



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: CHUNGA, C.J. GICHERU & SHAH, JJ.A.)**

**CRIMINAL APPEAL NO. 91 OF 1999**

**BETWEEN**

**JOSEPH OPONDO ONAGO .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

**(Appeal from a Judgment of the High Court of Kenya at Mombasa (Justice Waki) dated 30th April, 1999**

**in**

**H.C.CR.A. NO. 103 OF 1999)**

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**JUDGMENT OF THE COURT**

The appellant Joseph Opondo Onago, was charged with and tried for the offence of indecent assault of a female, contrary to S.144(1) of the Penal Code, Chapter 63, Laws of Kenya in the Resident Magistrate's Court of Mombasa.

The particulars of the offence alleged that on the 4th day of October, 1998 at [Particulars Withheld] in Mombasa district within Coast Province, the appellant unlawfully and indecently assaulted one P A by touching her private parts.

After the trial, the appellant was, eventually convicted as charged and sentenced to 3 years imprisonment with 2 strokes of the cane by the Resident Magistrate on 18th March, 1999. Following his conviction and sentence as aforesaid, the appellant appealed to the High Court Mombasa against both conviction and sentence. He was unrepresented and therefore prepared and filed his grounds of appeal in person.

The appellant's appeal and the lower court record came before Waki, J. who, after perusal of the lower court record ordered as follows:

"I certify that I have perused the record and I am satisfied that the appeal has been lodged without any sufficient ground for complaint. Appeal summarily rejected under S.352(2)."

We would assume that the learned Judge was acting under S.352 (2) of the Criminal Procedure Code Chapter 75 Laws of Kenya which provides as follows:

"Where an appeal is brought on the ground that the conviction is against the weight of the evidence or that the sentence is excessive and it appears to a judge that the evidence is sufficient to support the conviction and that there is no material in the circumstances of the case which would raise reasonable doubt whether the conviction was right or lead him to the opinion that the sentence ought to be reduced, the appeal may, without being set down for hearing, be summarily rejected by an order of the judge certifying that he has perused the record and is satisfied that the appeal has been lodged without any sufficient ground for complaint".

This court has had occasions in the past to comment on and lay down principles upon which S.352 (2) CPC ought to apply. It will apply only where the appeal is brought and based on the ground that the conviction is against the weight of evidence or where there is no material disclosed by the record to raise doubt whether the conviction was right. Where there is a point of law raised, either in the grounds of appeal or by the material on the record, the section ought not to be used and an appeal ought not to be summarily rejected. It ought to be set down for hearing so that the point of law is fully ventilated, and argued by the parties, and considered by the court whereupon the court may dismiss or allow the appeal on such a point of law.

In the present appeal the prosecution called a total of 4 witnesses. The 1st prosecution witness was herself the subject of the charge. She was P A against whom, according to the particulars of the charge, the offence was committed.

The 2nd prosecution witness was one E A, apparently a sister of the complainant P A.

Both prosecution witness numbers 1 and 2 were treated by the trial court, for purposes of their evidence, as children of tender years. Accordingly, in compliance with S.19 of the Oaths and Statutory Declarations Act, Chapter 15, Laws of Kenya, the two witnesses, after requisite examination by the court, were allowed to give unsworn evidence. Put briefly, both described to the court how the appellant entered a toilet with the complainant and in the said toilet, the appellant indecently assaulted the complainant.

For two reasons, the evidence of the two prosecution witnesses required corroboration. First, indecent assault is a sexual offence, for which corroboration of the evidence of the complainant is necessary as a rule of practice or prudence. This rule applied, however, to the evidence of the complainant only.

The second reason why corroboration was required for the evidence of the two witnesses flows from S.124 of the Evidence Act Chapter 80 Laws of Kenya. It provides as follows:

"Notwithstanding the Provisions of S.19 of the Oaths and Statutory Declarations Act, where the evidence of a child of tender years 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."

As we mentioned earlier, the complainant, P A, prosecution witness No.1 and her sister, E A, prosecution witness No.2 were treated by the trial court as children of tender years. They were therefore permitted to give unsworn evidence pursuant to S.19(1) of the Oaths and Statutory Declaration Act, Cap. 15, Laws of Kenya. That being so, the evidence of the two witnesses, in terms of S.124 of the Evidence Act, required corroboration as a rule of law without which, the accused was not liable to be convicted upon such evidence.

The trial Magistrate appeared to have appreciated the need for corroboration. He, however, seemed to proceed on the basis that the complainant's evidence was, at least, partially corroborated by the evidence of her sister, prosecution witness No.2.

As already pointed out, the complainant's sister, P.W.2, was also treated as a child of tender years and she also gave unsworn evidence.

The issues that arise from the preceding paragraphs are, in our opinion, issues of law. The requirement for corroboration was a legal requirement flowing, as we have indicated, from S.124 of the Evidence Act. Additionally, it was an issue of law whether, the complainant's sister (PW2), could corroborate the evidence of the complainant.

It is settled in law that, evidence which itself requires corroboration, cannot be used to corroborate another evidence. That is the error which appears to us to have been occasioned in the judgment of the trial Magistrate. He used evidence which itself required corroboration, to corroborate another evidence.

The upshot of the matter is this. There were points of law disclosed in the record. There was material in the record which raised doubt as to whether the conviction was right.

The entire record, for purposes of S.352(2) CPC, must be taken into consideration. A Judge seized of the record under the said section is required, to look, not only at the grounds of appeal, but, he must, also, look at the entire record to see whether there are circumstances which raise a reasonable doubt about the conviction or whether there are points of law which emerge in the trial and which should be the subject of full appeal hearing. This is more particularly desirable where, as here, the appellant is unrepresented.

We arrive at the inevitable conclusion that this appeal ought not to have been summarily rejected by the High Court for the reasons we have advanced in this judgment.

Before we finally dispose of the appeal, there is one other matter upon which we must comment. PW1 and PW2 were treated as children of tender years and were examined by the trial court pursuant to S.19 of the Oaths and Statutory Declarations Act, Cap. 15, Laws of Kenya, which we have quoted verbatim elsewhere in this judgment. We have looked at the record of the trial Magistrate and we think that the examination of the two witnesses was perfunctory. It failed to follow the sequence of examination as required by law and to go to the root of that examination.

There are two stages which must be followed and must appear on the record of the trial court. First, the examination must, endeavour to ascertain whether the witness understands the meaning, nature and purpose of an oath. The question or questions by the court must be directed to that. If the court, from the answer it receives from the witness is satisfied that the witness understands the meaning, nature and purpose of an oath, the witness must then be allowed to give sworn evidence. Stage two of the matter does not then come into play.

Where however, the witness does not understand the meaning, nature and purpose of an Oath, stage two of the examination then follows. The witness is examined by the court to ascertain whether the witness is possessed of sufficient intelligence to justify reception of his or her evidence though not upon oath. This examination must, equally, appear on record. Simple elementary questions would normally be asked like the date, the day, the school the witness is attending and other matters. If the court is satisfied from the answers to such questions, that the witness is possessed of sufficient intelligence, the court will allow the witness to give unsworn evidence.

Having examined the record of the trial magistrate carefully, we are satisfied that the trial magistrate did not follow the sequence as set out in the preceding paragraphs. Nowhere does he appear to have asked the two witnesses whether they understood the meaning, nature and purpose of an oath. Instead the Magistrate seems to have started at the second stage of finding out whether the witnesses were possessed of sufficient intelligence. This, was an error which ought not to have occurred.

There is absolutely no corroboration to the evidence of the complainant, P A, and the evidence of her sister, E A. The two witnesses could not corroborate each other because they both required corroboration. The appeal was erroneously dismissed by the High Court under the Summary Procedure set out in S.352(2) CPC.

We hereby therefore, and for all the reasons given allow this appeal, quash the conviction and set aside the sentence. We order that the appellant shall forthwith be set free unless otherwise lawfully held.

**Dated at Mombasa this 19th day of January 2000.**

**B. CHUNGA**

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**CHIEF JUSTICE**

**J.E. GICHERU**

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**JUDGE OF APPEAL**

**A.B. SHAH**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**