REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO 55 OF 1991

SAMWEL GODFREY OTILI..............................APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(From original conviction and sentence in Criminal Case No 120 of 1991 of the Principal Magistrate's Court at Kisumu)

JUDGMENT

The appellant had been charged in the Chief Magistrate's Court with defilement of a girl under fourteen years of age contrary to section 145(1) of the Penal Code. The particulars were that on the 28th June 1991 at Lake Primary School in Kisumu District he had carnal knowledge of C A O a girl under the age of 14 years.

He was tried by the Chief Magistrate, Kisumu after he pleaded not guilty. He was convicted and given a robust sentence of 51/2 years which was to reflect the seriousness with which the Courts consider the offence.

He has now appealed against conviction. The victim of the alleged defilement was C A O aged, at the time, about 13 years. On the 28/6/91 she said she left home at 6 am for school arriving at school at 6.30 am. A teacher – the appellant now – called her and told her to sweep the office. She went inside the office and as she took the broom, the appellant got hold of her by the waist. He had locked the office. He put the girl down and forcefully had sexual intercourse with her. At the end of it all, the girl left the office, was taken by her colleagues to report the incident to her mother and, she was later, the same day, examined by Dr Charles Okal of what is referred to in the proceedings at Kisumu Hospital. The doctor found that the girl was about 13 years old. The school uniform she was wearing was dirty but had no tears. No scratch marks on the body, dried semen around *labia majora* and thighs, no lacerations of the genital organs; hymen "already broken" as no bleeding. Slimy discharge from vaginal and cervical area.

The doctor's impression was that "weapon causing the injury was a male sexual organ". An examination of the vaginal swab showed scanty spermatozoa and pus cells.

The matter was reported to police and the appellant was arrested. His blood group was found to be B while that of the victim was of group O positive. Semen of group B secreta is said to have been found on the uniform of the victim.

The learned magistrate wrote a carefully considered judgment and in coming to this finding said *inter alia* this:

“The evidence of Dr Okal corroborates that of the complainant that there was indeed sexual intercourse as he found semen discharge from ‘the vaginal vaults’. The evidence that the complaint was in accused’s office is supported by that of Linet PW6”. He goes on to say:-

“I must warn myself that the unsworn evidence of a child cannot corroborate the unsworn evidence of another child. Corroboration in this was from the sworn evidence of Adhiambo PW9 who saw the complainant emerge, from accused’s office crying.”

The learned magistrate further stated that the analyst’s report further indicated accused’s blood group as B and that semen of group B secreta was found on the complainant’s uniform and found this to amount, also, to corroboration of the complaint’s evidence that accused is the one who defiled her. The material witnesses in so far as establishing that the accused was the perpetrator of this crime were the complainants PW1, Linet Raffa PW6 and Sandra Adhiambo PW9. The three were all aged 13 or below. PW1 and PW6 gave unsworn evidence but PW9 gave sworn evidence and this is why her evidence was said to be corroboration of the complainant’s evidence.

The unsworn evidence of a child needs corroboration, before conviction can be founded on it. This being a sexual offence, corroboration was required both as to the act of defilement and identity of the accused.

I have carefully gone through the recorded word of the witnesses and I am left in no doubt that there was corroboration that the complainant was defiled.

Was she defiled by the accused or more accurately, was it found beyond reasonable doubt that she was defiled by the accused"

The complainant gave unsworn evidence and therefore her word that it is the accused who defiled her required corroboration in law. The learned Magistrate found such corroboration in the evidence of PW9 aged 12 years who said that she heard appellant call the complainant into the office and later on the complainant came out crying saying that she had been raped. He found his other corroboration from the fact that the blood group of the accused was B and that sperms of group B secreta or secretion, whatever that is, was found on uniform of the complaint. No expert or anyone for that matter was called to say what connection is there between blood group and sperms secretion group and it is difficult to see why the learned magistrate found that the sperms found on dress of complainant being of group B secreta must have come from the accused because the latter was found to be of group B. An expert witness was necessary to show the connection beyond reasonable doubt. In short it was fallacious to derive corroboration in this respect.

In sexual offences generally like rape, the trial magistrate should warn himself of the danger of acting on the uncorroborated testimony of the complainant. Having done so, he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If there is no such warning a conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice – see *Chila & Ano vs R* [1967] EA 722.

One important aspect of the three witnesses – namely PW1, PW6 and PW9 is that they were all children albeit that PW1 was sworn and the rest were not.

The evidence of PW9 being sworn did not as a matter of law require corroboration. As a matter of

practice though, the Court should always warn itself of the danger of convicting on uncorroborated evidence of a child. Sandra PW9 was a child. Her evidence as a matter of practice required corroboration and it is dangerous to convict on it without such corroboration. If the Court does not warn itself of that danger and convicts on it, the conviction will always be set aside even if there was corroboration except where there has been no substantial injustice – see *Maganga Msigara vs R* [1965] EA 471.

There was no such warning here about PW9's evidence. She wasn't the complainant but her evidence required in practice, corroboration and it would not, particularly without a warning as aforesaid, be said to corroborate the unsworn evidence of another child. Take out that and there is no corroboration of PW1's evidence with regard to the identity of the appellant. It follows that it is unsafe to let the conviction of the appellant stand. He will accordingly get a new lease of freedom.

The conviction is therefore quashed and the sentence arising from it set aside and if the appellant is not held for other lawful charges, he will be set to immediate freedom forthwith.

Dated and delivered at Kisumu this 18th day of December 1992.

J.A MANGO

JUGE

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