REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO. 75 OF 2002

PHILIPH KIPROP TOO V REPUBLIC

SEPTEMBER 26, 2003

LESSIT J

(From original Kericho P. M Criminal Case No. 1846 of 2001 the conviction and sentence of Mrs. R. Ngetich – R. M.)

September 26, 2003, Lessit J delivered the following Judgment.

The appellants herein have appealed against the conviction and sentence imposed against them by Kericho PM's Court (MRS. NGETICH, R.M) – Both of them had been charged with BURGLARY AND STEALING contrary to section 304 (2) and 279 (b) of the Penal Code. They were convicted for this offence and sentenced to serve 7 years imprisonment with two strokes of the cane each.

Each of the appellants argued their defence. I will consolidate the issues raised as three.

The first issue raised is that one of them who had been arrested for the offence together with them was released and later called as a witness. The other issue was that no exhibits were recovered at all. Thirdly they raised issue with the prosecution failure to call the chief of the area who arrested them for this offence.

The learned state counsel, Mr. Onderi, did not oppose the appeal. He conceded that the only eye-witness, PW4 was clearly an accomplice and also a minor whose evidence needed corroboration and there was none.

I have carefully considered this appeal. I will deal with the issue of PW4 a child aged 13 years who was the key and only eye witness in this case. I do agree with the appellants www.kenyalawreports.or.keand the state that his evidence needed corroboration of some material particulars implicating the appellants with this offence on two grounds. First being he was an accomplice having admitted the offence. Secondly, for being a child. On the issue of being a child in JOHNSON MUIRURI –V- REPUBLIC 1983 KLR 445, MADAN, POTTER JJA and CHESONI ag. JA dealt extensively with;

(1) Meaning of a child of tender years.

(2) Proper procedure while dealing with child witness as far as assessing whether a child understands;

(a) The nature of an Oath,

(b) Responsibility to tell the truth involved in the oath,

(c) Sufficiency of the child's intelligence to satisfy the reception of evidence,

(d) Understands the duty to tell the truth and the difference between the truth and falsehood.

The court laid down the proper procedure to be followed when children are tendered as witnesses as follow;-

> "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 even 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 understands the duty of speaking the truth."

The court went further to state the weight to be given to the unsworn evidence of a child as follows;-

> "In the latter event (where an unsworn evidence is taken) an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him."

Having set out the counts holding at length I need not explain anything except to make two observations one that the learned trial magistrate in the instant case did not carry out a voire dire examination or inquiry to enable this court determine whether the important matters in issue were rightly decided.

No record was made of the questions put to the child, PW4, or his answers to keep demonstrate whether the court called out an inquiry and to show clearly what cause the court took. The Judges of appeal in the cited case need that where the court carried out no voire dire examination and where no inquiry was done as to the child's understanding of the solemnity of an oath, the duty to tell the truth or whether it was possessed of sufficient knowledge that would justify the talking of his evidence whether sworn or unsworn, the failure was a fatal error and no conviction based on such evidence could stand.

In the instant case the learned magistrate has not demonstrated that any voire dire examination or inquiry took place. The second observation is that the court should have walked itself of the danger of relying on the uncorroborated evidence of a child of tender years. The child in this case, PW4, was not only of tender age but was also an accomplice corroboration was required before reliance of his evidence. There was no corroboration whatsoever.

For the foregoing reasons I do find that the conviction entered herein was unsafe and should not be allowed to stand.

Accordingly I do quash the conviction, set aside the sentence and direct that the appellants should be set at liberty unless otherwise lawfully held.