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IN THE COURT OF APPEAL OF KENYA
AT NAKURU
Criminal Appeal 208 of 2008
YUSUF SABWANI OPICHO ..... APPELLANT
AND
REPUBLIC ..... RESPONDENT
(Appeal from a judgment of the High Court of Kenya
Nakuru (Mugo, J) dated 24th July, 2008
In
H.C. C. C. No. 208 of 2007)
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JUDGMENT OF THE COURT

The appeal before us rests on two, out of five, grounds laid out in the memorandum of appeal filed belatedly on 28th September, 2009. Three of the grounds were abandoned at the hearing of the appeal by counsel for the appellant, Mr. Githui, who urged the following grounds:-

> *"1.THAT the learned judge erred in law and in fact in failing to appreciate the nature and*
> *meaning of voire dire proceedings.*
> *2. THAT the learned judge erred in law and in fact in failing to understand the nature of*
> *evidence required in corroboration."*

Those are issues of law which are properly raised on a second and final appeal in accordance with section 361 of the Criminal Procedure Code. For reasons which will shortly become apparent, we shall desist from analyzing the facts and circumstances of the case, in view of the final orders we intend to make.

The appellant, Yusuf Sabwami Opicho, was charged before Molo Senior Principal Magistrate's Court with the offence of grievous harm contrary to section 234 of the Penal Code. It was alleged in the charge sheet that the appellant, on 25th day of May, 2007 at Eastleigh Estate Elburgon, in Molo District, jointly with others not before court, unlawfully did grievous harm to Faris Wanjala . Faris Wanjala was the appellant's four-year old son with his estranged wife, Prisca Adhiambo (PW3). The circumstances of the offence amounts to what is generally referred to as child abuse. Upon his trial in which the son, his mother, his grandfather, a clinical officer and the investigating officer testified, the appellant was convicted and sentenced to serve 10 years in prison. His first appeal to the superior court (Mugo, J) was not only dismissed but the sentence was enhanced to 20 years imprisonment.

In his first ground of appeal, the appellant challenges the manner in which the evidence of the child, Faris Wanjala was recorded, admitted and considered by both courts below. In his submissions, Mr. Githui referred us to the record of the trial Magistrate (Oseko, SPM) and pointed out that there was no examination of the child as to his level of intelligence and understanding of an oath before he was allowed to testify. All the record shows is the result

of some examination of the minor which showed that he was intelligent. Nothing was said about his understanding of the nature of an oath or the duty of speaking the truth. In that event, submitted Mr. Githui, the trial was dealt a fatal blow. He also referred us to the record of the superior court where the same issue was raised but was given short shrift, the learned Judge stating:-

> "It is trite law that age alone can never form the determining factor in judging the competence of a witness."

The learned Judge was of the view that the trial Magistrate's statement that she had examined the child and found him intelligent was sufficient compliance with procedure . We think with respect, that there is merit in the appellant's complaint and we must restate the law and procedure relating to reception of evidence of children of tender years. There is nothing novel in what we are about to say as this Court has pronounced itself on the matter many times before. The starting point is section 19 of the Oaths and Statutory Declarations Act (Cap 15), Laws of Kenya which provides as follows:-

> *"19. (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 section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section."*

The construction of that section is now well grounded in many previous decisions and it is surprising that trial courts still get it wrong. We need only refer to four of them: In **Nyasani S/o Gichana UR [1958] EA 190,** the predecessor of this Court stated:-

"It is clearly the duty of the court under that section to ascertain, first whether a child tendered as a witness understands the nature of an oath, and if the finding of this question is
in the negative, to satisfy itself that the child is possessed of sufficient intelligence to justify
the reception of the evidence and understands the duty of speaking the truth."

The following year in **Kibangeny Arap Kolil v. R [1959] EA 92**, the court stated:
"In the present case, the learned trial judge, so far as appears from the record, made no such
investigation before affirming either of the two boys witnesses. Such an investigation need not be a lengthy one, but it must be made and, when made, the trial judge ought to record it. The investigation 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."

The procedure for investigation, or preliminary examination of a witness, otherwise referred

to in old French and Anglo-Norman as the “voire dire” or “voir dire” is taken in two steps as summarized in **Kinyua v. Republic [2002] 1 KLR 256:**-
“(a)The court should first ascertain whether the child understands the nature of an oath. An investigation to this effect must be done by the court immediately the child witness appears in court. The investigation need not be a long one but it has to be done and it has to be directed to the particular question whether the child understands the nature of an oath. If upon investigation it appears that the child understands the nature of the oath, then the court proceeds to swear or affirm the child and to take his or her evidence.
(b) If the child does not understand the nature of the oath, he or she is not necessarily disqualified from giving evidence . The court may still receive the evidence if it is satisfied, upon investigation, that the young person is possessed of sufficient intelligence and understands the duty of speaking the truth. This investigation must be done and when done, it must appear on record. Where the court is so satisfied then the court will proceed to record unsworn evidence from the child witness.”

Further in **John Muiruri v. R [1983] KLR 445** this Court re-emphasized, inter alia, that:-
“2. 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.
3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child’s ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.
6. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of oath. The failure to do so is fatal to the conviction.
9. The correct procedure for the court to follow is to record the examination of the child witness as to the sufficiency of her intelligence to satisfy the reception of evidence and understanding of the duty to tell the truth.”
What happened in the case before us? Faris Wanjala was the second prosecution witness and the prosecutor promptly drew the attention of the court to his age stating:
“My next witness is a 4 years (sic) old juvenile. I request the court to examine him.”

There is nothing in the record to show the manner in which the child was examined, or the questions asked of the child and his response thereto. The learned trial Magistrate simply recorded:
“I have examined the child. He is intelligent, speaks well though s h y . He is understandable and eloquent. He will testify without giving oath but through the court clerk.”

Clearly that was flagrant breach of the requirements of section 19 of the Oaths and Statutory Declarations Act and the elaborate procedure laid by this Court in the authorities cited above for compliance with the section. The child was a vital witness in the trial and the failure by the court to comply with the procedure in the reception of his evidence vitiates that evidence. The learned Senior State Counsel, Mr. Njogu, readily conceded the appeal on that issue alone,
since the learned Magistrate only tested the intelligence of the child and not his duty to tell the
truth. He, however, sought an order for retrial since the prosecution had nothing to do with the omission. In his view there was substantial evidence to sustain a conviction of the appellant and he prayed for an opportunity to mount a fresh prosecution. That view, was, of course, rejected by Mr. Githui, who argued strongly in his second ground of appeal that even if the evidence of the chid was accepted, there was no corroboration as required under *section*
124 of the Evidence Act.

As we stated earlier, we have no intention of analyzing the evidence on record and will not therefore discuss the submission by Mr. Githui whether the evidence of the child was

corroborated. We must first discuss whether, in view of the transgression of procedure evident in the trial, the appellant ought to be retried before another court. If so, any analysis of the evidence on record may well prejudice that retrial . Should we order one?
"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it;"

That was stated in **Fatehali Manji v. The Republic [1966] EA 343**. In many other decisions of this Court it has been held that although some factors may be considered, such as illegalities or defects in the original trial; the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence, a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for retrial should only be made where the interests of justice require it. See **Muiruri v. Republic [2003] KLR 552, Mwangi v. Republic [1983] KLR 522, and Bernard Lolimo Ekimat v. Republic,** Criminal Appeal No. 151 of 2004 (UR).

The prosecution had nothing to do with the omissions made in this trial. On the contrary it was the prosecutor who drew the attention of the court to the required procedure but the trial court was entirely to blame for what followed. The allegations made against the appellant are extremely serious and of public interest as they relate to child abuse, a phenomenon now topical on the world stage, and in this country, due to its prevalence. It is in the interests of justice that the appellant receives a fair trial and if he is to be acquitted or convicted, then it ought to be seen that it was, in either case, in accordance with the law . We are inclined in all the circumstances of this case to order a retrial.

In the result we allow the appeal and set aside the conviction of the appellant and the sentence imposed on him. The appellant shall be retried before a court of competent jurisdiction other than J. Oseko, SPM. As the appellant has been in custody for over two years, we direct that the retrial be conducted expeditiously and to this end, the appellant shall be produced before the Chief magistrate, Nakuru within seven (7) days of this order, for appropriate directions.

Those shall be our orders.

Dated and delivered at Nakuru this 2nd day of October, 2009.

P.K. TUNOI
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JUDGE OF APPEAL
P.N. WAKI
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JUDGE OF APPEAL
ALNASHIR VISRAM
,…….
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR