**Mungai v Republic**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of judgment:** 10 November 2006

**Case Number:** 157/03

**Before:** O’kubasu, Waki and Deverell JJA

**Sourced by:** LawAfrica

**Summarised by:** R Rogo

*[1] Criminal procedure – Duty of court to conduct a* voire dire *examination before taking evidence of a*

*child – Effect of failure to conduct a* voire dire *examination.*

*[2] Criminal procedure – Unqualified prosecutors – Effect of a trial that is partly conducted by a police*

*constable.*

**Editor’s Summary**

The appellant was convicted on three counts of attempted defilement of a girl contrary to section 145(2) of the Penal Code. Upon conviction, he was sentenced to seven (7) years imprisonment on each count and the sentences were ordered to run concurrently. The trial of the appellant commenced on 23 April 2001 when a police constable, Muasya, was the prosecutor. He called seven prosecution witnesses to testify. The trial was adjourned severally until 26 October 2001 when Inspector Obure appeared for the prosecution. Inspector Obure called only one witness and the prosecution case was closed. The appellant was then called to defend himself. From the record of the trial court, it was observed that the appellant’s convictions on the three counts were based on the evidence of the three young girls. It also appeared that the magistrate did not conduct a *voire dire* examination before receiving the evidence of the three minors.

**Held** – Where, in the proceedings of 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. The learned Magistrate failed to adopt the correct procedure as regards the evidence of the three girls. (*Johnson Nyoike Muiruri v Republic* [1982-1988] 1 KAR 150; *Kinyua v Republic* [2003] KLR 301 followed). In view of the fact that the trial magistrate failed to adopt the correct procedure as regards evidence of the three young girls, the Court would be entitled to interfere with the conviction of the appellant. Police Constable Muasya was not a qualified prosecutor. If a police constable who was unqualified to conduct prosecution conducted part of the prosecution, the court 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. (*Elirema and another v Republic* [2003] KLR 537 followed). In view of the foregoing, the appellant’s trial was partly conducted by a police constable hence unqualified person contrary to section 85 of the Criminal Procedure Code.

Appeal allowed.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Elirema and another v Republic* [2003] KLR 537 – **F**

*Johnson Nyoike Muiruri v Republic* [1982-1988] 1 KAR 150 – **F**

*Kinyua v Republic* [2003] KLR 301 – **F**

*Peter Kirigi Kiune* criminal appeal number 77 of 1982

***United Kingdom***

*R v Campbell* Times, 10 December 1982