IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GITHINJI, ONYANGO OTIENO & OKWENGU, JJ.A)
CRIMINAL APPEAL NO. 218 OF 2007

BETWEEN

SAMUEL WAHINI NGUGI …………….......………………. APPELLANT

AND

REPUBLIC …………………………...………………. RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Nairobi (Lesiit, J) dated 17th June, 2005

In

H.C. Cr. A. No. 152 of 2004)
****

JUDGMENT OF THE COURT

This is a second appeal. The appellant Samuel Wahini Ngugi, who conducted his case in person in the trial court, in the first appellate court and before us, was arraigned before the Senior Resident Magistrate's court at Limuru with offence of unnatural offence contrary to ***section 162 (a)*** of the Penal Code. The particulars were that:

"On diverse dates between 19th November, 2003 and 21st January, 2004 in Kiambu District within Central Province, had carnal knowledge of G.N.W against the order of nature."

He pleaded not guilty, but after full hearing in which four prosecution witnesses gave evidence and he gave unsworn statement in his defence, the learned Resident Magistrate, (Mrs. Muthoni Mburu) found him guilty as charged, convicted him and sentenced him to serve a term of twenty-one (21) years imprisonment. He was not satisfied with that conviction and sentence and thus he appealed in the High Court against both. The High Court (Lesiit, J) heard the appeal and in a judgment dated and delivered on 17th June, 2005, dismissed the appeal both on conviction and on sentence and hence this appeal based on grounds that an essential witness, the assistant chief to whom the initial report was made was not called as a witness; that no test was done on him to prove or disapprove the allegations of the complainant; that his defence though had merit, was not considered, and that the sentence imposed was harsh and excessive.

As we have stated, the appellant conducted his appeal in person and he submitted written submissions which we have considered. Mr. Monda, the learned Principal State Counsel, opposed the appeal arguing that the learned Judge of the High Court based his decision on cogent evidence that was in the record and was plainly right in dismissing the appeal. When we are brought to his attention that the record does not show that the appellant was availed opportunity to cross examine the complainant, Mr. Monda told

us that the appellant himself stated in his submissions that he could not cross examine witnesses because he was confused. He urged us to dismiss the appeal as in his view it lacks merit.

For reasons that will be clear in this judgment, we will not consider the grounds raised in support of the appeal as we feel two matters need to be dealt with first. The record shows that the complainant G.N (PW1) was a child aged twelve years. He gave his evidence on 12th February, 2004 but there is no record of him having been cross- examined by the appellant. There is no record that such an opportunity was ever availed to the appellant to cross- examine him.We checked the handwritten record of the learned Magistrate and it is clear, there was no record that the appellant was afforded that opportunity at all. We note that when JTN (PW2), Dr. Manase Ndakaru (PW3) and APC Peter Irungu (PW4) gave evidence, it is clear he was given opportunity to cross-examine them and he did cross- examine them though the same cross- examination in respect of each of these three witnesses was short and that is what the appellant meant when he stated that due to confusion in his mind, he could not cross-examine the witnesses. That is different from not being afforded opportunity as is required by law to cross-examine the witnesses. We do not agree with Mr. Monda in his assertion that the appellant's remarks explain this serious procedural lapse which in the end deprives an accused of his rights to ensure justice is done to him. The provisions of ***section 208 (2)*** and ***(3)*** are clear in the issue. In fact the provisions of ***section 208 (3)*** enjoins the court to inform the accused of his right to cross- examine the witnesses. This is a must for the word '**shall**' is used in the provision. This does not appear to have been done here in respect of the first witness. If the appellant had been represented by an advocate, that omission would not have been viewed difficulty. But like the appellant was acting in person and the provision of ***section 208 (3)*** (supra) squarely applied to him. The first appellate court did not direct its mind to this omission. This apparent failure to record whether the appellant was afforded opportunity to cross-examine the complainant who in this case is the most important witness vitiated the proceedings.

But that is not enough. G.N, the complainant, in his evidence stated that he was 12 years old. That was not challenged. Indeed the learned Resident Magistrate did accept that and the learned Judge of the High Court referred to the complainant's age on passing but did not doubt it. ***Section 19*** of the Oaths and Statutory Declarations Act **Chapter 15** Laws of Kenya, provides that evidence of a child of tender years called as a witness, who in the opinion of the court does not understand the nature of an oath, may be received if in the opinion of the court such a child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of telling the truth. That Act, however, does not define child of tender years. The Children Act 2001 (Act No. 8 of 2001) defines a child of tender years at ***section 2*** as follows:

"Child of tender years means a child under the age of ten years."

That is, however, for the purposes of Children Act, 2001 (Act No. 8 of 2001). It may not necessarily be applicable in respect of cases such as the one before us which is a matter instituted under the Penal Code. In the case of **Johnson Muiruri vs. Republic (1983) KLR 445**, the same question of the definition of a child of tender age for purposes of ***section 19*** of the Oaths and Statutory Declaration Act as applicable to criminal cases did arise and this Court held that:

"The matter whether a child is of tender years or not is a matter of the good sense of the court where there is no statutory definition of the phrase. In Kenya there is no statutory definition of the expression "_child of tender years_***"***

for purposes of ***section 19*** of the Oaths and Statutory Declarations Act (Cap 15)".

However, this Court has treated children under 14 years of age as children of tender age. In the case of **John Okeno Oloo vs. Republic**, Criminal Appeal No. 350 of 2008 (UR) this Court, in a judgment dated and delivered on 9th October, 2009 stated as follows:

"In our view, whereas we agree that as concerns C, who said she was 13 years old, the trial court should have, note of caution, formed an opinion on a voire dire examination whether she understood the nature of an oath before she could be sworn. We do not agree with the superior court that failure

to do so could not have occasioned miscarriage of justice had that been their only witness the issue that was before the Court."

Again in the case of **Kibageny v. R. [1959] EA 92**, the predecessor of this Court rendered itself thus on the matter:

"There is no definition in the Oaths and Statutory Declaration Ordinance of the explanation "*child of tender years****" for the purposes of section 19. But we take it to mean, in the absence of special circumstances, any child of an age, or apparent age of under fourteen years."***

Lastly, on the issue of definition of a child of tender years for purposes of ***section 19*** of the Oaths and Statutory Declarations Act, in the case of **Cleophas Ochieng Otieno vs. Republic**, this Court treated a child aged eleven (11) years as a child of tender age.

From the above, it is clear to us that the complainant in this appeal was a child of tender age and the court had to comply with the provisions of ***section 19*** of the Oaths and Statutory Declaration Act (Chapter 15, Laws of Kenya) before receiving his evidence. *How does the court ensure that it complies with the provisions of that section?* The answer to this question is found in this Court's judgment in the case of **Johnson Muirui vs. R (1983) KLR 445**, when this Court stated on pages 448 – 449 as follows:-

"*We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses. In* ***Peter Kiriga Kiune,*** *Criminal Appeal No. 77 of 1982 (unreported) we said:-*

"When in any proceeding before any court, a child of tender years is called as a witness, the court is required to form an opinion, on voire dire examination, whether the child understands the nature of an oath in which event his sworn evidence may be received. If the court is so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (section 19, Oaths and Statutory Declarations Act Cap 15). The Evidence Act (section 124, Cap 80). It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions."

This line of authorities goes back to the then decision of the predecessor to this Court in the case of **Oloo s/o Gai. vs. R. (1960) EA 86** where it said that it could have been better for the trial Judge to record in terms that he had satisfied himself that the child understood the nature of an oath.

In this case, as we have stated, the complainant was a child of 12 years who as we have demonstrated above, was to be treated as a child of tender years. It was necessary that the trial court satisfy itself that he understood the nature of an oath before being sworn to give evidence on oath as is spelt out under ***section 19*** of the Oaths and Statutory Declaration Act (Cap 15 Laws Kenya) on even to ascertain that he was sufficiently intelligent to give evidence even if not on oath. The learned Magistrate never did that and never carried out any examination to ascertain those requirements.

In our view, he needed even out of caution to have done so, noting that the child before him was aged twelve (12) years. The effect of the failure to strictly comply with those requirements on the trial will depend on the circumstances of each case. In the circumstances of this case, we find that the trial was vitiated, the conviction cannot stand and the sentence of 21 years imprisonment cannot also stand. Both are set aside.

What next ? The appellant conducted his appeal in person and did not raise the issues above, whereas Mr. Monda, though his attention was drawn to lack of cross-examination of the complainant, felt that nothing arose from that apparent error on the face of the record as to him, it is the appellant who could not cross-examine the complainant as he was confused. He therefore did not address us on the effect of the

two errors on the entire appeal and certainly did not address us on whether a retrial should be ordered or not. We will, however, consider whether or not to order a retrial. The law as regards what the Court should consider on whether to or not to order retrial is now well settled. In the case of **Ahmed Sumar vs. Republic [1964] EA 481**, at page 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:

"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered."

The Court continued in the same page at paragraph……. and stated further:-

"We are also referred to the judgment in PASCAL CREMENT BRAGANZA VS. R [1951] EA 152. In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person."

That decision was echoed in the case of **Lolimo Ekimat v. R**, Criminal Appeal No. 151 of 2004 (unreported) when this Court stated as follows:

"There are many decisions on the question of which appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where interests of justice require it."

The admissible evidence or potentially admissible evidence in this case, without going to the merits of it, would on consideration lead to a conviction. The appellant has been in prison for close to eight years. He was sentenced to 21 years imprisonment. On the other hand the offence that was allegedly committed was beastly and the victim will suffer traumatic butts for the rest of his life. The victim was allegedly appellant's nephew and thus the main witness is a family member of the appellant's family. It might not be difficult to trace J.T.N who is the Deputy Headmaster, R Primary School, the Doctor and APC Peter Irungu. We think a retrial can be mounted. In our view, the ends of justice would be served by an order of retrial and we so order it.

The appellant will be released into police custody and be produced before any court competent to try him except Mrs. Muthoni Mburu, within ten (10) days of the date of this judgment.

Dated and delivered at Nairobi this 28th day of March, 2012.

E.M. GITHINJI
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JUDGE OF APPEAL

J.W. ONYANGO OTIENO
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JUDGE OF APPEAL

H. OKWENGU
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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.