Ayieyo v Republic (Criminal Appeal 165 of 2006) [2006] KECA 336 (KLR) (24 November 2006) (Judgment)

Samson Oginga Ayieyo v Republic [2006] eKLR

Neutral citation: [2006] KECA 336 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 165 OF 2006

RSC OMOLO, SEO BOSIRE & JWO OTIENO, JJA

NOVEMBER 24, 2006

BETWEEN

SAMSON OGINGA AYIEYO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kisumu (Justice Tanui) dated 16th June, 2005 in H.C.CR.A. NO. 42 OF 2004)

Legal standards for child testimony in sexual offence cases.

The case clarified the standards for receiving evidence from children in sexual offence cases and reinforced the principle that a child's testimony would be sufficient for a conviction if credibility was established, despite the absence of corroborating evidence.

Reported by Moses Rotich

Criminal Law *– sexual offences - defilement - defilement of a girl under the age of 16 years – second appeal against conviction and sentence - allegation that despite the court conducting a voir dire examination and admitting the evidence of a child of tender years, it did not actually make a finding that it was satisfied that the child understood the meaning of an oath and was possessed of sufficient intelligence to allow for the admission of her evidence - whether the appeal was merited - Penal Code, cap 63, section 145(1).*

Evidence Law *- child witness - evidence of a child of tender years - meaning of "child of tender years" - voir dire examination - procedure in taking the evidence of such a witness - trial court conducting a voir dire and proceeding to take the child's evidence on oath - court failing to expressly make a finding on whether it was satisfied that the child could give evidence on oath – meaning of "child of tender years" - whether it could be presumed that the trial magistrate was satisfied as to the intelligence of the child - whether the child's evidence required corroboration - Oaths and Statutory Declarations Act, cap 15, section 19; Children Act, Act No 8 of 2001 (Repealed), section 2; Evidence Act, cap 80, section 124.*

Evidence Law *- confessions - admissibility - manner in which evidence relating to an alleged admission of the commission of the offence as charged should be admitted - whether the admission breached the provisions of section 25A of the Evidence Act - whether such evidence was admissible - Evidence Act, cap 80, section 25A.*

Brief facts

The appellant was charged with defilement of a girl under the age of 16 years, contrary to section 145(1) of the Penal Code, cap 63. The prosecution's key witnesses included the complainant, LAO, aged 6, her sister RA, their mother JA, and a clinical officer. The trial court admitted the testimony of LAO despite the challenges surrounding her understanding of an oath, as required by section 19 of the Oaths and Statutory Declarations Act, cap 15.

Issues

i. Whether the trial court properly conducted the *voir dire* examination to assess the complainant's understanding of an oath and her intelligence.

ii. Whether the evidence of a child of tender years could support a conviction in the absence of corroboration.

Relevant provisions of the Law

Children Act, 2001, No 8 of 2001 (Repealed)

Section 2 - Interpretation

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

Oaths and Statutory Declarations Act, cap 15

Section 19 - Evidence of children of tender years

(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, 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 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 into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.

Evidence Act, cap 80

Section 6 - Facts forming part of the same transaction.

Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant whether they occurred at the same time and place or at different times and places.

Section 124 - Corroboration required in criminal cases.

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth

Held

1. There being no definition of a "child of tender years" in the Oaths and Statutory Declarations Act, cap 15, the expression "child of tender years" for the purpose of section 19 meant, in the absence of special circumstances, any child of an age or apparent age of less than fourteen years. However, whether a child was considered of tender years was a matter of the good sense of the court.
2. Section 2 of Children Act, 2001, defined a child of tender years as a child under the age of ten years. Following that definition, the complainant was a child of tender years. Section 19(1) of Oaths and

Statutory Declarations Act therefore applied to the complainant. The trial court was thus duty-bound to comply with the requirements of that section before receiving her evidence.

3. There was sufficient compliance with the provisions of section 19 of the Oaths and Statutory Declarations Act and the general requirements of a *voir dire* examination. The investigation was intended for the benefit of the presiding officer of a court. That the magistrate decided to receive her evidence after the *voir dir*e was sufficient material from which the first appellate court was entitled to infer.
4. Section 25A of the Evidence Act provided that a confession or any admission of a fact tending to the proof of guilt made by an accused person was not admissible and could not be proved as against such person unless it was made in court. However, in absence of any express provision, it did not exclude admissions under section 6 of the Evidence Act, which dealt with *res gestae.*
5. The trial magistrate was satisfied that the complainant was truthful and so was the first appellate court. There was no necessity in law for corroboration. Hence, there was no basis for interfering with the findings.

Appeal dismissed.

Citations

Cases

Regional Court

1. *Kibageny v R* ([1959] EA 92) —(Explained)
2. *Nyasani s/o Bichana v R* [1958] EA 190 — (Mentioned)
3. *Sakila v R* [1967] EA 403 — (Explained

United Kingdom

1. *R v Campbell* [1956] 2 All ER 272 — Explained
2. *R v Sugruor* [1940] 2 All ER 249 — Explained

Statutes

Kenya

1. Children Act (cap 141) section 2 — (Interpreted)
2. Children and Young Persons Act (repealed) (cap 141) — (Interpreted)
3. Court of Appeal Rules, 2010 (cap 9, Sub Leg) rule 32(2) — (Cited)
4. Evidence Act (cap 80) sections 6, 25A, 124 — (Interpreted)
5. Interpretation and General Provisions Act (cap 2) In general- (Cited)
6. Oaths And Statutory Declarations Act (cap 15) section 19 — (Interpreted)
7. Penal Code (cap 63) section 145(1) — (Interpreted)

Advocates

Mr Onsongo for the appellant

JUDGMENT

1. The appellant, Samson Oginga Ayieyo, (the appellant), was charged before the Senior Resident Magistrate's Court, at Nyando, with the offence of defilement of a girl contrary to section 145(1) of the *Penal Code*, the particulars thereof being that on 15th day of March, 2004, at [Particulars withheld] Estate in Nyando District of the Nyanza Province, had carnal knowledge of LAO, a girl under the age of 16 years.

2. The key witnesses who testified for the prosecution were LAO (the Complainant), a girl aged about 6 years old, her sister, RA (PW2), aged 12 years, their mother, JA (PW3) and a clinical officer, Thomas Oluoch (PW6).

3. Section 19 of the *Oaths and Statutory Declarations Act*, cap 15 Laws of Kenya deals with the reception of evidence of children of tender years by a court or any adjudicating authority. Sub-Section (1) thereof provides thus:-

"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, 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 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 into writing in accordance with section 233 of the *Criminal Procedure Code*, shall be deemed to be a deposition within the meaning of that section."

4. That section does not, however, define who is a child of tender years – nor does the Act itself have such a definition. The *Interpretation and General Provisions Act*, cap 2, Laws of Kenya, does not, likewise, have the definition of that phrase. It is however, noteworthy that courts have attempted to define the phrase in past decisions.

5. In *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 Declarations Ordinance of the expression 'Child of tender years' for the purpose 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."

6. That court cited with approval the words of Lord Goddard, CJ in R v Campbell [1956] 2 All ER 272, in which the learned judge said:-

> "Whether a child is of tender years is a matter of the good sense of the court ...."

7. Those words apply where there is no statutory definition of the phrase. In the *Kibageny* case (above), the court must have picked the maximum of 14 years, because, the definition of "child" under the *Children and Young Persons Act,* cap 141, Laws of Kenya, (since repealed by the *Children Act*), provided that a child means "........... a person under the age of fourteen years."

8. We have tried to expound on the law as it stood before the *Children Act, 2001*, Act No 8 of 2001 was enacted. Section 2 of that *Act* defines "Child of tender years" as meaning:-

> "........... A child under the age of ten years."

9. Following the foregoing definition in the *Children Act*, PW1 was clearly a child of tender years but not PW2. Sections 19(1) above therefore applied but only to PW1. The trial court was therefore duty bound to comply with the requirements of that section before receiving her evidence.

