JOHN OKOYE v. THE STATE

(1972) LPELR-2510(SC)

In The Supreme Court of Nigeria

On Friday, the 15th day of December, 1972

SC.367/1971

Before Their Lordships

GEORGE BAPTIST AYODOLA COKER Justice of The Supreme Court of Nigeria

DAN IBEKWE Justice of The Supreme Court of Nigeria

AYO GABRIEL IRIKEFE Justice of The Supreme Court of Nigeria

Between

JOHN OKOYE Appellant(s)

AND

THE STATE Respondent(s)

Other Citations

(1972) All N.L.R 938

(1972) 12 S.C. 77

RATIO DECIDENDI

1. EVIDENCE - COMPETENCE OF A CHILD: Whether the competency of age is a matter for a child to understand the nature of an oath

"...there is a long line of authorities establishing that competency is not a matter of age but of understanding and that if a child understands the nature of an oath, the provisions in question are completely out of place. See Reg. v. Perkins (1840) 9 C. and P. 395 (or 173 E.R. 884); also R. v. Michael Moscovitch (1924) 18 Cr. App. R. 37." PER COKER, J.S.C. (P. 14, paras. D-F) (...read in context)

2. EVIDENCE - COMPETENCE OF A CHILD: What a judge is required to do in determining competency of a child to give evidence

"But, although the judge is not bound to hold a preliminary inquiry, he is nonetheless required to form an opinion that the child does not understand the nature of an oath in order to make the section operative. The section has approached the problem in a negative way and obviously says nothing concerning the child produced and tendered as a witness who understands the nature of an oath. The section is aimed at a child who does not understand the nature of an oath and what it then says is that the unsworn evidence of such a child may be received despite the provisions of section 179 if "in the opinion of the court" he has sufficient intelligence to justify his giving such evidence and understands the duty of speaking the truth. As the section does not contemplate a child who understands the nature of an oath, it is difficult to see how section 182 applies to the present case. We think it appropriate to observe however that where a judge thinks that the case of a child-witness should be taken away from the provisions of section 182(1), there should be recorded a note to that effect stating that in his opinion the child is capable of understanding the nature of an oath." PER COKER, JSC (Pp. 14-15, paras. F-D) (...read in context)

3. PRACTICE AND PROCEDURE - IRREGULARITIES IN PROCEEDINGS: Duty of counsel to raise an objection to any irregularity in the conduct of the proceedings

"It is as well the duty of counsel to raise an objection to any irregularity in the conduct of the proceedings and especially so when it is clear that a particular step ought to have been taken or a particular thing done. In the present case, the witness, Agnes Okoye, gave evidence under oath without

any objection whatsoever from anybody and as her age does not necessarily import an incapability to understand the nature of an oath or any other form of incompetency the section relied upon to attack the proceedings is in our view unavailing." PER COKER, JSC (P. 16, paras. B-E) (...read in context)

4. WORDS AND PHRASES - "A CHILD": Meaning of a Child

"A child is a young person in the formative period of life and whilst it is easy to see that a person of the age of 6 or 7 years does not understand the nature of an oath, it is impossible to be categorical on the capability or otherwise of a child of the age of 13 years or more to understand the nature of an oath. A great deal depends on the opinion of the judge who sees and hears the witness. Where the child is incapable of understanding the nature of an oath, the procedure in section 182(1) must be followed so as to justify the necessary departure from the provisions of section 179. On the other hand, where the child is capable of understanding the nature of an oath, he must comply with section 179 as is the case in the present proceedings." PER COKER, J.S.C. (Pp. 15-16, paras. D-A) (...read in context)

G. B. A. COKER, J.S.C. (Delivering the Leading Judgment): The appellant herein has appealed to this Court against his conviction for murder by Oputa J. (High Court, Onitsha). He was charged and tried on an Information which alleged that on the 19th March, 1970, at Isuh in the Onitsha Division of the East-Central State he murdered one Mgbankwo Nwuzo who was his own sister-in-law having been married to a brother of the appellant who died during the recent civil war. Six witnesses gave evidence for the prosecution at his trial but only one of them, Agnes Okoye, 2nd prosecution witness, was an eye-witness to the events leading to the death of Mgbankwo Nwuzo. The case for the prosecution is that on the day in question the appellant resented the action of Mgbankwo Nwuzo in hoisting sticks on the ground for the erection of a shed and, as she repeatedly gathered her sticks and tried to put them up again after he had pulled them down, the appellant kicked her with his foot on the waist and the stomach and then hit her on the head with a bamboo stick. Mgbankwo Nwuzo fell down on the spot and died within a few moments thereafter. A local chief-Matthias Maduka, 1st prosecution witness testified to the effect that soon after the killing of the deceased the appellant and one Lawrence Ofurume (3rd prosecution witness, came to him and reported that the appellant and a woman had fought and that the woman, by name Mgbankwo Nwuzo, had died. The Chief also said that he followed them to the place where they said the body lay and saw the corpse of the deceased. Dr. Douglas Ikegwuonu, 5th prosecution witness,

had performed a post-mortem examination on the corpse and he gave it in evidence that the deceased had the following injuries:-

"1. She was dead probably two days before the 20th March, 1970.

2. Lacerations were found at the abdominal regions.

3. The rectum was gushing out from the anal region.

4. A lot of clotted blood were observed in the thoracic and

abdominal cavities.

5. There was a rupture of the liver at right lobe.

6. Rupture of the spleen was also seen.

7. Fracture of the 7th, 8th, 9th left ribs were seen."

The doctor thought the deceased had died from rupture of the liver, ribs and spleen and that the injuries could have been caused by the use of a blunt object like a heavy stick used with force or a kick with the foot applied with great force.

Â Â The appellant made a statement to the police after his arrest and in that statement he denied having killed the deceased; indeed he said that on the day in question Mgbankwo Nwuzo came out of the house, protested against his own erection of a shed on the spot where it stood and then proceeded to pull down the shed which he, appellant, had already erected. The appellant further stated that he then took her by the hand and led her out of the place; that she came back and continued to pull down his own shed and that he, the appellant, left the spot after he had been advised to do so in order to avoid a quarrel. He further stated that he learned later that the deceased had fallen down on that spot and that people were throwing water on her. At his trial, the appellant gave evidence in his own defence. He told more or less the same story as contained in his statement to the police and admitted that he was aware that Mgbankwo Nwuzo was generally known to be subject occasionally to fits of epilepsy.

Â Â As stated before, the only eye-witness to the killing of the deceased was Agnes Okoye a daughter of the deceased. She was at the time of giving evidence in this case a school girl and was only some 13 years old. The records show that when she was called into the witness box she was sworn on the Bible and thereafter proceeded with her evidence even though the learned trial judge observed and noted on his records that she was a young girl of about 13 years. In his judgment, the learned trial judge accepted her testimony and rejected the story of the appellant, although it is fair to observe that the learned trial judge also looked for and found other materials which tended to make her own story more probable.

On these facts, the learned trial judge convicted the appellant of murder and sentenced him to death. He has now appealed to the Court against that conviction and the only ground of appeal argued on his behalf reads:-

"That the learned trial judge erred in law in failing to make a preliminary inquiry as to the competence of the 2nd prosecution witness to give evidence on oath and thereby came to a wrong decision. "

Â Â Learned counsel for the appellant argued that the learned trial judge should have complied with the provisions of section 182 of the Evidence Act by making and recording a preliminary inquiry and that his failure to do so vitiates the evidence of the 2nd prosecution witness, Agnes Okoye, and that since that was the only evidence against the appellant there should have been a direction to the effect that there was no evidence or no sufficient evidence to sustain the charge. On the other hand, learned State Counsel for the respondent argued that there was no duty on the learned trial judge to hold a preliminary inquiry before allowing the witness to give evidence since, as State Counsel submitted, section 182 of the Evidence Act does not so prescribe; that the provisions of section 149(1) of the Evidence Act apply and that in any case this is a proper case and occasion to apply the provisions of the proviso to section 26(1) of the Supreme Court Act. It was also urged in argument by learned counsel for the appellant that by virtue of the provision of section 2 of the Criminal Procedure Act, which states that a "child" means any person who has not attained the age of 14 years, the girl Agnes Okoye was a child within the meaning of section 182 of the Evidence Act. We entertain some doubt as to whether or not the definition of child in the Criminal Procedure Act does necessarily carry the same connotation in the context of section 182 of the Evidence Act, but the point is immaterial to our present decision since it must be generally accepted that a boy or girl of the age of 13 years must be considered a child. There are on the statute books a large number of statutes concerning children and many of them, if not most, do carry relevant definitions of the word "child" or cognate expressions like "children", "childish" or indeed "young persons" and in these circumstances except there be a general definition provided by a statute of interpretation, it might be imprudent to lay down any hard and fast rule. As Willes J. observed in Reg. v. Cockerton [1901] 1 K.B. 322 at pages 340-341, when dealing with the provisions of the Elementary Education Act, 1870:-

"Except for the purposes of one Act, dealing with compulsory attendance, no definition has been given of a 'child'. It is impossible to lay down any definite boundary as separating 'children' from 'young men' or 'young women', or any other description by which an advance beyond childhood may be indicated. Practically I suppose that at somewhere between sixteen and seventeen at the highest an age has been arrived at which no one would ordinarily call childhood."

