



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL NO 2 OF 2018

WNO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being a ruling from the judgement of Hon. H. Ng'ang'a, SRM, delivered on 6/7/2018 in the Chief Magistrate's Court at Narok in Criminal Case SOA No. 31 of 2017, R v. WNO)

RULING

1. Pursuant to the provisions of the articles 50 (2) (g) and 53 of the 2010 Constitution, section 358 of the Criminal Procedure Code (Cap. 75) Laws of Kenya and section 191 of the Children's Act No.8 of 2001, the appellant has applied for the following orders.

1. an order that the appellant be recognized as a minor and be treated as such at the main appeal hearing.
2. an order that the appellant be accorded his rights such as to choose and be represented by an advocate at the hearing of this application and or the appeal.
3. an order be made to provide for costs to be in cause.

2. The application is supported by the following grounds. First, that at trial the appellant did not have a chance to produce his birth certificate to show that he was a minor at that time. Second, the appellant was in remand custody throughout his trial and therefore he was unable to access his birth certificate. Third, the appellant was unrepresented by an advocate during his trial, which infringed on his right to legal representation.

3. Furthermore, the application is supported by a seven paragraphs supporting affidavit of the appellant. The major averments are as follows. That he was charged with the offence of defilement on 11th May 2017, when he was 16 years old. That he was issued with a birth certificate based on his baptismal card issued by Fr. Henry Momanyi of the Diocese of Kisii, Our Lady of Assumption, Nyamagwa Parish. That following advice of his advocate which he believes, he should have been given a chance to have an advocate of his choice and that if he could not afford one then the state was to provide him with an advocate. That he prays that the birth certificate be admitted into evidence as new evidence in his pending appeal.

4. Mr. Ole Yenke, counsel for the appellant filed written submissions in support of the application. He submitted that the appellant was convicted and sentenced to 15 years' imprisonment in respect of the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the Sexual Offences Act No. 3 of 2006. That at the time of arrest and trial the appellant was not in position to produce his birth certificate to show his age. The said certificate was not available until the 18th of April 2019, when it was issued to him. That the evidence sought to be adduced was not available at trial and its production meets the threshold laid down in *Elgood v. Regina [1968] EA 274*. Counsel also cited *Tom Martins Kibisu v Republic (2014) ECLR*, which also sets out the threshold for the admission of new additional evidence during the pendency of an appeal. Furthermore, counsel cited article 53 of the Constitution which sets out the rights of the child and in particular requires that a child be detained in a separate facility from that of adults. He finally, cited section 358 of the Criminal Procedure Code (Cap 75) Laws of Kenya, which is in respect of admission of new additional evidence during the appellate proceedings.

5. Finally, counsel cited *Tentere Sankale v. Republic [2018] ECLR*, in which a birth certificate was admitted in evidence during the appellate proceedings with the court holding that article 50 (2) (k) of the Constitution which guarantees to the accused fair trial rights; includes the production of additional evidence on appeal.

6. Ms. Nyaroita for the state opposed the application on the basis that the evidence sought to be adduced was available during trial. She pointed out that the baptismal card was issued in 2002, and therefore it was available and should have been produced. She also submitted that the appellant did not inform the trial court that he was a minor. She further submitted that the evidence sought to be adduced is not credible, because the record of the court proceedings shows that the appellant was a tenant at the material time; which in her opinion showed that the

evidence sought to be adduced is tailored to assist the appellant to be released on the basis that he was a minor at the time the offence was committed.

7. I have considered the affidavit evidence of the appellant and the submissions of both counsel and the applicable law. I find that the appellant was unrepresented during trial in the lower court. I further find that he was in remand custody throughout the trial. In the circumstances, he may not have known the legal procedures regarding the production of the baptismal card into evidence and could not have had access to the said card. I therefore find that the evidence sought to be adduced was not available at trial.

8. I further find the doctrine of the best interests of the child is paramount in terms of article 53 (2) of the Constitution; which reads as follows:

“A child’s best interests are of paramount importance in every matter concerning the child.”

9. This is a universal doctrine. It therefore follows that the admission of this evidence will assist the court in hearing and determining the appeal. This application is similar to ***Tentere Sankale v. Republic, supra***, which I find to be persuasive. I further find that the application has met the threshold as set out in ***Elgood v. Regina, supra*** in that the evidence sought to be produced is relevant, credible and has probative value. Additionally, it will also have a decisive effect upon the judgement.

10. I find that the respondent did not adduce file any evidence in opposition to the application with the result that the affidavit evidence of the appellant was not challenged. I therefore do not find merit in the submissions of Ms. Nyaroita, which I hereby reject.

11. In the premises, I find that the application succeeds with the result that the birth certificate and the card are hereby admitted as additional evidence in terms of section 358 of the Criminal Procedure Code.

Judgment signed, dated at Narok this 29th day of January 2020 in the presence of Mr. Yenko for the applicant and Ms Torosi for the respondent.

J. M. Bwonwong’a.

Judge

29/01/2020