



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO 176 OF 2012
J G K.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

(Appeal against Judgement conviction and sentence imposed in Sexual Offence Case Number 14 of 2012, Republic vs J G K at Nyeri , delivered by W. A. Juma C.M. on 5.10.2012).

JUDGEMENT

The appellant herein seeks to quash the conviction and sentence imposed case number **14 of 2012** where the appellant was charged with the offence of committing an indecent with a child contrary to Section **11 (1)** of the Sexual Offences Act No. **3** of 2006.

The particulars of the offence were that on the **25th** day of March 2012 at 9.45 am in Kieni West District within Central Province, unlawfully and intentionally touched the breasts of **V W** a child aged 17 years.

The appellant faced a second count of assault causing actual bodily harm contrary to section 251 of the Penal Code.^[1] It was alleged that on 26th day of March 2012 in Kieni West District in Central Province unlawfully assaulted V W thereby occasioning her actual bodily harm.

The prosecution called a total of five (**5**) witnesses whose evidence is summarized below. In determining this appeal, this court fully understands its duty as stated in the case of **Okeno v. R.**^[2]

In my view, the first appellate court must itself weigh conflicting evidence and draw its own conclusions.^[3] It is the function of this court as a first appellate court to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.^[4]

I now turn to the evidence adduced before the trial court.

PW1, V W was the complainant; a minor then aged 17 years at the time of giving evidence. The record does not show that the learned Magistrate contacted a **voire dire** examination. Further, the record does not show the magistrate asked her some preliminary questions to assess her ability whether she was composed and of good understanding of the oath. What is recorded is that she was sworn and proceeded to give her evidence in chief and was cross-examined by the appellant and re-examined by the respondent. I will later in the judgement discuss the legal consequences of the said omission and offer my own conclusions on the same.

Her evidence was that she stays with her uncle, the appellant herein who is married to her mothers' sister. She testified that on the material day the appellant held her hands and touched her breast saying 'we should make each other happy.' She asked how and he said they go and sleep together, he asked for her phone and said he would keep it until she slept with him. Later she informed her auntie who suggested that she does not tell anyone else lest they all be beaten.

On 26.3.12 she reported to her teacher who called him and relayed the information to him. Upon returning home that same day the appellant assaulted her using a metal. He hit her on the forehead, right hand and shoulder. Later on she informed her cousin a one V W who called him, but after she returned home she received more threats from the appellant. She fled to a neighbour's home, but later her auntie came looking for her holding a panga and held her hand. She fled to a neighbour's house. On 29th March 2012, in the company of a Mama G and A, she reported to the Assistant chief who referred them to the police. She also went to [particulars withheld] Dispensary, but was not treated, was issued with a P3 form at Nairotia Police. Appellant was summoned to the police and arrested.

PW2 testified that the complainant went to her house at night on 28.3.12 and narrated her ordeal, the next day together with the complainant auntie they took the child to the sub-chief who referred them to the police post. She confirmed that the complainant's mother was dead, hence she was living with her auntie.

PW3 confirmed that **PW2** called her to report that the complainant had fled to her home but since she had travelled she asked that she allows her sleep there for the night and later she reported to the assistant chief who gave her a letter to take to the police station. She accompanied the child to the police and hospital where her P3 form was completed

PW4, a clinical officer confirmed the complainant had a wound on the forehead, a friction wound on posterior aspect of right shoulder and estimated age of injuries was 4 days.

PW 5 Cpl Terry Pussy attached to Nairotia Police Station testified that on 29th March 2012 a complaint was made at the station by the complainant in the company of her aunt. She had injuries on forehead. She produced the P3 form. The complainant was arrested and charged.

After evaluating the above evidence, the trial magistrate was satisfied that a *prima facie* case had been established and put the accused on his defence and complied with the provisions of Section 211 Criminal Procedure Code. The accused elected to give sworn evidence and called two witnesses. He stated that on the date in question he heard the complainant talking over the phone using bad language, he felt bad and asked her to leave the phone on the table and go to church and she complied. Later she came back and nothing happened but he added that she later ran away to her aunt's place.

DW1, the appellants' wife testified that on the material day she went to church and after coming back they continued living peacefully, but on the date she went to her aunties' place she had sent her to the shamba, but instead she abandoned the rope at the shamba and went to her auntie. She went looking for her, held her hand but on the way she escaped and ran away.

DW2 was a minor aged 25 years. The record shows that in what was meant to be a voir dire examination, the magistrate wrote as follows:-

'Minor states on Kiswahili. A am 15 years a form 11. I know the Bible. I am baptized in Catholic Church. I know that if one swear on Bible he tells the both (sic) and he has read can punish in different ways like illness.'

Court- Minor understands moral duty to tell the truth and consequences of lying.

In my view, that is not a proper way of conducting a voir dire examination, but I will revert to this issue later as I re-visit the evidence of PW1.

The learned magistrate in her judgement analysed the evidence of all the prosecution witnesses and the

above defence and concluded that the appellant was guilty as charged and convicted him on both counts. After hearing the accused in mitigation the learned magistrate proceeded to sentence the appellant to **ten years imprisonment for count one and two years' imprisonment for the second count.**

Aggrieved by the above verdict, the appellant appealed to this court seeking to quash the conviction and sentence and advanced three grounds; namely; **(i)** that the trial magistrate relied on uncorroborated evidence, **(ii)** that the trial magistrate rejected his unsworn defence; **(iii)** that the charges were not proved. The appellant filed written submission which he adopted.

Learned State Counsel Miss Chebet urged the court to uphold the conviction and submitted that there was overwhelming evidence to support both the conviction and sentence.

I propose at this point to address the issue of the Magistrate's failure to conduct a *voir dire* examination before taking the evidence of **PW1**. The record clearly shows the Learned Magistrate never conducted a *voir dire* examination. I have gone a step further and confirmed from the original un-typed proceedings that that indeed *voir dire* examination was never conducted at all in respect to this witness. The Learned Magistrate never recorded anything of that sort nor did she ask the minor preliminary questions to satisfy herself of the fact that the minor was composed and indeed understood or appreciated the meaning of an oath or consequences of not telling the truth. She straight started recording evidence and the opening statement is "*Minor Sworn states in Kiswahili, I am 17 years old.....*"

So long as the witness was below 18 years as in the present case, she was a child and a *voir dire* examination was necessary. Section **11 (1)** of the Sexual Offences Act^[5] provides as follows:-^[6]

"Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years"

The Sexual Offences Act defines as follows; "**child**" has the meaning assigned thereto in the Children Act, while the Children's Act defines a child as any human being under the age of eighteen. Thus, PW1, aged 17 at the time of giving evidence was a child and as the law requires, the magistrate ought to have conducted a *voir dire* examination before taking her evidence.

The court of Appeal gave its guidance on the issue of *voir dire* examination in **Johnson Muiruri vs Republic**^[7] as follows:-

*"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 Kiume**^[8] 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 *voir 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 event 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 Laws of Kenya. The Evidence Act, Section 124, cap 80, Laws of Kenya) (Emphasis added).*

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

A similar opinion was expressed by the Court of Appeal in England in **Regina vs Campell**^[9]

" If the girl (ten years) had given unsworn evidence then then corroboration of those issues was an essential requisite. If she gave sworn evidence there was no requirement that her evidence had

to be corroborated 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 oath it should be borne in mind that where there was an inquiry as to the understanding of a child witness of nature of solemnity of an oath, the Court of Appeal in **R vs Lal Khan**[10] made it quite clear that the questions put to a child must appear on the shorthand note so that the course the procedure took in the court below could be seen... (Emphasis added).

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 be sworn: first that the child had sufficient appreciation of the particular nature of the case and, secondly 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.....In **Gabriel Maholi vs R**,[11] 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 **Kivevo Mboloi vs Republic**[12], the court held that failure to conduct a *voir dire* rendered the entire evidence of the complainant of no use to the court. In the case of **Musyoka Mwasya vs Republic**,[13] the court held that failure to conduct *voir dire* examination in a situation where it is necessary, like the case before this court renders the evidence of the particular witness of no use.

In **Kibangeny vs Republic**[14] the Court of Appeal stated that:-

‘The investigation (*voir dire* examination) should precede the swearing and the evidence, and should be directed to the particular questions whether the child understands the nature of an oath rather than to the question of his general intelligence. Since the evidence of the two boys was of so vital a nature we cannot say that the learned trial judge’s failure to comply with the requirements of section 19(1) was one which can have occasioned no miscarriage of justice, and upon this ground alone the appeal must be allowed’

In **Gamaldene Abdi Abdirahman & Another vs Republic**[15] after considering with approval the decision in **Kibngeny arap Kolil vs Republic**[16] stated as follows:-

“Does the definition of a child of tender year” by the Children Act, 2001 oust the jurisprudence that has been developed in criminal trials? The first thing to note is that in passing the Children Act, Parliament was trying to address issues touching on the welfare of children. We do not think parliament was concerned about the rights of accused persons as relates to the testimony of child witnesses. As already stated there are specific reasons why *voir dire* examination is necessary before the evidence of a child of tender years can be accepted by the courts.....In our view, the jurisprudence established over a long period of time is still good jurisprudence despite the definition provided by the Children Act. In saying so, we are guided by the fact that a child’s development both physically and intellectually is governed by the social, cultural and economic environment under which the particular child is brought up.....Having reached the above conclusion, it follows that the acceptance of the complainant by the trial magistrate without

conducting a voir dire examination on the witness was fatal to the prosecution case....”

The above position was explained more clearly in the case of **Nyasani s/o Bichana vs Republic**[17] where the court held that failure to conduct a *voir dire* examination is fatal to the prosecution case where there is no other evidence sufficient enough to sustain a conviction. I take the view that this is good jurisprudence. The court needs to exclude the evidence of the minor and put to test the remaining evidence. A similar position was held in the case of **Hussein Ali Genga vs Republic**. [18]

Guided by the above position I arrive at the conclusion that the evidence of **PW1** cannot be allowed to stand and ought to be excluded while determining the guilt or otherwise of the appellant. Next I now pose the question, does the remaining evidence in this case establish a case against the appellant. Since I have already reproduced the evidence earlier in this judgement, it will suffice for me to state that in my own assessment, the remaining evidence does not create a basis to convict the appellant on count one. Accordingly, having excluded the evidence of PW1 as aforesaid, I find nothing remained to warrant the trial magistrate to arrive at a finding of guilty with regard to count one.

Accordingly, the conviction on count one was not supported by the evidence or the law and cannot be allowed to stand.

With regard to count two, having excluded the evidence of PW1, I find as a fact that the evidence of **PW2** and **PW3** confirmed that the child had an injury on the face **and this was sufficiently collaborated by PW4** the clinical officer who produced the **P3** form. The **P3** form confirmed the said injuries. **PW5** also confirmed that **PW1** had injuries on the head. On the whole I am persuaded that count 2 was proved beyond doubt and that the learned Magistrate rightly convicted the appellant on the said count.

I agree with the learned Magistrate that defence offered was not credible but just a mere denial nor did the witnesses in any manner discredit the evidence on the said assault. The second defence witness was a minor and a proper *voir dire* examination was not conducted, hence I find his evidence of little use, even though, to my mind even if we were to consider the same, it does not negate the alleged assault.

Accordingly, I hereby quash the conviction on count one and set aside the sentence of ten years imposed upon the appellant in the said count.

With regard to count two, I find no basis to interfere with the conviction and sentence. I however note that the appellant was sentenced to serve two years imprisonment for the said count on 5.10.2012. The two years have since lapsed. I find that the appellant has fully served the entire jail term of two years for the conviction on count two.

Having quashed the conviction on count one and having set aside the sentence of ten years, I order that the appellant be released forthwith unless otherwise lawfully held.

Dated at Nyeri this 5th day of October 2015

John M. Mativo

Judge

[1] Cap 63, Laws of Kenya

[2] {1972) E.A, 32at page 36

[3] Shantilal M. Ruwala V. R (1957) E.A. 570

[4] see Peters V. Sunday Post (1958) E.A. 424

[5] Act No 3 of 2006

[6] Act no. 8 of 2001

[7] {1983} KLR 447 at page 448-450

[8] Criminal Appeal No. 77 of 1982 (unreported)

[9] Times, December 10, 1982.

[10] {1981} 73 Cr App R 190

[11] {1960} EA 86

[12] HCCR APP NO. 34 OFV 2013 (GARISSA)

[13] HCC CR APP NO 50 OF 2013, Garissa

[14] {1959} E.A.92

[15] HC CR NO. Appeal No. 40 of 2013 Garrissa

[16] {1959} EA 92

{1959} EA 190

[18] HC CR APP NO. 91 OF 2011.