IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GITHINJI, MAKHANDIA & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 484 OF 2010

BETWEEN

KABWERE CHIKO KABWERE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from a conviction, Judgement of the High Court of Kenya at Malindi (Omondi J.) dated 16th Nov. 2010

in

H.C.Cr.A. No. 128 of 2008)

****

JUDGMENT OF THE COURT

This is an appeal from the Judgement of the High Court ***(Omondi J)*** dismissing the appellant's appeal against conviction and sentence for the offence of defilement contrary to **section 8(1) 2** of the sexual offences Act.

The particulars of the charge stated that on 14th March 2008 the appellant unlawfully defiled ***E C L*** a girl aged 9 years old child.

Before receiving the evidence of the child the Senior Resident Magistrate made a record of the examination of the child thus:

> " ***Voire Dire examination***
>
> ***I am aged 9 years. I go to [Particulars Withheld] in standard 3. I understand the importance of speaking the truth.***
>
> ***Court***
>
> ***Order***

To give unsworn statement

(Kiswahili) ***"***

Thereafter the complainant gave unsworn evidence. She stated in essence that on the morning of 14th March 2008 she went to look for palm leaves when ***Kabwere*** whom she identified as the appellant called her to the road side; held hand; laid her down, removed her underpants and defiled her and that when the appellant saw her uncle called ***S T*** he ran away.

S T (Pw2), (***Tsuma***) testified that on 14th March, 2009 when he was leaving his shamba at 7.30 a.m he saw the appellant defiling the complainant and when he went near him the appellant buttoned up his pair of trousers which he had lowered and ran away and that he took the complainant who was crying to her parents.

Kabwere Mongo (Pw3), who is a village elder, testified that the appellant was brought to him by members of public on 14th March 2008 at 9.00 am with an allegation that he had defiled a young girl. The Assistant Chief ***Kauma Tandia Malo (Pw4),*** testified that after the village elder reported to him he went to where the appellant was and found him surrounded by members of public who hit him on the head, thereby injuring him.

On his part, and in his own defence, the appellant testified at the trial that on 14th March 2003 as he was going home from his sister's house he met two people at [Particulars Withheld] school who took him to a house and caused him to be tied and taken to the village elder. He denied defiling the child or seeing ***Tsuma*** on that day.

The trial Magistrate made a finding that the appellant had committed an act which caused penetration, that the appellant was well known and that his defence was a sham. Accordingly, the trial court convicted the appellant and sentenced him to the imprisonment. Aggrieved by the conviction and sentenced, the appellant mounted an appeal to the High Court.

The High Court considered two of the substantive complaints by the appellant. The first was that he was not allowed to cross-examine the child and the second was that the charge was fabricated. On the first complaint, the High Court made a finding that although the trial magistrate carried out a minimal inquiry from the child before receiving her evidence and although the child was not cross-examined, her evidence was corroborated by the evidence of ***T*** who found the appellant in a compromising position with the complainant.

On the complaint that the charge was fabricated the High Court after re-evaluating the evidence made a finding that the evidence that the child was defiled was consistent and well corroborated. On the basis of the foregoing, the High Court dismissed the appeal. The appellant was still dissatisfied, hence this second appeal.

There are two main grounds of appeal, the first is in essence that **section 19(1)** of the Oath and Statutory Declarations Act ((Act) was contravened by not adopting the proper ***voire dire*** examination of the child prior to receiving her evidence. The second substantive ground is that the evidence adduced by prosecution was insufficient and untruthful.

The appellant relied entirely on his written submissions.

On his part ***Mr. Musyoka,*** the learned Senior Prosecution Counsel conceded the appeal on the ground that the trial Magistrate did not make a finding that the child understood the meaning of the Oath or the duty of telling the truth. He submitted that the omissions resulted in a mistrial and asked for a re-trial.

By section **19(1)** of Oaths and Statutory Declarations Act,

"Where.,

any child of tender years called as a witness does not, in the opinion of the court,

understand the nature of oath, his evidence may be received, though not given on oath, if in the opinion of the court,....., he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.."

In **KINYUA VS REPUBLIC [2002] 1 KLR 256** this Court exhaustively examined the procedure to be followed before the reception of the evidence of a child of tender years and set out useful guidelines. It is not necessary to repeat what the Court said. Suffice to say that the duty of the court under Section 19(1) aforesaid is to ascertain, first, whether the child tendered as a witness understand the nature of the oath and if so satisfied, to receive the evidence of the child on oath and, if not, to satisfy itself both that the child is sufficiently intelligent and understands the duty of speaking the truth, and if so satisfied, it will receive unsworn evidence of the child. Thus, before the court can receive the unsworn evidence of a child it should test the capacity of the child to give rational evidence and also to understand the difference between truth and falsehood.

As the predecessor of this Court said in **NYASANI BICHANA VS REPUBLIC [1958] EA 190,** At P. 191, this is a condition precedent to the proper reception of unsworn evidence from a child and it should appear on the record that there has been due compliance with the section.

In the ***Nyasani's*** case, a child aged about six years was allowed to give unsworn evidence without the trial Judge making an inquiry but merely noting that the child had promised to tell the truth. The predecessor of this Court said:at page 191 paragraph I-P 192 paragraph A:

"In the instant case we did not consider it necessary to call for a full report from the learned Judge as to whether or not there had in fact been compliance with the requirements of S. 19, since we were of the opinion that there was ample evidence of commission of the offence apart form the evidence given by the complainant herself. We do, however emphasize the necessity for strict compliance with the provisions of the section.

Non compliance might well result in the quashing of a conviction in a case where the other evidence before the court was insufficient in itself to sustain a conviction."

In **GABRIEL S/O MAHOLI V R [1960] EA 159 ,** a Tanzanian case, in a trial for murder material evidence was given by a child of about 9 years. Whilst the trial Judge satisfied himself and recorded that the child was sufficiently intelligent to give evidence he did not record that the child understood the difference between truth and falsehood.

Although there was no statutory provision in Tanganyika then similar to section 19(1) of the the Kenya Act, the Court applied Section 118 of the Indian Evidence Act in force at the time and held at page 161 paragraph G-H:-

"In the instant case the conviction did not depend entirely on the evidence of the child since there was another eye witness of the murder, an adult, whose evidence was accepted. In the circumstances, we were of opinion that the omission to ascertain

whether the child understood the duty of speaking the truth did not invalidate the conviction."

In **KINYUA V REPUBLIC** (supra) this Court said at page 266 paragraph 40.

> ***"The procedures are required by statute and need strict compliance Several judicial authorities some of which we have set out in this judgement, clearly explain that procedure. We would like to call the attention of trial Judges and Magistrates to***
>
> ***this procedure and to emphasise that there is need for strict compliance failure of which, may very well, in appropriate circumstances, vitiate conviction, and result in allowing the appeal."***

Those authorities show that while the Court has exhorted strict compliance with provisions of Section 19(1) of the Act, the court has nevertheless refrained itself from holding that non compliance with the provision of **section 19(1)** of the Act is fatal to a conviction and would in all cases result in the conviction being quashed. On the contrary, the Court has treated non compliance as an irregularity in the trial proceedings which can be cured under **section 382** of Criminal Procedure Code by other evidence. **Section 382** aforesaid prohibits an appellate court from reversing or altering a finding of sentence of a court of competent jurisdiction on an account of an error, omission or irregularity in, among other things, charge, judgement or other proceedings unless the error,omission or irregularity has occasioned a failure of justice. It follows that whether or not the conviction would be quashed for non compliance with **section 19(1)** of the Act would ultimately depend on the circumstances of each case.

However, as a general principle which emerges from the above authorities, a conviction will not be quashed for non compliance if there was ample evidence other than that of the child and the conviction was not thus entirely dependent on the evidence of the child.

That leads to the consideration of the second main ground of appeal that the evidence was insufficient and untruthful.

The appellant in his written submissions submitted that ***Tsuma*** was not cross-examined and that the medical report that the child was defiled was unreliable.

Firstly, the proceedings before the trial Magistrate show that the appellant was given an opportunity to cross-examine ***T*** and that he in fact cross-examined him. ***T*** testified that he found the appellant defiling the child, that he is an uncle of the child; that he knew the appellant before and that the appellant is his neighbour. The appellant admitted that he knew ***T*** but denied meeting him on the material day. He however stated that he has no grudge with ***T.***

The two courts below believed his evidence. His evidence was not discredited at all and there is no reason for interfering with the findings of the two courts below that ***T's*** evidence was credible.

The two courts below also made a concurrent finding of fact that the child was defiled.

The unsworn evidence of the child that she was defiled was amply corroborated by the evidence of ***T*** and by the medical evidence of ***Dr.Mutinda (Pw5)*** who examined the child and found that the child had lacerations on the vaginal wall and that her hymen was broken.

From the foregoing, we are satisfied that there was ample evidence apart form the evidence of the child that she was defiled. There also ample evidence from ***T*** that it is the appellant who defiled the child.

In conclusion, we find that although the trial Magistrate did not subject the child to sufficient examination in order to ascertain the matters specified in **section 19(1)** of the act the conviction was safe as it was not entirely dependent on the evidence of the child.

We also find that, the view taken by ***Mr. Musyoka,*** the learned Senior Prosecution Counsel, that, there was a mistrial, is not in the circumstances of this case, supported by the law.

In the result, we dismiss the appeal in its entirety.

Dated and delivered at Malindi this 21st day of June 2013.

E. M. GITHINJI

….....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

….....

JUDGE OF APPEAL

F. SICHALE

….....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

Deputy Registrar