REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 224 OF 2011

Boniface Githinji Ndereva.....……....…..…..……..…..…….Appellant

Versus

Republic…….....……..…….……Respondent

(Appeal against Judgement conviction and sentence imposed in Criminal Case Number 23 of 2010, R vs Boniface Kithinji Ndereva at Nyeri, delivered by Joshua Kiarie, S.P.M. on 27.10.2011).

JUDGEMENT

Boniface Githinji Ndereva (hereinafter referred to as the appellant) was convicted of the offence of defilement of a child aged 13 years contrary to Section **8 (3)** of the Sexual Offences Act[1]and sentenced the appellant to **20 years imprisonment.**

Aggrieved by the verdict, the appellant appealed to this court against both conviction and sentence. The supplementary grounds of appeal filed on 7th March 2016 cites **8** grounds which in my can conveniently be reduced to three namely:-

a. *Whether the magistrate erred in allowing PW7 to be recalled.*
b. *Whether the prosecution proved its case to the required standard.*
c. *Whether the appellants' defence was considered.*

From the record, the appellant was charged at Nanyuki Law Courts where he admitted the offence and was sentenced to 20 years jail. He appealed and a retrial was ordered and he was convicted and sentenced to a similar jail term, hence this appeal.

This being a first appellate court as was held by the Supreme Court of India in the case of *K. Anbazhagan v. State of Karnataka and Others*,[2] *"The court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely,.....The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated.... They are to be resolutely expressed.."*

In his written submissions, the appellants counsel took issue with the recalling of the **PW7** to identify and produce some exhibits , namely a biker and a blood stained pant and argued that this violated the appellants fair trial as provided under article **50 (2) (c)** of the constitution. Counsel also submitted that the

evidence was manifestly in adequate and that the appellants defence was not considered. Though learned Counsel for the appellant did not cite any authorities in his written submissions, counsel handed in a copy of this court's decision in the case of *Duncan Mwai Gichuhi vs Republic*.[3] I will comment on the decision shortly particularly on its relevancy or otherwise to this case. However, in my view, the said decision can be distinguished from the facts of this case. In the said case, the court found that the defence provided under section 8 (5) & (6) of the Sexual Offences Act[4] applied while the facts of the present case do not disclose the said defence.

Prosecution counsel **Festus Njue** in his written submissions maintained that the prosecution proved its case to the required standard and urged the court to dismiss the appeal. Counsel also submitted that **PW4** was not subjected to *voir dire* examination and argued that the complainant aged 13 years at the time of giving evidence was not a child of tender years, hence a *voir dire* examination was not necessary in his opinion. I will revert to this fundamental point of law later in this judgement.

With regard to ground one above, was the appellant denied a fair hearing when the trial magistrate overruled his objection and allowed the prosecution to recall **PW7** to identify and produce exhibits among them a blood stained pant and a biker.? Also, the prosecution applied to recall **PW4** to identify the underpants and bikers and to confirm that they belonged to her. The accused did not object to **PW4** being recalled.

The relevant provision I believe is Section **150** of the Criminal Procedure Code[5] which provides as follows :-

> ***S.150*** *A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:*
>
> *Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.*

Although, as worded, Section **150** seems to suggest that only the court has the right to recall, I am of the view that a court has inherent power to do justice to all, and if justice is going to be done by recalling a witness, I think the court will be within the law, if it allows the application for recall even if made by the prosecution or the defense. However, good reason(s) must be provided, and in this case **PW7** was recalled to identify and produce the two exhibits while **PW4** was recalled to identify them and confirm they belonged to her.

Discussing a similar situation, the High Court of India in the case of *State of Jharkhand*

Vs Sanjay Mondal & Others[6] stated that:-

> *"In the light of the aforesaid provisions, the trial court has power to summon any person to give evidence, if his/her evidence is essential for just decision of the case and .....this Court has also power to take further evidence or to direct it to be taken, if the evidence is necessary to secure the ends of justice."*

Also relevant is the Supreme Court of India decision in the case of *Rajendra Prasad v. Narcotic Cell*[7] where it was stated:-

> ***7.*** *It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the*

Evidence Act, 1872 by saying that the court could not "fill the lacuna in the prosecution case." A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage "to err is human" *is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such larches or mistakes during the conducting of a case cannot be understood as a lacuna which a court cannot fill up.*

8. *Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better. (Emphasis supplied)*

In the above decision, the Supreme Court of India ruled that *"the error on the part of the prosecution of non-examination of three doctors and the Investigating Officer should be allowed to be corrected.*"

Also relevant is the Supreme Court of India decision in the case of *Rambhau & anr. v. State of Maharashtra*[8], where it was held:-

"A word of caution however, ought to be introduced for guidance, to wit: that this additional evidence cannot and ought not to be received in such a way so as to cause any prejudice to the accused. It is not a disguise for a retrial or to change the nature of the case against the accused. This Court in the case of Rajeswar Prasad Misra v. State of W.B. in no uncertain terms observed that the order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it. This Court was candid enough to record however, that it is the concept of justice which ought to prevail and in the event, the same dictates exercise of power as conferred by the Code, there ought not to be any hesitation in that regard.

