REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.85 OF 2002

(From Original Conviction and Sentence in Criminal Case No.85 of 2002 of the Resident Magistrate's Court at Taveta –G.M. Gogwe, Esq., DM.I)

S O O……..APPELLANT

V E R S U S

REPUBLIC……RESPONDENT

JUDGMENT OF COURT

The appellant was charged with two counts of Assault Causing Actual Bodily Harm contrary to Section 251 of the Penal Code. He was convicted of both and sentenced to 3 years imprisonment in respect of each count both to run concurrently. He appeals against conviction and sentence.

The prosecution facts in a summary are that the two complainants in the case are his own children aged about 12 and 11 years. They have lived with the appellant all along since they were born first in Nyamira District and later in Taita-Taveta District. The mother, who is the 2nd wife of the appellant, appears to have deserted the appellant early after the children were born, leaving the children to be brought up by the appellant. The prosecution purported to prove that in the months of September and October 2001 the appellant assaulted the children. No definite date of assault is asserted. The star witnesses were the two children, PW.5, B S O and PW.6, A O, who both are 12 and 11 years old and therefore children of tender years as defined in the law. Other evidence came from the grandmother of the children, the maternal uncle of the children and neighbours.

After the appellant had argued his appeal on both conviction and sentence, the State Counsel Mrs. Mwangi could not support the conviction, and impliedly, the sentence. She pointed out that the critical evidence came from children of tender years and that under those circumstances the trial Magistrate was under a legal obligation to establish on the record of the evidence, that the children were intelligent enough to give evidence and whether or not each understood the nature and purpose of an oath. And since the record fails to confirm that the Magistrate complied with the relevant legal requirement to establish that the children were intelligent enough to give evidence at all, the trial amounted to a mistrial. She sought for orders of retrial before another competent Magistrate.

I have carefully considered the evidence on the record, the submissions by the State Counsel and those of the appellant. I do express this court's concurrence with the first opinion of the State Counsel that failure by the trial Magistrate to show on the record that he sufficiently tested the intelligence of the two

children is fatal to the conviction herein. In respect to PW.5 the trial Magistrate only established that the child was 12 years old. He failed to ask questions which would establish the facts as whether or not the child understood where he was and what he was doing there. Or whether he understood the meaning of speaking the truth and if he was going to speak the truth. In respect to the 2nd child, PW.6 who was even the younger one, the court did not even bother about the child's intelligence.

I have also examined the rest of the record and note that the trial Magistrate does not on his record show when the witnesses were giving evidence in chief or when they are answering under cross-examination. This is a sad situation.

Be that as it may, I have also considered and evaluated the evidence on the record. Even were it properly recorded, it would not have led to the convictions arrived as the charges are amorphous and unspecific. It is likely that the complainants were being abused by the appellant, a situation which appears to have lasted a long period. Even the neighbours and relatives who gave evidence may have known for sometimes that the said children, in the absence of their mother or a woman living with them to take care of them, were suffering. It is also possible as suggested in the evidence that the appellant may not have looked after them properly, but there is no specific evidence proving any assault causing actual bodily harm. Even the medical evidence on the record from PW.8 Charles Muthemba is so general and unspecific that it deserve no credibility. Much more however, the evidence of the two children cannot be used to support the conviction on the ground that it was not tested to establish whether or not the children were intelligent enough as stated earlier, nor in my view is there other independent evidence upon which the conviction could be based.

I further hold that the whole trial appears to have been instigated by maternal relatives of the children with a motive to deprive the appellant of the children as it appeared that the appellant was not looking after them well but most importantly because the appellant did not appear to the relatives to deserve keeping the children after failing to pay dowry in respect to the marriage. It was improper however, to use a criminal charge to separate the children from their father with whom they have all along stayed.

Having come to the above conclusions I have also considered whether or not this would be a suitable case for retrial. I have come to the conclusion that a retrial will serve very little purpose considering the nature of evidence on the record. The conviction is accordingly quashed and the sentence set aside. I hold that this court should not ignore the fate of the two children. Their former and present conditions of living should be thoroughly investigated by the Taita-Taveta Children's Officer to establish whether or not the appellant is a proper and fit person to keep custody of the children and if not to deal with the children as the relevant law provides. That having been said, I hereby forthwith set the appellant at liberty unless he is lawfully held in prison. It is so ordered.

Dated and delivered at Mombasa this 12th day of September, 2002.

D. A. ONYANCHA

J U D G E