10. One of the grounds of appeal in this matter is that:-

> "The superior court failed in law and in fact in not faulting the voir dire as conducted by the trial court as the same did not comply with the requirements of the law."

11. Mr. Onsongo, for the appellant, submitted before us that the approach adopted by the trial magistrate was not in accordance with the law as he did not make a finding whether PW1 possessed sufficient intelligence to testify, whether on oath or otherwise.

12. In *Sakila v R* [1967] EA 403, the Court of Appeal for Eastern Africa then, said, that the first duty of the court is to ascertain and record accordingly, whether or not the witness is a child of tender years. It appears to us that that court was of the view that the trial officer's sense of judgment has to be relied upon.

13. The language of section 19, above, requires the trial court to then, investigate whether the child understands the nature of an oath. It is after the trial court is satisfied that the child understands the meaning of an oath that it will proceed to swear the child (See *Nyasani s/o Bichana v R* [1958] EA 190). This investigation is intended for the presiding officer to satisfy himself that the child understands the meaning of an oath and if not to investigate, further, whether the child is possessed of sufficient intelligence for her evidence to be received at all.

14. The investigation, according to *Fransisio Matovu v R* [1961] EA, 260 at p 262, is through questions asked of the child.

15. According to section 19 above, after the second inquiry, the child can only be allowed to testify if she understands the duty of telling the truth in which case she may testify but not on oath.

16. How did the trial court handle PW1? It recorded her name as PW1, followed by the letters J/F/A/S, and then the words "Dholuo/Kiswahili". The record then has the word "Examinations" underlined, followed by questions and answers as follows:-

> "CT: How old are you?
>
> PW1: I am 6 years old.
>
> CT: Do you go to school?
>
> PW1: I am in Nursery School at Karanda Primary School.
>
> CT: Do you go to Sunday School?
>
> PW1: Yes I do. If you lie, God will burn you."

17. The trial magistrate then proceeded to receive her evidence. We presume that the letters J/F/A/S mean "Juvenile/Female/Affirmed/States." Likewise, in the case of PW2, the trial magistrate adopted the same approach although it was not necessary to do so in her case. There was no recording of the finding by the trial magistrate on the two aspects, namely, whether or not PW1 understood the meaning of an oath, or whether or not she was possessed of sufficient intelligence and understood the duty of telling the truth before she was allowed to testify. A careful reading of what transpired during the time PW1 testified clearly shows that the trial magistrate was satisfied that she understood the meaning of an oath, hence her being asked to affirm. It is not clear at what stage she was affirmed. On the face of the record, she appears to have been affirmed before the *voir dire* examination but there is also the possibility that the trial magistrate put down her name, examined her and on being satisfied she understood the meaning of an oath, recorded the other details later. That is, however, conjecture.

18. We have to take the record as it is. We are satisfied that there was sufficient compliance with the provisions of section 19 and the general requirements of a *voir dire* examination. The investigation is intended for the benefit of the presiding officer of a court. That the magistrate decided to receive her evidence after the voir dire is sufficient material from which the first appellate court was entitled to infer, as it did, and for this court also to infer that the magistrate was satisfied on the matters of which he was required to be so satisfied.

19. In *R v Sugruor* [1940] 2 All ER 249 it was held that a *voir dire* examination was necessary for the benefit of the presiding officer of the court. Even a casual reading of section 19, above, is clear that the court must satisfy itself on the two matters.

20. Ordinarily sworn evidence does not need corroboration. Section 19, above, previously had a proviso which enacted that:-

> "Provided that, where evidence admitted by virtue of this Section is given on behalf of the prosecution in any proceedings against any person for any offence, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him."

21. The section was amended and that proviso was left out, and transferred to the *Evidence Act*, cap 80 Laws of Kenya, and re-enacted as section 124 of that Act. However, by Act No 5 of 2003, section 124, above, was amended to add a proviso to it which reads as follows:-

> "Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth."

