



**Republic v NKG (Criminal Case 21 of 2007)
[2020] KEHC 3661 (KLR) (Crim) (29 July 2020) (Sentence)**

Republic v Njomo Kamau Gacheru [2020] eKLR

Neutral citation: [2020] KEHC 3661 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

CRIMINAL CASE 21 OF 2007

J WAKIAGA, J

JULY 29, 2020

BETWEEN

REPUBLIC PROSECUTOR

AND

NKG ACCUSED

The delay of 14 years in concluding the trial of a child resulted to a miscarriage of justice.

The case dealt with the right of an accused person to have the trial begin and conclude without unreasonable delay. In the instant matter the accused person was minor charged with the offence of murder . His trial took 14 years to be concluded. The court noted that the judicial system was unfriendly to the child offender and that the delay in concluding the trial of the child denied the child his right to benefit from the provisions of the Children Act, 2001. Taking that into consideration, the court sentenced the accused to a probation term of 3 years.

Reported by Moses Rotich

Constitutional Law - fundamental rights and freedoms - rights of a child - the right to a fair trial - where there was inordinate delay in concluding the trial of the accused person - where the trial of the accused person who was a minor at the time of commission of the offence was delayed for 14 years - whether there was inordinate delay in concluding the trial of the accused person - Constitution of Kenya, 2010 article 50(2)(e).

Criminal Procedure - sentencing - sentencing of a child in conflict with the law - where the accused person was a minor at the time of commission of the offence - where the accused person had attained the age of majority and as such could no longer benefit from the provisions of section 191 of the Children Act - what was the appropriate sentence to be imposed on the accused person given that he was a child at the time of commission of the offence - Children Act, 2001 section 191.

Brief facts

The accused, who was a minor at the time of commission of the offence, was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, Cap 63 Laws of Kenya (Penal Code). He



was first presented in court on March 12, 2007 and, after a trial that took fourteen years, the accused was found guilty and convicted of the offence of murder on November 19, 2019. In the instant matter, the accused was brought to court for sentencing.

Issues

- i. Whether there was inordinate delay in concluding the trial of the accused person.
- ii. What was the appropriate sentence to be imposed on the accused person given that he was a child at the time of commission of the offence?

Held

1. The case of the accused was a clear case of miscarriage of justice in as much as he was convicted by the court. He was first presented to court on March 12, 2007. That was after he was arrested on June 23, 2006. When the accused raised a constitutional issue by way of an application under the then section 72 as read with section 77 of the repealed Constitution to the effect that he was produced in court 120 days from the date of his arrest, the court held that the accused constitutional rights had been violated by the state and in particular the police who held him in custody for much longer than allowed by the law. However, the court declined to discharge him by declaring the proceedings illegal.
2. The accused was sinned against more by the judicial system than he had sinned against the deceased. That factor was to be taken into account when passing any sentence against him. Had the criminal justice been friendly towards the accused, then perhaps the accused case would have been dealt with differently.
3. Article 50(2)(e) of the Constitution provided that every accused person had a right to a fair trial which included the right to have the trial begin and conclude without unreasonable delay. A trial that took a period of 14 years could not be said to be a trial without unreasonable delay. The court also took into account the fact that the accused was not taken to court within the constitutional period of 14 days then provided for by the repealed Constitution.
4. The accused person was a minor at the time of commission of the offence. Section 191 of the Children Act, 2001 (Children Act) made provisions on how a court was to punish a child offender. It was clear to the court that the accused person had been deprived of the benefits of that section.
5. Given the special circumstances of the instant case and noting that the best sentencing objective suitable for the accused was rehabilitation, and considering that the accused had been in custody for a period of 14 years which the court considered as lost years which could not be compensated, the court sentenced the accused to a probation term of 3 years during which the probation officer with the assistance of the accused person's brothers and sisters would walk with him so as to settle and integrate him into society.

Sentenced.

Orders

- i. *Accused sentenced to a probation term of three years during which period of time the probation officer with assistance of his brothers and sisters will walk with him so as to settle and integrate him in society*
- ii. *The accused is entitled to his right of appeal of both conviction and sentence while the state has the right of appeal on sentence*

Citations

Cases

Kenya

1. *DKC v Republic* Criminal Appeal 184 of 2009; [2014] KECA 230 (KLR) - (Mentioned)
2. *JKK v Republic* Criminal Appeal 118 of 2011; [2013] eKLR - (Mentioned)
3. *JOO v Republic* Criminal Appeal 48 of 2018; [2019] KEHC 2600 (KLR) - (Mentioned)



4. *Muruatetu & another v Republic; Katiba Institute & 5 others (amicus curiae)* Petitions 15 & 16 of 2015 (Consolidated); [2017] KESC 2 (KLR) - (Explained)
5. *PKS v Republic* [2018] eKLR - (Mentioned)
6. *Republic v Dennis Kirui Cheruiyot* [2014] eKLR - (Explained)

