



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT MOMBASA**

**Criminal Appeal 47 of 2007**

**BAKARI ABDALLA MBOYE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal from judgment of the High Court of Kenya at***

***Mombasa (Njagi, J) dated 31<sup>st</sup> May, 2007***

**In**

**H.C. Cr. A. No. 228 of 2005)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The appellant was convicted by the Resident Magistrate, Kwale, S. S. Maindi, (Mrs.) for the offence of unnatural offence contrary to section 162 (a) of the Penal Code and sentenced to 20 years imprisonment. His first appeal to the superior court against the conviction and sentence was dismissed hence the present appeal.

The particulars of the offence alleged that on 5<sup>th</sup> August 2005 at 5 p.m. at M Village, D. Location in Kwale District the appellant had carnal knowledge of SL against the order of nature. The prosecution case against the appellant was briefly as follows:

On 5<sup>th</sup> August, 2005 at about 5.00 p.m. RM (PW2), a teacher at M Primary School was in her house preparing supper. She heard her child SL (PW1) crying behind the house. She did not bother but when she heard the screams again she went outside. She found a wheelbarrow and a spade behind the house but she did not see anybody. While there she heard the screams for the third time coming from the direction of a nearby house which was under construction. When she (RM) went there she found the appellant lying on her child, SL, sodomising him. She screamed and the appellant ran away. The members of the public who went to the scene to answer the screams chased the appellant and arrested him. They handed him over to P.C. Linus Kimathi (PW4) who was on patrol in the area. The appellant was taken to Diani police station where he was locked up.

On the same day RM took the child to the police station and reported the matter. The child was issued with a P3 form and taken to Msambweni Hospital for examination and treatment. The P3 form was filled by Dr. Chrispin Mnyapara (PW3) on 8<sup>th</sup> August, 2005. The age of the child was assessed as 7 years and

upon examination spermatozoa and pus cells were found on the anus. The doctor formed the opinion that the child had been defiled.

The appellant denied the offence in his sworn testimony at the trial and called one witness Mwanasiti Bakari Matata (DW1) (Mwanasiti). He testified that; on the material day he was employed to carry building sand into the house which was under construction, that he carried sand using a wheelbarrow the whole day up to 5.30 p.m.; that he stopped work at 5.30 p.m. and placed the wheelbarrow at a corner of the building; that SL came, held a bicycle and said he wanted to play with it; that he refused the child to play with the wheelbarrow but the child took the wheelbarrow; that he (appellant) pushed the child who fell down and started screaming; that the child's mother RM, came and asked why her child was crying; that RM also started screaming and beating him (appellant); that members of public came and started beating him; that he ran away as members of the public were beating him and that RM alleged that the appellant had defiled her child. Mwanasiti testified that she was passing near a building heading towards the shops; that SL went to where the appellant was and said that he wanted to be carried by the wheelbarrow but when the appellant told him not to go near the wheelbarrow the child started crying and his mother went there.

The trial Magistrate considered the evidence and made findings thus:-

***“The complainant SL evidence (sic) was corroborated by that of her mother PW2 who saw the accused sodomising the child. Later upon examination at the Hospital it was further confirmed that this act has been committed on the complainant. The P3 was produced in evidence.***

***I do not believe the accused's defence. I see no reason why the complaint's mother should fabricate such a case of the accused they involve her own child (sic). The evidence of the witness PW2 (should be DW2) is not reliable. She kept contradictions (sic) herself on what she saw and where she was at that particular time when this offence occurred.***

***I find her evidence was incredible and not to be relied on.”***

The trial Magistrate ultimately concluded:-

***“I find the accused guilty of the offence as charged and should be convicted accordingly.”***

The appellant appealed to the superior court on several grounds. Mr. Magolo who appeared for the appellant in the superior court raised four substantive grounds of appeal, namely, that the conviction was a nullity as the trial Magistrate had already made a finding before trial when cancelling the appellant's bond that the appellant had committed the offence; that the charge was defective; that the evidence of SL should be disregarded as the trial Magistrate did not make an inquiry before trial as to whether SL understood the nature of the oath or the duty of telling the truth in breach of **section 19** of Oaths and Statutory Declarations Act, and, lastly, that the evidence did not support the conviction. Regarding the ground that the evidence of SL should be disregarded for non compliance with **section 19 (1)** of the Oaths and Statutory Declarations Act, the superior court said:-

***“In my opinion, the witness displayed adequate intelligence to justify, at the very least, the reception of his unsworn evidence. Indeed, the appellant cross-examined him and did not shake even an iota of his evidence. Instead the boy's mother, who was an eye witness to this obnoxious affair, corroborated the boy's evidence. And to give it even bigger punch the doctor corroborated it. I do not think that such evidence deserved to be disregarded.”***

Mr. Magolo submitted in the superior court in the support of the appeal that the evidence did not support the conviction, that the child SL was examined three days after the incident and that the spermatozoa was not linked to the appellant. The superior court considered that ground and stated in part:-

***“This observation (that child was examined three days after the event) is not factually correct. Even though the P3 form was completed on 8<sup>th</sup> August, 2005, the medical notes on record show that the***

***medical tests commenced on the day the boy complained that he was assaulted and continued the following day. As for the contention that the sperms found were not linked to the appellant that is, with respect, stretching our criminal justice system too far. -----."***

The appellant now appeals to this Court on the following four main grounds, namely,

- (1) the superior court erred in law in confirming a sentence that was illegal and imposed without jurisdiction.
- (2) the superior court erred in law in finding that the charge was not defective.
- (3) the superior court erred in law in finding that the trial court had complied with the statutory provisions with regard to the evidence of the child.
- (4) the superior court erred in law in failing to note that the trial court's discretion as regards the cancellation of the bond was abused and thereby making the entire proceedings a nullity.

It is trite law that a second appeal is confined to points of law only and that in such an appeal the court is bound by the concurrent findings of fact made by the lower courts unless those findings were shown not to have been based on evidence. (see **Karingo v. Republic [1982] KLR 213; Njoroge v. Republic [1982] KLR 388**)

Moreover a first appellate court could not interfere with those findings of the lower court which are based on the credibility of witnesses unless no reasonable tribunal could make such findings or where it is shown that there existed errors of law (**Republic vs. Oyier [1985] KLR 353**).

It is convenient to deal with the third ground of appeal first. Mr. Magolo contended that the evidence of SL should have been rejected in its entirety because the trial Magistrate did not inquire whether or not the child understood the nature of the oath and the duty of telling the truth. He further contended that if the evidence of SL was rejected there would have been no evidence against the appellant. By **section 19 (1)** of the Oaths and Statutory Declaration Act (Cap 15), if a child of tender years who is called as a witness does not, in the opinion of the court, understand the nature of the oath, his evidence may nevertheless be received though not given on oath, if in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of such evidence and understands the duty of speaking the truth. The procedure to be followed at the trial before reception of the evidence of a child has been explained in many decisions of this Court – see for instance **Johnson Muiruri v. Republic [1983] KLR 445**. In **Nyasani S/o Bichana v. R. [1958] EA 190** the predecessor of this Court said at page 191 para 1:-

***"This is a condition precedent to the proper reception of the unsworn evidence from the child, and it should appear upon the face of the record that there has been due compliance with the section. In the instant case we did not consider it necessary to call for a report from the learned Judge as to whether or not there had in fact been compliance with the requirements of section 19, since we were of the opinion that there was ample evidence of the commission of the offence apart from the evidence given by the complainant herself. We do, however, emphasize the necessity for strict compliance with provisions of the section. Non compliance might well result in the quashing of the conviction in a case where the other evidence before the court was insufficient in itself to sustain the conviction."***

Thus the court has a discretion even when the procedure has not been strictly complied with.

In the present case, the trial Magistrate inquired into the capacity of the child to understand the nature of the oath thus:-

***"Preliminary test.***

***SL states:-***

***I go to school. I am in class one at LR Primary. I am 7 years old. I go for religious classes. I am taught religion. If you lie u you will be burned. I will tell the truth.”***

The trial Magistrate thereupon ruled that the child understands the meaning of an oath and should give evidence on oath.

The child was sworn and gave evidence and explained how the appellant defiled him inside the house which was under construction.

Mr. Magolo has contended as he did in the superior court, that, the finding of the trial Magistrate that the child understood the nature of the oath had no basis as the examination was not directed to that fact but rather to whether the child goes to school and to church.

In this case, unlike in **Oloo S/o Gai v. R (1960) EA 86** the trial Magistrate recorded verbatim the answers given by the child and made a specific finding that the child understood the meaning of the oath. Although the child was not specifically asked whether he knew what an oath was, he did say that he attends religious classes and that if one lies he would be burnt and promised to tell the court the truth. Thus the child appreciated that on taking the oath one had a duty to tell the truth, and, that, if he did not tell the truth he would be punished. Moreover, the predecessor of this Court in **Oloo S/o Gai** (supra) said at page 88 para 1:-

***“Religious belief is fundamental to the understanding of an oath, and we think it to be inferred from the passage cited that the learned Judge was satisfied that the witness’s religious belief was such as to enable her to appreciate the nature of the oath.”***

Whilst it would have been preferable for the trial Magistrate to have conducted a more exhaustive examination to leave no doubt that the child understood the nature of the oath, we are nevertheless satisfied that there was substantial compliance and that the brief examination supported the Magistrate’s finding that the child understood the meaning of the oath and justified the reception of the child’s evidence on oath. Moreover, the conviction of the appellant was not entirely based on the evidence of the child. The evidence of RM, the child’s mother who testified that she found the appellant defiling the child was material. There were concurrent findings of fact by the two courts below that the appellant indeed defiled the child. The two courts below believed the evidence. We are satisfied that the concurrent findings of fact were supported by credible evidence.

