REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

APPELLATE SIDE

CRIMINAL APPEAL NOS 565 AND 578 OF 1976)

FELIX KIARIE MARGARET

EDWARD MBITHI KANG'ETHE ……..……..APPELLANTS

VERSUS

THE REPUBLIC……..……..RESPONDENTS

JUDGMENT

Having found that the appeals against conviction should be allowed, his lordship continued: We have said enough to show why we believe that the convictions entered are not for sustaining, but as the magistrate twice more misdirected himself, it may be of use generally if we set out what those misdirections were and deal with them. They appear in this passage of the judgment:

It must be noted that the Court will be acting on the uncorroborated evidence of the two complainants. I have considered the case of *Chila v The Republic* [1967] EA 722 in which the desirability of corroboration was stressed. I have warned myself of this fact but having considered the evidence of the two complainants I accept the same as true.

The first misdirection is that there was no corroboration to be found in the evidence, for it was there, if accepted as being such. By his use of the expression "the uncorroborated evidence of the two complainants" the magistrate appears to have treated the two girls, if we may so put it, as joint complainants, but this they were not. Each of the girls was the complainant only in respect of those charges which named her and, that being so, each girl could, in law, provide the necessary corroboration in regard to the charges in which she was not named. In *R v Cambell* (1956) 40 Cr App Rep 95, a case in which the accused was convicted on seven counts of an indictment, each alleging indecent assault on a boy, Lord Goddard CJ, delivering the judgment of the Court of Criminal Appeal, stated at pages 100 and 101:

Each count in an indictment is equivalent to a separate indictment … In our opinion … it makes no difference whether the child called to corroborate the evidence of another is alleged to be the victim in another count of the indictment or not, though, if he is, no doubt it would be wise to warn a jury that they should bear this in mind and look with particular care on that evidence.

That was said in relation to the sworn evidence of a child in a sexual case, but it is just as applicable to the evidence of an adult complainant in this type of case. In *Director of Public Prosecutions v Kilbourne* [1973] 2 WLR 254 at 262 Lord Hailsham LC refers to “the alleged victims, whether adults or children, in cases of sexual assault”. On the facts of the case before us, of course the misdirection is not of consequence for the girls’ evidence is suspect, there being more than the possibility that they may have made up their story for one reason or another as Law JA might put it [*Chila v The Republic* [1967] EA 722 at 723], though it would not be the reason which Lord Hailsham LC thought might have actuated his Lady Wishfort (at page 269) in the *Kilbourne* case.

The second and more serious misdirection is that the magistrate was prepared to, and did, warn himself that he would act on the girls’ uncorroborated evidence when he should not have done so for the facts of the case, to some of which we have drawn attention, were such that it was far from safe to convict, save with the required corroboration. What the case called for was a direction that a conviction was not to be entered without corroboration. It is not a rule of law that a person charged with a sexual offence cannot be convicted on the uncorroborated evidence of a complainant, but it has long been the custom to look for and require corroboration before a conviction for such an offence is recorded. There are many cases in the reports saying so, such as *Njuguna s/o Wangurimu v R* (1953) 20 EACA 196. Nonetheless, there are certain cases where convictions may yet be entered even though there is no corroboration of the complainant’s evidence. As Law JA put it at page 723 in *Chila’s* case, to which reference has already been made: The law of East Africa on corroboration in sexual cases is as follows: The judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice.

It was suggested to us that *Chila’s* case runs counter to the rule restated in *Njuguna*, but we do not think that it does. The rule is for following, but where the Court in an exceptional case is satisfied that the complainant’s evidence is true, and the warning of the danger involved has been given, a conviction may be entered. In the *Kilbourne* case Lord Hailsahm LC, at page 262 said:

However, it is open to a judge to discuss with jury the nature of the danger to be apprehended in convicting without corroboration and the degree of danger …

Perhaps giving the impression that, as long as the warning is given and attention is drawn to the particular dangers in the case, the jury may still be told that they may convict without corroboration; but bearing the longstanding rule in mind, the warning is not, as we believe, for giving in every case. Indeed, at page 269 Lord Hailsham LC comments, “This prompts me to point out that although the warning must be given in every appropriate case”, but it must be stressed that he was not there referring to quite the situation that we are now considering. The warning is not a mere formality and it must not degenerate into a purely technical exercise or, worse, into the mere utterance of words. It is only to be given where the Court, with all the evidence of the case in mind, including that given by the complainant, is satisfied that it is safe to give it. In *Chila’s* case, Law JA speaks, not of the “testimony of a complainant” in a sexual case, but the “testimony of the complainant” before the Court. The Court must first ask itself whether upon all the evidence before it, it is safe, notwithstanding the rule, to give the warning, and its next step depends on the answer given. If that answer is unfavourable, then the warning given should be in some such form as we have earlier suggested, ie that conviction is not possible without the required corroboration, whilst, if the answer is favourable, then the Court must consider the complainant’s evidence with the rest of the evidence in the case to see whether it is true, that is, that it feels sure that it is true, and then, and only then, can it proceed to conviction. Once that is understood it will readily be appreciated that the cases in which the warning can properly be given are restricted, perhaps much

restricted, and rightly so because, as has so often been said of these cases, and as was said in *R v Crocker* (1922) 17 Cr App R 46 at 48, the objection is that the case is one of an oath against an oath. It is, we need hardly say, impossible to lay down rigid guide-lines as to when it is safe to issue the warning, for this must inevitably depend on the particular facts of each case. But what we can say is that in arriving at a decision, such matters as consistency, the possibility of perjury, vindictiveness, fear of consequences, or the desire not to admit the consensual intercourse of which the complainant may be ashamed, must be borne in mind with all other relevant factors.

[His lordship then noted that the present case was not an exceptional case and allowed the appeals against conviction.]

Appeals allowed.

Dated at Nairobi this 5th Day of November 1976

E. TREVELYAN

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JUDGE

S.K. SACHDEVA

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JUDGE