Be it noted that no set of principles can be set forth for such an exercise of power under Section 391, since the same is dependent upon the fact situation of the matter and having due regard to the concept of fair play and justice, well-being of the society."

In my view Section **150** of the Criminal Procedure Code[9] is intended to sub serve the ends of justice by arriving at the truth and there is no question of filling of any lacuna in the case at hand.[10] The provision though a discretionary one is hedged with the condition about the requirement to record reasons.[11] In a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crimes being public wrongs in breach and violation of public rights and duties, which affect the whole community as a community and are harmful to the society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interests of society are not to be treated completely with disdain and as persona non grata. Courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice — often referred to as the duty to vindicate and uphold the "majesty of the law." Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge/Magistrate must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials

necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community.

A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the facts in issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not about over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of

the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny.[12]

In the case before me, there were good grounds for recalling the two witnesses. Above all, the appellant was afforded an opportunity to cross-examine them. In fact he cross-examined the two witnesses and there is nothing to suggest that the appellant was prejudiced by the recalling of the said witnesses. I therefore find no reason or grounds to fault the trial magistrate for allowing the application for recall. In summary therefore, I am of the opinion that the appellant was accorded a fair hearing.

On the question of failure to conduct a *voir dire* examination, I have confirmed from both the original hand written proceedings and the typed proceedings that indeed, the learned Magistrate omitted this essential step. This is totally regrettable. Mr. Njue submitted that the complainant in the present case aged 13 years at the time of giving evidence was not a child of tender years, hence a *voir dire* examination was not necessary. Counsel cited the decision in *Samuel Warui Karimi vs Republic.* ***[13]***However, a close examination of the said decision reveals that the decision does not support the position taken by Mr. Njue. In the said case, the court citing numerous court precedents held that *"court decisions regarding the competency of evidence by children of tender years have maintained a higher threshold of 14 years and not 10 years as witnesses of tender years whose evidence must be subjected to voir dire examination."* Thus, the age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap15.[14] In the said case, the minor as aged 12 years, and the court quashed the conviction for failing to take the essential step of failing to conduct a *voir dire* examination and held that such evidence was not properly taken.

It is also necessary to emphasise in the above cited case cited by Mr. Njue, the Court of Appeal citing the case of *Patrick Kathurima vs Republic*[15] at paragraph 18 held that:-

> *"The above decision supported the definition of a child of tender years to be 14 years and below and contextualized that definition within the Oaths and Statutory Declarations Act.****[16]*** *On our part, we have no good reason to depart from this well-trodden path, as we are in agreement the purpose of undertaking voir dire examination in a criminal trial is to protect the guaranteed right of a fair trial.....In the circumstances we find the evidence by the complainant was not properly received, thus, the conviction of the appellant becomes unsafe to sustain as she was the complainant and not any other witness."*

In my view, so long as the witness was of tender years as in the present case, she was a child and a *voir dire* examination was necessary. The Sexual Offences Act[17] defines a child as follows:- **“child”** has the meaning assigned thereto in the Children's Act, while the Children’s’ Act defines a child as any human being under the age of eighteen. Further, the Children's Act defines a child of tender years as a child under the age of ten years. The above cited authority held that the age of 14 years remains reasonable indicative age for the purposes of criminal proceedings.

PW4, was aged 13 at the time of giving evidence, hence she was a child and as the law requires, the magistrate ought to have conducted a *voir dire* examination before taking her evidence. I find no difficulty in concluding that her evidence was not properly received by the trial court.

The court of Appeal gave its guidance on the issue of *voir dire* examination in *Johnson Muirurivs Republic*[18] as follows:-

*"We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses. In Peter Kariga Kiume**[19]** we said " Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voir dire examination whether the child understands the nature of an oath in which event his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is collaborated by material evidence in support thereof implicating him (Section 19, Oaths and Statutory Declarations Act, cap 15 Laws of Kenya. The Evidence Act, Section 124, cap 80, Laws of Kenya) (Emphasis added).*

It is important to set out questions and answers when deciding whether a child of tender years understands the nature of oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions"

*A similar opinion was expressed by the Court of Appeal in England in R vs Campell**[20]***

" If the girl (ten years) had given unsworn evidence then corroboration of those issues was an essential requisite. If she gave sworn evidence there was no requirement that her evidence had to be corroborated but the jury had to be directed that it would not be safe to convict unless there was corroboration.

*Dealing with the question of the girl taking oath it should be borne in mind that where there was an inquiry as to the understanding of a child witness of nature of solemnity of an oath, the Court of Appeal in R vs Lal Khan**[21]** made it quite clear that the questions put to a child must appear on the shorthand note so that the course the procedure took in the court below could be seen…. (Emphasis added).*

There Lord Justice Bridge said:

"The important consideration…..when a judge has to decide whether a child should properly be sworn, is whether the child has sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct"

There were therefore two aspects when considering whether a child should be sworn: first that the child had sufficient appreciation of the particular nature of the case and, secondly a realization that taking the oath did involve more than the ordinary duty of telling the truth in ordinary day to day life"

*……..…..In Gabriel Maholi vs R,**[22]** again our former Court of Appeal said that even in the absence of express statutory provision it is always the duty of the court to ascertain the competence of a child to give evidence; it is not sufficient to ascertain that the child has enough intelligence to justify the reception of the evidence, but also that the child understands the difference between the truth and falsehood.*

In *Kivevo Mboloi vs Republic***[23]**, the court held that failure to conduct a *voir dire* rendered the entire evidence of the complainant of no use to the court. In the case of ***Musyoka Mwasya vs R***,[24] the court held that failure to conduct *voir dire* examination in a situation where it is necessary, like the case before this court renders the evidence of the particular witness of no use.

In *Kibangeny vs R***[25]** the Court of Appeal stated that:-

'The investigation (voir dire examination) should precede the swearing and the evidence, and should be directed to the particular questions whether the child understands the nature of an oath

rather than to the question of his general intelligence. Since the evidence of the two boys was of so vital a nature we cannot say that the learned trial judge's failure to comply with the requirements of section 19(1) was one which can have occasioned no miscarriage of justice, and upon this ground alone the appeal must be allowed'

In *Gamaldene Abdi Abdirahman & Another vs R* [26] after considering with approval the decision in *Kibngeny arap Kolil vs R*[27] stated as follows:-

"Does the definition of a child of tender year" by the Children Act, 2001 oust the jurisprudence that has been developed in criminal trials? The first thing to note is that in passing the Children Act, Parliament was trying to address issues touching on the welfare of children. We do not think parliament was concerned about the rights of accused persons as relates to the testimony of child witnesses. As already stated there are specific reasons why voir dire examination is necessary before the evidence of a child of tender years can be accepted by the courts……In our view, the jurisprudence established over a long period of time is still good jurisprudence despite the definition provided by the Children Act. In saying so, we are guided by the fact that a child's development both physically and intellectually is governed by the social, cultural and economic environment under which the particular child is brought up……Having reached the above conclusion, it follows that the acceptance of the complainant by the trial magistrate without conducting a voir dire examination on the witness was fatal to the prosecution case….."

The above position was explained more clearly in the case of *Nyasani s/o Bichana vs Republic*[28]where the court held that failure to conduct a *voir dire* examination is fatal to the prosecution case where there is no other evidence sufficient enough to sustain a conviction. I take the view that this is good jurisprudence. The court needs to exclude the evidence of the minor and put to test the remaining evidence. A similar position was held in the case of *Hussein Ali Genga vs R.**[29]***

Guided by the above position I arrive at the conclusion that the evidence of **PW4** cannot be allowed to stand and ought to be excluded while determining the guilt or otherwise of the appellant. Next I now pose the question, does the remaining evidence in this case establish a case against the appellant. Having excluded the evidence of **PW4** as aforesaid, I find that it would be totally unsafe to up hold the conviction on the basis of the remaining evidence.

The upshot is that this appeal on both conviction and sentence succeeds and the same is hereby allowed. Accordingly, I hereby quash the conviction and set aside the sentence and order that the appellant be released forthwith unless otherwise lawfully held.

Right of Appeal **14** days.

Signed, delivered and dated at Nyeri this **19th** day of **May** 2016

John M. Mativo

Judge