Turning to the fourth ground of appeal, it is true that the trial magistrate cancelled the appellant’s bond after two material witnesses had given evidence remarking:-

***“Surety not sufficient for offence committed. Accused to get another surety.”***

Mr. Magolo contended that the trial Magistrate’s conduct and remarks exhibited a bias which vitiated the whole proceedings. By **section 127** of the Criminal Procedure Code (CPC) the court can order a person already released on bond to provide sufficient sureties in a case where the sureties accepted afterwards become insufficient. After hearing the two material witnesses the trial Magistrate considered that the surety provided was insufficient and ordered the appellant to provide another surety. The Appellant did not provide any. The superior court considered this ground of appeal and concluded that by the use of the words “*offence committed*” the trial Magistrate was referring to the gravity of the offence. We respectfully agree with that finding, for, before ultimately making a finding that the appellant had committed the offence the trial Magistrate considered the entire evidence including the evidence of the appellant and his witnesses with circumspection. The cancellation of the bond was sanctioned by the law and it cannot be said with justification that such a conduct amounted to bias serious enough to make the proceedings a nullity.

We will consider the first and the second grounds of appeal together.

Before **section 162** of the C.P.C was amended by **section 32** of the Criminal Law (Amendment) Act

2003 (Act No. 5 of 2003) which came into force on 25<sup>th</sup> July, 2003 it provided:-

**“Any person who –**

**(a) has carnal knowledge of any person against the order of nature; or**

**(b) has carnal knowledge of an animal; or**

**(c) permits a male person to have carnal knowledge of him or her against the order of nature is guilty of a felony and is liable to imprisonment for fourteen years with or without corporal punishment.”**

Act No 5 of 2003 amended **section 162** by deleting the provision for corporal punishment and by adding the following proviso:-

**“Provided that in case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if –**

**(i) the offence was committed without the consent of the person who was carnally known; or**

**(ii) the offence was committed with that person’s consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm or by means of false representations as to the nature of the act.”**

By section 4 of the C.P.C that offence is shown in the First Schedule to the C.P.C. as triable by a subordinate court of the first class which court is defined in section 2 of the Magistrate’s Courts Act as the “Resident Magistrate’s Court, or a District Magistrate’s Court of the first class.”

By **section 4** of the Magistrate’s Court’s Act, the Resident Magistrate’s Court exercises Criminal jurisdiction as conferred by the C.P.C. or any other written law. **Section 7** of Criminal Procedure Code provides:-

**7 (1) A subordinate court of the first class held by –**

**(a) Chief magistrate, Senior Principal Magistrate; Principal magistrate or Senior Resident Magistrate may pass any sentence authorized by law for any offence triable by that court;**

**(b) A Resident Magistrate may pass any sentence authorized by law for an offence under section 278, 308 (1) or 322 of the Penal Code or under the sexual offences Act 2006.**

**(2) subject to subsection (1), a subordinate court of the first class may pass the following sentences in case where they are authorized by law –**

**(a) Imprisonment for a term not exceeding seven years;**

**(b) A fine not exceeding twenty thousand shillings.**

We would generally agree with Mr. Magolo that a charge sheet should specify whether the offence charged is under **section 162 (a)** or **162 (a) (i)** or **(ii)** of the Penal Code as the case may be and that if the offence charged is under **section 162 (a) (i)** the particulars of the charge should give reasonable information that the carnal knowledge was without the consent of the complainant. In this case, however, the appellant was charged under section 162 (a) and was found “*guilty of the offence as charged.*”

Thus the charge sheet was not defective and the conviction was entered for the offence charged. The problem is with the sentence. The trial Magistrate instead of passing a sentence provided for the offence, which is a maximum of 14 years imprisonment, passed a sentence of 20 years imprisonment.

The inference to be drawn from the sentence passed is that, either the trial Magistrate did not realize that the offence under **section 162 (a)** had a maximum sentence of 14 years imprisonment or that she deliberately passed the sentence provided under **section 162 (a) (i) and (ii)**. In either case, the trial Magistrate - a Resident Magistrate, had no jurisdiction to pass a sentence of more than 7 years imprisonment as **section 162** does not fall within the specific provisions of the Penal Code specified in **section 7 (1) (b)** of C.P.C. It is a glaring anomaly that a Resident Magistrate has jurisdiction to try the offence under **section 162** but has no jurisdiction to pass the maximum sentences provided therein. That anomaly can be remedied by either amending the First Schedule in the 5<sup>th</sup> column of C.P.C. to provide that the offence under **section 162** should be tried by a court of the first class presided over by a magistrate above the rank of a Resident Magistrate or by repealing section 162 of the Penal Code and re-enacting the offence in the sexual offences Act – Act No. 3 of 2006, as was done with most of the offences against morality in Chapter XV of the Penal Code. This is a recommendation that the office of the Attorney General should seriously consider.

In conclusion we are satisfied that the appellant was properly convicted and we dismiss the appeal against the conviction. However, the Resident Magistrate had no jurisdiction to pass a sentence of 20 years imprisonment. We therefore allow the appeal against sentence, set aside the sentence of 20 years imprisonment and substitute therefor a sentence of 7 years imprisonment to take effect from 14<sup>th</sup> November 2005 when the appellant was convicted.

Dated and delivered at Mombasa this 23<sup>rd</sup> day of January, 2009.

**J.E. GICHERU**

.....

**CHIEF JUSTICE**

**E.M. GITHINJI**

.....

**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**