



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 50 OF 2013

MUSYOKA MWASYAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 245 of 2012 in the Senior Resident Magistrate's Court at Mwingi - V.A. Otieno (Ag. SRM) on 21st March, 2013)

JUDGEMENT

The Appellant Musyoka Mwasya was charged with defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence stated that on 22nd April, 2012 at Mwingi Township, [particulars withheld] in Mwingi District within Kitui County he did an act which caused the penetration of his male genital organ into the female genital organ of T W a child aged ten years.

In the alternative the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. It was alleged that if he did not defile the said T W then he committed an indecent act by causing his male genital organ to come into contact with the child's female genital organ.

After full trial, the Appellant was convicted and sentenced to imprisonment for life. He now appeals against both conviction and sentence.

In the amended petition of appeal filed on 17th October, 2013 the Appellant faults the trial magistrate for convicting him without ascertaining the age of the complainant; admitting a P3 form which was inadmissible in the circumstances of the case; convicting him on contradictory and inconsistent evidence adduced by prosecution witnesses; failing to conduct a *voir dire* examination of the complainant before proceeding to take her evidence; and failing to record the date of the judgement and sentence. When the appeal came up for hearing on 17th October, 2013 Mr. Mulama for the state conceded the appeal.

I have perused the proceedings before the lower court and note that no *voir dire* examination was conducted on the complainant child who testified as PW2. A *voir dire* examination was necessary in this case considering that the charge sheet indicated that the complainant was ten years old. Her mother (W M M) who testified as PW1 indicated that the child was nine years. A *voir dire* examination serves two purposes. The first objective is to find out whether the witness understands the meaning and solemnity of an oath. If the witness understands the meaning of an oath then the evidence of such a witness will be received under oath. The second purpose is to test the competency of the witness. It is used to establish whether a witness is possessed of sufficient intelligence and thus capable of adducing any useful

evidence. Related to this is whether a witness understands and appreciates the importance of telling the truth.

Failure to conduct a *voir dire* examination in a situation where one is necessary, like in the case before this Court, renders the evidence of the particular witness of no use. The Court of Appeal in **KIBANGENY v. R. [1959] E.A. 92** stated that:-

“The investigation (voir dire examination) should precede the swearing and the evidence, and should be directed to the particular question 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.”

It is the duty of the Court to conduct a *voir dire* examination once it becomes apparent that the witness is a child of tender years.

A perusal of the Court record also shows that one Dr. Indumwa Edmond testified as PW4. He told the Court that he had a P3 form for T.W. and then proceeded to explain to the Court the examination findings as noted in the P3 form. He produced the P3 form as Exhibit 1. A look at the P3 form clearly shows that the same was signed by a Dr Njoroge on 23rd April, 2012. There is no reason why one would not agree with the Appellant that the author of the P3 form was indeed a different person from PW4.

There was need to capture in the proceedings the reason for the production of the P3 form by a person who was not the author of the same. The reason why the author of the document could not testify ought to have been placed on record. This was not done and the P3 form was not properly before the Court and could not have been relied on in support of the prosecution case.

The prosecutor should make an application before a P3 form can be produced by a witness who is not the maker of the same. The magistrate will then consider the application and make a decision on it. If the application is allowed, the prosecutor will, after the witness is sworn, ask the witness whether he has worked with the author of the P3 form. Other questions would relate to the length of time they have worked together and whether he is familiar with the handwriting of the author. The basis for the production of a document by a witness other than the author must be firmly laid.

In her evidence the complainant told the Court that **“during the night the accused ”Kilungu” opened the door to the office, he put off the lights and had sex with meThat day was the first time I saw the accused.”**

This evidence is quite contradictory. There is nowhere in the record to show that the Appellant is called Kilungu. There is nothing to explain how the child who was seeing the Appellant for the first time on the material night knew his name was Kilungu.

Although a copy of a birth certificate is in the Court file, there is nowhere in the proceedings showing that the same was marked after identification. There is also no evidence in the Court record that the same was produced. In this case the mother of the child talked of a certificate of birth. At this point the record ought to show that she identified it and the magistrate ought to have indicated in the proceedings that it had been marked for identification. The marked exhibit would then have been given a number. The investigating officer should have also identified the certificate of birth before proceeding to produce it as an exhibit. This was not done.

In my view, the state counsel correctly conceded this appeal. Apart from the errors committed in the course of the trial, the evidence adduced was contradictory and the case ought to have been decided in favour of the Appellant. This appeal succeeds. The result is that the Appellant is set free unless otherwise lawfully held.

Orders will issue accordingly.

Prepared, Dated and signed this 27th November 2013

W. KORIR,

JUDGE OF THE HIGH COURT

Dated and delivered on 2nd day of December, 2013

S.N.MUTUKU

JUDGE OF THE HIGH COURT