



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CRIMINAL APPEAL NO. 213 OF 2009**

F O N.....APPELLANT

**-VERSUS-**

REPUBLIC.....RESPONDENT

**JUDGMENT**

**(Being an appeal from the Senior Resident magistrate's court at Nyamira criminal case no. 188 of 2009 L.Komingoi-SRM)**

Unfortunately, the fate of this appeal will turn on the procedural omission committed by the subordinate court during the trial. The appellant was charged before the Senior Resident Magistrate's Court at Nyamira with the offence of incest contrary to section 20(1) of the **Sexual Offences Act**. It was alleged in the particulars of the charge sheet that on 28<sup>th</sup> march, 2009 in Nyamira District within Nyanza province, the appellant being a male person, did intentionally and unlawfully by use of his genital organ namely , penis caused penetration to the vagina of **E.A**, a female person aged 13 years old and who was to his knowledge his daughter without her consent. The appellant too faced an alternative charge of indecent assault on a child contrary to section 11(2) of the sexual offences Act. It was claimed that on the same day and place, the appellant unlawfully and intentionally assaulted **E.A** by touching her private parts namely the vagina. The appellant pleaded not guilty to both counts.

Briefly, the prosecution case was that on the material day, PW1 **E. A**, the complainant was asleep in the same house with the appellant who is her biological father. The appellant went to her bed, removed her undergarment and sexually assaulted her for hours on end. When she tried to scream, the appellant covered her mouth. This was happening in the presence of the complainant's other sister, **T.A** (PW2). When the appellant was done, he went out to look for his wife, whom he had earlier on quarreled with and chased out of the house. However, the wife was a step mother to both the complainant and her sister aforesaid, as the appellant had chased away their biological mother and later married their stepmother. In the morning, the appellant ordered the complainant to bath and go to church. PW2 later told their elder brother Walter what had transpired the previous night. He in turn informed his paternal uncle **C.M.N** (PW3). PW3 took the complainant to Nyamira District hospital where she was examined by **Lameck Karanja Nyamosi** (PW6), a clinical officer. Upon examination, he formed the opinion that the complainant had been sexually assaulted. The case was then investigated by **PC Mary Dayo** (PW5) who later preferred the charges against the appellant.

Put on his defence, the appellant opted to give an unsworn statement and called no witnesses. He stated that on 28<sup>th</sup> March, 2009 he was going about his routine business. His wife and daughter, the

complainant had in the meantime gone to church at Rangenyo. However, the wife came back alone and when he asked her the whereabouts of the complainant, she replied that she left her at M AP post. He was later apprehended while having a hair cut at B market by people who claimed to have been sent by the Assistant chief, **James Ongubo Sabuni** (PW4). He accompanied them and on the way, they met the Assistant chief who accused him of having defiled his daughter. He denied the offence and as far as he was concerned he was framed in the case.

The learned magistrate having considered the evidence presented by the prosecution as well as the defence was persuaded as to the guilt of the appellant. Accordingly she convicted the appellant and sentenced him to the mandatory life imprisonment. That conviction and sentence triggered this appeal.

The appellant faulted his conviction and sentence on four grounds; that the prosecution case was not proved beyond reasonable doubt, the investigations of the case was poorly done, evidence relied on was hearsay and finally that the sentence imposed was harsh and excessive.

When the appeal came up for hearing before me on 24<sup>th</sup> November, 2010 the appellant opted to canvass the same through his written submissions. I have read and considered the said written submissions.

**Mr. Gitonga**, learned state counsel opposed the appeal. He submitted that the complainant gave clear testimony which was corroborated by her younger sister (PW2). These were young girls who had no reason to implicate their own father. Their evidence was thus credible and devoid of contradictions. The clinical officer confirmed that the complainant had been sexually assaulted. The sentence imposed was one provided for the offence.

As I said at the beginning of this judgment, the learned magistrate committed a fatal procedural omission during the trial. The complainant was aged 13 years at the time she was testifying. Section 19 of the oaths and statutory declarations Act, deals with the reception of evidence of children of tender years by a court or any adjudicating authority. It provides inter alia:

***“...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 given upon oath, if, in the opinion of the court or such 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 into writing in accordance with section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section....”***

However, as it can be gathered this section does not define who is a child of tender years nor does the Act itself have such definition. The Interpretation and General Provision Act, likewise does not define a child of tender years. Nonetheless in the case of **Kibageny v. R. (1959) E.A 92**, the court stated ***“....there is no definition in the Oaths and Statutory Declarations Ordinance of the expression child of tender years’ for the purpose of section 19. But we take it to mean in the absence of special circumstances, any child of an age, or apparent age of under fourteen years....”*** But it appears that, that was the position before the children Act was enacted. Section 2 thereof defines a child of tender years to mean ***“....A child under the age of ten years....”*** Following the foregoing definition in the **Children Act**, PW1 was not a child of tender years. That notwithstanding I do not think it requires any magic to say and, indeed imprudent to hold that any child above the age of 10 years is possessed of sufficient intelligence, understands the need to tell the truth and the meaning of an oath and therefore must not be subjected to **Voire Dire** examination. The learned magistrate seem to have appreciated the need for the complainant to be subjected to **Voire Dire** examination her age notwithstanding and rightly so in my view for she stated ***“ .... The witness is aged 13 years old. I have examined her and found that she does understand the meaning of Oath to give a sworn statement....”*** Is this however how Voire Direction examination is conducted? The answer is an emphatic No! In the case of **Sakilla v. R. (1967) E.A.403**, the court of appeal stated that the first duty of the court is to ascertain and record accordingly, whether or not the

witness is a child of tender years. Thereafter the trial court investigates whether the child understands the nature of an oath, if not, investigate further, whether the child is possessed of sufficient intelligence and the need to tell the truth. Depending on the conclusion that the trial court will come to after such investigations, the court may decide to take the child's evidence either on oath, affirmed and or unsworn. The investigations according to **Fransio Matovu.R (1961) E.A 260** is through questions put to the child. The questions put to the child and his answer must be reflected in the record of the trial court. This does not seem to have happened in the circumstances of this court. As an appellate court, it is of great importance to see the kind of questions put to the child and the child's response. In the absence of such record, it is difficult to discern the basis upon which the trial court reached the verdict that the child understands the nature of an Oath and therefore should testify an oath. It may well be that wrong questions were put to the child. It may well be again that proper questions were put to the child. It is also possible that depending on the questions put the child, he correctly or wrongly responded. But there also the possibility that the trial court did not conduct the inquiry. This is all but conjuncture. I have to take the record as it is. I am not satisfied that there was compliance with the provisions of section 19 and the general requirements of **Voire Dire** examinations.

The complainant was the star witness. If her evidence is rejected as it should have been for want of compliance with proper **Voire Dire** examination, there was very little evidence left for which the trial court should have proceeded to act upon and convict the appellant. Save for her sister and perhaps the clinical officer, the rest of the evidence was hearsay. In any event, her young sister's evidence founders on the fact that, the incident was allegedly committed at night. She claims to have seen the father in the act, yet does not disclose how she was able to see and recognize her father in darkness. She testified that when she woke up, the source of light being the lamp had been put off. One then wonders how she was able to tell that whoever was sexually assaulting her sister, if at all, was her father. Considering the defence advanced by the appellant, it is possible that the case was a fabrication bearing in mind his relationship with the two witnesses' mother which was anything but cordial.

I allow the appeal, quash the conviction and set aside the sentence imposed. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

**Judgment dated, signed and delivered** at Kisii this 17th day of January 2011.

**ASIKE-MAKHANDIA**  
**JUDGE**