

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 127 of 2004

(From original conviction and sentence of the Principal Magistrate's Court at Nyahururu in
Criminal Case No. 1438 of 2003 – Kathoka Ngomo {P.M.})

DAVID NGANGA MBIYU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, David Nganga Mbiyu was charged with the offence of Assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars of the offence were that on the 12th April 2003 at Losongwa village in Laikipia District, the appellant unlawfully assaulted Margaret Waithera thereby occasioning her actual bodily harm. When the appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the appellant was convicted as charged and sentenced to serve five years imprisonment. The appellant was aggrieved by his conviction and sentence and appealed to this court.

In his petition of appeal, the appellant raised several grounds of appeal challenging the decision of the trial magistrate in finding him guilty. He was aggrieved that he had been convicted based on the evidence of the prosecution that was scanty, insufficient and contradictory. He was aggrieved that the trial magistrate had considered extraneous matters when he made the decision to convict him. He faulted the trial magistrate for failing to properly evaluate the evidence adduced by the prosecution witnesses and thereby arrived at the erroneous decision finding the appellant guilty as charged. He was finally aggrieved that the trial magistrate had failed to properly exercise his discretion and thereby arrive at the wrong decision sentencing the appellant to serve a custodial sentence instead of a non-custodial sentence.

At the hearing of the appeal, Mr. Muhia for the appellant made submission on several aspects of the grounds of appeal urging this court to acquit the appellant. This court will not deal with other aspects of the appeal raised by the appellant other than one ground of appeal which will dispose this appeal. Mr. Muhia argued that the trial magistrate erred in law and in fact when he took the evidence of the complainant, who was a child of young and tender years. He submitted that the trial magistrate did not comply with the requirement of **Section 19** of the **Oaths and Statutory Declarations Act** which requires *voire dire* to be conducted before evidence of a child of young and tender years can be received. He further submitted that the trial magistrate did not establish whether the complainant was intelligent enough or knew the requirement of telling the truth before he offered his testimony before the trial court. Miss. Opati for the State conceded to the appeal on this ground. She however submitted that the appellant should be retried in view of the overwhelming evidence that was adduced in the vitiated trial. Mr. Muhia urged this court not to order the appellant to be retried. He maintained there was no evidence by which this court could order a retrial. He urged the court to acquit the appellant.

This being a first appeal, this court is mandated to re-evaluate and re-consider the evidence adduced in the trial before the magistrate's court so as to reach its own independent determination whether or not to uphold the conviction. In reaching its determination, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore could not make any finding as regard the demeanour of witnesses (See **Okeno –vs- Republic [1972] E.A. 32**). The issue for determination by

this court is whether the prosecution adduced sufficient admissible evidence to enable this court uphold the conviction of the appellant.

The complainant in this case was a child of young and tender years. She was seven years old at the time of the alleged incident. When she appeared before court on the 26th June 2003, the trial magistrate took her evidence without first establishing if she was sufficiently intelligent to offer evidence before court. The record of the subordinate court did not indicate whether the trial magistrate established by *voire dire* whether the complainant understood the meaning of oath and the requirement to tell the truth. The trial magistrate was required to conduct *voire dire* before receiving the evidence of the complainant.

The complainant was a child of young and tender years. According to **Section 2** of the **Children Act**, a child of tender years is a child who is less than ten years old. In **Michael Muriithi Kinyua vs Republic CA Criminal Appeal No.38 of 2002 (Nyeri) (unreported)** the Court of Appeal held at page 11 of its judgment in regard to the steps that are required to be taken before the evidence of a child of tender years can be received as follows;

“We would summarise the position thus; there are two steps to be borne in mind. The first step is for the court to ascertain whether the child understands the nature of an oath. An investigation to this effect must be done by the court immediately the child-witness appears in court. The investigation need not be a long one but it has to be done and has to be directed to the particular question whether the child understands the nature of an oath. If the answer to this question is in the affirmative, then, the court proceeds to swear or affirm the child and take his or her evidence upon oath. On the other hand, if the child-witness does not understand the nature of an oath, he or she is not necessarily disqualified from giving evidence. The second step then follows. The court may still receive his evidence if the court is satisfied, upon investigation, that he is possessed of sufficient intelligence and understands the duty of speaking the truth. Again investigations in this respect need not be a long one but it must be done and when done, it must appear on record. Some basic but elementary questions may be asked of the child to assess the level of his intelligence and whether he understands the duty of speaking the truth or otherwise. Where the court is so satisfied, then, the court will proceed to record unsworn evidence from the child-witness.”

In the present case, the trial magistrate did not comply with the requirement that made it mandatory for *voire dire* to be conducted before the testimony of the complainant could be received. The failure by the trial magistrate to conduct *voire dire* rendered the evidence of the complainant to be vitiated on grounds of illegality. The evidence of the complainant was therefore not of any evidential value to the court. In the absence of the evidence of the complainant, the evidence which was adduced by the other prosecution witnesses was of no probative value. The said evidence could not corroborate evidence which was vitiated on grounds of illegality. In the premises therefore, I will allow the appeal, quash the conviction of the appellant and set aside the sentence that was imposed on him by the trial magistrate.

Miss. Opati submitted that the appellant ought to be retried in view of the fact that the trial magistrate failed to conduct *voire dire* in the vitiated trial. This court is of the view however, that the error committed by the trial magistrate went to the root of the case. This is not one of the cases where this court may consider making an order for a retrial. The mistake committed by the trial magistrate is not one of those instances where this court cannot order a retrial. The failure by the trial magistrate to conduct *voire dire* did not render the proceedings before him a nullity. The proceedings conducted thereto meant that the prosecution did not prove its case to the required standard of proof beyond reasonable doubt. If this court were to order the appellant to be retried, it would give an opportunity for the prosecution to fill up the gaps in its case. This would be to the detriment of the appellant. (See **Ekimat –vs- Republic C.A. Criminal Appeal No. 151 of 2004 (Eldoret) (unreported)**).

In the premises therefore, I will not make an order for retrial. The appellant is acquitted. The criminal proceedings against him on the charge of assault are hereby terminated. He is ordered set at liberty unless otherwise lawfully held.

Dated at NAKURU this 20th day of December 2007

L. KIMARU

JUDGE