Section 182 of the Evidence Act is as follows:-

182.-(1) In any proceeding for any offence the evidence of any child who is tendered as a witness and does not, in the opinion of the court, understand the nature of an oath, may be received, though not given upon oath, if, in the opinion of the court, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

(2) If the court is of opinion as stated in subsection (1), the deposition of a child may be taken though not on oath and shall be admissible in evidence in all proceedings where such deposition if made by an adult would be admissible.

(3) A person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused.

(4) If any child whose evidence is received as aforesaid 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 against section 191 of the Criminal Code and, on conviction, shall be dealt with accordingly."

Â Â With respect to the argument of learned State Counsel that section 149(1) of the Evidence Act should be applied, it is only sufficient to say that even that section requires that the act which is called in question should have been "done in a manner substantively regular" and it will be idle to argue that a step which was not taken or complied with at all is the same as one which was indeed taken or complied with substantively regularly although not in entire conformity with statutory or other requirements. We point out that the marginal note to section 182(1) of the Evidence Act states that it deals with the unsworn evidence of a child.

The section itself provides for the reception of the evidence of a child produced as a witness in a criminal proceeding who cannot be and is not sworn because he cannot understand the nature of an oath. Section 182 falls within Part X of the Evidence Act and that part deals with the taking of oral evidence. Section 179 which is the first section in that part of the Act, provides thus:-

" 179 . Save as otherwise provided in sections 181 and 182 all oral evidence given in any proceedings must be given upon oath or affirmation administered in accordance with the provisions of the Oaths and Affirmations Act."

Thus, one sees that section 182 is an exception to the peremptory provisions of section 179. So also is section 181 which deals with other cases in which evidence not given on oath may be received. Section 181 provides as follows:-

"181.-(1) Any court may on any occasion, if it thinks it just and expedient, receive the evidence, though not given upon oath, of any person declaring that the taking of any oath whatsoever is, according to his religious belief, unlawful, or who, by reason of want of religious belief, ought not, in the opinion of the court, to be admitted to give evidence upon oath.

(2) The fact that in any case evidence not given upon oath has been received, and the reasons for the reception of such evidence, shall be recorded in the minutes of the proceedings."

Â Â Manifestly, therefore, the duty imposed on the court by section 181(2) to record the reasons for departing from the provisions of section 179 is clearly seen in the wording of the section. Strangely enough, there is no such duty imposed on the court by section 182 which on a fair reading has clearly left the whole matter to the "opinion of the court." We do not think that it is right to contend therefore, as learned counsel for the appellant has done, that the court has a duty to make a preliminary inquiry and to record it. On this point, learned counsel had referred us to the provisions of section 38 of the Children and Young Persons Act of England and to cases which were decided on the interpretation and application of that section. Section 38 of the Children and Young Persons Act, 1933 (23 Geo. 5 c. 12) provides:-

"38. (1) Where in any proceedings against any persons for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence, though not given on oath but otherwise taken and reduced into Writing in accordance with the Provisions of section 17 of the Indictable Offences Act, 1848, Or of this part of this Act, shall be deemed to be a deposition within the meaning of that section and that Part respectively:

Provided that where evidence admitted hy virtue of this section is given on behalf of the prosecution the accused shall not be liahle to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.

(2) If any child whose evidence is received as aforesaid 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 liable on summary conviction to be dealt with as if he had been summarily convicted of an indictable offence punishahle in the case of an adult with imprisonment", and in his argument, learned counsel for the appellant had submitted quite properly that cases like R. v. Reynolds (1950) 34 Cr. App. R. 60 and R. v. Southern (1930) 22 Cr. App. R. 6 were decided on the basis of this section. Unlike the case

on appeal before us, these two cases were tried with juries. In Reynolds the conviction was set aside on the grounds that the issue of competence of the young witness to give evidence and indeed, her evidence were tried or taken in the absence of the jury, i.e. after the jury had been asked to retire. In setting aside the conviction in that case, the Lord Chief Justice (Goddard L.C.J.) observed thus:-

"It should be regarded as most exceptional that any evidence should be given in a criminal trial in the absence of the jury." ,

Â Â Earlier on in the judgment (i.e. in Reynolds, Supra) the Court had observed that it was important that the jury should hear the child's, answers to questions put to her to ascertain her competency to take oath so as to assist them to come to a conclusion as to the weight they should attach to the evidence of the child. The Court further stated:_

"A fortiori, the jury should be present when a witness is called to assist the Court by telling the Court what his or her experience of the child is, and what impressions he or she has formed of the child's character. The jury will then have before them all the available information with regard to the child's reputation or character for truthfulness. "

Â Â Similar observations occur in Southern, supra (especially per Talbot J. at page 13 of the report). So much is clear from these cases and others of the like; the opinion about the child-witness is the "opinion of the Court" and it is easy to see why the jury should also know these facts. When a judge sits alone the position is entirely different and he is preeminently the person whose opinion is relevant. And, apart from this, there is a long line of authorities establishing that competency is not a matter of age but of understanding and that if a child understands the nature of an oath, the provisions in question are completely out of place. See Reg. v. Perkins (1840) 9 C. and P. 395 (or 173 E.R. 884); also R. v. Michael Moscovitch (1924) 18 Cr. App. R. 37. We do not think that the English authorities support the contention of learned counsel for the appellant on this ground of appeal.

Â Â But, although the judge is not bound to hold a preliminary inquiry, he is nonetheless required to form an opinion that the child does not understand the nature of an oath in order to make the section operative. The section has approached the problem in a negative way and obviously says nothing concerning the child produced and tendered as a witness who understands the nature of an oath. The section is aimed at a child who does not understand the nature of an oath and what it then says is that the unsworn evidence of such a child may be received despite the provisions of section 179 if "in the opinion of the court" he has sufficient intelligence to justify his giving such evidence and understands the duty of speaking the truth. As the section does not contemplate a child who understands the nature of an oath, it is difficult to see how section 182 applies to the present case. We think it appropriate to

observe however that where a judge thinks that the case of a child-witness should be taken away from the provisions of section 182(1), there should be recorded a note to that effect stating that in his opinion the child is capable of understanding the nature of an oath. A child is a young person in the formative period of life and whilst it is easy to see that a person of the age of 6 or 7 years does not understand the nature of an oath, it is impossible to be categorical on the capability or otherwise of a child of the age of 13 years or more to understand the nature of an oath. A great deal depends on the opinion of the judge who sees and hears the witness. Where the child is incapable of understanding the nature of an oath, the procedure in section 182(1) must be followed so as to justify the necessary departure from the provisions of section 179. On the other hand, where the child is capable of understanding the nature of an oath, he must comply with section 179 as is the case in the present proceedings.

Â Â The contention of learned counsel for the appellant is, in short, that it must be shown on the records that the child witness is capable of understanding the nature of an oath before he is allowed to take such oath. We point out that the section on which learned counsel relies makes no provisions for the situation postulated by his argument. It is as well the duty of counsel to raise an objection to any irregularity in the conduct of the proceedings and especially so when it is clear that a particular step ought to have been taken or a particular thing done. In the present case, the witness, Agnes Okoye, gave evidence under oath without any objection whatsoever from anybody and as her age does not necessarily import an incapability to understand the nature of an oath or any other form of incompetency the section relied upon to attack the proceedings is in our view unavailing.

Â Â We are ourselves satisfied, like the learned trial judge, that the witness, Agnes Okoye, spoke the truth throughout and that the appellant had lied to the court by saying that all he did was to hold Mgbankwo Nwuzo by the hand and lead her out of the place. The evidence of Agnes Okoye is supported by the testimony of Chief Maduka, 1st prosecution witness, to whom the appellant and his relation, Lawrence Ofurume, had earlier on reported the fight with the deceased and her death thereby. The doctor who performed the post-mortem examination on the corpse of the deceased found the injuries exactly where Agnes Okoye stated that the appellant had inflicted them. Even if the witness Agnes Okoye should not have been sworn and had wrongly been so sworn, we would have held that this is a case to which we would apply the provisions of the proviso to section 26(1) of the Supreme Court Act and affirm the conviction of the appellant. This is a clear, simple and straight forward case of murder brutally committed by the appellant against a helpless woman for no just cause. He had kicked her twice

on the waist, and clubbed her on the head-an outburst of savagery the bitter consequences of which the law says he must have intended.

We do not accede to the argument on the ground of appeal argued and the appeal fails and it is dismissed. The conviction and sentence of the appellant are affirmed.

Appearances

F. O. AkinreleFor Appellant

AND

M. C. Ejiafor, Senior State Counsel, (East-Central-State)For Respondent