REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 184 of 2007

SIMON NDERITU DICKSON …… APPELLANT

Versus

REPUBLIC ……..…….…… RESPONDENT

(Being an appeal against the conviction and sentence by P. C. TOROREY, Senior Resident Magistrate, in the Senior Resident Magistrate's Criminal Case No. 152 of 2006 at KARATINA)

JUDGMENT

The appellant was charged in the lower court with *Defilement of a girl contrary to Section 145 of the Penal Code.* He was tried and convicted by the lower court and was sentence to 20 years imprisonment. The learned State Counsel conceded to the appellants appeal against conviction and sentence on the basis that PW 1 the complainant was not subjected to voire dire examination as required. Indeed as I re-examined the proceedings of the lower court it is clear that PW 1 was not subjected to such an examination and was not put on oath. She said that she was five years old. The testimony of PW 1 was not under oath. The court did not try to confirm whether the child could give evidence under oath or otherwise. *Section 19* of the *Oaths And Statutory Declarations Act Cap 15* deals with the manner with which a court should receive the evidence of a child of tender age. This section provides as follows:-

" 19(1) 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 opinions of the court of 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".

Section 2 of the *Children's Act* defines a child of tender years as a child under the age of 10 years. PW 1 therefore was a child of tender years. The procedure that the lower court should have followed in receiving her evidence was well stated in the case of JOSEPH KARANJA MUNGAI vrs REPUBLIC (2006) eKLR as follows:-

"*The proper procedure to be followed when children are tendered as witnesses was set out in the decision of this court in JOHNSON NYOIKE MUIRURI vs R. (1982 –88) 1 KAR 150 at p. 152 where Madan, J. A. (as he then was) said:-*

"*We once again wish to draw the attention of our courts as to the proper procedure to be followed when*

children are tendered as witnesses.

In Peter Kirigi Kiune Cr. App 77 of 1982 we said:-

"*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. 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 understand the duty of speaking the truth. In the latter even an accused person shall not liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (Section 19, Oaths and Statutory Declarations Act, Cap 20 The Evidence Act (S 124, Cap 80).*

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, and not be forced to make assumptions.

A similar opinion was expressed by the Court of Appeal in England recently in R vs Campbell (1982) Times, 10 December.

"*If the girl (10 years) had given unsworn evidence then corroboration of those issues was an essential requisite. If she gave sworn evidence there was no requirement that her evidence had to be corroborated but the jury had to be directed that it would not be safe to convict unless there was corroboration".*

Dealing with the question of the girl taking the oath it should be borne in mind that where there was an inquiry as to the understanding of a child witness of the nature and solemnity of an oath, the court of appear in Re v Lal Khan (1981) 73 Cr. App R 190) made it quite clear that the questions put to a child must appeal on the shorthand note so that the course the procedure took in the court below could be seen...

There Lord Justice Bridge said:

"*The important consideration ….. when a judge has to decide whether a child should properly be sworn, is whether the child has sufficient appreciation of the solemnity of the occasion, and the added responsibility to tell the truth, which is involved in an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct".*

There were therefore two aspects when considering whether a child should properly be sworn: first that the child had sufficient appreciation of the particular nature of the case and, second a realization that taking the oath did involve more than the ordinary duty of telling the truth in ordinary day to day life".

Section 124 of the *Evidence Act* was amended as from 25th July, 2003. That amendment would have been relevant to this case when it was heard by the lower court. That amendment states as follows:-

"*Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence,*

the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth".

That section shows that corroboration was not necessary in the case of a sexual offence charge involving a child of tender years. It is clear that the lower court did not follow the correct procedure with regards to the evidence of PW 1. Had the court followed the correct procedure by virtue of the amendment of *section 124* of the *Evidence Act,* the evidence of PW 1 would have been sufficient to convict the Appellant. That however was not be. This court is unable to determine whether PW 1 understood the nature of an oath or possessed sufficient intelligency to justify receipt of her evidence. The evidence of PW 1 was vital for a conviction to follow. It was the only evidence linking the Appellant with the

defilement of PW 1. Having failed to follow the correct procedure I do find that the conviction of the appellant by the lower court of defilement cannot stand.

In addition the appellant was detained in custody from 17th February 2006 to 22nd February 2006 when he was presented before court. In other words he was in custody for 4 days. That was in violation to *Section 72(3)(b)* of the constitution. The Court of Appeal has severally held that such violation can lead to the quashing of a conviction.

See the following cases;

- *Criminal Appeal No. 35 of 2006 Paul Mwangi Murungu v Republic*

- *Criminal Appeal No. 120 of 2004 Albanus Mwasia Mutua Vs. Republic*

- *Criminal Appeal No. 119 of 2004 Gerald Macharia Githuku Vs. Republic*

On that basis too the appellant's appeal would succeed. I do therefore find that the Appellant's appeal against conviction and sentence must and does succeed. The Appellant's conviction is therefore quashed and the sentence is hereby set aside. The Appellant shall be set at liberty unless otherwise lawfully held.

DATED AND DELIVERED THIS 28th DAY OF JULY 2008

MARY KASANGO

JUDGE