



**Mwangi v Republic (Criminal Appeal 21 of 2006)
[2008] KEHC 3894 (KLR) (20 February 2008) (Judgment)**

ELISHAVAN MWANGI v REPUBLIC [2008] eKLR

Neutral citation: [2008] KEHC 3894 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL 21 OF 2006
MM KASANGO, J
FEBRUARY 20, 2008**

BETWEEN

ELISHAVAN MWANGI APPELLANT

AND

REPUBLIC RESPONDENT

A child of tender years had to possess sufficient intelligence for their testimony to comply with section 19 of the Oaths and Statutory Declarations Act

The appellant challenged his conviction and sentence which was arrived at partly because of the evidence of two children aged 5 and 6 years old. The instant court found that the trial court correctly conducted a voir dire examination and found that the two children possessed sufficient intelligence to give unsworn testimony pursuant to section 19 of the Oaths and Statutory Declarations Act.

Reported by Moses Rotich

Criminal Practice and Procedure - appeal - appeal against conviction and sentence - offences of defilement and indecent assault - whether the evidence adduced at trial could secure a conviction on both counts - whether the appeal had merit - Penal Code, cap 63, sections 144 (1) and 145 (1).

Evidence - witnesses - child witnesses - evidence of a child of tender years - voire dire examination - whether a child's evidence required corroboration - whether the court could use such evidence to convict - Oaths and Statutory Declarations Act, cap 15, section 19.

Evidence - witness - expert witness - where the clinical officer's evidence was unclear in respect to the words used - effect of - whether the court can use such evidence to convict.

Sentencing - discretion of the sentencing court - whether an appellate court could interfere with the trial court's exercise of discretion in sentencing.

Brief facts

The appellant was charged with defilement of a girl contrary to section 145(1) of the Penal Code (count 1) and indecent assault on a female contrary to section 144(1) of the Penal Code (count 2). It was alleged that on 1 and



11 October 2005, the appellant unlawfully had carnal knowledge of the complainant 1, EWN, a 5-year-old girl, and that between 1 and 15 October 2005 appellant unlawfully and indecently assaulted complainant 2, AMN, a 6½ -year-old girl, sister of complainant 1. He was convicted and sentenced to seven years imprisonment, each count to run concurrently.

The appellant appealed both against conviction and sentence in the instant appeal. The evidence given by complainants 1 and 2 were unsworn, since after a *voir dire* examination the court found they could not be sworn in because of their tender years. They testified that the appellant had put his fingers into complainants' vaginas on separate occasions. Appellant had got hold of them each as they were walking home from a shop. The complainants did not report the incidents for several days because, they said, the appellant told them it was a secret. The complainants' mother learned of the abuse when complainant 2 complained that her genitals were injured. A clinical officer who examined complainant 1 stated that there was evidence of penetration, bruising, injuries to her genitals, and discharge. In his defence, appellant testified that when the mother of complainants confronted him he did not know why he was being confronted.

Issues

Whether the trial correctly conducted *voir dire* examination of two children under the age of ten years who testified against the appellant as an accused person.

Held

1. The court of first appeal had the obligation and duty to re-examine the evidence and reach its own conclusion.
2. The evidence for count two was clear and that conviction had to stand; however, the evidence of the clinical officer was contradictory and the testimony of complainant 1 was unclear.
3. A child under the age of 18 years had to possess sufficient understanding to comply with section 19 of the Oaths and Statutory Declarations Act. As the trial court had determined through *voir dire* that complainants were too young to give sworn testimony, unsworn testimony was appropriate.
4. An appellate court had the discretion to mitigate a sentence. It being the appellant's first offence, then 86 years old, his sentence was reduced from seven to four years.

Appeal partly allowed.

