



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**HCCRA NO. 25 OF 2015**

**CHARLES OPONDO MAGERO ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*[Being an appeal from the conviction and sentence of the Principal Magistrate's Court at Ukwala (Hon. R. M. Oanda Senior Resident Magistrate) dated the 3rd February 2015 in Ukwala PMCCR No. 351 of 2014]*

**JUDGMENT**

The appellant was on the main charged with Defilement Contrary to Section 8(1)(2) of the Sexual Offences Act No. 3 of 2006 the particulars being that on 21st day of June 2014 at unknown time in Ugunja District within Siaya County he intentionally caused his penis to penetrate the vagina of S A a child aged 3 years.

He was in the alternative charged with Indecent Act With a Child aged 3 years in the alternative and the particulars were that on 21st June 2014, he unlawfully and intentionally committed an indecent act with a child by causing his penis to touch the vagina of S A a child aged 3 years.

After hearing and considering the evidence of five prosecution witnesses and the sworn testimony of the appellant the Court found the appellant guilty on the alternative charge of indecent act with a child and subsequently sentenced him to 10 years imprisonment.

In his petition and the supplementary grounds the appellant basically faults the trial Magistrate for not sufficiently considering the evidence before him. He also contends that the police investigations were shoddy. These grounds are reiterated in his written submissions.

The appeal was opposed with the Court being urged to uphold the conviction and the sentence.

The Complainant in this case was aged 3 years hence a child of tender years as defined in Section 2 of the Children's Act. However as I perused the record so as to reconsider and evaluate the evidence myself the first thing noted I was that although that was the case and was accepted by the trial Magistrate he did not conduct a voir dire examination before taking her evidence. In **Ayieyo V. Republic [2008] 1 KLR (G & F) 684** the Court of Appeal held:-

**"1. The six year old witness was a child of tender years for the purposes of section 2 of the Children's Act, 2001. The Court was therefore bound to comply with the requirements of section 19(1) of the Oaths and Statutory Declarations Act (Cap 15) before receiving her evidence.**

2. ....

3. The trial Court is required to investigate whether a child witness = understands the nature of an oath. After it has been satisfied that the child does understand the nature of an oath, the Court will proceed to swear the child and to hear the child's evidence.

4. Where the Court finds that the child does not understand the nature of an oath, it will investigate further whether the child is possessed of sufficient intelligence for the child's evidence to be received at all. The investigation is done through questions put to the child. After the inquiry the child can only be allowed to testify if it understands the duty of telling the truth in which case the child will testify without taking an oath. (Underlining mine).

The Court was emphatic in holding No. 4 that the child can only be allowed to testify if it understands the duty of telling the truth. In **Johnson Muiruri V. Republic [1983] KLR** the same Court stated:-

"1. 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 *voire dire* examination, whether the child understands the nature of an oath in which even 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 corroborated by material evidence in support thereof implicating him.

2. ....

3. ....

4. ....

5. ....

6. ....

7. ....

8. Despite the absence of an express statutory provision, it is the duty of the Court not only to ascertain the child is intelligent and competent to justify reception of evidence from the child, but it must also ascertain that the child understands the difference between truth and falsehood.

9. The correct procedure for the Court to follow is to record the examination of the child witness as to the sufficiency of her intelligence to satisfy the reception of evidence and understanding of the duty to tell the truth."

In the instant case the trial Magistrate did not examine the child at all. He went direct into taking her unsworn evidence and in my view this rendered the trial defective. I am however satisfied that there is evidence that may result in a conviction and this is a proper case for re-trial. Accordingly I proceed to quash the conviction and

set aside the sentence and order that the matter go back to the Ukwala Court for re-trial by a Magistrate other than Honorable Oanda. For that purpose I direct that the appellant be brought before the Ukwala Court on Monday 2nd November 2015. In the meantime he shall be remanded at the Kisumu Main GK Prison.

**Signed, dated and delivered at Kisumu this 29th day of October 2015**

**E. N. MAINA**

**JUDGE**

In presence of:-

Miss Wakio for state

Appellant in person

CA: Felix Magutu