IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: O'KUBASU, WAKI & DEVERELL, JJ.A)

CRIMINAL APPEAL NO. 157 OF 2003

BETWEEN

JOSEPH KARANJA MUNGAI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Tuiyot, J) dated 3rd October, 2002

in

H.C. Cr. Appeal No. 22 of 2002)

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JUDGMENT OF THE COURT

The appellant herein, ***Joseph Karanja Mungai***, was convicted by the learned Senior Resident Magistrate at Kikuyu (Mrs. A. N. Ongeri) on three counts of attempted defilement of a girl contrary to ***section 145(2)*** of the Penal Code. It was alleged that on *23rd February, 2001* at Thogoto Village in Kiambu District within the Central Province, the appellant attempted to have carnal knowledge of three young girls, namely ***Mercy Wanjiku Kinyanjui***, ***Mary Wanjira Wangari*** and ***Nelly Mwende Magua***. The three girls were all under the age of 14 years. Upon conviction, the appellant was sentenced to seven (7) years imprisonment on each count and the sentences were ordered to run concurrently. This was pursuant to the trial magistrate's judgment delivered on *23rd*

November, 2001. The appellant's appeal to the superior court was dismissed by Tuiyot J, in a judgment delivered on *3rd October, 2002.*

From the record of the trial court, it is to be observed that the appellant's convictions on the three counts were based on the evidence of the three young girls. From the same record, it would appear that the learned trial Magistrate did not conduct a *voire dire* examination before receiving the evidence of the three minors. The proper procedure to be followed when children are tendered as witnesses was set out in the decision of this Court in **JOHNSON NYOIKE MUIRURI V. R. (1982 – 88) 1 KAR 150 at p. 152** where Madan, J.A (as he then was) said:-

> **"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.**
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> **In Peter Kirigi Kiune, Cr. App 77 of 1982 we said:**
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> ***"Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a 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 not 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 (s 19, Oaths and Statutory***

Declarations Act, Cap 20 The Evidence Act (s 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."

A similar opinion was expressed by the Court of Appeal in England recently in R. v Campbell (1982) Times, 10 December:

"If the girl (10 years) had given unsworn evidence then corroboration of those issues was an essential requisite. If she gave sworn evidence there was no requirement that her evidence had to be corroborated but the jury had to be directed that it would not be safe to convict unless there was corroboration.

Dealing with the question of the girl taking the oath it should be borne in mind that where there was an inquiry as to the understanding of a child witness of the nature and solemnity of an oath, the Court of Appeal in R v Lal Khan (1981) 73 Cr App R 190) made it quite clear that the questions put to a child must appear on the shorthand note so that the course the procedure took in the court below could be seen...

There Lord Justice Bridge said:

"The important consideration ..... when a judge has to decide whether a child should properly be sworn, is whether the child has sufficient appreciation of the solemnity of the occasion, and the added responsibility to tell the truth, which is involved in an

oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct.""

There were therefore two aspects when considering whether a child should properly be sworn: first that the child had sufficient appreciation of the particular nature of the case and, second a realization that taking the oath did involve more than the ordinary duty of telling the truth in ordinary day-to-day life."

That was still the position when this Court decided **KINYUA V. REPUBLIC [2003] KLR 301** on *16th May, 2003.* As from *25th July, 2003* however, Parliament made amendments to **section 124** of the Evidence Act and added a proviso, thus:

"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."

A further amendment has since been made by **Act No. 3/06** which took effect on ***21st July, 2006*** and provides that ***section 124*** be amended by deleting the words "***a child of tender years who is***" and substituting therefor the words "***alleged victim***" and by deleting the word "child" wherever it appears and substituting the words "***alleged victim***". The impact of those amendments will however await

construction by the courts as the matter before us predates these amendments.

Without going into any other aspect of this appeal, we think that in view of the fact that the trial Magistrate failed to adopt the correct procedure as regards evidence of the three young girls, this Court would be entitled to interfere with the conviction of the appellant. On that ground alone, this appeal would be allowed.

But there is yet another aspect of this appeal. This relates to the trial being partly conducted by a police constable.

The trial Magistrate's record shows that the trial of the appellant commenced on *23rd April, 2001* when a police constable, Muasya, was the prosecutor. He called seven prosecution witnesses to testify. The trial was adjourned severally until *26th October, 2001* when Inspector Obure appeared for the prosecution. Inspector Obure called only one witness, Inspector Gladys Gituku (PW 8) and the prosecution case was closed. The appellant was then called to defend himself.

It is clear from the record that a large portion of the prosecution was conducted by a police constable who called a total of seven prosecution witnesses out of the eight witnesses called by the prosecution. Inspector Obure came into the trial towards the end. On the authority of **ELIREMA & ANOTHER V. REPUBLIC [2003] KLR 537,** Pc Muasya was not a qualified prosecutor. In **Elirema** case (**supra**) this Court stated, *inter alia*:

> ***"For one to be appointed as a public prosecutor by the Attorney General one must be either an advocate of the High Court of Kenya or a police officer not below the rank of an assistant inspector of police. We suspect the rank of assistant inspector must have been replaced by that of an acting inspector but the Code has not been amended to conform to the Police Act. Kamotho and Gitau were not qualified to act as prosecutors and the trial of the appellants in which they purported to act as public prosecutors must be declared a nullity."***

It is, however, true that Inspector Obure also conducted part of the prosecution. But if a police constable who was unqualified to conduct prosecution conducted part of the prosecution, we cannot separate the part conducted by Inspector Obure from that conducted by police constable Muasya. There was only one trial and if any part of it was materially defective, the whole trial must be invalidated.

In view of the foregoing, the appellant's trial in which Pc Muasya purported to act as a prosecutor must be declared a nullity. We now do so with the result that all the convictions recorded against the appellant must be and are hereby quashed and the sentences are set aside.

While conceding that the appellant's trial was partly conducted by a police constable hence unqualified person contrary to ***section 85*** of the Criminal Procedure Code, Mr. Kaigai asked us to order a retrial.

As already stated in this judgment, the appellant was convicted and sentenced to seven years imprisonment on each count on *23rd November, 2001*. By the time this appeal came up for hearing before us

on 9th October, 2006 the appellant had already completed his prison term. Indeed the appellant appeared in person to argue his appeal. In view of the background of this matter and especially the fact that the appellant has served his term, we would not accede to Mr. Kaigai's request that a retrial be ordered. Taking all these matters into consideration, we do not think that it would be in the interest of justice to subject the appellant to a fresh trial. Accordingly, we refuse to order a retrial. The appellant shall continue to enjoy his liberty as he is no longer in prison. These shall be our orders.

Dated and delivered at Nairobi this 10th day of November, 2006.

E.O. O'KUBASU

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR