IN THE COURT OF APPEAL
AT NAKURU
(CORAM: TUNOI, AGANYANYA, NYAMU, JJ.A.)
CRIMINAL APPEAL NO. 148 OF 2010

BETWEEN

D.M.K……..…….APPELLANT

AND

REPUBLIC ……...……RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Emukule, J.) dated 24th April, 2010

in

H.C.Cr.A. 322 of 2009)

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JUDGMENT OF THE COURT

D.M. K, the appellant, is the husband of ***F.W*** (PW1) and the father of ***B. N*** (PW6), the complainant. He was charged in the Chief Magistrate's Court at Nakuru with the offence of defilement contrary to ***section 8(1)*** as read with ***section 8(2)*** of the Sexual Offences Act, No. 3 of 2006. The particulars of the charge were that on diverse dates between 24th and 28th day of March, 2009 at P[....] in Nakuru District of Rift Valley Province he unlawfully caused penetration with his genital organ, namely penis, into the genital organ of *B.N.M* aged 3 years, namely anus. He denied the charge and the case was heard by (*E. Tanui*, Resident Magistrate) between 28th July, 2009 and 7th October, 2009 when evidence of the prosecution witnesses and the appellant's defence was recorded.

The trial Magistrate then wrote his judgment which he delivered on 24th November, 2009 and in which he concluded, thus:-

"The prosecution has relied on both direct evidence and the circumstantial evidence in its bid to establish the guilty (sic) of the accused. The circumstantial evidence adduced by PW1 and PW2 does not only corroborate the statement given by the complainant (PW6) but in my view the evidence reveal facts that are in compatible with the innocence of the accused and incapable of any other explanation upon any other reasonable hypothesis than that of the accused persons guilty *(sic).* ***The defence offered by the accused is one that has been crafted to enable the accused to exonerate himself from the inculpatory facts.***

I find that the accused while having bonding time with his son *(the complainant herein)* ***took advantage of her*** *(sic)* ***innocence and inserted his penis*** *(known to the complainant as* ***"stick") into his anus. The accused has not succeeded in raising doubts on the otherwise strong prosecution case."***

Following his conviction the appellant was sentenced to serve life imprisonment as provided by law.

The evidence upon which the appellant's conviction was founded was that for some reason which was not explained, PW1 had left the appellant to go and live with her parents. However, the appellant visited her often and took PW6 out for a walk. According to the evidence of PW1 the appellant visited her on 24th March, 2009 and took PW6 away to visit his grandfather and he returned him on the same day. But on 29th March, 2009, PW6 developed a running stomach and when PW1 washed him and touched his buttocks PW6 screamed as if in pains. PW1 checked and noticed that PW6 had bruises on his anus. Then PW6 told PW1 that the appellant had put his *"stick"* there. Thereafter PW1 consulted her mother ***C.W*** (PW2) on what PW6 had told her and it was agreed that the complainant be taken to hospital.

PW1 then took PW6 to a private hospital on 29th March, 2009 but she was referred to Njoro Health Centre. As it was late, she could not go to the health centre and it was PW2 who took PW6 there on the following day. There PW6 was attended by ***Tabitha Ngugi*** (PW3), a registered nurse who examined him and found, as she explained in her evidence, thus:

"weeping rashes at the opening of anal region. The tissue at anal canal had cracks. There was also redness on anal canal. The anal opening was widen. I also found watery discharge along the anal opening. The lab investigations were negative. The urinalysis was also negative".

According to PW3 the duration of the injuries was 3 days.

PW6 gave unsworn evidence after the learned Magistrate administered *voire dire* examination on him. He said:

"I am B.N. The accused is my dad."
(Complainant points to the accused).

"My dad injected me using a stick at my buttocks. I felt pain. I was taken to hospital. My dad put his stick here" *(PW6 points to his anus)* ***while we were on bed).***

When the appellant was put to his defence after a ruling on a case to answer was made, he stated that he had gone to visit his wife on 28th March, 2009 at her parents' home but he was shocked at the cold reception he received from her, though the previous day they had parted happily. That he went back later and tried to talk to his said wife (PW1) but she did not respond. He went back home and the next day he went to sleep at the house of his brother after he had done some work for him during the day. He was arrested that night by some administration police officers and taken for medical examination on 30th March, 2009. Then he was charged in court on 31st March, 2009. He agreed that during the time he had separated with his wife he would go to her parents' home and take PW6 for a walk and that the last time he did so was on 27th March, 2009. He denied the charge facing him. However, as already stated he was found guilty of the charge, convicted and sentenced to life imprisonment. His appeal to the superior court was dismissed in a judgment delivered on 30th April, 2010 by *Emukule, J.* In it the learned Judge stated as follows:

"The essential ingredient in sexual offences is the act of penetration, as the Court of Appeal held in the case of *REPUBLIC V OYIER [1985] KLR. 353****. There is no doubt in this case that the appellant committed that act as stated in section 8(1) of the Sexual Offences Act. The punishment for the offence is life imprisonment under section 8(2) of the Act. Having considered all the appellant's submissions and the evidence there is absolutely no merit in this appeal".***

Still dissatisfied, the appellant has lodged this appeal before this Court through a homemade memorandum of appeal in which he listed 5 grounds of appeal as follows:

1. THAT both the learned trial magistrate and Judge of first appeal erred in law and facts when they held that each and every ingredient of the offence had been proved beyond reasonable doubt.

2. THAT the learned trial Magistrate and Judge of first appeal erred in law in holding that PW3 was an expert witness *(sic)* ***thus contravening the provisions of section 48 of the Evidence Act Cap. 80 Laws of Kenya.***

3. THAT it was a gross travesty of Justice the testimony of PW3 was procured to be corroborative evidential value while the medical examination results were patently inconclusive.

4. THAT both the learned trial Magistrate and Judge of first appeal erred in law and facts in their failure to give cogent reasons for their rejection of my sworn defence testimony as required by the law.

5. THAT it was a travesty of justice that the stipulations of section 124 of the Evidence Act Cap. 80 Laws of Kenya were not complied with in relation to the evidence testimony of PW6 (the complainant).

When this appeal was placed before us for hearing on 21st April, 2011, the appellant handed in written submissions which he highlighted by saying that there was no penetration as there was no medical evidence to establish this. He stated that at one time while he was away from home, his grandmother (PW3) called PW1 to her house and when he went there to find out why he was informed there was nothing wrong. He thought however, that there was an arrangement and that PW6 had been couched over this case to fix him, otherwise he did not know why he was arrested.

Mr. Nyakundi, learned State Counsel, however, supported the appellant's conviction and said that PW1 had discovered the injury on PW6 when she was washing him and that PW6 confirmed this when he testified; and that this was also supported by the evidence of PW3, the Clinical Officer.

This is a second appeal and by virtue of ***section 361(1)*** only matters of law fall for the consideration of this Court. The evidence adduced by the prosecution witnesses – PW1 and 2 was not clear on when the appellant committed the offence he was charged with, if at all. According to the evidence of PW1 the appellant took PW6 to see his grandfather on 24th March, 2009 and returned him on the same day and that it was on 29th November, 2009 when PW1 realized PW6 had diarrhea or running stomach. But when PW6 was taken to the health centre at Njoro on 30th March, 2009 for examination, PW3 did not check on the running stomach or whether this had anything to do with the

"weeping rashes at the opening of the anal region or the cracks at anal canal or the redness on the anal canal or even the watery discharge along anal opening."

which she observed on PW6 on the day he was taken to her for medical check-up.

In our view, the judgment of the trial court was wholly based on the evidence of PW6. The evidence of PW1 and PW2 hinged on what PW6 had told them about the assault of the appellant upon him, if at all. They did not witness the commission of the offence by the appellant, and it cannot be said that the evidence of these two witnesses provided circumstances which confirmed the commission of the offence with which he was charged. The evidence of PW6 was that of a child of tender age which was in form of an unsworn statement. ***Section 124*** of the Evidence Act (Cap. 80 Laws of Kenya) provides as follows:

"124 Notwithstanding the provision of section 19 of the Oaths and Statutory Declaration Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be convicted on such evidence

unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence the court shall receive the evidence of the alleged victim and proceed to convict the accused person if for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth."

An important element in the definition of corroboration is that it affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it – see ***R V. Manilal Ishwerlal Purohit [1942] 9 EACA 58 at p. 61*** – see also ***Mutonyi V Republic [1982] KLR 203.***

And where a child of tender years is allowed by the court upon proper examination under ***section 19(1)*** of the Oaths and Statutory Declarations Act, to give either sworn or unsworn evidence, there is a requirement, as a rule of practice that such evidence should be corroborated. This rule should not be disregarded for the sake of fair trial and justice for the offender. That corroboration should be in material evidence implicating the accused and the court should properly direct itself on it. It however remains a rule of practice and as such and subject to the proper warning being administered the court may still convict upon such evidence without corroboration - see ***Kinyua v. Republic [2002] 1 KLR 256 at page 258***.

Perusing through the judgments of the two courts below, we are not convinced proper direction or warning was given of the need for corroboration or otherwise given that PW6, the complainant and the sole prosecution witness to attest to the commission of the offence was 3½ years old. We are not also satisfied that the procedure for receiving the evidence of PW6, a child of tender years as provided under ***section 19(1)*** aforesaid was strictly followed as the record bears us out. We are also not convinced that due consideration was given to the sworn defence of the appellant by either the trial or the first appellate courts. Added to this is the time lapse between 24th March, 2009 when the appellant took away PW6 to see his grandfather and 29th March, 2009 when the injuries on him were discovered. If due consideration had been given to all these matters the first appellate court could not have come to the decision it did. In the circumstances, the guilt of the appellant was not proved beyond reasonable doubt.

We allow this appeal, quash the appellant's conviction and set aside the sentence of life imprisonment imposed upon him. The appellant shall be set at liberty forthwith unless he is otherwise held for some other lawful cause. It is so ordered.

Dated and delivered at Nakuru this 9th day of June, 2011

P. K. TUNOI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR