



**Karimi v Republic (Criminal Appeal 16 of 2014)
[2016] KECA 812 (KLR) (3 February 2016) (Judgment)**

Samuel Warui Karimi v Republic [2016] eKLR

Neutral citation: [2016] KECA 812 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 16 OF 2014
RN NAMBUYE, MK KOOME & PO KIAGE, JJA**

FEBRUARY 3, 2016

BETWEEN

SAMUEL WARUI KARIMI APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Kerugoya
(Olao, J.) dated 22nd October, 2013 in H.C.CR NO. 162 OF 2012)*

Definition of ‘a Child of Tender years’ under the Children Act is a guide to Criminal Responsibility and not a Test of Competency to Give Evidence in Criminal Proceedings

The main issue before the court was whether there was a difference in the definition of a child of tender years under the Evidence Act and the Oaths and Statutory Declarations Act on one part, and the Children Act on the other. The court held that the term ‘child of tender years’ as used in the Evidence Act and the Oaths and Statutory Declarations Act was for purposes of subjecting a witness of tender age to voire dire examination. Thus, the test was one of competency as the court was supposed to consider whether the child witness was developmentally competent to comprehend the questions put to him or her and to offer reliable testimony in criminal proceedings. On the other hand, the definition of a child of tender years under the Children Act was perhaps informed by the broad interests of protecting children from criminal responsibility and not as a test of competency to give evidence in criminal proceedings. There was no reason to import it in the absence of express statutory direction given the different contexts of the statutes.

Reported by Phoebe Ida Ayaya & Moses Rotich

Evidence law – evidence of a child of tender years – meaning of child of tender years – whether the definition of a child of tender years under the Children Act was a guide to criminal responsibility and not a test of competency in giving of evidence – whether the age limit of a child of tender years was an issue and required clarification because of the varying judicial precedents - Oaths and Statutory Declarations Act (cap 15) section 19; Children Act, section 2.



Evidence law – evidence of a child of tender years – meaning of child of tender age – procedure in receiving the evidence of a child – duty of a trial court to carry out a *voire dire* examination of a child before receiving the child's evidence – whether the failure by the trial court to conduct *voire dire* examination on the complainant a child aged 12 years affected the credibility of her evidence – Oaths and Statutory Declarations Act (cap 15) section 19; Children Act, section 2.

Criminal law – sentencing – appeal against sentencing – circumstances in which an appellate court would interfere with a sentence – whether the appellant's mitigation that he was a first offender and the sentence meted on him was harsh and disproportionate was valid – whether the appeal had merit.

Brief facts

The appellant was arraigned before the trial court and charged with attempted defilement contrary to section 9(1)(2) of the Sexual Offences Act. The particulars of the charge stated that the appellant attempted to defile LN, a child aged 12 years (the complainant). The appellant was also charged with an alternative count of indecent assault of a child contrary to section 11 of the Sexual Offences Act No 3 of 2008, but he was convicted and sentenced on the main count.

The prosecution relied on the evidence of 7 witnesses; 3 eyewitnesses, and 4 other formal witnesses. Upon being found to have a case to answer, the appellant was put on his defence. He gave unsworn statement of defence and did not call any witnesses. The trial court considered the defence evidence but found it lacking in substance in view of the prosecution's evidence that was not at all shaken by the defence. Upon his conviction on the main count of attempted defilement, the appellant was sentenced to 15 years imprisonment.

The appellant's appeal before the High Court was unsuccessful, he then filed a second appeal. The appellant challenged the sentence of 15 years and pleaded for leniency as he contended he was a first offender. The appellant reiterated his mitigation for a lesser sentence.

Issues

- i. Whether the definition of a child of tender years under the Children Act was a guide to criminal responsibility and not a test of competency in the giving of evidence.
- ii. Whether the failure by the trial magistrate to conduct *voire dire* (test of competency) examination on the complainant, a child aged 12 years, affected the credibility of her evidence.
- iii. Whether the age limit of a child of tender years was an issue and required clarification because of the different precedents set and the silent provisions in the Children Act and Oaths and Statutory Declarations Act.
- iv. Whether the appellant's mitigation that he was a first offender and the sentence meted on him was harsh and disproportionate, would have a bearing on his second appeal.

Relevant provisions of the Law

Evidence Act, section 125

All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause)

Oaths and Statutory Declaration Act, section 19

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 is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.



Held

1. A second appeal was to be confined to points of law and the court would not interfere with concurrent findings of fact arrived at in the two courts below unless they were based on no evidence. The test to be applied on second appeal was whether there was any evidence on which the trial court could find as it did.
2. The court had considered the appeal with tremendous anxiety for the simple reason that there was overwhelming evidence against the appellant as demonstrated in the record of appeal by the prosecution witnesses. The appellants' sole ground of appeal was on the sentence of 15 years that was based on the provisions of section 9 (1) of the Sexual Offences Act. The minimum sentence prescribed under that section was 10 years.
3. A point of law that the appellate court raised was about was the credibility of the evidence by the complainant, a child of 12 years whose competency to give evidence was not tested by the trial magistrate through *voire dire* examination.
4. Subjecting a witness of tender age to *voire dire* examination was founded under section 125 (1) of the Evidence Act and section 19 (1) of the Oaths and Statutory Declarations Act which had something to do with receiving evidence of a child.
5. Both statutes were silent on the definition of who was a child of tender years. The above provisions of the law *voire dire* was an examination that served two purposes; one, it was a test of the competency of the witness to give evidence and two, a means of testing whether the witness understood the solemnity of taking an oath. Thus under the Evidence Act, the test was one of competency as the court was supposed to consider whether the child witness was developmentally competent to comprehend the questions put to him or her and to offer reliable testimony in criminal proceedings. It, therefore, followed if the child was not competent to comprehend the evidence, they could not give sworn evidence.
6. Definition of a child of tender years was an issue that required clarification because the courts had made various conclusions. Section 2 of the Children Act defined a child of tender years to mean a child under the age of 10 years. There was no other statutory definition of a child of tender years other than the Children Act that was perhaps informed by the broad interests of protecting children from criminal responsibility and not as a test of competency to give evidence in criminal proceedings. Court decisions regarding the competency of evidence by children of tender years had maintained a higher threshold of 14 years and not 10 years as witnesses of tender years whose evidence must be subjected to *voire dire* examination.
7. The requirement by the provisions of the Evidence Act and the Oaths and Statutory Declarations Act of *voire dire* examination of a witness of tender years in a criminal trial was meant to guarantee an accused person a fair trial. A fair trial was guaranteed by the Constitution. The definition of a child of tender years under the Children Act could not globally be imported for offences under the criminal law. This was because children developed and matured differently depending on their social economic and other factors such that, some children of 11, 12 or 13 years could be very sharp and intelligent witnesses whereas others in the same age bracket may not at all comprehend what a court of law was.
8. Courts had held on the age at 14 years and sometimes even a higher age as the age below which a child was of tender years for purposes of criminal trials and insisted the competency be tested through questions that were to be put to the child and answers given by the child be recorded verbatim. The definition of a child of tender years provided under the Children Act had remained a guide in regard to criminal responsibility.
9. The approach resonated with the need to preserve the integrity of the *viva voce* evidence of young children, especially in criminal proceedings. It implicated the right to a fair trial and could always be followed. The age of 14 years remained a reasonable indicative age for purposes of section 19 of the Oaths and Statutory Declarations Act. Section 2 of the Children Act defined a child of tender years



- to be one under the age of ten years. The definition had not been applied to the Oaths and Statutory Declaration Act. There was no reason to import it in the absence of express statutory direction given the different contexts of the two statutes.
10. The purpose of undertaking *voire dire* examination in a criminal trial was to protect the guaranteed right of a fair trial. Where the witness as in the instant case was aged 12 years and that essential step was not taken in a criminal trial, that trial became problematic. The evidence by the complainant was not properly received thus, the conviction of the appellant became unsafe to sustain, as she was the complainant and not any other witness.
 11. The appellant was a first offender; the minimum sentence provided for the offence was 10 years although he was sentenced to 15 years. The appellant had served about 5 years out of the said sentence and a retrial could be prejudicial to him and could not serve the interest of justice.

Appeal allowed.

Orders

- (i) Conviction against the appellant was quashed;
- (ii) The sentence of 15 years was set aside;
- (iii) Appellant was set free.

Citations

Cases

Kenya

1. *Abdirahman, Gamaldene Abdi & another v Republic* Criminal Appeal 40 of 2013; [2013] KEHC 463 (KLR) - (Explained)
2. *JGK v Republic* Criminal Appeal 176 of 2012; [2015] eKLR - (Explained)
3. *Kaingo v Republic* [1982] KLR 213 - (Mentioned)
4. *Kathurima, Patrick v Republic* Criminal Appeal 131 of 2014; [2015] KECA 539 (KLR) - (Explained)
5. *MK v Republic* Criminal Appeal 15 of 2015; [2015] eKLR - (Explained)
6. *Chemangong v Republic* [1984] KLR 611 - (Mentioned)

Regional Court

Kibangeny Arap Korir v Republic [1959] EA 92 - (Explained)

Statutes

Kenya

1. Children Act, 2001 (Act No 8 of 2001) section 2 - (Interpreted)
2. Constitution of Kenya, 2010 in general - (Interpreted)
3. Evidence Act (cap 80) section 125(1) - (Interpreted)
4. Oaths And Statutory Declarations Act (cap 15) section 19(1) - (Interpreted)
5. Sexual Offences Act, 2006 (cap 63A) sections 9(1)(2); 11 - (Interpreted)

Advocates

None mentioned

JUDGMENT

1. On the night of July 28, 2011, LN a girl child aged 12 years was sleeping alone in a rented room within Kirinyaga County. LN was at the material time under the care of IN, (PW5), who told the trial magistrate that LN was his niece, and he had enrolled her in a nearby nursery school and rented for her a room where she was sleeping alone. While LN was sleeping, in the said room, she was awoken



- by a sudden bang on the door, a person she recognized by the name Samuel Warui Karimi (appellant) entered the room armed with a panga. The said intruder ordered LN to sit down and not to scream as he threatened to kill her and told her that he had come to collect her head. The intruder removed his clothes and tore LN's skirt, petticoat and pants. He had a torch which remained on as he attempted to have sexual intercourse with her. The light from the torch assisted LN to recognize the intruder whom she had been seeing in the vicinity and she knew him as Samuel Warui Karimi. The intruder was trying to lie on LN but she screamed and one M, (PW2), responded in the company of another neighbour called W, (PW3).
2. M had heard LN crying and also a voice of a man threatening to kill her. M quickly called his neighbour W and they went to rescue LN. On opening the door, they found the intruder naked, struggling to defile LN. When the intruder heard people, he quickly abandoned his mission and armed himself with a panga. Other neighbours quickly responded, and with their help they disarmed the intruder and took him to Kangai AP Camp where the incident was reported and later at Sagana Police Station.
 3. At Kangai AP Camp, CPL Boniface Ileri, (PW4), rearrested the intruder who was under escort of members of public on allegations that he was caught while attempting to defile LN. PW4 escorted him to Sagana Police Station where he was received by PC Philip Kigen, (PW5). He escorted LN to Murang'a hospital for medical examination and age assessment. PW4 took possession of the complainant's clothes that the intruder tore; he visited the scene of crime and recorded statements from the witnesses. The intruder was identified as Samuel Warui Karimi, (appellant), by the complainant, JM and SW, who found him struggling to defile the complainant.
 4. The appellant was arraigned before the Senior Principal Magistrate's Court at Baricho with the charge of attempted defilement contrary to section 9(1)(2) of the [Sexual Offences Act](#). The particulars of the charge stated that on the night of the 28th day, of July, 2011, in Kririnyaga South District of Central Province, the appellant attempted to defile LN a child aged 12 years. The appellant was also charged with an alternative count of indecent assault of a child contrary to section 11 of the [Sexual Offences Act](#) No 3 of 2008, but he was convicted and sentenced for the 1st count.
 5. The prosecution relied on the evidence of 7 witnesses; 3 eye witnesses, and 4 other formal witnesses. Upon being found to have a case to answer, the appellant was put on his defence. He gave unsworn statement of defence and did not call any witnesses. The defence evidence was considered by the trial court but the learned trial magistrate found it lacking in substance in view of the prosecution's evidence that was not at all shaken by the defence. Upon his conviction on the main count of attempted defilement, the appellant was sentenced to 15 years imprisonment. The appellant's appeal before the High Court was unsuccessful, hence this second appeal.
 6. By his home grown memorandum of appeal, the appellant challenged the sentence of 15 years and pleaded for leniency as he contends he was a first offender. The appellant reiterated his mitigation for a lesser sentence in his written submission.
 7. On the part of the state, Mr Kaigai, the learned Assistant Director of Public Prosecution, opposed the appeal. He submitted that there was sufficient evidence by three prosecution witnesses who caught the appellant in the act. Although the complainant did not give sworn evidence at first, she was subsequently recalled and gave evidence under cross examination by the appellant. Counsel for the state readily conceded that an essential step in taking evidence from a child witness was not followed in this matter as the complainant was not subjected to *voire dire* examination; he, however, stated that should the court find failure to subject the child victim to *voire dire* examination vitiated the trial of the appellant, the matter should be referred to the trial court for retrial in the interest of justice as there was overwhelming evidence against the appellant.



8. This is a second appeal and this court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See *Chemangong v R*, [1984] KLR 611. In *Kaingo v R*, (1982) KLR 213 at p 219, this court said:-

“A second appeal must be confined to points of law and this court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (*Reuben Karari C/O Karanja v R*, (1956) 17 EACA 146)”.

9. We have considered this appeal with tremendous anxiety for the simple reason that there was overwhelming evidence against the appellant as demonstrated in the record of appeal by the prosecution witnesses as summarized above. The appellants’ sole ground of appeal is on sentence of 15 years which was based on the provisions of section 9(1) of the *Sexual Offences Act*. It is important to also mention the minimum sentence prescribed under that section is 10 years. In view of appellant’s mitigation that he was a first offender he contended the sentence meted on him was harsh and disproportionate.
10. Another point of law which was not raised by the appellant (perhaps because he was not represented by counsel) was the credibility of the evidence by the complainant, a child of 12 years whose competency to give evidence was not tested by the trial magistrate through *voire dire* examination. The first time the complainant testified was on September 13, 2011. She was recalled again on September 26, 2011, when she was cross examined by the appellant. The complainant was not subjected to *voire dire* examination, an aspect that seems to have eluded both courts below. Samuel Warui Karimi Nonetheless, as it is apparent to us; we have to address it as a point of law in the instant appeal. Subjecting a witness of tender age to *voire dire* examination is founded under section 125(1) of the *Evidence Act*, which states:-

“All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause”.

11. Also section 19(1) of the *Oaths and Statutory Declarations Act* has something to do with receiving evidence of a child in the following:

“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 is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth”.

12. Both statutes are silent on the definition of who is a child of tender years. In our own understanding of the above provisions of the law *voire dire* is an examination that serves two purposes; one, it is a test of the competency of the witness to give evidence and two, a means of testing whether the witness understands the solemnity of taking an oath. Thus under the *Evidence Act*, the test is one of competency as the court is supposed to consider whether the child witness is developmentally competent to comprehend the questions put to him or her and to offer reliable testimony in criminal



proceedings. It, therefore, follows if the child is not competent to comprehend the evidence, they cannot also give sworn evidence.

13. Who is a child of tender years is an issue we think requires clarification because the courts have made various conclusions. Section 2 of the *Children's Act* defines a child of tender years to mean "a child under the age of 10 years". We have not come across any other statutory definition of a child of tender years other than the above which in our view was perhaps informed by the broad interests of protecting children from criminal responsibility and not as a test of competency to give evidence in criminal proceedings. Court decisions regarding the competency of evidence by children of tender years have maintained a higher threshold of 14 years and not 10 years as witnesses of tender years whose evidence must be subjected to *voire dire* examination.
14. In the leading case of; *Kibangeny Arap Korir v Republic*, [1959] EA 92; the Court of Appeal for Eastern Africa while dealing with a determination of the issue, held that tender years means a child under the age of 14 years. In a more recent decision of the Court of Appeal sitting in Malindi in the case of; *MK v Republic* [2015] eKLR; the court termed as "unnecessary" *voire dire* examination conducted on a child aged 15 years by the trial court. It was held that *voire dire* examination is done where a witness is a child of tender years. This postulation of the law on *voire dire* is not reflected across the board by all courts as our research has led us to numerous decisions of the High Court where the interpretation of "a child of tender years" is different. For example, in the case of; *JGK v Republic* [2015] eKLR; the trial court had received evidence of a girl aged 17 years without conducting *voire dire* examination. On Appeal, the High Court at Nyeri (differently constituted) disagreed with the trial magistrate and held:-

"So long as the witness was below 18 years as in the present case, she was a child and a *voire dire* examination was necessary".
15. In the above case it was apparent the court did not distinguish the difference between two definitions of a "child" and a "child of tender years". There is distinct and fundamental difference between the two definitions. In yet another case of; *Gamaldene Abdi Abdiraham & another v Republic*, [2013] eKLR, the High Court in Garissa set aside a conviction and sentence of the appellant on account of failure on the part of the trial magistrate to conduct *voire dire* examination of the complainant who was aged 13 years at the time she gave evidence.
16. Which definition should guide the courts in determining who is a child of tender years, is it the *Children Act*, or the precedents set by the Court of Appeal? The requirement by the aforementioned provisions of the *Evidence Act* and the *Oaths and Statutory Declarations Act* of *voire dire* examination of a witness of tender years in a criminal trial is meant to guarantee an accused person a fair trial. A fair trial is guaranteed by the *Constitution*. We have done the aforementioned review of the law and decided cases in an attempt to ascertain in this case whether failure by the trial magistrate to conduct *voire dire* examination on the complainant a child aged 12 years affected the credibility of her evidence. We are persuaded the definition of a child of tender years under the *Children Act* cannot globally be imported for offences under the criminal law Samuel Warui Karimi This is because children develop and mature differently depending on their social economic and other factors such that, some children of 11, 12 or 13 years can be very sharp and intelligent witnesses whereas others in the same age bracket may not at all comprehend what is a court of law Samuel Warui Karimi This explains why the courts have held on the age at 14 years and sometimes even a higher age as the age below which a child is of tender years for purposes of criminal trials and insisted the competency be tested through questions that must be put to the child and answers given by the child be recorded verbatim. The definition of a child of tender years provided under the *Children's Act* has remained a guide in regard to criminal responsibility.



17. In a recent decision of the Court of Appeal sitting in Nyeri the case of; Patrick Katburima v Republic, [2015] eKLR; it was held:

“We take the view that this approach resonates with the need to preserve the integrity of the *viva voce* evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of section 19 of cap 15. We are aware that section 2 of the Children’s Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declaration Act, cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes”.

18. The above decision supported the definition of a child of tender years to be 14 years and below and contextualized that definition within the Oaths and Statutory Act and under the Children’s Act. On our part, we have no good reason to depart from this well-trodden path, as we are in agreement the purpose of undertaking *voire dire* examination in a criminal trial is to protect the guaranteed right of a fair trial. Where the witness as in this case was aged 12 years and that essential step was not taken in a criminal trial, that trial becomes problematic. In the circumstances we find the evidence by the complainant was not properly received thus, the conviction of the appellant becomes unsafe to sustain as she was the complainant and not any other witness.

19. Mr Kaigai had implored us to order a retrial in view of the overwhelming evidence against the appellant. We take note of the fact that the appellant was a first offender; the minimum sentence provided for the offence is 10 years although he was sentenced to 15 years. The appellant has served about 5 years out of the said sentence and in our view; a retrial may be prejudicial to him and may not serve the interest of justice.

20. In the upshot, we find the appeal has merit and it is hereby allowed. The conviction against the appellant is quashed, and the sentence of 15 years is set aside and unless the appellant is otherwise lawfully held he is to be set at liberty forthwith.

DATED AND DELIVERED AT NYERI THIS 3RD DAY OF FEBRUARY, 2016.

R. N. NAMBUYE

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

