REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 23 OF 2018

BENSON NJUGUNA MUTUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Honourable J. H.S. Wanyanga - Resident Magistrate,

delivered on 20th February, 2018 in Molo Chief Magistrate's Court

Sexual Offences Case No. 1629 of 2016)

JUDGMENT

1. The Appellant, Benson Njuguna Mutua, was arraigned before the Molo Chief Magistrate's Court initially charged with two counts of defilement.

2. The first count was defilement Contrary to Section 8(1(2) of the Sexual Offences Act No. 3 of 2006. The particulars were that it was alleged that on the 29thMay 2016 at around 6.00pm at Londiani sub county, within Kericho County, intentionally caused his penis to penetrate the vagina of NW, a child aged 6 years

3. The second count was also defilement contrary to Section 8(1)(2) of the Sexual Offences Act No. 3 of 2006. The particulars alleged that on the 29th May 2016 at around 6.00pm at Londiani sub county, within Kericho County, intentionally caused his penis to penetrate the vagina of SW, a child aged 6 years

4. For each of the two counts, there was an alternative count of committing an indecent act with the same child on the same date and at the same place.

5. Later on, the Prosecution successfully applied for the second count to be stayed under section 25 of the ODPP Act.

6. The Appellant pleaded not guilty and the trial proceeded in full. At its conclusion, the Learned Trial Magistrate found the Appellant guilty of the first count and sentenced him to imprisonment for life as the statute stipulates.

7. The Appellant was dissatisfied with both the conviction and sentence and appealed to this Court. He filed a Petition of appeal which listed many grounds of appeal. However, during the first appearance before me, one of the grounds assumed priority: that it was unlawful for the Learned Trial Magistrate to try, convict, and sentence the Appellant as an adult yet he was a minor at the time of the alleged commission of the offence as well as at the time of trial and sentencing.

8. The Appellant first raised the issue of his age during the hearing of the appeal. He indicated that he is now nineteen years old and that he was a minor during the trial. I adjourned the matter to enable the Appellant's family to avail a copy of his Birth Certificate. In doing so, I noted that the original charge sheet in the Trial Court indicated that the Appellant was "18 years old". It is probably a good idea for trial Courts to take a moment to ascertain the actual age of Accused Persons before them in borderline cases such as this one. It is certainly curious here that the charge sheet stated the age as "18 years old" when it is more typical to indicate "Adult" where there are no questions that the Accused Person is a minor.

9. In any event, the Appellant's birth certificate was produced before this Court on 20/09/2019. It shows that the Appellant was born on 11/08/2002. This would mean that he was thirteen years and nine months (13 years and 9 months) at the time the offence was committed.

This would decidedly make him a minor at the time of commission of the offence as well as at the time of the trial, conviction and sentencing.

10. In ***Peter Kuria v Republic [2019] eKLR***, I faced a similar situation. After analyzing various constitutional and statutory provisions governing the question, I held as follows:

> *Looking at these four sets of legal provisions which guide the treatment of children in the Criminal Justice System and looking at the Trial Court record in its entirety as a first appellate Court is required to do (**Okeno v Republic [1972] EA 32**), it is readily obvious that once it is conceded that the Appellant was a minor at the time of the trial, one must come to the conclusion that the Appellant's trial fell afoul the fair standards guarantees in the Constitution and statute. This is so for all the four reasons given by Counsel for the Appellant:*
>
> > *a) The Appellant was not afforded legal representation or any other assistance in his defence;*
> >
> > *b) No consideration was given to the fact that the Appellant was a minor when admitting him to bail with the result that he was given prohibitive conditions which he could not meet. He, therefore, ended up in detention during the fourteen months of the pendency of his trial;*
> >
> > *c) The Appellant was held in detention an adult facility despite the fact that he was a minor; and*
> >
> > *d) There was no consideration of the fact that he was a minor during the commission of the offence when he was sentenced. As a result, the Court did not take into account section 191 of the Children's Act in sentencing the Appellant.*

11. In that case, I concluded as follows:

> *Mr. Chigiti would prefer that the matter is sent back for re-trial. However, that would be no cure for the wrong suffered by the Appellant. The genie cannot be put back in the bottle. He is already past the age of majority. He has had to spend the past seven years in a facility with adults – that included one year of what was supposed to be innocent years of his life. He went through a trial which, by law, was unfair. When an Appellant has gone through an unfair trial in circumstances such as this one, an order for re-trial inherently compounds the unfairness. The right course of action is to acquit. A child who was in need of care and protection was hauled through the Criminal Justice System; alone and scared – without legal counsel or even the benefit of the advice of a Children's Officer; and then detained with adults. That is enough suffering for that individual. It is time to bring an end to it…..*
>
> *In the present case, given the circumstances explained above, it is the duty of this Court to quash the conviction and set aside the sentence imposed which I hereby do. The Appellant shall be set at liberty unless otherwise lawfully held in custody.*

12. **The conclusion in the instant case must be the same. Once it was established that the Appellant was a minor at the time the offence was committed, and the time the trial was conducted and sentence handed down, the conclusion became inescapable that the only resort is to acquit the Appellant. I hereby do so. I quash the conviction and set aside the sentence imposed. The Appellant shall be set at liberty unless otherwise lawfully held in custody**.

13. Orders accordingly.

Dated and delivered at Nakuru this 20th day of February, 2020

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JOEL NGUGI

JUDGE