REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL REVISION NO. 2 OF 2019

From original conviction and sentence in Cr. Case No. S.O 24 OF 2018 of the Principal Magistrates Court at Wang'uru)

DIRECTOR OF PUBLIC PROSECUTION.....APPELLANT

V E R S U S

DADIV NJUKI WANJIKU.....RESPONDENT

JUDGMENT

1. The State filed this matter in this court for revision. The facts of the case are that the respondent was charged with the offence of attempted defilement contrary to **Section 9(1)(2) of the Sexual Offences Act No. 3/2006.** It was alleged that on 13/8/2018 at Huruma Village in Mwea East Sub-county within Kirinyaga County attempted to cause his penis to penetrate the vigina of R.M.W a child aged Four (4) years and Eight(8) months.

2. He was also charged with an alternative charge of committing an Indecent Act with a child contrary to **Section 11(1) of the Sexual Offences Act** in that on 13/8/2018 at Huruma Village in Mwea East Sub-County within Kirinyaga County intentionally touched the vigina of RWM a child aged 4 years and 8 months with his penis.

3. The accused persons denied the charges. The matter was then listed for hearing.

4. When this matter came up for hearing on 5/12/2018 before Hon. Mutiso, P.M, the complainant's mother D.M.M (PW-1-) adduced evidence. When the child was called and voire dire examination was done, the trial Magistrate ruled that the child was too young to understand the duty to speak the truth. The child was stood down and the court directed that the child could not testify.

5. The contention by the State is that the ruling was made in error as voire dire examination is meant to determine whether a witness understands the nature of the oath and not a basis of determining whether the witness will testify or not. It is contented that the child should not have been blocked from testifying but ought to have been allowed to give unsworn testimony. The applicant prays that the order be reviewed and set aside.

6. The powers of the High Court on revision are provided under **Section 362 to 366 of the Criminal Procedure Code.** **Section 362** provides:-

> ***"The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."***

7. It also provides for the orders which the court will issue on revision. This is provided under **Section 364 of the Criminal Procedure Code.**

8. Evidence of a child is admitted under **Section 19 of the Oaths and Statutory Declarations Act**. The section provides:-

> ***(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 CAP. 15 Oaths and Statutory Declarations [Rev. 2018] 8 section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.***

(2) If any child whose evidence is received under subsection (1) wilfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment."

9. The section provides that where the child of tenders years is called as a witness and does not understand the nature of the Oath, but is possessed of sufficient intelligence to justify the reception of her evidence, the court shall proceed to receive the evidence though not given on oath. The trial Magistrate is supposed to do a voire dire examination to determine whether the witness is intelligent enough to give evidence and whether he understands the meaning of the oath. Where the witness does not understand the meaning of oath. Where the witness does not understand the meaning of oath, the trial Magistrate is supposed to receive the evidence though not given on oath.

10. The Court of Appeal in **Johnson Muiruri –v- Republic (1983) KLR 447 @ 448-450. Quoted in the case of Kivevelo Mbeloi-v- R (2013) eKLR** where it was stated:-

We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses.

In *Peter Kariga Kiune, Criminal Appeal No. 77 of 1982 (unreported) we said:*

"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. In the latter even 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 (section 19, Oaths and Statutory Declarations Act, Cap 15. The Evidence Act (Section 124, Cap 80).

It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumption."

A similar opinion was expressed by the Court of Appeal in England recently in Regina –v- Campell (Times, December 10, 1982):

"If the girl (ten years) had given unsworn evidence then corroboration of those issues was an essential requisite. If she gave sworn evidence there was no requirement that her evidence had to be corroborate but the jury had to be directed that it would not be safe to convict unless there was corroboration.

Dealing with the question of the girl taking the oath it should be borne in mind that where there was an inquiry as to the understanding of a child witness of the nature and solemnity of an oath, the Court of Appeal in R-v-Lal Khan (1981) 73 Cr. App R 190 made it quite clear that the questions put to a child must appear on the shorthand note so that the court the procedure took in the court below could be seen ……

There Lord Justice Bridge said:

'The important consideration …… when a Judge has to decide whether a child should properly be sworn, is whether the child has sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct.'

There were therefore two aspects when considering whether a child should properly be sworn:

First that the child had sufficient appreciation of the particular nature of the case and, second a realization that taking the oath did involve more than the ordinary duty of telling the truth in ordinary day-to-day life"

It is fortunate that we can reinforce some of the foregoing views by the decisions of our own former perceptive Court of Appeal. As long ago as in Oloo s/o Gai –v- R(1960) EA 86 the court of Appeal said that it would have been better for the trial Judge to record in terms that he had satisfied himself that the child understood the nature of an oath; since the Judge had failed to direct himself or the assessors on the danger of relying on the uncorroborated evidence of a child of tender years and had also overlooked significant items of evidence bearing on the reliability of her evidence the conviction could not stand.

In Gabriel s/o Maholi –v- R(1960) EA p 159, again our former Court of Appeal said that even in the absence of express statutory provision it is always the duty of the court to ascertain the competence of a child to give evidence; it is not sufficient to ascertain that the child has enough intelligence to justify the reception of the evidence, but also that the child understands the difference between the truth and falsehood.

In Kibangeny Arap Kolil (1959) EA 92 the Court of Appeal held (i) that since the evidence of the two boys (12-14 years and 9-10 years) was of so vital a nature of the court could not say that the trial Judge's failure to comply with the requirements of Section 19(10 of the Oaths and Statutory Declarations Ordinance was one which could have occasioned no miscarriage of justice; (ii) the failure of the trial Judge to warn himself or the assessors of the danger of convicting upon the evidence of the two boys in view of the absence of corroboration and any admission by the appellant was an additional ground for allowing the appeal."

11. The trial Magistrate made an error when after attempt to conducting voire dire examination stated that the child is too young to understand the duty to speak the truth. He ought to have conducted voire dire examination and make a finding as to whether the child was possessed of sufficient intelligence and whether she appreciated the importance of telling the truth.

12. I find that the application for review of the order of the trial Magistrate has merits. I allow it and order that the ruling be set aside. The trial Magistrate will conduct a voire dire examination on the child (complainant) and make a finding whether the child is possessed sufficient intelligence and whether she appreciates the importance of telling the truth. The file shall be returned to the trial Magistrate.

Dated at Kerugoya this 9th Day of June 2020.

L. W. GITARI

JUDGE