Orders

- i. *Conviction on count 1 quashed, conviction on count 2 upheld.*
- ii. *Sentence on count 2 reduced from seven years to four years.*

Citations

Cases

Regional Court

Okeno v Republic [1972] EA 32) — (Mentioned)

Statutes

Kenya

Penal Code (cap 63) sections 144(1); 145(1) — (Interpreted)

Advocates

None mentioned

JUDGMENT

1. The appellant was charged in the lower court with defilement of a girl contrary to section 145(1) of the [Penal Code](#). The particulars of that offence are that on 1st and October 11, 2005 he did unlawfully had carnal knowledge with EWN a girl under the age of 16 years. On count II he was charged with Indecent



Assault on a female contrary to section 144(1) of the [Penal Code](#). Particulars are that the appellant between 1st and October 15, 2005 he unlawfully and indecently assaulted AMN a girl of age 6½ years. After the trial before the lower court the appellant was convicted and sentenced to seven years and each count to run concurrently. Being dissatisfied with his conviction and sentence the appellant has filed this present appeal. As the first appellant court, I am expected to submit the whole evidence of the lower court to a fresh and exhaustive examination. In so doing I must weigh the conflicting evidence and draw my own conclusion. In so doing I should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. See the case of *Okeno v R* [1972] EA 32.

2. The evidence adduced by the prosecution was that the appellant defiled PW 1 and also indecently assaulted PW 3. PW 1 was a child of 5 years old at the time of giving evidence. After *voire dire* examination the court found that this witness was intelligent sufficiently to give evidence but could not be sworn because of her tender years. She therefore gave an unsworn testimony. She stated that the appellant got hold of her, removed, her pant and put her on his wife's bed then inserted his finger inside her vagina. She began to bleed and appellant rubbed her with some oil. All this time he was fully dressed and apart from lying on top of her he did not do anything else. She said that this occurred as she passed by the appellant's house as she came from the shop where her mother had sent her. On arriving at home she did not tell her mother what the appellant had done. It was later that she was taken to hospital when she felt pain. She also said that after the incident she experienced pain in her vagina.
3. PW 2 said that on October 11, 2005 PW 1 complained of pain in her vagina. She examined her and found it to be red. She wiped it with a cloth and applied some oil. That she was not suspicious that anything untoward in respect of that redness. She did not suspect defilement. On October 15, 2005 her six year old daughter reported to her that the appellant had put his finger in her vagina twice. This occurred when she used the path passed his house as she went to the shops. On this report being made to her PW 2 remembered the incident of the redness in PW 1's vagina. She said that it took four to five days before PW 1 agreed to tell her what the appellant had done to her. This witness narrated what PW 1 said in her evidence. PW 2 reported the matter to the police whereby he was referred to Kangema Health Centre. A report was done at the Health Centre which indicated that PW 1 had been defiled. This witness said that PW 1 said that she began to be abused by the appellant on October 1, 2005 to October 11, 2005. On being cross examined this witness said that her children would pass the appellant's place on their way to the shops. She said that they love and respected the appellant as their grandfather. This witness denied that she had brought the action against the appellant because of the grudge she had with him for his refusal to her cutting his napier grass. Indeed she denied that she had a grudge against him.
4. PW 3 six year old child after *voire dire* examination the court found that although she could comprehend things well she could not be sworn because of her tender age. PW 3 is a child of PW 2 and a sister of PW 1. In court she identified the appellant whom she called Wagacheke. She said that he touched her at the place where she passes urine using his hand twice. Once was when she was coming from the shop. That the appellant told her that who ever was touched in that manner did not tell anybody because it was a secret. As a consequence this witness did not tell her mother. It occurred another time when she was on the way to the shop. On her return as she passed the appellant's compound and whilst she was in company of PW 1 the appellant called when she ran away but PW 1 stopped. PW 3 told her mother that the appellant put his finger where she urinates.
5. PW 4 arrested the appellant after the complaint was made to him.
6. PW 5 the Clinical Officer confirmed that he examined PW 1. He described her as 4½ years old. On October 24, 2005 when he carried out the examination he found that she had sustained injuries on the left side of her vagina. He noticed there was discharge and odour but he noted that there were no



spermatozoa. He noted that there was evidence of penetration. He noted that the complainant had been exposed to infection from external source. There was however indication that there was lapse of time from the time of the infection occurring. The bruising of the left side of the vagina in his opinion could have been caused by friction from the external source. By the time he carried out the examination that bruising had not healed.

7. The appellant was found to have a case to answer and in his defence he tendered sworn evidence. He stated in detail how PW 2 the mother of the two children confronted him accusing him of something he did not know. She threatened to burn his house. He reported to the sub-chief. He attributed the confrontation to a grudge between them because he had stopped her from cutting napier grass. He said that the confrontation was such that he presented himself to the police. He was told by the police to return home and if they need him he was told they would call him. Some officers from the DO did subsequently come to him asking him about the offences he faced. He denied them. He was later arrested. He called a witness. That is, the Assistant Chief of [particulars withheld] sub-location. That witness confirmed that on October 25, 2005 the appellant told him that PW 2 had on the previous night insulted him for reasons he did not know. On being cross examined this witness said that there was no through way through the appellant's shamba that he knew of.
8. The lower court convicted the appellant on both counts. In convicting the appellant the court found that the evidence of Clinical Officer proved that PW 1 had been defiled. Further the learned magistrate found that there was relationship of trust whereby PW 1 as a child believed everything that the appellant told her. That was the reason the court attributed to the lack of reporting by the children to their mother. The lower court rejected the appellant's defence and found that it was "far fetched". In respect of count II the court found that there was evidence of corroboration of the evidence of PW 3 by PW 2.
9. Having examined the evidence of the lower court I wish to begin by stating that it is important for the courts to record the exact words used by the witnesses in their evidence. I say so because the lower court record indicated that PW 1 a child of 5 years said that the appellant touched her vagina. It is unlikely that a child of that age would use such a word. That as it may be I do find that the evidence of PW 1 was very clear that the appellant did not undress and all he did was touching her vagina with his finger. She was very clear that he did nothing else. That being the case it is not possible to say that count I was proved. The medical evidence of the Clinical Officer stated as follows in short, "According to our conclusion, there was evidence of penetration in lieu of physical examination." It is not clear what the Clinical Officer meant by those words. Did he mean that there was no physical examination of the complainant? If that was so how could the Clinical Officer deduce that there was penetration? In my view it was necessary for the prosecution to probe this evidence to make it clear what the Clinical Officer meant. As the evidence stand I find that I entertain doubt in respect of what the Clinical Officer meant. The doubt that I entertain is whether the words of the Clinical Officer amounted to saying that there was penetration. The other doubt that I entertain is whether that penetration is consistent with defilement. The doubt that I entertain added to the fact that PW 1 said that the appellant did not remove his clothing will be taken to the benefit of the appellant. I am of the view that that evidence adduced in respect of count I cannot be relied upon for a conviction on that count. What evidence there was in respect of PW 1 was that the appellant indecently assaulted her. On count II of indecent assault on PW 3 I find just like the lower court that there was clear evidence that the appellant indecently assaulted PW 3. She reported that assault to her mother. Indeed that report was what set in motion the mother inquiring on the injury to PW 1. The magistrate correctly carried out *voire dire* and found PW 3 to be a child of tender years. A child of tender years under the Children's Act is defined as a child under 10 years of age. The lower court was therefore correct to receive an unsworn testimony from PW 3. As stated before there was sufficient evidence in support of count II. Accordingly the appeal in



respect of that count is dismissed. In the end the court does hereby quash conviction on count I that is of defilement and does hereby set aside the sentence of seven years in respect of that count. In respect of count II the court does hereby uphold the conviction of the appellant on that count. In respect of the sentence of count II of seven years I have considered that the appellant was a first offender. He now says that he is 86 years old. Not wishing to minimize the seriousness of the offence in considering the age of the appellant and the fact that he was a first offender, I do hereby substitute the sentence of seven years on count II to a term of four years imprisonment which sentence shall start from the date of conviction on that count at the lower court.

DATED AND DELIVERED AT NYERI THIS 20TH DAY OF FEBRUARY 2008.

MARY KASANGO

JUDGE

