REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 207 OF 2007

(From Original Conviction and Sentence in Criminal Case No. 1267 of 2006 of the Senior Resident Magistrate's Court at Voi:

J.M. Gandani – S.R.M.)

JUSTIN MWAZIGHE..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

JUDGEMENT

This is the appeal of **JUSTIN MWAZIGHE**, against his conviction by the lower court on a charge of **INDECENT ACT WITH A GIRL CONTRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT 2006**. The particulars of the offence were that –

"On the 13th day of November 2006 in Taita Taveta District within Coast Province, unlawfully and indecently assaulted J.C a child aged 6 years by touching her private parts namely buttocks with his hands"

The Appellant entered a plea of ***'not guilty'*** to the charge and his trial commenced before the learned Resident Magistrate sitting at Voi Law Courts on 19th December 2006. The prosecution led by **INSPECTOR MUTAI**, called a total of four (4) witnesses in support of their case. At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence. He gave a sworn defence in which he denied the charges. On 15th March 2007 the learned trial magistrate delivered his judgement in which he convicted the Appellant as charged and thereafter sentenced him to serve ten (10) years imprisonment. It is against this conviction and sentence that the Appellant now appeals.

PW1 **J.C** was seven year old child. As such she was a child of tender years. Before embarking on taking her evidence the trial magistrate ought to have conducted a ***'voire dire'*** examination in order to determine whether or not the child understood the nature of an oath and could be sworn before testifying. This is in compliance with S**. 19(1) of the Oaths and Statutory Declarations Act Cap 15, Laws of Kenya** which provides as follows –

"19(1) where, in any proceedings before any court or person having by law or consent or 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"

The term used in S. 19(1) above is a child of ***'tender years'***. The term ***'tender years'*** is not defined but has generally been taken to mean a child under the age of 12 years. A child above the age of 12 is deemed to be possessed of sufficient maturity and intelligence to understand the nature of an oath as well as the duty to be truthful. This provision of the law obliges the court to establish **before** receiving the evidence of such a child, whether, that child is qualified to give sworn or unsworn testimony. The only way a court can establish this is by conducting a ***'voire dire'*** examination. ***'voire dire'*** is a French term which taken literally means 'tell the truth'. This is the established practice in the Kenyan courts. In the case of **JOHNSON MUIRURI –VS- REPUBLIC [1983] KLR 445**, the Court of Appeal held

"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 event his sworn evidence may be received ….."

This same authority goes on to provide the manner in which such a ***'voire dire'*** examination should be conducted as follows –

"It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided"

Lastly in the same decision the Honourable Judges of Appeal held that

"The Judge [or magistrate as the case may be] is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to the conviction"

In the present case the learned trial magistrate erred in failing to conduct a ***'voire dire'*** examination on **PW1** who was a child of tender years. Instead the court proceeded to swear the child before ascertaining whether she understood the nature of an oath, and whether she was competent to give sworn evidence. There is no indication by the trial magistrate about his findings on this crucial question. The belated attempt to question the child **after** swearing her does not fulfil the requirements of law. Failure by the trial court to conduct this essential exercise is fatal to the prosecution case and nullifies the subsequent proceedings. On this basis alone I do allow the present appeal. The conviction of the Appellant is quashed and his ten (10) year sentence is also set aside. The Appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 29th day of November 2010.

M. ODERO

JUDGE

Read in open court in the presence of:-
Appellant in person
Mr. Onserio for State

M. ODERO

JUDGE

29.11.2010