REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NO. 131 OF 1986

BETWEEN

DAVID NJOGU NJUGUNA ……APPELLANT

AND

REPUBLIC……...……..…RESPONDENT

(Appeal from the Second Class District Magistrate's Court at Limuru, G Githaiga Esq)

JUDGMENT OF THE COURT

The appellant was convicted of abduction of an unmarried girl under the age of 16 years contrary to section 143 of the Penal Code and was sentenced to 2 years' imprisonment. He has appealed against the conviction and sentence.

On 21st October, 1985, J G (P.W.1) a 12 year old standard III pupil was sent by her mother (P.W.2) to go and pick other children from the home of her grandmother. On her way to grandmother's home appellant got hold of her and took her to his house where he raped her throughout the night. On the following morning he locked her in the house and left but in evening when he opened the house she escaped and at home she related the episode to her mother (P.W.2) who reported the matter to police. The appellant was arrested and charged with this offence.

The learned trial magistrate in his judgement after reviewing all the evidence adduced before him said that P.W.1 although very young girl gave very impressive evidence and that she was very young but very intelligent and cohesive and therefore convicted the appellant of the offence.

The appellant through M/S Ogutu, Wariuki & Co., Advocates, has advanced four grounds of appeal with which he seeks to impeach the findings, conviction and sentence of the trial court. At the hearing of this appeal Mr. Onyango-Ogutu appeared for the appellant while Mrs Mulei represented the State.

Mr. Onyango-Ogutu for the appellant in ground No. 1 urged this court that the learned trial magistrate misdirected himself in his examination of the complainant for purposes of finding out whether she possessed sufficient intelligence and understood the duty of speaking the truth as well as the nature of an oath.

The Court's record in respect to this examination is as follows:-

P.W.1 Child – J G

"I am 12 years of age. I am in Std. III in Manguo Primary school. I cannot tell lies. I go to church

to pray God."

Court:

"The child is intelligent and can give sworn statement."

The child was then sworn and she gave evidence as prosecution witness No. 1. It appears to me that the learned trial magistrate omitted to ascertain and satisfy himself that the child J G understood the nature of an oath before allowing her to give evidence. In this regard the most relevant authority is the case of *Kibangeny arap Kolil v R* EA 92 CA in which the Court of appeal considered at length section 19(i) of the Oaths and Statutory Declarations Act as amended by Oaths and Declarations (Amendment) Act 1954 and held:

> "The investigation 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."

In the case of *Oloo S/o Gai v R* [1960] EA 86 which was relied upon by the State the trial judge had recorded finding after his examination as follows:

> "Ambingu d/o Ambet, appears to be about twelve years of age. Goes to school. Appears to be intelligent and understands proceedings. Satisfied knows the truth from falsehood. States a Catholic and goes to the Catholic Church."

Although the trial judge had not made any findings as to whether the child understood the nature of an oath the Court of Appeal held that because the judge had found that the child had "sound religious belief in the Roman Catholic faith was fit to be sworn" confirmed that the judge had satisfied himself that the child understood the nature of an oath but stated that:

> "While the passages cited do not contain specific reference to the understanding of an oath, and it would undoubtedly have been preferable for the learned judge to have recorded in terms that he had satisfied himself that the witness understood the nature of an oath..."

Applying the principles enunciated in the above two cases it appears to me from the record of the proceedings that the learned trial magistrate in the instant case did not satisfy himself that J G understood the nature of an oath before accepting her evidence on oath. The statement that she goes to church to pray God did not in any way inform the magistrate that the witness understood the nature of the oath as stipulated by the Oaths and Statutory Declarations Act. The court swore the child without satisfying itself that she knew the importance of an oath. Since the only evidence inculpating the appellant is that of this child, the trial magistrate's failure to comply with the requirements of section 19(i) of the said Act occasioned miscarriage of justice and on this ground the appeal is allowed.

As pointed out by Mr. Anyango-Ogutu there was also another serious irregularity in this case. The learned trial magistrate in his judgement said:-

> "The accused raised the defence of an alibi. Actually the accused called no witness. This leaves his evidence without any corroboration in material."

From this it appears that the learned trial magistrate shifted the burden of proof of the case from prosecution to the defence. This is a serious misdirection on the part of the magistrate which would render quashing of conviction of the appellant.

For these reasons I allow this appeal and quash the conviction and set aside the sentence and order that the appellant be set free unless he is lawfully held.

Dated and delivered at Nairobi this 12th day of March , 1987

B.K TANUI

JUDGE