REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 32 OF 2005

(From original conviction and sentence in Criminal Case No. 93 of 2004 of the Senior Principal Magistrate's Court at Naivasha, S. R. Wewa [R.M.])

EVANS MATHENGE WACHIRA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, now a retired teacher, was charged with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code *(Cap. 63, Laws of Kenya)* and was sentenced to a fine of Ksh 3,000/= or in default to three months imprisonment. Being aggrieved both with his conviction and sentence, he came on appeal to this court and set out nine grounds -

1. *the learned trial Magistrate erred in law in failing to form and record her opinion on a voire dire examination that PW1, PW2 and PW3 being children of tender years understood the nature of an oath before receiving their sworn evidence.*

2. *the learned trial Magistrate erred in law in failing to warn herself that it was unsafe to convict on the evidence of a child of tender years unless there was corroboration.*

3. *the learned trial Magistrate erred in law in finding that the evidence of PW1 was corroborated by the evidence of PW2 and PW3, evidence which itself required corroboration.*

4. *the learned trial Magistrate ererd in law and in fact in relying on the medical evidence of the P3 form whereas the same was never duly admitted in evidence.*

5. *the learned trial Magistrate erred in law in convicting the Appellant on a charge of assault causing actual bodily harm without any medical evidence.*

6. *the learned trial Magistrate erred in law failing to state the points for determination, the decision thereon and the reasons for the decision in her judgment and has therefore occasioned failure of justice.*

7. *the learned trial Magistrate erred in law and misdirected herself when she shifted the burden of proof to the Appellant.*

8. *the learned trial Magistrate erred in law in holding that the Prosecution has proved its case beyond any reasonable doubt.*

9. *the conviction of the Appellant is against the weight of the evidence.*

and by reason thereof, prayed that the appeal be allowed the conviction be quashed and the sentence set aside.

2. Though the State conceded the appeal when it came up for hearing on 3/02/2014, it is still the duty of this court to re-evaluate the evidence before the trial court in line with the grounds of appeal, and make its own findings, and draw its own conclusions.

3. The Appellant argued the appeal on five broad grounds -

1. *the necessity for voire dire examination,*
2. *corroboration,*
3. *medical evidence,*
4. *burden of proof and evidence tendered,*
5. *contents of a judgment,*
6. *conclusion.*

I will consider each of these grounds separately.

VOIRE DIRE EXAMINATION

4. Section 19 of the Oaths and Statutory Declarations Act, *(Cap. 15, Laws of Kenya)* provides -

> ***"where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person understand the nature of an oath, his evidence may be received, though not on oath, if in the opinion of the court or such a person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced in writing in accordance with Section 233 of the Criminal Procedure Code shall be deemed to be a deposition within the meaning of that Section."***

In the case of **JULIUS KIUNGA M'RITHIA VS. REPUBLIC [2011] eKLR**, the court held -

> ***"Under Section 19 of the Oaths and Statutory Declarations Act, (Cap. 15, Laws of Kenya), where a child of tender years is called as a witness in a proceeding there are two things the trial court must be severally satisfied about -***

1. ***whether the child understands the nature of an oath;***

> ***or***
>
> ***(2) if the child in the opinion of the court does not understand the nature of an oath, whether the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth."***
>
> and the court further held -
>
> ***...the procedure for conducting voire dire examination was properly enunciated in FRANSISCO MATOVE VS. REGINA [1961] E.A. 260 and emphasised in subsequent decisions of the Court of Appeal. The trial magistrate should question the child to ascertain whether the child understands the nature of the oath, and (2) if the court does not allow the child to be sworn, it should record whether or not, in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of evidence, and***

understands the duty of speaking the truth. Applying that procedure, the record of the trial shows that the magistrate clearly recorded the voire dire examination of the child."

5. In the present case, the trial magistrate did not ascertain the ages of PW1, PW2 and PW3. Though PW1, PW2 and PW3 stated their ages to be 10, 11 and 13 years respectively, there was no basis laid out by the trial court by way of voire dire examination to ascertain whether these children were not of tender age, and understood the nature of an oath before they were sworn, or possessed sufficient intelligence to justify the reception of their evidence, or that they understood the duty speaking the truth. In the absence of compliance with the mandatory provisions of Section 19 of the Oaths and Statutory Declarations Act, the evidence of PW1, PW2 and PW3 was inadmissible and should not have been relied upon. The appeal succeeds on this ground.

