Case Number:	Criminal Appeal 89 of 2003
Date Delivered:	26 Sep 2003
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Court:	High Court at Kericho
Case Action:	Judgment
Judge:	Jessie Wanjiku Lessit
Citation:	Philip K Langat v Republic[2003] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Kericho
Docket Number:	-
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Case Outcome:	-
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Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO 89 OF 2003

PHILIP K. LANGAT V REPUBLIC

SEPTEMBER 26 2003

LESSIT J

September 26 2003, Lessit J delivered the following Judgment.

The appellant herein PHILIP K. LANGAT has appealed against both the conviction and sentence through his advocate, Mr. Matwere. The counsel argued grounds 2, 3 and 4 of the appeal together. The ghast of his submissions were that the conviction was based on the evidence of PW1 and 2 both of who did not witness the incidence. In addition, he submitted that the evidence of PW2 was erroneously recorded. In disregard of section 124 of the Evidence Act and section 19 of Cap 16.

Counsel for the appellant submitted that the evidence of PW2 was not corroborated. He also urged court to find that the sentence was excessive considering the amounts involved.

The learned counsel for the state, Mr. Onderi, did not oppose this appeal. He conceded that the conviction was based on the evidence of PW2 described in the proceedings as a juvenile. He submitted that the evidence was taken improperly and that the court did not hold a mini-trial to determine the competence of the said witness.

I have carefully considered this appeal. The appellant had been charged with two counts. Count 1 of Hose breaking and stealing contrary to section 304 (1) and section 279 (b) of the Penal Code. Count 2 as stealing by servant contrary to section 281 of the Penal Code. In count 1 he was charged with another. The court convicted the appellant for count 1 and sentenced to 2 years and 6 strokes of the cane. On the record, it is quite clear that the only evidence which tended to inflicate the appellant with the offence was that of PW2. The evidence goes as far as showing that the appellant was left at the complainant's premises by PW2 and that when she went back, she found the premises broken into. There is no other evidence.

PW2 was described as a juvenile. There is no indication about her age. Under part 111 of the Evidence Act, section 124 provides as follows;-

"Notwithstanding the provision of section 19 of the Oaths and Statutory Declaration 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."

The Childrens Act has defined a child as any person below the age of 16 years. It was very important in light of the provisions of section 124 of the Evidence Act for the trial court to have indicated the exact

age of PW2. MADAN, POTTER JJA and CHESONI ag. JA, IN JOHNSON MUIRURI V REPUBLIC 1983 KCR 445, held on the issue of assessing who is a child of tender age, held;

“The matter of whether a child is of tender years or not is a matter of the good sense of the court where there is no statutory definition of the phrase. In Kenya there is no statutory definition of the expression “child of tender years” for purposes of section 19 of the Oaths and Statutory declaration Act’ ……Despite the absence of an express Statutory Provisions, it is the duty of the court not only to ascertain the child is intelligent and competent to justify reception of evidence from the child, but it must also ascertain that the child understands the difference between truth and falsehood.”

The court went ahead and held that such assessment and ascertainment could only be made through a voire dire examination. During such examination the court must set down the questions and answers to enable the appellate court decide whether this important matter was rightly decided. It is a mandatory to hold such an inquiry and to record the nature of it so that the cause the court took is clearly understood.

In this case the learned trial magistrate did not demonstrate that a voire dire examination was caused out to determine whether PW2 understood the nature of an oath. Neither did the court demonstrate that it held an inquiry to determine whether PW2 understood the solemnity of the oath he took or the duty to tell the truth or the difference between truth and falsehood. That omission was fatal to the prosecution case and PW’S evidence being only evidence tending to implicate the appellant, the conviction is irregular and cannot be allowed to stand.

I will allow the appeal, quash the conviction and set aside the sentence. The appellant should be set at liberty unless otherwise awfully held.

Orders accordingly.

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