminally responsible for any acts or omissions. Such persons can in our view be properly said to be children of tender years. It is therefore our view that section 124 of the Evidence Act only applies to children under the age of 8 years upon whose uncorroborated evidence no conviction can be based. We also believe that other considerations ought to be applicable to children who are not of "tender years".

In the case before us, the complainant was aged about 12 years. He was therefore not a child of "tender

years" whose evidence required corroboration as a matter of law. In our view however as he was not over 14 years age and his evidence still needed corroboration as a matter of practice and the court must caution itself on the dangers of convicting on uncorroborated evidence of such a child (as against a child of tender years) before acting on such evidence.

Arising from the aforesaid conclusion, the next issue is now whether or not there was any corroborative evidence as a matter of practice and/or whether the learned trial magistrate warned himself of the dangers of convicting on uncorroborated evidence of a child whose evidence has been received on oath.

According to the record the only direct evidence implicating the appellant was the evidence given by the complainant. The evidence of the complainant's brother merely laid a strong suspicion on the appellant as he followed the same route as his brother, the complainant soon after the complainant had left, thereby showing an opportunity for the appellant to commit the offence herein. This did not however amount to corroboration as it did not connect the appellant with the offence. Nor did the fact that spermatozoa was found in the anus of the complainant as it could have come from any other person.

However, during the trial and evaluation of the evidence, the learned trial magistrate found the complainant to be an intelligent child who knew why he should speak the truth and allowed him to take an oath.

He also found that the complainant did not succumb to the threats of the appellant and had made an early report to the mother. The record also shows that on account of the report made by the complainant, some spermatozoa was found in his anus. There was also no evidence of animosity or reason for the complainant to frame up the appellant.

Consequently, in our view, the complainant was a truthful witness and his evidence was safe for a conviction to be based thereon even though it was uncorroborated in a material particular. As regards the appellant's grounds of appeal, we find that there were no contradictions in the prosecution's evidence and that the complainant's evidence proved the prosecution's case beyond any reasonable doubt. We also find that the appellant's denial was unbelievable in light of the complainant's consistent description or explanation on how the appellant attacked him against the order of nature.

On sentence, we observe that the appellant could have been imprisoned for fourteen years, with or without corporal punishment. Consequently a term of 2 1/2 years' imprisonment cannot be said to be manifestly excessive or harsh for such a beastly offence committed on an unsuspecting youth like the complainant. We are therefore unable to interfere with it.

On account of our above findings, the appellant's appeal against conviction and sentence is dismissed.

Dated and delivered at Nairobi on 2nd December , 1988

MBITO AG **SHAH CA**

JUDGE **JUDGE**