Case Number:	Criminal Appeal 328 of 2009
Date Delivered:	24 Sep 2010
Case Class:	Criminal
Court:	Court of Appeal at Kisumu
Case Action:	Judgment
Judge:	N/A
Citation:	Cleophas Ochieng Otieno v Republic [2010] eKLR
Advocates:	-
Case Summary:	Criminal Procedure – defilement– appeal against conviction and sentence – where there was no record of the prosecution witness being sworn before giving testimony – evidential value of such testimony - whether it was a mandatory requirement in court proceedings that witnesses be sworn.Evidence – child evidence - child of tender years - duty of the court to conduct a voire dire examination – where it was a mandatory requirement for the court to conduct a voire dire examination on a child of tender years – validity of conviction and sentence. – Oaths and Statutory Declarations Act section 19
Court Division:	Criminal
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	H.C.CR.A. NO. 166 OF 2008
Case Outcome:	Appeal allowed
History County:	Kisumu
Representation By Advocates:	-
Advocates For:	-

Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

Criminal Appeal 328 of 2009

CLEOPHAS OCHIENG OTIENO …… APPELLANT

AND

REPUBLIC ……...…… RESPONDENT

(Appeal from the judgment of the High Court of

Kenya at Kisumu (Mwera, J.) dated 27th May, 2009

in

H.C.CR.A. NO. 166 OF 2008)

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JUDGMENT OF THE COURT

The appellant was convicted by the Ag. Senior Resident Magistrate at Bondo (E. S. Olwande, Esq.) (SRM) of Defilement of a girl under the age of 11 years contrary to **Section 8 (2)** of the *Sexual Offences Act – No. 3 of 2006* and sentenced to life imprisonment. His subsequent appeal against conviction and sentence to the superior court at Kisumu was dismissed. Thus, this is his second and last appeal.

The particulars of the charge alleged, among other things, that on 6th May, 2007, the appellant defiled P.A.J (victim) a girl under the age of 11 years. Three witnesses testified in support of the charge, namely, M.A.J (M) (PW1) the mother of the victim, P.A.J (PW2) the victim, and Redemta (PW3) a clinical officer who examined the victim.

M.A testified in brief that on the material day at 7 a.m., she left her three children including the victim at home and went to the river to wash clothes and when she returned at 10 a.m. she noticed that the victim was walking with a limp and on questioning her, the victim reporteda that the appellant who is a son of Tobias, had defiled her. On checking the victim she noticed that she had a cut on her genitals and was bleeding. She took the victim to the dispensary and thereafter reported to the police. She subsequently led police to R Secondary School where the appellant was schooling and the appellant was arrested. The victim was examined by Redemta on 9th May, 2009 who found that the victim had a first degree perineal at the genitilia indicating forceful penetration.

The appellant stated at the trial that on 6th May, 2007, a Sunday, the victim's mother asked him if he had defiled her child but he denied only to be arrested at the school one week later.

The subordinate court appreciated that there was no independent eye – witness but nevertheless believed the evidence of the victim that she recognized the appellant as the person who defiled her. The superior court after the re-appraisal of the evidence arrived at the same conclusion.

In the course of the appeal in the superior court, it came to the notice of the superior court that there was a procedural error in the trial as **Section 19** of the *Oaths and Statutory Declarations Act* (Act) was not complied with before the reception of the evidence of the victim. Indeed, the record of the subordinate court shows that the child was merely asked about her age and no further *voire dire* examination was made to show whether or not the child understood the nature of the oath or if not, whether she was possessed of sufficient intelligence to justify the reception of the evidence and understood the duty of telling the truth to justify reception of her evidence. The procedural prerequisite under **Section 19** of the Act before reception of evidence of a child of tender years has been considered in numerous decisions of this Court (see particularly **Johnson Muiruri vs. Republic** [1983] KLR 445 and **Kinyua vs. Republic** [2002] 1 KLR 256.

The authorities show that if the trial court after *voire dire* examinations is satisfied that the child witness understands the nature of the oath, the court without much ado proceeds to swear the child and receive the evidence on oath. But if the court is not so satisfied, the unsworn evidence of the child 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 **Kinyua** case the court said that failure to strictly comply with the procedure may in appropriate circumstances vitiate the conviction.

The superior court held that non-compliance with **Section 19** of the Act did not prejudice the appellant. The record shows that the child gave unsworn evidence. In our view, in absence of an inquiry and a finding that the child was possessed of sufficient intelligence and understood the duty of speaking the truths, it cannot be said that the child was a competent witness or that her statement had an evidentiary value.

There was a further fundamental procedural error. The record of the subordinate court shows that the entire trial including the defence case was conducted by D. K. Mikoyan, SRM. However, the judgment was written, read and signed by E. S. Olwande, Ag. SRM. The record is silent why this happened. However it can be reasonably assumed that D. K. Mikoyan ceased to exercise jurisdiction. In such an eventuality **Section 200 (1) (b)** of *Criminal Procedure Code* (CPC) authorizes the succeeding magistrate:

“to act on the evidence recorded by that predecessor or resummon the witnesses and re-commence the trial”.

However, vide **Section 200 (4)** CPC; the High Court in that event can set aside the conviction and order a retrial if it is of the opinion that the accused person was materially prejudiced thereby.

The prosecution case was dependent on the evidence of one witness a child of tender years whom the succeeding magistrate neither saw nor heard. Apparently, it was not brought to the attention of the superior court that the judgment was written by a magistrate who had not heard the case. Had this been brought to the attention of the superior court, the court would have, in accordance with **Section 200 (4)** CPC, investigated whether the appellant was thereby materially prejudiced and if so satisfied it could have set aside the conviction and ordered a retrial.

We think, that the appellant was prejudiced by the two defects in the trial and that it is in the interest of justice that a re-trial be held.

In the result, we allow the appeal, set aside the conviction and sentence imposed on the appellant. We order that the appellant be retried before a magistrate of competent jurisdiction other than D. K. Mikoyan and E. S. Olwande. The appellant shall be remanded in custody and produced before the subordinate court within 14 days of this judgment for fixing the date of the retrial.

Dated and delivered at Kisumu this 24th day of September, 2010.

J. E. GICHERU

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CHIEF JUSTICE

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR