REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(CORAM: BOSIRE J)

CRIMINAL APPEAL NO 42 OF 1988

BETWEEN

MICHAEL NYWELA............................ APPELLANT

AND

REPUBLIC..RESPONDENT

JUDGMENT

(From original conviction and sentence of the Second Class District Magistrate's Court at Mombasa G. K. Njuguna Esq D M II) in Criminal Case No 3361 of 1988)

March 17, 1989, **Bosire J** delivered the following Judgment.

The conviction of Michael Nywela of indecent assault on a female contrary to section 144 (1) of the Penal Code was based on sworn testimony of two school girls whose ages were under 18 years. The 1st of those girls who was the complainant was **H A** of *[particulars withhel]* Primary School. The next witness also a pupil in the same school, was **M H**.

The two witnesses had on the 26th August, 1987 gone to the show ground at Mombasa to attend a disco dance. The time they went to the disco dance was after 7 pm. The complainant testified that at about 3.30 am, presumably, on the 27th August, 1987, the appellant confronted her as she walked out of the dance hall, held her from behind, and touched her breasts and buttocks. She resisted and when the appellant persisted in the act, she started crying. It was further her testimony that her friend **M H** saw what the appellant was doing to her and quickly alerted the police who were outside the dance hall, who then came and arrested the appellant. **M H** testified as much.

In his defence the appellant admitted he held the complainant, but not by her breasts or buttocks. He stated on oath that all he did was to request the complainant to dance with her but that when she resisted he held her by the hands and insisted that she dance with him. He called two witnesses who testified in support of his case.

In this appeal the main complaint is that the trial magistrate based his judgment of conviction on improperly admitted evidence of children of tender years; also, that the evidence fell far short of that required to establish the charge the appellant faced.

Mr Mburu who prosecuted this appeal on behalf of the appellant submitted that the trial magistrate was obligated to comply with the provisions of section 19 of the Oaths and Statutory Declarations Act. That section requires of a trial court to first investigate and satisfy itself as to the intelligence of a child of tender age and whether he understands the meaning of an oath before receiving his evidence. It was Mr Mburu's view that the complainant whose age was given as 14 years was a child of tender age and so was her witness **M H**. The age of the latter was not given, but the evidence demonstrates that he could have been about the same age with the complainant. He was then in standard seven.

This court posed a question to Mr Mburu as to what age can be regarded as the upper most limit of a child of tender years. Mr Mburu was of the view that a child of tender years is one whose age is below 12 years. However, his subsequent arguments tended to suggest that, in his view the upper age limit of a child of tender years is 14years.

Mrs Momanyi, learned State Counsel, was of a different view. She submitted that the complainant could not be regarded as a child of tender years nor could the only other witness.

The law as who can be regarded as a child of tender years was succinctly stated by Windham JA in the case of *Kibangeny v R* [1959] EA 92 at p 94. The learned judge had this to say"

> 'There is no definition in the Oaths and Statutory Declaration Ordinance of the expression "child of tender years" for the purpose of section 19. But we take it to mean, in absence of special circumstances, any child of an age, or apparent age, of under 14 years; although, as was stated by Lord Goddard, CJ. In *R vs Campbell* (1) [1956] 2 All ER 272 –
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> "Whether a child is of tender years is a matter of the good sense of the court .... Where there is no statutory definition."

From that exposition of who is a child of tender years, I cannot possibly, nor did I consider it necessary, to fault the trial magistrate for thinking and considering that the two witnesses were not children of tender years to have required a *voir dire* examination before their evidence was received. Applying the test of Lord Goddard, the trial magistrate must have applied his good sense to reach the conclusion which I believe he did that the two witnesses were not children of tender years.

To my mind, the decision whether or not to conduct a *voir dire* examination rests with the trial court. The presiding judge or magistrate has first to make a general assessment of the witness tendered before him. If from his general assessment he thinks a witness is not a child of tender years, and if there are no circumstances to warn him that the witness could be a child of tender years, an appellate court, which did not have the same advantage as the trial court to see the witnesses, will be in no firm position to find that his exercise of discretion in accepting the witnesses' testimony, without a *voir dire* examination, was wrong. The other way in which a trial court may know whether or not a witness tendered is of tender age is when his age has been given. Generally however, unless there are exceptional circumstances to warn the trial court that the witness could be of tender age, the trial court might not be in a position to say a witness is a child of tender years before testifying.

In the instant case the complainant's age was given as 14 years. She cannot be said to have been a child of tender years applying the test of Windham JA in the case I cited above. Nor can she be said to have been a child of tender years if the test of Lord Goddard CJ in the case of *R v Campbell*, above was applied by the trial magistrate. The same reasoning applies to **M H**.

As for the evidence, it is quite clear from the evidence which was tendered before the trial magistrate that the appellant accosted the complainant, and, against her will held her. Two witnesses testified that he held her in such a way which suggested an indecent motive. I have carefully considered what the appellant and his witness said and to my mind the trial magistrate rightly rejected their account of the incident. In any event an act of insisting to dance with a female to my mind, constitutes an act of indecency, particularly when accompanied by acts insulting her modesty, as was the case here. Consequently it is my judgment that the appellant was properly convicted. His appeal against conviction fails and is dismissed.

As for sentence, a sentence of six months imprisonment cannot be said to have been manifestly excessive as to demand interference by this court. It was however on the high side but not too high to call for interference.

Appeal against sentence also fails and is dismissed. Orders accordingly.

Delivered this at Mombasa7th day of March, 1989,

S.E.O BOSIRE

JUDGE