



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 73 OF 2015

AMOS GICHOVI NJERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in CR. 255/13 at Siakago Principal Magistrate's Court by Hon. A.N. Makau - SRM on 9th September, 2015)

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of 10 years imprisonment in respect of a charge of committing an indecent act with a child contrary to section 11 (i) of the Sexual Offences Act No. 3 of 2006, which was imposed upon him on the 9th September 2015 by the court of the Senior Resident Magistrate at Siakago. He was acquitted of defilement, which was the main charge.
2. The state through Ms Mbae supported both the conviction and sentence.
3. The appellant was convicted on the evidence of the complainant (PW 1) who was a child of tender years, aged 9 years old. The evidence of PW 1 was that she had gone to graze her grandmother's goats. In the course of grazing those goats, the appellant who was also grazing his goats in the same area approached her and requested her "to give him" something, which the complainant did not understand. The complainant was unable to understand what the appellant was talking about. As a result, she escaped but the appellant chased her, got hold of her and removed her clothes including the inner wear. Thereafter, the appellant lay on top of her and did "bad manners" to her. She felt pain. The appellant then rose up and put on his trousers and she similarly put on her clothes. In the evening, she did not report the incident to her grandmother. Subsequently, she disclosed what had happened to A W, her mother (PW 2).
4. As a result, she was taken for medical examination. Upon examination by the medical officer, PW 1 was found to have dirt on her private parts. He then prepared a medical report popularly known as the P3, which was put in evidence as exhibit Pex 2.
5. The appellant made an unsworn statement in his defence and called no witnesses. According to him, he was approached by Bernard Nyaga Njeru (PW 4) who intended to employ him as a herds boy but the appellant refused to be so employed. PW 4 then threatened to deal with him. The appellant reported this to his employer. He told his employer that he wanted to leave his employment. As a result, the employer persuaded him to stay on until his wife delivered. Thereafter, he was called by the Assistant Chief to his office. He went there and upon arrival he was arrested for allegedly having assaulted the employer's wife. They settled that issue in the office of the Assistant Chief. He was then arrested by a stranger and taken to the police station. He concluded his evidence by testifying that the whole case against him was a frame

up.

6. The appellant has raised nine grounds of appeal. In ground 1 he has stated the unchallengeable fact that he did not plead guilty to the offence. In ground 2 he has faulted the trial court for convicting him on the evidence of a single witness namely the complainant, whose evidence was uncorroborated. In that same ground he has stated that the evidence of the complainant was inconsistent and contradictory. I find that the appellant was convicted on the evidence of the complainant (PW 1 name withheld).

7. I further find that the complainant (PW 1) was 10 years old and for that reason the trial court rightly conducted a *voire dire* examination. At the end of that examination, the trial court found as follows: “upon examination above, I find the child is knowledgeable but does not understand the nature of taking an oath. She shall give unsworn statements and accused will cross examination.” In view of this finding, it was not proper for the trial court to permit the complainant to give what she termed “unsworn statements” in view of the provisions of section 151 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

8. The provisions of **section 151 of the Criminal Procedure Code (Cap 75) Laws of Kenya** state that **“Every witness in criminal cause or matter shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath.”**

9. In the light of the foregoing provisions, the complainant was not competent to give any evidence in court, since she was not sworn as required by **section 151 of the Criminal Procedure Code**. It seems that the trial court did not appreciate the importance of conducting a *voire dire* examination. The purpose of such an examination is to ascertain whether a child of tender years is competent to testify on oath or not. And once the trial court found that that this was a child of tender years and was not competent to give evidence on oath, it should have discharged the child. The solemnity of taking the oath binds the witness to testify truthfully. If such a witness gives false testimony while under oath such witness commits the offence of perjury in terms of **section 108 Penal Code (Cap 63) Laws of Kenya** and he is liable to be punished for perjury in terms of **section 110 of the Penal Code** for imprisonment for up to 7 years. It is important to point out that the solemnity of taking the oath and the sanction of being punished for perjury are both geared to ensure that the witness testifies truthfully.

10. The taking of the oath and penalty for perjury are lacking when a child of tender years is allowed to make an “unsworn statements”. It is important to point out that the *voire dire* examination is conducted pursuant to **section 19 of the Oaths and Statutory Declarations Act (Cap 15) Laws of Kenya**. These provisions are of a general application in relation to the reception of evidence of a child of tender years. Since the provisions of **section 151 of the Criminal Procedure Code** are specific and are couched in mandatory language in requiring that every witness in criminal matters must be sworn, they take precedence over the provisions of **section 19 of the Oaths and Statutory Declarations Act**. In this appeal the conviction of the appellant was based mainly on the unsworn evidence of the complainant (PW 1) , who was a child of tender years.

11. As a first appeal court according to the Court of Appeal in **Peters v Sunday Post Ltd (1958) EA 424** I am required to re-assess the entire evidence and come to my independent conclusion while at the same time generally deferring to findings of fact based on credibility. I have done so. I find that the conviction of the appellant was based on the uncorroborated evidence of the complainant, which was not given on oath as required. In the circumstances I find that the conviction of the appellant cannot stand. Finally, on matters law it is important to point out that the trial court ought not to have acquitted the appellant on the main charge of defilement. According to the Court of Appeal in **Kantilal Jivraj v R (1961) EA 6** and the cases cited therein, the trial court ought to have acquitted the appellant in respect of defilement, because of the conviction entered in respect of the alternative charge of indecent act. It is good judicial practice to leave it open so that an appeal court may enter a conviction once it finds that it was the charge that was proved and not the alternative charge. This relieves the Director of Public Prosecutions from lodging a cross appeal.

12. In view of the foregoing findings I hereby recommend an amendment to section 151 of the Criminal

Procedure Code to authorize the reception of the unsworn evidence of children of tender years in criminal matters. I direct the Deputy Registrar to forward a copy of this judgement to the Offices of the Director of Public Prosecutions and the Attorney General for their consideration in respect of this recommendation, since crimes involving children seem to be on the increase.

13. In the circumstances, I hereby allow the appeal, quash the conviction and sentence imposed upon the appellant.

14. It is moot to consider the other grounds of appeal Nos. 3, 4, 5, 6 7, 8 and 9 of the petition of appeal.

15. In the light of the foregoing findings, I hereby order for the release of the appellant unless otherwise held on other lawful warrants.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **21st** day **SEPTEMBER 2016**

In the presence of the appellant and Ms Mbae for the respondent

Court clerk Njue

J.M. BWONWONGA

JUDGE

21.09.16