



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CRIMINAL APPEAL NO. 180 OF 2016**

**GEOFFREY MWANGI WAWERU.....APPELLANT**

**VERSUS**

**REPUBLIC.....STATE**

(Being an appeal from the Judgment of Honourable J. M. Omido Senior Resident Magistrate, delivered on 16<sup>th</sup> November, 2016 in Nakuru Chief Magistrate's Court Criminal Case No. 167 of 2015)

**JUDGMENT**

1. The Appellant was arraigned before the Chief Magistrate's Court at Nakuru charged with a single count of defilement of a child contrary to section 8(1) as read together with section 8(2) of the Sexual Offences Act. The particulars alleged in the charge sheet were that on diverse dates between July, 2015 and 06/08/2015 at [particulars withheld] Centre in Nakuru North Sub-county, Nakuru County, the Appellant unlawfully and intentionally committed an act by inserting his male genital organ namely penis into the female genital organ (vagina) of one MWA, a girl aged 11 years old, causing penetration.

2. There was also an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. It was alleged that at the same place and time, the Appellant unlawfully and intentionally assaulted MWA by touching her private parts namely breasts, buttocks and vagina with his genital organs, namely penis.

3. After a fully-fledged trial, the Appellant was convicted of the principal count and was sentenced to life imprisonment. He is aggrieved by both the conviction and sentence and has appealed to this Court.

4. The principal complaint raised by the Appellant on appeal is one of defective trial process: that the Learned Trial Magistrate proceeded to swear a child of tender years and relied on her testimony before the Court had satisfied itself that the child understood the meaning of oath.

5. I have perused the Trial Court record. It shows that on 06/09/2016, the Complainant in this case was presented before the Court. The Learned Trial Magistrate records the beginning of her testimony thus:

PW1: Female child duly sworn Christian states as follows in Swahili: I am [MWA]. I am 12 years old. I am in [particulars withheld] Primary School.....

6. It is readily obvious that the Learned Trial Magistrate did not conduct *voir dire* to satisfy himself that the child understood the nature and meaning of taking oath.

7. While the Oaths and Statutory Declarations Act does not define who a child of tender years is, the Courts have held that a child of tender years for purposes of the Oaths and Statutory Act is one the age of under fourteen years (See [Kibageny Arap Kolil v R \(1959\) EA 82](#); [Patrick Kathurima v R Court of Appeal at Nyeri Criminal Appeal No. 131 of 2014](#)).

8. In the present case, MWA was, by her own testimony, twelve years old. She was, indubitably, a child of tender years.

9. The only question, then, is whether the failure to conduct *voir dire* renders the whole trial a nullity. Our decisional law is unanimous that it fatally vitiates a criminal trial if a witness of tender years is allowed to be sworn and for their evidence to be taken if the Court has not satisfied itself first that the witness understands the nature and meaning of taking an oath. This is by dint of section 19 of the Oaths and Statutory Declarations Act. See [Kibageny Arap Kolil v R \(1959\) EA 82](#); [Patrick Kathurima v R Court of Appeal at Nyeri Criminal Appeal No. 131 of 2014](#)); and [Peter Kariga Kiune v Republic \(Crim. Appeal No. 77 of 1982\)](#).

10. Having reached that conclusion, it follows that the Appeal must succeed on that point alone.

11. However, that does not end the analysis. The Court must now consider whether to order a retrial in this case. Having looked at the circumstances here, my view is that a re-trial is appropriate. The case of ***Makupe v Republic, Criminal Appeal No 98 of 1983***, the Court of Appeal at Mombasa on July 18, 1984 (Kneller JA, Chesoni & Nyarangi Ag. JJ A) set out the general test to be utilised in determining whether a retrial should be ordered or not: In general a retrial will be ordered when the original trial was illegal or defective. Conversely, a retrial will not be ordered where the conviction is set aside because of insufficient evidence. The court must in ordering a retrial take the view that had the case been properly prosecuted and admissible evidence adduced, a conviction might fairly result.

12. I am persuaded here, from my view of the case and having looked at the Trial Court record in its entirety that properly prosecuted there might be sufficient admissible evidence to result in a conviction. The less I say about this, the better.

13. In the end, therefore, the orders and directions of the Court are as follows:

**a. The conviction entered in Nakuru Chief Magistrate's Adult Criminal Case No. 167 of 2015 is hereby set aside.**

**b. The sentenced imposed on the Appellant is hereby consequently set aside.**

**c. The Appellant shall be released from Prison forthwith and shall, instead, be placed on remand pending his presentation before the Nakuru Chief Magistrates' Court to take plea.**

**d. The Appellant shall be presented before the Chief Magistrate's Court, Nakuru on Monday, 8<sup>th</sup> October, 2018 to take plea. The case shall be allocated to a magistrate other than the Learned Honourable J. Omido who initially heard the case.**

**e. The Deputy Registrar is directed to send back the Trial Court file in Nakuru Chief Magistrate's Adult Criminal Case No. 167 of 2015 and a copy of this ruling to the Chief Magistrate's Court, Nakuru for compliance.**

14. Orders accordingly.

**Dated and delivered at Nakuru this 4<sup>th</sup> day of October, 2018.**

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**JOEL NGUGI**

**JUDGE**