REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL NO. 120 OF 1986

JAMLICK GACHARI MUSIKIRI ……..……APPELLANT

AND

REPUBLIC…….....……..…RESPONDENT

(Appeal From The Resident Magistrate's Court At Kerugoya, Muchemi Esq)

JUDGEMENT

The appellant was convicted by the learned Resident Magistrate at Kerugoya of defilement contrary to section 145 of the Penal code (cap 63) and of being in possession of *bhang* contrary to section 10 of the Dangerous Drugs Act (cap 245) of the Laws of Kenya. He was sentenced to 5 years imprisonment together with 3 strokes for the offence of defilement and to 3 months imprisonment for being in possession of *bhang*. The sentences were ordered to be consecutive. It may be mentioned that the imprisonment under section 145 of the Penal Code is required to be with hard labour.

The appellant was originally charged with rape contrary to section 140 but in accordance with the provisions of section 184 of the Criminal Procedure Code (cap 75) a conviction for defilment as above was substituted.

The complainant whose age had not been medically assessed nor did the learned magistrate make note of her apparent age, proceeded to record her evidence on oath without inquiring whether she was intelligent enough to understand nature of the oath. The complainant's mother testified that the complainant was of 12 years age. The learned magistrate made a finding in her judgment that the complainant was of 12 years age. It would seem that such finding was made on the basis of the evidence of the mother. It would have been desirable to seek better evidence as to age of the complainant, such as medical assessment of the age or birth certificate before making a finding as to age on mere say of the complainant's mother. Be that as it may, under interpretation section 2 of the Children and Young Persons Act cap 141 of Laws of Kenya "child" means a person under the age of fourteen years.

If the complainant was of 12 years age, section 19(1) of the Oaths and Statutory Declarations Act cap 15 Laws of Kenya ought to have been complied with. That section reads 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 witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, 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 an oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code, shall be deemed to be deposition within the meaning of that section."

In *Nyasani s/o Bichana v Republic* [1958] E A 190 it was held:

> "It is clearly the duty of the court under that section (section 19 supra) to ascertain, first, whether a child tendered as a witness understands the nature of an oath, and if the finding on this question is in the negative, to satisfy itself that the child "is possessed of sufficient intelligence to justify reception of the evidence and understand the duty of speaking the truth". This is a condition precedent to the proper reception of unsworn evidence from a child, and it should appear upon the face of the record that there has been a due compliance with the section."

The importance of recording *voir dire* examination and the satisfaction that the child understands the nature of oath or is of sufficient intelligence to justify reception of evidence is stressed also in (1) *Kibangeny Arap Kolil v Republic* [1959] EA 92 (2), *Oloo s/o Goci v Republic* [1960] EA 86 and (3) *Gabriel s/o Maholi v Republic* [1960] EA 159. Moreover, the necessity of material corroboration of the evidence of child of tender years is not only emphasized in these cases but is a *sine qua non* under section 124 of the Evidence Act (cap 80) to conviction of a person charged with an offence. The said section 124 reads as follows:

> "Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where 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."

It may also be observed that for a conviction to be had in offences involving sexual transgressions, the need for corroboraiton of the evidence of prosecution is essential.

The complainant (PW 4) testified that in the evening of October 20, 1985, she was sent by her mother outside their house to put out fire, when the appellant held her and asked her to accompany him. She refused but the appellant threatened her saying that he was a police officer. He took her to his house, where he cooked food and they ate. Then the appellant asked her for sexual intercourse but she refused. Again, the appellant threatened her and had sexual intercourse with her. In the morning, she washed her private part before returning home. Her mother, who had gone out to look for her, returned and she reported to her mother what had happened. They reported to police and she was escorted to the hospital. She took the police to the house of the appellant who was arrested. Police found some *bhang* on the person of the appellant.

She testified that she did not know the appellant before the incident, yet she told her mother that she had known the appellant by appearance. Moreover, under cross-examination, she said that there were other persons in the appellant's house, one of whom talked to her.

The medical evidence adduced was a vaginal smear examination report by an unknown person which was altogether negative. This report was produced by a police constable. It is not known under what provision of the law the said report was admitted, though it was favourable to the appellant. It could not be under section 77 of the Evidence Act, as it was not a report under the hand of the government analyst nor could it be produced under section 33 of the Evidence Act because it was not established that the maker of the report was dead, or could not be found or had become incapable of giving evidence or his attendance could not be procured without an unreasonable delay or expense nor was it established that it was made in the ordinary course of business in the discharge of professional duty. Medical evidence, if sought to be adduced, ought to be so done with propriety and not in such slipshod manner. The doctor who examined the complainant should have been called to adduce proper evidence.

During the course of the trial, the prosecution sought to adduce the cautionary statement of the appellant in evidence. The appellant objected to the same on the grounds that he was beaten up before he made the statement. The trial magistrate proceeded to hold a trial within a trial in which only a police officer in the report office was called as a witness and then the trial magistrate ruled that the statement was admissible because the appellant "did not challenge any witness on cross-exam."

This was altogether unsatisfactory as by then only the mother of the complainant, the arresting officer and the inspector who had recorded the statement had testified at the main trial. Be that as it may, the inspector who recorded the statement ought to have adduced evidence in the trial within trial. It is probable that the appellant may have suggested to the inspector as to when and where he was beaten before he made the statement. In any event, the appellant ought to have been given an opportunity to say when, where and by whom he was beaten before closing the trial within trial. If the appellant made new allegations in his statutory statement or evidence on oath with regard to beating which could not be foreseen by the prosecutor by exercise of due diligence, then the prosecution, in accordance with section 212 of the Criminal Procedure Code could be allowed to adduce evidence in reply to rebut the allegations of the appellant. I am not satisfied that the cautionary statement of the appellant was properly admitted in evidence.

Fortunately, the learned magistrate in her judgment did not take into account, the said cautionary statement which is admission in only six words, namely "It is true, I raped her".

In his defence, the appellant denied that he slept with the complainant. He admitted that the complainant slept in his house because he found her on the road looking for vehicles to take her to Nyeri and as it was too late, he gave her shelter in his house, where there were other persons, one of whom testified on behalf of the appellant.

In her judgment, the learned magistrate made a finding that "the important ingredients of the offence have been proved" without looking for the corroboration of the evidence of the complainant.

It may be mentioned that the alleged incident occurred on Kenyatta Day. The mother's evidence that the complainant went outside the house to put out fire does corroborate the evidence of the complainant, but it is not corroboration implicating the appellant. It cannot be held that a girl who had been out throughout the night, and who was found at home the following day by the mother, who is bound to question the daughter what she was up to throughout the night and what the daughter told her, is corroboration of all that befell to the daughter.

I have anxiously considered whether it would be safe to uphold the conviction for defilement. The learned Principal State Counsel does not support such conviction. I agree with him.

In the event, I quash the conviction and sentence passed for the offence of defilement.

As regards conviction for being in possession of *bhang* the trial magistrate was entitled to accept the evidence of the arresting officer, which in any case was not disputed by the appellant. The appeal against both conviction and sentence for such offence is dismissed.

The appellant having already served the sentence for being in possession of *bhang*, he may be released forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 16th day of October, 1987.

F.E. ABDULLAH

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JUDGE OF APPEAL