22. So much for the law. PW1 testified and her evidence was supported by PW2 that the appellant led her to his house. PW2 did not see the appellant leading her to his house, but it was her evidence that she saw PW1's slippers outside the appellant's house. She later saw her come out of the house. Her clothes were wet with blood. PW1 testified that in his house, the appellant had sexual intercourse with her. The trial magistrate has recorded her as saying:-

> "The accused person then removed my clothes including my panties and defiled me. (Emphasis supplied).

23. "Defiled" is a technical term. It is quite improper to use such term or any other technical term when recording the evidence of a witness unless the witness himself or herself has used it. The correct approach is to use the words used by the witness. We do not believe that PW1 or any other witness used that term in proceedings before the trial court.

24. Be that as it may, PW1 testified that the appellant put her on his bed, removed her underwear and had sexual intercourse with her. The act tore her hymen causing her heavy bleeding. It was her evidence that she knew the person who had sexual intercourse with her as "Jaramogi". This was the appellant's nickname. The appellant admitted in court he was known by that nickname. The appellant was a neighbour and she therefore knew him well.

25. PW2 testified that she saw PW1's slippers at the door into the appellant's house, called PW1 by name but got no response. Shortly later she emerged from inside the appellant's house with wet clothes and told PW2 she had been sexually assaulted. The two then went together to the market where their mother was trading some wares and reported the matter to her.

26. PW3 confirmed she received the report that PW1 had been sexually assaulted. PW3 also saw her daughter bleeding from her vagina. She took PW1 for medical attention, after which she went to see the appellant. When they eventually met, the appellant allegedly admitted having committed the sexual act on PW1 and pleaded that they reconcile. Mr Onsongo, in his submissions before us, stated that the evidence relating to the appellant's alleged admission of the offence to PW3 was improperly admitted as such admission breached the provisions of section 25A of the *Evidence Act*, which provides:-

"25A. A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court.

27. That section, was introduced by Act No 5 of 2003 and in absence of any express provision, it does not exclude admissions under section 6 of the *Evidence Act*, which deals with res gestae. The section provides:-

> "Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant whether they occurred at the same time and place or at different times and places."

28. PW1 was examined by a clinical officer, one, Thomas Oluoch (PW6) who confirmed to the trial court that indeed PW1's hymen was torn and he observed a discharge from it indicating there had been sexual penetration of her vagina. Mr Onsongo was right that the testimony of the Clinical Officer did not show the appellant was responsible. He, however, corroborates the complainant's story regarding sexual penetration.

29. As to whether the appellant was responsible there are concurrent findings of fact by the trial and first appellate courts that PW1 was a truthful witness, knew the appellant well, and that the appellant's defence was not believable. The superior court concluded its judgment on this score thus:-

> "The evidence that implicated the appellant was that of the 6 years old complainant who narrated in detail how the incident happened and the medical report supported it. The magistrate appears to have been convinced of her truth and sincerity and accordingly he convicted the appellant. He appears to have invoked the proviso to section 124 of the *Evidence Act* ...."

30. The proviso, which we reproduced earlier, empowers the trial court to convict even without corroboration, an accused person on the basis of the evidence of the child affected, if it is satisfied that such victim was a witness of truth. That amendment came into force long before this case. The trial magistrate was satisfied that PW1 was truthful and so was the first appellate court. There was no necessity in law for corroboration. We have no basis for interfering with the concurrent findings. The appellant's appeal has no merit. Moreover, even assuming corroboration was necessary as a matter of practice, corroboration was supplied by the evidence of PW2 who saw the complainant come out of the appellant's house with wet clothes. She was bleeding. PW2 gave sworn evidence, and the record shows she was about 12 years old when she testified.

31. The appellant's appeal must be and is hereby dismissed.

32. We must add that this judgment is not signed by Onyango-Otieno J.A., and is therefore delivered pursuant to rule 32(2) of the *Court of Appeal Rules*.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF NOVEMBER, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO-OTIENO

....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR