Case Number:	Criminal Appeal 106 of 2015
Date Delivered:	06 Oct 2016
Case Class:	Criminal
Court:	High Court at Kitui
Case Action:	Judgment
Judge:	Lilian Nabwire Mutende
Citation:	D. K. D v Republic [2016] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Kitui
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal succeeded
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL NO. 106 OF 2015

D K D.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Kitui

Senior Principal Magistrate's Court Criminal Case No. 300 of 2012

by Hon. B. M. Kimemia P M on 25/02/15)

J U D G M E N T

1. **D K D,** "the Appellant" was charged with the offence of **Causing Grievous Harm** contrary to **Section 234** of the **Penal Code.** Particulars of the offence were that on the **20th** day of **May, 2012** at about **7.30 p.m.** at ***[particulars withheld]*** **Village, Mbusyani Sub-location, Mbusyani Location,** in **Kitui County,** unlawfully did **Grievous Harm** to **E M** a child aged **7 years.**

2. Facts of the case as presented by the Prosecution were that PW1, **M E M** the Complainant a child of tender years (approximately 7 years old) took the Appellant's money and purchased some two (2) doughnuts. The Appellant, his aunt meted out punishment by pouring hot water on his hands. PW2, **Charles Mutia Mbithia,** the Assistant Chief **Kiaini Sub-location** on receiving the report visited the home of the Appellant and found the Complainant who was injured. He arrested the Appellant and took her to **Mbitini Police Post.** The Complainant was taken to **Kisasi Dispensary** and was admitted at **Machakos Hospital** for 5 weeks. Later he went to **Kitui District Hospital** where he was examined by PW3 **Peter Muthengi Wambua,** a Clinical Officer. He had sustained burns on both hands. Te index and 3rd finger were burnt and the skin was rotten. Skin grafting was done. The injury sustained was grievous harm. The Appellant was charged.

3. In her defence, the Appellant stated that the Complainant, her nephew took her money, **Kshs. 150/=.** When she asked him about the money he denied having had any knowledge of the same. She took a stick intending to discipline him. He ran away and fell in water. She took him to hospital for treatment of burns sustained. They encountered the Chief who was looking for her. They went to **Mbitini Police Station** where she was charged. She concluded by alleging that the Chief had a grudge against her.

4. The learned trial Magistrate considered evidence adduced and concluded that the explanation given by the Appellant as to how the child sustained the burns was not plausible. It could only be consistent to the Accused having tied the child's hands with a polythene paper and setting it ablaze. And, that if the child had fallen into hot water. Further she argued that the Appellant must have convinced the child to lie to the police by stating that he fell into hot water fearing dire consequences. She convicted the

Appellant and sentenced her to serve **Eight (8) years imprisonment.**

5. Being aggrieved by the conviction and sentence thereof, the Appellant appealed on grounds that:

- The Magistrate relied on hearsay evidence to convict the Appellant.
- The Appellant was denied a chance to call witnesses which occasioned prejudice to her defence.
- The court considered extraneous matters that were not adduced by the Prosecution with regard to the interference of the witnesses that caused a mistrial.
- Important witnesses were not called.
- The defence was not given a benefit of doubt.
- The court relied on evidence not adduced in court to convict the Appellant, having reflected in the judgment.
- Convicting the Appellant basing on matters done in camera in the absence of the Accused was erroneous and a mistrial.
- The court relied on evidence of a minor alone yet it was obvious that he was not a truthful witness.

6. The State through **Ms. Amojong,** learned State Counsel opposed the appeal.

7. This being the first Appellate Court, It is bound to subject evidence adduced at trial to a fresh and exhaustive examination and come to its own conclusion bearing in mind that it did not see nor hear witnesses who testified at the hearing. **(See Okeno vs. Republic (1972) EA 32).**

8. In determining the matter I will condense most of the grounds of appeal raised by the Appellant. The single witness to the act that caused the Complainant injuries that were classified as grievous harm was PW1. He was a minor. Being a child of tender years estimated to be between 7 – 10 years, the learned Magistrate conducted a *voire dire* examination in order to come up with an opinion as to whether he understood the nature of oath he may have been expected to take. Having gone through the process of examining the child, she formed the opinion that the child did not comprehend the nature and purpose of the oath and directed that he makes an unsworn statement.

9. The Complainant stated that the Appellant wanted to beat her as she had taken her money. She ran away into the kitchen, water that was on the fire poured on his hands. He screamed and **W** and **N** went to where they were. He concluded his testimony by stating that the Appellant tied his hands with papers, lit them and burned his fingers and hands.

10. **Section 19** of the **Oaths and Statutory Declarations Act, Cap 15** states:

"(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.

(2) If any child whose evidence is received under subsection (1) wilfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment."

11. **Section 124** of the **Evidence Act** provides thus:

"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."

In the case of **Kinyua vs. Republic (2002)** the Court of Appeal stated thus:

"……."

If the child does not understand the nature of oath he is not necessarily disqualified from giving evidence. The court, may still receive the evidence if satisfied upon investigation, that the young person is possessed of sufficient intelligence and understands the duty of speaking the truth. The investigation must be done and appear on record. If the court is so satisfied that it will proceed to record unsworn evidence from the child witness.

12. In this case the court did not state if the child was seized of sufficient intelligence to satisfy the court of the truthfulness of his testimony.

13. Evidence of such a child would require corroboration. In the case of **Johnson Muiruri (1983) KLR 445** it was held that the Accused should not be convicted in the absence of corroborating testimony.

14. In the case the child gave contradictory evidence. At the outset he stated that he suffered injuries as a result of an accident as he ran away from the Appellant who wanted to mete out a disciplinary act against him. Then, he concluded his testimony by stating that the Appellant tied his hands and burnt them.

15. In convicting the Appellant the learned trial Magistrate based her decision on evidence purportedly obtained from the child as she interviewed her in camera. In her judgment she had this to state:

"I note that the child stated at first that he fell into hot water and on intervening him in camera the child stated that accused burnt his hands and threatened to beat him if he said it was accused who burnt him. I have noted that there were no witnesses who witnessed the act. I have noted

that the hands of the PW1 were severely burnt and became deformed and hence cannot use his hands. I note that the accused stated it was an accident and that PW1 fell in hot water which was on the jiko as he was running away but there is a curious question on how comes only the hands were injured up to the wrist. The child on being interviewed by the court said that he had lied because the accused threatened to beat him if he told the truth and indeed the child stated that accused tied his hands with polythene paper and set it ablaze. I think this gives a good explanation as to how comes the injuries were only on the hands and resulted in disability of both hands. I note that the explanation by the accused that PW1 fell in hot water is not plausible as hot water would not have cause such deep extensive injuries and if he fell in hot water, it would have burnt other parts of the body but in this instance, the injuries were only on both hands up to the wrist and I note that hot water could not have cause such deep seated injuries resulting in disability. In the circumstances, I note that the accused may have influenced the child to lie to the police on the count at first instance because he was afraid of the consequences."

The alleged interview carried out by the trial Magistrate does not form part of the record. The only remark the court made was that it had taken note of the fact that the Appellant was interfering with the witness having threatened to beat him if he stated that she burnt him. Consequently her bond was cancelled.

16. It is apparent that in her judgment the learned Magistrate took into consideration extraneous facts that were not adduced in evidence. The judgment of the learned Magistrate was an opinion formed on the basis of speculation and conjecture. It was erroneous on the part of the Magistrate to come up with theories based on assumption or supposition.

17. This was a case where the Complainant sustained serious injuries amounting to grievous harm. The child stated that when he raised a call of distress some two individuals responded. He gave their names as **W** and **N.** These were crucial witnesses whose evidence would have corroborated that of the Complainant. The investigation Officer did not consider calling them as witnesses. In the case of **Bukenya and Others vs. Uganda (1972) EA 549** it was held that where crucial witnesses are not called to testify, the court is entitled to draw an inference that the evidence of those important witnesses would have been adverse to the Prosecution's case.

18. I do appreciate the fact that an Investigation Officer has a discretion to decide who to call as a witness. But, this having been a case of a child of tender years who could not express himself appropriately the Investigation Officer should have moved a stride further and considered calling witnesses who found him soon after he was injured. His evidence needed to be corroborated.

19. In her defence the Appellant alleged that after the accident she took the child to hospital. The learned Magistrate considered the Appellant to have been inhuman by not taking the child to hospital. PW2 the Chief stated that on receipt of the report he found the Accused at her kiosk and arrested her. It was stated that at the outset the Complainant was seen at **Mbusyani Hospital** prior to being referred to **Machakos General Hospital.** The only medical evidence adduced was the medical examination report (P3) filled at **Kitui District Hospital** and a discharge summary from **Machakos General Hospital.** The chain of evidence as to what state the Complainant was in on being taken to **Mbusyani Hospital** and when exactly he was taken there is missing. It is therefore difficult to tell as to who took the child to hospital.

20. This was a case where the police should have been diligent in carrying out investigation but they simply did their work in a shoddy manner hence failing to present evidence before the court that would

be dealt without occasioning an injustice.

21. Having re-evaluated evidence adduced it is apparent that convicting on evidence tendered was unsafe. Therefore, the appeal succeeds. The conviction entered is quashed and sentence imposed set aside. The Appellant shall be released forthwith unless otherwise lawfully held.

22. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **6th** day of **October,** 20**16.**

L. N. MUTENDE

JUDGE