IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Gachuhi Masime & Gicheru, JJ.A.)

CRIMINAL APPEAL NO. 61 OF 1992 BETWEEN

JOHN KIKUVI..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Mr. Justice Hancox C.J.) dated 17th December, 1991,

in

H.C.CR.A.NO. 11 of 1991)

JUDGMENT OF THE COURT

In this second appeal, John Kikuvi, the appellant, has, in a nut-shell, complained that the offence of his having had carnal knowledge of M M, the complainant, against the order of nature contrary to section 162(a) of the Penal Code for which he was convicted and sentenced to 7½ years imprisonment together with 8 strokes of corporal punishment by the Resident Magistrate's Court at Mombasa was not proved against him beyond reasonable doubt. He had denied having committed the offence.

The complainant was a boy aged about 6 years. When presented to the trial court by the prosecution to testify, the trial magistrate made the following note:

"Court: The child before court is aged 6 years. He cannot give sworn testimony."

The magistrate then proceeded to receive the complainant's unsworn evidence. That evidence in its totality was as follows:

> "My name is M M. I saw him at Nyali. The accused came to our house. He comes, takes me and took me to a bush. In the bush he did bad things to me. He removed my trouser. I cried. He then went away with a bicycle. I came alone. I could not run. I was bleeding from my buttocks. I went and told my mother.

I went with my mother to hospital. We then went to the police station. Accused normally comes home to greet my mother." The learned trial magistrate then made the following startling observation:

"Court: As the juvenile has given unsworn statement no questions asked by the accused."

It is important to remember that a court when confronted with a child of tender years who has been called to give evidence, the presiding magistrate or judge should himself question the child to ascertain whether he or she understands the nature of an oath, and, if the presiding magistrate or judge does not allow the child to be sworn, he should record whether in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of telling the truth. See the case of Fransisio Matovu v R., (1961) E.A. 260 at page 262 letter B.

Section 19(1) of the Oaths and Statutory Declarations Act, Chapter 15 of the Laws of Kenya is, where relevant, in the following terms:

> "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.....; "

In connection with the foregoing provisions, we can do no better than set out what Briggs, V.P., said when reading the judgment of the court in Nyasani s/o Bichano V.R., (1958) E.A. 190 at page 191 letter I :-

> '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 on 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 understand the duty of speaking the truth."
>
> This is a condition precedent to the proper reception of unsworn evidence form a child, and it should appear upon the face of the record that there has been due compliance with the section.'

In the instant appeal, it is plainly obvious that the trial court did not comply with the requirements of the section aforementioned. Having not done so, we are unable to say that the complainant was possessed of sufficient intelligence to justify the reception of his unsworn evidence, and that he understood the duty of speaking the truth.

Without the complainant's evidence, what other evidence was available to sustain the appellant's conviction for the offence under section 162(a) of the Penal Code?

There was the evidence that the appellant gave a ride to the complainant on a bicycle on 22nd May, 1990 at about 2.00 p.m. in the direction of Nyali from Shauri Yako village in Mombasa. At about 3.00 p.m. the complainant came home crying with bleeding buttocks. When his mother, R W, looked at him, she saw that his rectum had come out. Medical evidence was that the complainant had sustained multiple scratches on the right leg, multiple bruises on both buttocks and multiple lacerations in the anus. This evidence did not indicate how these injuries were inflicted; and by themselves, they did not irresistibly point to the offence under section 162(a) of the Penal Code having been committed. We think that this evidence was insufficient to sustain the appellant's conviction.

The first appellate judge did not address himself to the non-compliance with section 19(1) as is mentioned above nor did he seriously consider whether the other available evidence was material, independent or unimpeachable, and that it connected the appellant with the commission of the offence for which he was convicted. Had he done so, we cannot say that he would have upheld the appellant's conviction. We consider therefore that the appellant's complaint before us is not without merit. Accordingly, we allow his appeal, quash his conviction and set aside his sentence of 7½ years imprisonment together with 8

strokes of corporal punishment. He will be set at liberty forthwith unless otherwise lawfully held in custody.

Those then are the orders of the court.

Dated and delivered at Mombasa this 30th day of July,1992.

J.M.GACHUHI

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JUDGE OF APPEAL

J.R.O.MASIME

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JUDGE OF APPEAL

J.E.GICHERU

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JUDGE OF APPEAL