



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL REVISION NO. E004 OF 2021

REPUBLIC.....APPLICANT

VERSUS

MESHACK KIBET.....RESPONDENT

(Being revision of the Order of Hon. N.M. Idaqwa, SRM, dated 4th May 2021

in the Chief Magistrate's Court at Kabarnet in Criminal Case No. E056 of 2021.

Republic v. Meshack Kibet)

ORDER IN REVISION

Introduction

1. The accused has been charged with three counts of traffic offences as follows:

i. *Riding a motorcycle without a valid driving licence contrary to sec 103B(7) of the Traffic Act.*

ii. *Riding a motorcycle without a valid insurance cover contrary to section 4(1) as read with 4(2) of the Insurance Motor Vehicle Third Party Risk Act.*

iii. *Riding an unregistered motorcycle contrary to section 6(1) as read with sec 14 of the Traffic Act*

2. The accused person pleaded guilty to count 2 and was fined Ksh 10, 000 or in default, 2 months in prison. The hearing of count 1 was scheduled on 11/5/2021. On the hearing date, the accused changed his plea to count 1 and pleaded guilty.

3. During his mitigation, the accused said he is not able to raise the fine in count 1, he prayed for forgiveness. He further stated that the motorbike was new and prayed for the court to help as his mother was in hospital and his grandmother was the one taking care of his mother. The accused also stated that he was 17 years old and he was to report to form one at Kapkawa Boys and that he is the one taking care of his other siblings. Age assessment was ordered and the results confirmed that the accused was approximately 17 years old.

4. The matter has been brought before the High Court for review pursuant to section 186(f) of the Children's Act.

Issue

What is the suitable sentence in the circumstances?

Analysis of Facts and the Law

5. Section 186(f) of the Children's Act provides as one of the guarantees that if found guilty, have the decisions and any measures imposed in consequence thereof reviewed by a higher court. This matter is therefore before the High Court for review pursuant to section 186(f) of the Children's Act among other enabling provisions of the High Court review powers. When an appellate court is asked to review a sentence, it is guided by the principles laid down in *Republic v. Maxwell Musundi* [2016] eKLR where the High Court at Busia relied on the cases of *Wanjema v. Republic* [1971] E.A. 494 and *Bernard Kimani Gacheru v. Republic* [2002] eKLR and stated that:

“Those principles show that an appellate court can intervene with the sentencing discretion of the trial Court when:

- (i) the sentence is manifestly excessive in the circumstances of the case;*
- (ii) the trial court overlooked some material factor;*
- (iii) the trial court took into account some irrelevant material; or*
- (iv) the trial court acted on a wrong principle of law.”*

6. The main issue in this matter is, what would be the appropriate sentence in these circumstances? The accused in this matter is a minor aged 17 years. He is charged with three counts of traffic offences attracting a maximum sentence of 20 thousand each or to imprisonment of 12 months in respect of count one, 24 months do count two and 2 years for count 3. The age of the accused has been ascertained after sentencing for count 2 but prior to sentencing in respect but prior to sentencing for count 1.

7. In respect of sentencing of children in conflict with the law, section 191(1) of the Children’s Act is an omnibus provision and provides that:

(1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways—

- (a) By discharging the offender under section 35(1) of the Penal Code (Cap. 63);*
- (b) by discharging the offender on his entering into a recognisance, with or without sureties;*
- (c) by making a probation order against the offender under the provisions of the Probation of Offenders Act (Cap. 64);*
- (d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children’s institution willing to undertake his care;*
- (e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;*
- (f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;*
- (g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;*
- (h) by placing the offender under the care of a qualified counsellor;*
- (i) by ordering him to be placed in an educational institution or a vocational training programme;*
- (j) by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act (Cap. 64);*
- (k) by making a community service order; or*
- (l) in any other lawful manner.*

8. What considerations should the court make when relying on section 191 of the Children’s Act? In *JKK v. Republic* [2013] eKLR, the Court of Appeal in Nyeri while considering the effect of sec 191 of the Children’s Act stated:

*“The purposes of the sentences provided for under the **Children Act** are meant to correct and rehabilitate a young offender, i.e. any person below the age of 18 years while taking into account the overarching objective is the preservation of the life of the child and his best interest. ... when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner.”*

9. In another Court of Appeal decision in *R v. Dennis Kirui Cheruiyot* [2014] eKLR, the Court stated that:

“...when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. We think that due to the gravity of the offence, and the current age of the appellant, he cannot be released to the society without being brought to terms with the consequences of his action or omissions by a custodial sentence. It is for this reason that we are inclined to allow the appeal against the life sentence imposed by the trial court and substitute it with imprisonment for a period of 10 years from the date of conviction.”

10. In *RKS v. Republic* [2018] eKLR, Justice Joel Ngugi in High Court at Nakuru considered the rationale of the Court of Appeal in *JKK v. Republic* [2013] eKLR and *R v. Dennis Kirui Cheruiyot* [2014] eKLR and subsequently stated:

“In both the Dennis Cheruiyot Case and the JKK Case, the Court of Appeal latched on to the omnibus proviso in section 191(1)(l) of the Children’s Act to fashion a sentence that it deemed appropriate for the context and circumstances of the case at hand.”

11. The same position was adopted by the High Court in *Daniel Langat Kiprotich v. State* [2018] eKLR. In *JOO v. Republic* [2019] eKLR, the High Court at Migori considered section 191 of the Children’s Act and stated:

“the Appellant is almost turning 18 years old. In that case, this Court has to consider the effectiveness of the sentences in Section 191 of the Children’s Act vis-à-vis the duty to ensure that the Appellant is properly rehabilitated. The Court has also to consider public interest and the fact that the victim is secured from the possible repeated acts of the Appellant. A balance must be struck.”

12. From the foregoing authorities, there are at least five considerations that court should take into account while sentencing children in conflict with the law. These are:

1. *The purpose of a sentence imposed is meant to correct and rehabilitate a juvenile offender;*
2. *That the preservation of the life [future] of the minor and his best interests as a child are guaranteed;*
3. *Gravity of the offence;*
4. *Age of the accused when the offence was committed and at sentencing;*
5. *Circumstances of the offence;*
6. *Effectiveness of the sentence imposed.*

13. In the instant case, the accused is a school going child preparing to join secondary school. He is the one fending for the younger siblings as the mother is sick and the grandmother is taking care of the mother in hospital. The accused pleaded guilty to the offences and stated that the motorbike was new and he had collected it for repairs. However, I also note that he was arrested at 11 pm in the night. In addition, the accused has been remanded for the past 8 days. The accused is also 17 years.

14. Considering all these circumstances as well as the principles and considerations established in the above cited cases, I am persuaded by the decision of Nakuru High Court in *RKS v. Republic* [2018] eKLR, supra.

15. In this case, the accused is due to join form one should not be denied such an opportunity because of his inability to pay the fines as stipulated. In addition, school seems to be the best place that can offer the accused a suitable environment to reform and learn to become a law abiding citizen and a better person in the society. I also note that there are no aggravating circumstances to the offences that the accused was charged with.

Final order

16. Most of the authorities cited resulted in courts fashioning different sentences. In *Republic v. Maxwell Musundi* [2016] eKLR, the court stated that *“Discharge under Section 35 of the Penal Code is only meant for minor offences and is aimed at ensuring that an offender is not incarcerated.”*

17. I note that the accused was convicted and sentenced in respect of a misdemeanour

18. In the premises, I hereby set aside the orders imposed by the trial court. And in its place I hereby sentence the accused to a conditional discharge under section 35(1) of the Penal Code on condition that he commits no offence within one year failing which he will be brought back for re-sentencing.

19. Subject to the foregoing order of conditional discharge, the accused is hereby ordered released from prison unless held on other lawful warrant.

Order in revision signed, dated and delivered at Kabarnet this 24th day of May 2021.

J M BWONWONG’A

JUDGE

In the presence of:

Mr. Kemboi, Court Assistant.

Mr Mong’are for the Republic

Respondent present in person.