



IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Tunoi, Owuor & Keiwua JJ A)

CRIMINAL APPEAL NO 207 OF 2002

GABRIEL KAMAU KINUTHIA APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court at Mombasa (Tutui CA)

dated 28th February 2002 in HC Cr Appeal No 267 of 2002)

JUDGMENT

The appellant, Gabriel Kamau Kinuthia, was convicted of the offence of defilement of a girl under the age of 14 years contrary to section 145 (1) of the Penal Code. He was sentenced to 10 years imprisonment with 2 strokes of the cane. The particulars of the charge are that on the 24th day of August, 2000, at *[Particulars Withheld]* in Likoni Location within Mombasa District of the Coast Province, the appellant had carnal knowledge of EW. The appellant's first appeal to the Superior Court against both conviction and sentence was dismissed. This is therefore a second appeal.

The appellant, who very ably and persuasively argued his own appeal, raised two main grounds to challenge the conviction. He said:-

1. The medical evidence was insufficient to warrant its authenticity as the author of the P3 form never presented himself for cross-examination.

and

2. The entire case was a frame up as one of the main witnesses in the case R N M, who has marital relationship with the mother of the child complainant has also against himself a similar criminal case i.e Mombasa Chief Magistrate's Court Criminal Case No 3486 of 2001.

The facts giving rise to this appeal are as follows. The complainant was aged 10 years old and was a pupil in class 5 at *[Particulars Withheld]* Primary School. The appellant, her neighbour, was a watchman and a part-time cobbler. On the material day the complainant was sent by her mother to the appellant's house to have her sandals mended. This was about 11 am but the appellant did not mend the sandals. Instead he deliberately busied himself with his friends, cooking his food and other house chores until the afternoon.

In that long process of waiting, the complainant fell asleep. Her upper body rested on the appellant's bed and the feet on the floor. After a while she was awakened by an excruciating pain in her private parts. She found herself tossed onto the bed and lying on her back. Her pants had been lowered and the appellant was lying on top of her. She screamed and ran out towards their home.

Outside the compound she met Mzee Kinango (PW4) to whom she narrated her ordeal. When he asked her why she was crying she replied that Kamau had done something bad to her. He advised her not to go into Kamau's house again.

M W (PW2), the mother of the complainant also had this to say in her evidence:-

"I arrived home 7.30 pm. My daughter told me, immediately I arrived home, not to sit down. She told me to go and see Kamau. I thought Kamau was holding onto her slippers for money.

She narrated to me what had happened during the day. She had taken her slippers to Kamau and had waited so long that she had fallen asleep on Kamau's bed. She was awakened by a sudden pain and a heavy weight against her. He had lowered her pant and he defiled her.

I checked my child's genitalia and noted that it was widened and the flesh was irritated and red. It was late in the evening and I was alone. I just held the child and stayed with her. She said she had left her pant at Kamau's house."

During cross-examination by the appellant she answered:-

"N is your friend and my friend. You have a wife and she used to mind my child when I was looking for a job. N was trying to convince me to settle this matter out of court. There is no conspiracy between N and me to frame you" (emphasis ours).

The appellant's version of the affair, which he gave in an unsworn statement to the trial court, was to the effect that he did not do anything bad at all to the child and that the entire charge against him was concocted.

In a reserved judgment the trial magistrate convicted him holding that the evidence of the complainant had received the requisite corroboration under the law. The first Appellate Court confirmed the finding.

The two Courts below were alive to the danger of convicting the appellant upon the uncorroborated testimony of the complainant, a child of tender years, even though her evidence had been given under oath. Consequent upon this warning, the trial magistrate looked for and did find corroboration. There was sufficient corroboration implicating the appellant in the crime charged. Further, there was ground upon which the trial court could express itself to be convinced of the child's story. We think that there was sufficient evidence to convict the appellant.

However, what has caused us grave concern is the second limb of the grounds of appeal. Who is N M and what is the relevance of Mombasa C M Criminal Case No 3486 of 2001? The charge is framed as follows:

"CHARGE:

Defilement of a girl under fourteen years of age, contrary to section 145(1) of the penal code.

Particulars:

Ngugi Mwangi. On the divers dates during the month of September and 18th day of October 2001 at *[Particulars Withheld]* village Likoni location in Mombasa District within the Coast Province, had carnal knowledge of E W a girl under the age of fourteen years."

By the institution of this second case against N a lot of questions arise. Is the complainant a young child of 10 or 14 years or not? Actually, how old is she? Has the mother (PW2) neglected her? Is N committing incest? Why did the alleged defilement last so many weeks? Who is looking after her? Do these two charges of defilement have a correlation? Is it not possible that the charge against the appellant is a frame up?

In our view and upon a proper consideration of the evidence on record we hold that the evidence of the mother of the complainant (PW2) is untrustworthy. She has failed to explain the role of N in the first charge and so many other relevant aspects of the case. Her evidence cannot found a conviction. In the case of *Ndungu Kimanji v Republic* [1979] KLR 282 this Court said:-

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

We accept this *dictum* because we have formed the impression on the recorded evidence that PW2 is a person of doubtful integrity and indeed an unreliable witness.

We consider it unsafe to allow the appellant’s conviction to stand. We allow the appeal, quash the conviction and set aside the sentence. The appellant shall be entitled to his liberty forthwith unless otherwise lawfully held.

As we believe that various offences might have been committed under the Children Act, we order the Deputy Registrar of this Court to report this matter to the relevant authority to investigate it with a view to safeguarding the welfare of the young E W.

Dated and delivered at Mombasa this 24th day of January, 2003

P.K.TUNOI

.....

JUDGE OF APPEAL

E. OWUOR

.....

JUDGE OF APPEAL

M.M.O. KEIWUA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR