REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 281 of 2004

PETER KIMANI KIARIE……..…..…..………....................................….…………..…..APPELLANT

VERSUS

REPUBLIC…………………… ……….…………………….................................…....RESPONDENT

J U D G M E N T

PETER KIMANI KIARIE was convicted of **Indecent Assault on a female** contrary to **Section 144(2)** of the **Penal Code**. Initially the learned trial magistrate sentenced the Appellant to life imprisonment with hard labour. The learned trial magistrate later sent the file for Revision to this Court under **Section 362** and **364** of the **Criminal Procedure Code**. My brother, Hon. Justice Ocheing' after perusing the record reduced the sentence to 7 years imprisonment with hard labour.

The Appellant appeals against both the conviction and the sentence. The Appellant in his appeal raises two grounds: -

One that the case was a fabrication and was not proved as required.

Two that the learned magistrate failed to consider his defence.

The appeal was opposed.

The particulars of the charge alleged that the Appellant indecently assaulted the Complainant, a girl aged six years by removing her underpants and touching her private parts. The Complainant, PW1 was duly examined by the Court in a *voire dire* after which the Court decided to affirm her.

The investigations the court carried court was fair. However, the issues the court had to determine in that investigation were not properly stated. In two leading Court of Appeal cases **NYASANI s/o BICHANA vs. REPUBLIC (1958) EA 190** and **KIBANGENY vs. REPUBLIC [1959] EA 92**, the purpose and nature of the investigations a court must carry out are well set out.. To quote from **Nyasani's case** at page 191, **O'CONNOR P, BRIGGS V-P** and **FORBES JA**, held;

"***It is clearly the duty of the court under that section (referring to Section 19 of oaths and statutory declarations Act) to ascertain first whether a child tendered as a witness understands the nature of an oath, and, if the 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."***

This is a condition precedent to the proper reception of unsworn evidence from a child, and it should appear upon the face of the record that there has been a due compliance with the section."

After conducting the *voire dire* on the Complainant, the court made the following remarks;

"**Court The juvenile to be affirmed"**

Those remarks clearly demonstrate that the learned trial magistrate, despite knowing how to conduct a *voire dire*, was not clear as to the purpose of doing so. The learned trial magistrate was in error in not making a finding whether the Complainant understood the nature of an oath and further whether she was possessed of sufficient knowledge to justify the reception of her evidence and the duty to tell the truth. The Complainant's evidence in the circumstances could not be relied upon.

The evidence adduced by PW3, Uncle of the Complainant's mother indicates clearly that the Appellant had been with the Complainant for over one hour. PW3 passed by where the Appellant and the Complainant were. One hour later he passed by that same place and saw the Appellant holding the Complainant and he became suspicious. The Appellant on seeing him first threatened PW3 with a stone before he, the Appellant, abandoned the Complainant and ran away. Later on the Complainant repeated her ordeal to her mother, PW2, her aunt, PW4 and to PW3. In light of the evidence by these witnesses the learned trial magistrate was satisfied that the charge of **indecent assault** was proved. She was not satisfied that **defilement** contrary to **Section 145 (2)** of the **Penal Code**, which was the main charge against the Appellant, had been proved.

In light of my finding that the Learned Trial Magistrate was not clear of the purpose of a *voire dire* before taking of the evidence of the Complainant, I find that without this evidence, the charge facing the Appellant cannot stand. None of the prosecution witnesses saw the Appellant indecently touch the Complainant on the private parts. All of them were only informed by the Complainant what had happened to her. In view of my holding on the evidence of the Complainant, the evidence of PW2, PW3 and PW4 was hearsay and therefore inadmissible.

Consequently I declare this a mistrial and the proceedings defective on grounds that the learned trial magistrate did not follow the proper procedure. I set aside the conviction and sentence herein. The Appellant was only convicted on 24th May 2004. He faced a life imprisonment before the sentence was reduced, on revision to 7 years imprisonment with hard labour. In the interest of justice, and being satisfied that the Appellant will suffer no prejudice, I order that a retrial be held in this case. In that regard the Appellant will remain in custody until 21st March 2006 when he should be produced before Kiambu Senior Principal Magistrate's court for plea to self same charges. The case should then be heard expeditiously by a competent magistrate other than **MRS. MURAGE, PM**, who heard his case.

Dated at Nairobi this 15th day of March 2006.

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LESIIT, J.

<u>**JUDGE**</u>

Read, signed and delivered in the presence of;

Appellant in person – present for the State

CC: Huka

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LESIIT, J.

JUDGE