Statutes

Kenya

1. Children Act (cap 141) section 191 - (Interpreted)
2. Constitution of Kenya, 2010 articles 25(c); 27; 28 ; 48; 50(1); 50(2)(q); 52 - (Interpreted)
3. Constitution of Kenya (Repealed) sections 72(3)(b); 77- (Interpreted)
4. Penal Code (cap 63) sections 203, 204- (Interpreted)

International Instruments

Universal Declaration of Human Rights (UDHR), 1948 article 48

Advocates

Mr. Ongw'eno for the State

Mr. Kariu for Accused

SENTENCE

1. The accused was on November 19, 2019 found guilty and convicted of the offence of murder contrary to section 203 as read with 204 of the *Penal Code*. The court is now called upon to pass an appropriate, just and adequate sentencing herein.
2. The starting point in the determination of the appropriate sentence is section 204 of the *Penal Code* as read with the decision of the Supreme Court in the case of *Francis K Muruatetu & another v Republic* [2017] eKLR wherein the court outlawed the mandatory nature of death sentence and stated as follows: -

“(45) To our minds, what section 204 the *Penal Code* is essentially saying to a convict is that he or she cannot be heard on why, in all the circumstances of his or her case, the death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless, as illustrated by the foregoing Court of Appeal decisions. Try as we might, we cannot decipher the possible rationale for this provision. We think that a person facing the death sentence is most deserving to be heard in mitigation because of the finality of the sentence.

(46) We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in the Constitution does not deprive it of its necessity and essence in the fair trial process. In any case, the rights pertaining to fair trial of an accused pursuant to article 50(2) of the *Constitution* are not exhaustive.

(47) Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in article 10 of the *Universal Declaration of Human Rights*, and in the same vein article 25(c) of the *Constitution* elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society,



without which the rule of law and public faith in the justice system would inevitably collapse.

- (48) Section 204 of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under articles 25 of the Constitution; an absolute right.

.....

- (59) We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under section 204 of the Penal Code, unfair thereby conflicting with articles 25(c), 28, 48 and 50(1) and (2)(q) of the Constitution. Violation of article 27 of the Constitution”

3. The trial court is therefore now given a wide discretion in passing sentence as regards a convict on the charges of murder.
4. In compliance with the decision of the Supreme Court above, the court called for pre-sentencing report and allowed the accused to offer his mitigations.

Pre-sentencing Report

5. It was stated that the offender was the last born child in a family of five children with his eldest sister living at Kamwangi where she owns a small scale hotel business while his brother is a mason at Githurai 45. He studied up to form two but dropped out due to financial constraints and was a minor at the time of his arrest. On the circumstances of the offence:- it was indicated that he thought that his sister's husband was manipulating her with a view to taking away their family land and under intoxication on the fateful day, the offender pursued the deceased and her cousin leading into her death.
6. The offender was indicated to be remorseful stating that he had wasted much of his time while in custody and regretted that such thing happened. He had no previous criminal record and had received salvation while in custody. He pleaded for leniency to be given a second chance to make amends and lead a meaningful purpose driven life.
7. On the home front, his sisters, brother and brother-in-law stated that the convicts bad company then, had a negative impact on him leading to the commission of the offence. The incidence shook the family to its core with his mother said to have nothing to do with the offender, while his sister the mother of the victim separated from her husband but had pardon the offender noting that the same had learned his lesson during the period of trial and sought for non-custodial sentence taking into account the period spent in custody. His brother is ready to host him at Dandora Phase 2 to assist him adjust to life outside prison.
8. On the victim's impact statement, the father of the victim stated that he had forgiven the accused. The victim's mother indicated that she was yearning for justice for her child.



9. In conclusion and recommendation: - it was stated that the accused was arrested fourteen years ago at the age of fourteen (a minor) and had been in custody since. The accused had since learnt his lesson the hard way during the time he had been in incarceration and pleaded that the court consider the time he had spent in custody for non-custodial sentence.

Mitigation

10. In mitigation, Mr Kariu for the accused stated that he was a first offender and was a minor at the time of the commission of the offence. It was submitted that the accused father abandoned them when he was eight years old and at the time of the offence he was living with his sister. It was submitted that the accused will continue to suffer stigma for causing the death of the deceased, a fact which he shall have to live with for the rest of his life.
11. It was submitted that the accused had been in remand custody for a period of 14 years which was enough punishment and should therefore be given a chance to integrate with society. Mr Kariu submitted that the accused should be given a non-custodial sentence in view of his tender age as at the time of the commission which entitled him to the least punishment. He submitted further that the accused was prejudicial since his right under article 52 of the *Constitution* were violated as he proceeded for trial in the absence of a next of friend or family member to guide him through the trial. Further it was contended that he could only be sentenced under a section 191 of the *Children Act* and now that he had attained the age of majority, the court should exercise a discretion and struck a delicate balance between the gap in the law, the right of the victim and the accused.
12. It was submitted that in the case of *Republic v Dennis Kirui Cheruiyot* [2014] eKLR the Court of Appeal appreciated the dilemma in sentencing an offender who was a minor when he committed a serious offence but had turned into an adult at the time of sentencing or at the time of an appeal and stated that the court can sentence him in any other lawful manner. Mr Kariu submitted that he court ought to invoke cap 64 of the Laws of Kenya and assign a probation officer to the accused for a period of three years to be integrated in society. The following cases were submitted in support: -
- a. *JKK v Republic* [2013] eKLR
 - b. *DKC v Republic* [2014] eKLR
 - c. *PKS v Republic* [2018] eKLR
 - d. *JOO v Republic* [2019] eKLR
13. On behalf of the state Mr Okeyo submitted that the accused was a first offender and that the pre-sentencing report was favourable to him. He stated that taking into account the age of the accused at the time of the commission of the offence and the 14 years he had spent in remand custody; he should be put under probation to enable him be integrated into society.

