



IN THE COURT OF APPEAL

AT NYERI

CORAM: WAKI, KIAGE & KANTAI, JJA)

CRIMINAL APPEAL NO. 14 OF 2015

BETWEEN

ELPHAS MUGO..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at

Embu (Muchemi, J.) dated 3rd December, 2014).

in

(H. C. CR. A. No. 25 of 2013)

JUDGMENT OF THE COURT

Learned Assistant Director of Public Prosecutions, **Mr. Kaigai** concedes this appeal on account of violation of the fair trial rights of the appellant, and, in our view, he was right to do so.

The appellant was tried and convicted by Runyenjes Ag. Resident Magistrate, **J. P. Nandi** for the offence of defilement contrary to **Section 8(1)** of the **Sexual Offences Act** in that he intentionally and unlawfully caused his penis to penetrate the anus of **V.K**, a minor aged 11 to 12 years. The facts accepted as proof of that offence came from the minor himself, **PW1**, and two other minors: **PW2**, a standard six school leaver who said he was aged 15, and **PW3**, a standard two pupil who said he was aged 14. The three, together with the appellant, aged 17 years according to a medical report on record, and two other minors, were on 5th February 2013 placed in custody in the same juvenile cell in Runyenjes Police Station. According to **V.K**, who was supported by **PW2** and **PW3**, they were sleeping at 8.30 pm when the appellant and the other two minors poured water on their blanket and they woke up. The appellant then told the other two minors to hold **V.K** and remove his clothes. They did so and the appellant inserted his penis into **V.K's** anus sodomizing him several times. **PW2** also said the appellant had sodomized him on another day before **V.K** joined them in the cell, while **PW3** said he had resisted a rape attempt by the appellant the same evening.

In the morning, before **V.K** was taken out by officers to draw water for cleaning the cells, he was

threatened and warned by the appellant not to return to the cells and that is why, according to him, he made an attempt to escape from the police station. He was not lucky as he was soon pursued and rearrested. Two days later, on 7th February, he complained that he had been sodomized and he was taken to a clinical officer, **PW5**, who confirmed that he had some bruises, which were healing, in the anal opening caused by a 'blunt weapon', but PW5 was unable to determine the age of the bruises.

The appellant denied committing the offence and contended that he was merely framed because the complainant escaped from custody. He applied to call the other two minor inmates as witnesses, and witness summonses were issued, but the police did not avail them since, according to them, the minors had been released from police custody.

For some reason, which is not on record, the trial Magistrate stated that the appellant was aged 18 years and sentenced him to serve 20 years upon conviction. His first appeal to the High Court (**Muchemi J.**), on the conviction and sentence was dismissed, hence this second appeal.

The issues raised by the appellant who was not represented before all three courts, related to proof of the age of the complainant; failure to avail his witnesses and thus compromising his defence; rejection of his defence without sufficient reasons; and reliance on insufficient evidence which did not prove the case beyond reasonable doubt. Needless to say, this Court on a second appeal, may only consider and decide issues of law as provided in **Section 361** of the **Criminal Procedure Code**. Our focus was, however, drawn to the glaring omission by the trial court to determine whether the three minor prosecution witnesses were children of tender years and if so, proceed to test their capacity to give evidence on oath or otherwise, or put another way, failure to conduct the *voir dire* in respect of those witnesses. Our attention was also drawn to the failure to ascertain the age of the appellant as at the time the alleged offence was committed, for sentencing purposes, considering that he was held in lawful custody with other minors when the offence was allegedly committed. The High Court made no mention of those omissions but they are issues of law that go to the fair trial rights of the appellant, and we shall proceed to examine them.

It is common ground that PW1, PW2 and PW3 were children under the age of 18 as defined in the Children Act. It was incumbent on the trial court to enquire whether any of them was a child of tender years. As *Lord Goddard C. J.* in his famous dictum in **the case of R v Campbell [1956] 2 All to E.R. p. 272** stated:-

“Whether a child is of tender years is a matter of the good sense of the Court...”

and in **Kibangeny Arap Kolil v R [1959] EA 92** the predecessor of this Court held that there is no definition in the Oaths and Statutory Declarations Act of the expression 'child of tender years' for the purposes of Section 19 but in the absence of special circumstances, it took it to mean any child of any age, or apparent age, of under fourteen years. We are aware that the **Children Act** which came into effect in 2006 has, in **Section 2**, defined “**child of tender years**” as a “**child under the age of ten years.**” But this does not take away the discretion of the court to use its good sense to enquire into the capacity of the child to testify. Such procedure affords an opportunity to both the trial court and the appellate court(s) to form an opinion on the minor's intelligence, ability to understand the nature of the oath and the obligation to speak the truth to avoid a miscarriage of justice. In a recent decision, **Patrick Kathurima Vs. Republic, Meru Criminal Appeal No. 131 of 2014 (UR)**, this Court had occasion to consider the same issue and stated as follows:-

“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 Act defines a child of tender years to be one under the age of ten years. That definition is preceded by the words “In this Act, unless the context otherwise requires...” That 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.”

In earlier decisions, for example, *John Wambua Mutunga v Republic [2005] eKLR*, this court stated:-

“The basic statutory provision relating to the evidence of children of tender years is to be found in section 19(1) of the Oaths and Statutory Declaration Act Cap 15 Laws of Kenya, which says:-

“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 as aforesaid, 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 as aforesaid, 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 in writing in accordance with the provisions of section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section.”.....

“There are two steps to be borne in mind. The first step is for the court to 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 has to be directed to the particular question whether the child understands the nature of an oath. If the answer to this question is in the affirmative, then, the court proceeds to swear or affirm the child and to take his or her evidence upon oath. On the other hand, if the child – witness does not understand the nature of an oath, he or she is not necessarily disqualified from giving evidence. The second step then follows. The court may still receive his evidence if the court is satisfied, upon investigation, that he is possessed of sufficient intelligence and understands the duty of speaking the truth. Again investigation in this respect need not be a long one but it must be done and when done, it must appear on record. Some basic but elementary questions may be asked of the child to assess the level of his intelligence and whether he understands the duty of speaking the truth or otherwise. Where the court is so satisfied, then, the court will proceed to record unsworn evidence from the child – witness”

See also *Kinyua v. R [2004] 1 KLR 256 at p. 265.*

In the present case, **V.K** was about 11 years old and PW3 was a standard two pupil although he said he was aged 14! The trial court made no attempt to form an opinion on whether they were children of tender years, but the **Kolil case** (supra) covers them. The evidence recorded from the two minors was not preceded by the two steps above which must obtain when a child of tender years first appears in court. Properly recorded, the evidence of **V.K** alone, if believed, could form the basis of a conviction under the proviso to **Section 124** of the **Evidence Act**. But it was not so recorded, and the procedure followed was simply contrary to the law and practice. We find and hold that it was prejudicial to the fair trial rights of the appellant.

The third minor, PW2, was aged 15 at the time of the trial and it may not have been necessary to conduct the *voire dire* for him. Not unless the trial court in its good sense so determined. But his evidence was meant to corroborate the evidence of **V.K** which was not properly on record. PW2’s evidence thus hung in the air, as it were. No other evidence implicated the appellant in the commission of the offence and it remains unproved beyond reasonable doubt. It was also against the appellant’s fair trial rights to treat casually his application to call in his defence, two witnesses who had been in police custody with him, but were reportedly released. No attempt was made by the police to serve the witness summonses issued by the court.

The effect of these procedural errors is that the appellant's trial was vitiated and was a mistrial. As they were not errors of the prosecution's making but the trial court's, and considering the relative shortness of the time that has lapsed since the offence, a serious one at that, is alleged to have been committed, we think that this is a case where the interests of justice will best be served by a retrial.

Accordingly, the appellant shall be presented before the subordinate court at Runyenjes with a view to a retrial before any competent Magistrate save J. P. Nandi.

Orders accordingly.

Dated and delivered at Nyeri this 2nd day of March, 2016

P. N. WAKI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. KANTAI

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JUDGE OF APPEAL

I certify that this is a true
copy of the original

DEPUTY REGISTRAR