



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**

**CRIMINAL APPEAL NO. 240 OF 2004**

DAVID OUMA .....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

**JUDGEMENT**

The Appellant in this case **DANIEL OUMA** and **PETER NDUNGU** were the 2<sup>nd</sup> and 1<sup>st</sup> Accused persons in their trial before the lower Court. They were both charged with **HOUSE BREAKING** and **STEALING FROM A DWELLING HOUSE** contrary to **Section 304 (1) and 279 (b)** of the Penal Code. The particulars of the charge were:

***“On the 9<sup>th</sup> July 2003 at Bahati Estate, Nairobi, jointly with others not before the Court, broke and entered a dwelling house of ANN WANGARI with intent to steal and did steal from therein one radio cassette make Sony and iron box all valued at Kshs 9,300/= the property of ANN WANGARI.”***

After a full trial, the learned trial magistrate, **MRS MBUGUA, RESIDENT MAGISTRATE** found both guilty and sentenced them to 4 years imprisonment each. It is against the conviction and the sentence that the Appellants now appeal to this Court.

The facts of the prosecution case was that the complainant locked her house on the morning of 9<sup>th</sup> July 2004 and left for work. She returned at 8.00 p.m. to find her radio cassette worth 8,950/= missing. She produced the receipt and permit for the said radio as exhibits 1 and 2. The complainant, P.W.1, received information from P.W.3 a child of 9 years, that she knew who broke into her house. The complainant then reported to the police. P.W.2 P.C. Kanyi arrested the 1<sup>st</sup> Appellant after the complainant identified him to him. P.W.4. P.C. Mboya arrested the 2<sup>nd</sup> Appellant after P.W.1 identified him to him. Both Appellants in their unsworn statements in defence narrated how they were arrested and later charged by the police.

The 1<sup>st</sup> Appellant in his petition of appeal raises the following grounds:-

One that the evidence of the prosecution was insufficient to convict since none of the witnesses implicated him with the offence, two that the prosecution witnesses 1,2,3, and 4 gave hearsay evidence; three that vital exhibits and witnesses were not produced and or called and finally that his defence was not given due consideration.

The learned State Counsel, **MRS GAKOBO** opposed this appeal and submitted that the State was supporting both the conviction and the sentence. In brief, learned counsel submitted that P.W.3 saw the

two Appellants open and enter into the complainants house and leave carrying certain items including an iron box. Learned Counsel submitted that being a minor, P.W.3 could not have had any grudge against the Appellants and urged the Court to believe her evidence. On failure to produce exhibits, Learned Counsel correctly submitted that since no exhibits had been recovered in the case, failure to produce any exhibits at the trial was immaterial. That is the correct position in laws. It would have been different if some exhibit was recovered and never produced.

Learned Counsel submitted that the trial magistrate considered the Appellants defences before dismissing them for lack of merit. Further that the sentence of 4 years was quite in order since the maximum sentence for the offence was 7 years.

No doubt the only witness in this case was P.W.3, a child of 9 years. Before taking her evidence, the learned trial magistrate examined the child and recorded the following:-

**“CHILD EXAMINATION**

***My names are C . I am 9 years. I am in class 4. I go to church. I know it is bad to tell lie. One will go to hell. I will tell the truth***

**MRS MBUGUA**

**COURT**

***Child understands oaths, to be sworn”***

The Learned trial Magistrate then went ahead to have the child sworn before she gave her evidence.

**Section 19 (1)** of the Oaths and Statutory Declaration Act provides.

***“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 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 t he meaning of that section.***

‘A child of tender years’ has not been defined in the law. However in the leading case of **KIBAGENY V. REP(1959) E.A. 92 at page 94, FORBES V-P, GOULD and WINDHAM J.J.A.** held:-

***“There is no definition in the Oaths and Statutory Declaration Ordinance of the expression “child of tender years” for the purpose of S.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; although, as was said by LORD GODDARD C.J, in R-V-Campbell (1) (1156) 2 ALL ER 272.***

***“whether a child is of tender years is a matter of the good sense of the Court”.....***

***where there is no Statutory definition of the phrase. The two boys in this case, both of whom were estimated to be under fourteen years old, must therefore be considered as children of tender age.”***

The law as stated in the **Kibangeny** case (supra) has not changed and is that a child of 9 years old must be considered to be a child of tender age in terms of S 19 (1) of the Oaths and Statutory Declaration Act. In the same case, the learned judges of appeal made it very clear that a presiding judge, and in our purposes, a magistrate in that matter, must make an investigation for himself as a duty he owes, to satisfy himself concerning two issues. Before I mention the nature of the investigation I must also state that the learned

judges of appeal made it clear that this investigation must firstly, precede the swearing and the evidence and; secondly need not be a lengthy one and must be recorded. The Learned Judges of Appeal in **Kibegeny's** case referred to an earlier decision of the same Court in which the Court interpreted S19 of the Oaths and Statutory Declaration Act and expounded on the nature of investigation the Court should carry out. That was the case of **NYASANI S/O BICHANA –V- REP.(1958) E.A. 190**. Upon quoting S. 19 (1) and its proviso, **SIR O'CONNOR P, BRIGGS V-P AND FORBES J.A.** held:-

***“It is clearly the duty of the Court under that Section to ascertain first, whether a child tendered as a witness understands the nature of an oath, and, if any finding on this question is in the negative to satisfy itself that the child:***

***“is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.”***

The position is therefore very clear that the presiding magistrate has a duty to conduct an inquiry called **voire dire** with the aim of determining whether the child before Court first and foremost understands the nature of an oath. Whether the answer to this question is positive or not, the Court must then satisfy itself that the child is possessed of sufficient intelligence to justify the reception of the evidence and that he also understands the duty of speaking the truth.

Considering the record of the lower Court, I am not satisfied that the Learned trial magistrate was clear of her duty while conducting the **voire dire** on P.W.3. The learned trial magistrate found that P.W.3 understood oaths. From the record preceding that finding, one finds no reference to oaths. In any event, the trial magistrate had no such duty of determining whether P.W. 3 understood “oaths”. There was no material before the Court from which the Learned trial magistrate could have come to that conclusion. The investigation carried out was far from sufficient to determine the question whether the child understood the nature of an oath leave alone the other question that he was possessed of sufficient intelligence and understood the duty to tell the truth.

The second matter upon which I wish to comment is the fact that in the learned trial magistrate's judgment, she did not warn herself of the need, under the proviso to Section 19 as quoted above, for the corroboration of the evidence of P.W. 3 nor did she look for the necessary corroboration to P.W.3's evidence. Such an omission is a serious defect in a judgment.

There was also another serious defect in the manner in which the evidence of the prosecution witnesses was taken. P.W.1 gave hearsay evidence as to the identity of the persons who broke into her house. The Court seems to have been oblivious to the provisions of **S.63 of the Evidence Act**. This section defines what “direct evidence” means. If the learned trial magistrate were to comply with this section most of the evidence she recorded from P.W.1, the complainant and P.W.2 and P.W.4 the arresting officers, would not have been recorded.

Having carefully considered these two appeals and having re-evaluated all the evidence, I find that for the reasons contained in this judgment, the convictions entered against both the Appellants were unsafe. The evidence of P.W.3, which formed the basis of the convictions was irregularly taken without proper compliance to **S.19 of Cap.15 Laws of Kenya**. The learned trial magistrate relied on that evidence without warning herself of the need for corroboration and neither did she seek to look for the necessary corroboration of that evidence. In addition, P.W.1, P.W.2, and P.W.4 repeated what the child witness, P.W.3, had told them and their evidence was recorded in contravention of **S.63(2) of the Evidence Act**. The evidence of P.W.1 did not provide the necessary corroboration to P.W.3's evidence. In fact what P.W.1 said was stolen from her house at the time of the incident i.e. a radio, contradicted P.W.3's evidence as to what she saw the thieves carry away from P.W.'s house. P.W.3 said she saw them carrying an iron box and speakers.

I find the Appellants appeals have merit and I allow them. Consequently, I quash the conviction and set aside the sentences. The Appellants should be set at liberty unless they are otherwise lawfully held.

Dated at Nairobi this 15<sup>th</sup> day of March 2006.

**J. LESIIT**

**JUDGE**

**Read, signed and delivered in the presence of**

**Appellant**

**.....for the State**

**Huka – Court Clerk:**

**J. LESIIT**

**JUDGE**