Analysis and Determination

14. The case of the accused herein is a clear case of miscarriage of justice in as much as he was convicted by this court. He was first presented to court on 12/3/2007. I must point out to his credit Mr. Kariu had walked with him since 20/6/2007 at the time when our murder trials were being conducted with the aid of assessors to date. As at 20/11/2007 Mutungi J, as he then was, ordered that age assessment on the same be conducted which report was presented to court on 4/3/08. I have not seen any comment on the said age by any of the Judges who handled this matter.



15. On 16/6/2009 the accused raised a constitutional issue by way of an application under then section 72(3)(b) as read with section 77 of the retired *Constitution* to the effect that he was arrested on June 23, 2006 but only produced in court on 21/3/2007 a period of 120 days from the date of arrest. While Ochieng J held that the accused constitutional rights were violated by the State and in particular the police who held him in custody for much longer than is allowed by the constitution he declined to discharge him by declaring the proceedings illegal or null and void.
16. On 28/1/2013 the issue of the accused age once again became a subject of determination before Muchemi, J when it was confirmed that he had by then attained the age of 25 years. Then there was further the issue of the accused mental status, as immediately he was placed on his defence, he became abusive and had to be taken to Mathare for mental evaluation, where he was from 16/2/2017 up to 13/5/2018 when a medical report was produced in court to the effect that he might not recover, which medical report was reviewed on 18/6/2019 and confirmed that he was then fit to take his defence.
17. The other remarkable feature of this case is that when put on his defence he selected to remain silent and as stated by Mr Kariu, the accused has to date kept to himself what happened to him which led to the commission of the offence.
18. As I write this order on sentence, it is clear in my mind that the accused was sinned against more by the judicial system than he had sinned against the deceased which factor I must take into account while passing any sentence against him. Had out criminal justice been friendly perhaps the accused case would have been dealt with differently.
19. Article 50(2)(e) provides that every accused person has a right to a fair trial which includes a right to have the trial begin and conclude without unreasonable delay. A trial that takes a period of fourteen years cannot be said to be a trial without unreasonable delay. I have further taken into account that the accused was not taken to court within the constitutional period then provided which was 14 days but was taken to court after a period of 120 days the fact that he was a minor notwithstanding.
20. Article 50(2)(p) provides that an accused person is entitled to the benefit of the least severe of prescribed punishment for an offence if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing. As regards the accused person, herein as he was a minor as at the time of the commission of the offence and as submitted by Mr Kariu, section 191(1) of the *Children Act* makes provisions on how a court should punish a child offender as follows:-

“ 191.

- (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 followings ways –
 - a. by discharging the offender under section 35(1) of the Penal Code;
 - 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;



- 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 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;
- k. by making a community service order; or
- l. in any other lawful manner.”

21. It is clear to my mind that the accused person has been deprived of the benefit of the said provisions of the law and in line with the holding of the Court of Appeal in *JKK v Republic* [2013] eKLR he is entitled to the benefit of a lesser sentence provided that the said sentence is lawful, as was stated in the case of *DKC v Republic* [2014] eKLR and *PKS v Republic* [2018] where Ngugi J stated in similar circumstances as follows: -

“ 15. . The upshot is that the facts, context and circumstances of this case strongly suggest that the punishment suffered by the appellant in this case for an offence committed when he was, at most, fourteen years old is already disproportionate to the offence. The only fair outcome is to revise the sentence to the time already served in prison. That is the order of the court. The appellant shall, therefore, be released from prison forthwith unless he is otherwise being lawfully held.”

22. Having taken note of the special circumstances of this case and noting that the best sentencing objective suitable for the accused herein is rehabilitation, notwithstanding the fact that the same has been in custody for a period of fourteen years which I consider as lost years which may not be compensated, I hereby sentence the accused to a probation term of three years during which period of time the probation officer with assistance of his brothers and sisters will walk with him so as to settle and integrate him in society and it is ordered.



23. The accused is entitled to his right of appeal on both conviction and sentence while the State has right of appeal on sentence.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY, 2020 THROUGH MICROSOFT GOOGLE TEAMS.

.....

J. WAKIAGA

JUDGE

In the presence of: -

Mr. Ongw'eno for the State

Mr. Kariu for the Accused

Accused present

Court Assistant - Karwitha