OF CORROBORATION

6. Halsbury's Laws of England, 4th Edition Vol. 11(2) para. 1141, **Criminal Law, Evidence and Procedure,** the word *"corroboration"* is defined as follows -

"The word "corroboration" is not a technical term it means by itself no more than evidence tending to confirm, support or strengthen other evidence."

Section 124 of the Evidence Act, *(Cap. 80, Laws of Kenya),* provides that -

"124. Notwithstanding the provisions of the Oaths and Statutory Declarations Act, where the evidence of a child of tender years is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted unless it is corroborated by other material evidence in support thereof implicating him."

7. In this case, the learned trial magistrate convicted and sentenced the appellant on the evidence of PW1, PW2 and PW3, without first ascertaining their actual ages. The conviction and sentence on their evidence was consequently unsafe. The appeal succeeds on this ground as well.

OF MEDICAL EVIDENCE

8. The evidence of PW1 *(if it be taken as such)*, did not clearly state what injuries he suffered. Those injuries would only be established by way of medical evidence. The P3 Form upon which the learned trial magistrate purported to rely was never produced in court as evidence of injuries suffered by PW1. Medical evidence would have shown the actual bodily harm. In the absence of such medical evidence, it was a miscarriage of justice to convict the appellant on a charge of assault causing actual bodily harm.

OF THE BURDEN OF PROOF AND EVIDENCE TENDERED

9. The burden of proof in criminal cases lies with the prosecution. In **REPUBLIC VS. DERRICK WASWA KULOBA [2005] eKLR** the court said -

"... the burden of the prosecution is to establish its case beyond reasonable doubt..."

10. In this case, the prosecution failed to discharge that burden. The prosecution called four witnesses all of whom failed to prove the ingredients of the offence of assault causing actual bodily harm. In **NDAA VS. REPUBLIC [1984] KLR** ...the court spelt out ingredients of **assault causing actual bodily harm** as **-**

(a) assaulting the complainant or victim,

(b) occasioning actual bodily harm.

11. In this case, the prosecution did not prove beyond reasonable doubt that the injuries, if any, sustained by PW1 were inflicted by the Appellant, or that the injuries sustained were as a result of an assault or attack. This is so because according to the charge sheet, the assault was allegedly committed on 11.03.2002 but the same was reported to the Police Station two years later on 8.01.2004. The Appellant was also arrested two years later on 8.01.2004. Even though there is no limitation on crimes, there was no explanation tendered for such unreasonable delay.

12. The evidence of PW4, was merely that he received a report from the complainant that he had been assaulted in school. PW4 proceeded to arrest the Appellant. There is no evidence that PW4 conducted any investigations on the complaint. He relied entirely on the complainant's version on a matter which had allegedly taken place two years earlier. PW4 never gave the appellant any hearing and charged the appellant on the basis of the complaint merely.

13. Besides the cause of the injury was not clear. PW1 testified that he was hit with a ruler which broke. PW2 testified that PW1 was hit with a stick. PW3 on his part had omni-presence, he was watering trees outside the class-room, and at the same pretended that he witnessed the Appellant assault PW1. The evidence of PW3 has no credence at all. Again the appeal fails on this ground as well.

OF CONTENTS OF A JUDGMENT

Section 169 of the Criminal Procedure Code**,** provides -

> ***"169. Every judgment shall, except as otherwise expressly provided by this Code, be written by or under the discretion of a presiding officer of the court in the language of the court, and shall contain the point or points for*** determination***, the decision thereon and the reasons for the decision and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."***

14. The judgment herein did not comply with the dictates of Section 169 aforesaid, and thus occasioned a miscarriage of justice.

15. For those reasons, the learned prosecution counsel was well advised to concede the appeal herein. The appeal is therefore allowed, the conviction is quashed, the sentence set aside, and the fine of shs 3,000/= be refunded to the Appellant.

It is so ordered.

Dated, signed and delivered at Nakuru this 16th day of May, 2014

M. J. ANYARA EMUKULE

JUDGE