IN THE COURT OF APPEAL
AT KISUMU

(CORAM: GITHINJI, KARANJA, MARAGA JJ.A

CRIMINAL APPEAL NO. 216 OF 2010

BETWEEN

DAVID OKEROSI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kisii (Musinga J) dated

3rd June 2010

in

H.C.C.R. No. 65 of 2009)

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JUDGMENT OF THE COURT

The appellant was convicted by the Senior Resident Magistrate Kisii of the offence of defilement of a girl contrary to ***section 8(1)*** as read with section ***9(2)*** of the sexual offences Act and sentenced to sixteen years imprisonment. His appeal to the High Court against conviction and sentence was dismissed and in addition the sentence was enhanced to life imprisonment.

The appellant was alleged to have defiled ***L.K. (the child)*** on 8th October 2007. The age of the child was assessed by a doctor as 7 years about six months after the date of the alleged offence. The child was a primary school pupil in Class 4. The child is an orphan. His mother is a daughter of **TN *(Pw3) (T)***. The child placed into the custody of the appellant by the child's uncle upon the death of her mother. The appellant is a son-in-law of T as he is married to ***M*** the youngest daughter of T. The appellant had leased land in Kilgoris and built a house. He moved there with his wife and the child. His mother-in-law T later joined them and built a hut in the same compound.

Sometimes in October 2007 T left Kilgoris and went to her rural home. She returned to Kilgoris on 8th October 2007. She found that the child had been beaten and her body was swollen. She asked the child what had happened and the child reported that the appellant had defiled her. When the appellant heard T inquiring from the child, he chased her wielding a panga. She ran to the home of one ***Ole Merenya*** who called people and the appellant was arrested and taken to police station. The alleged offence was reported to the Assistant Chief who escorted the child and the appellant to Kilgoris police station. ***P.C. Isabel Wangechi (Pw4)*** investigated the case and caused the child to be examined by

Dr. Philip Masango (Pw1) on 12th October 2007. The doctor found that the child had a bruise on the right side of the head and on the right side of the face. The child had also a missing tooth and one was loose. The child had also redness of both labia majora and minora and a whitish discharge on her external vulva.

The doctor testified and also noted on the Medical Examination Report (P3) that the child was unco-operative during examination and that it was difficult, to ascertain the state of her hymen.

The appellant made a long unsworn statement at the trial. He explained that the child was left under his custody by the child's uncle upon the death of her mother and that he has been looking after the child until the date of the alleged offence. He stated that the child developed a mental problem as she used to wander about as if insane and that he took her to Mwanza, Tanzania where she was treated by a witch doctor. He also stated that on one occasion, the child was defiled by under age boys but the issue was resolved after he forgave them.

The appellant also narrated in detail the bad relationship between him and T his mother-in-law and denied that he committed the offence.

The trial magistrate made a finding that the child was defiled and that it is the appellant who defiled her.

He also made a finding that the medical evidence did not show that the child was an imbecile saying:-

> ***"She was able to testify firmly even though she had a little irrationality here and there but never lost focus to the point she put forth."***

The High Court (***Musinga J*** as he then was) also made a finding that as the offence was committed in broad day light there was no possibility of mistake in the recognition of the appellant by the complainant.

Regarding the appellant's defence, the High Court said:

> ***"The trial court considered the appellant's defence and rightly rejected it. There was no evidence of any existing grudge between the complainant or her grandmother and the appellant which could have caused the former to frame up the latter."***

The appellant relies on seven grounds of appeal but only two of them are worth considering. The first main ground is that there was a mistrial as the mental status of the child was not ascertained by a doctor although the trial magistrate had found the child to be irrational. The second main ground is that the two courts below erred in law in convicting the appellant on the uncorroborated evidence of a child. We will consider the two grounds together.

By dint of ***section 124*** of the Evidence Act, the evidence of a child of a tender years, that is a child under the age of 10 years, according to the definition in s.2 of the Children Act requires corroboration as a matter of law. However, by the proviso to that section the court could convict on uncorroborated evidence of a child of tender years in sexual offences if the child is the victim and the court is satisfied, for reasons to be recorded in the proceedings, that the child was telling the truth.

In Law, corroborative evidence is independent evidence which confirms in some material particular both that the crime was committed, and, that, it is the accused who committed the crime.

The doctor who examined the child found redness on both labia majora and minora and whitish discharge on the external vulva. However the child was unco- operative during the examination and the status of the hymen was not ascertained. ***PC Isabel Wangechi*** testified that the child's panty had blood stains but the child denied that her pant had blood stains. The child stated categorically stated that she did not discharge any blood. The blood stains on the pant were not visible at the time of trial. Apparently, the pant was not shown to the doctor and there was no verification that it had blood stains.

The child was aged less than 7 years at the time of the trial. The child herself said that she was 4 years old but the trial magistrate noted that she was much older. The trial magistrate examined the child before she gave evidence. Although he found that the child was not capable of giving sworn evidence and that she was irrational he nevertheless allowed her to be affirmed.

Certainly, the evidence of the child was not consistent. The evidence shows that she was defiled from behind as she was bending inside or around the house but later says that she was defiled next to a tree in the bushes.

Further, the High Court misdirected itself by finding that there was no evidence of any existing grudge between the child's grandmother and the appellant which would have caused the grandmother to frame up the appellant. On the contrary, the evidence of T, in cross-examination, revealed that there was a strained relationship between the two. It seems from her evidence that she wanted the child to be under her custody but according to her the appellant stole the child and took her to Mwanza. Indeed, T in her evidence in re-examination, agreed that she had differences with the appellant before the incident.

The appellant's case was throughout that T had fabricated the case. The child in her evidence on cross-examination by the appellant stated.

> **"My grandmother told me to go and say to the police that you defiled me."**

It is apparent from the Judgment of the High Court it did not re-evaluate the entire evidence.

Had it done so, it could have appreciated that the conviction of the appellant was dependent on the sole evidence of a child of tender years who was found to be irrational and who had admitted that she was told by T to implicate the appellant.

The High court would have further appreciated that there were no reasons or good reasons given by the trial court below for believing that the child had told the truth.

On our own analysis, we have come to the conclusion that there was no concrete and credible evidence to support the conviction.

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

The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kisumu this 4th day of April 2014.

E.M. GITHINJI

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JUDGE OF APPEAL

W.KARANJA

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JUDGE OF APPEAL

D.K.MARAGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR