



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL REVISION NO. 57 OF 2020

VK.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

[1] The applicant by a revision application moved by letter dated 13th July 2020 sought the court intervention to determine the propriety, legality and correctness of the proceedings in the trial court as set out in the revision application as follows:

“Our Ref: VK/RWK/1896/2020

Date: 13/07/2020

Your Ref:

THE DEPUTY REGISTRAR,

HIGH COURT OF KENYA,

P.O. BOX 66,

KABARNET.

Email: kabarnethc@court.go.ke

Dear Sir/Madam,

RE: KABARNET HIGH COURT CRIMINAL REVISION NO. 57 OF 2020 – VK – V – REPUBLIC.

We act for the applicant herein namely **VK** who is the accused person in Eldama Ravine Pm. Sexual Offences case no. 2 of 2020 – **Republic v VK**. The applicant is charged with the offence of defilement contrary to section 8 (1) as read with 8 (4) of the Sexual Offences Act, no. 3 of 2006 in the principal count and in the alternative count with the offence of committing an indecent act with a child contrary to section 11 (1) of the **Sexual Offences Act**, no. 3 of 2006. The victim of the crime based on the charge sheet is aged 16 years.

Our client wishes to invoke the revisionary jurisdiction of this court under the provisions of sections 362, 364 and 365 of the **Criminal Procedure Code**, Cap. 75 of the Laws of Kenya. The applicant wishes the court to call for the record for purposes of satisfying itself as to the propriety, legality and correctness of the proceedings and orders made therein with regard to:-

a) Whether the matter is being tried in the proper court as the applicant is a minor born on 6th April, 2005 who ought to be tried in a Children’s Court pursuant to the provisions of section 73 (b) of the **Children Act**, 2001.

b) Whether the order made on the 6th February, 2020 concluding that the applicant was above the age of 18 years was proper considering the applicant was not given a chance to address the court and to tender evidence of his certificated of birth to confirm that at the time of the alleged offence he was aged about 14 years old thus the court failed in the duty to make due inquiry as to the age and for that purpose to take such evidence as provided for in section 143 (1) of the **Children Act**, 2001?

c) Whether the applicant by being solely charged with the offence of defilement instead of both the minors in this matter, he has been subjected to discrimination in breach of article 27 of the Constitution of Kenya, 2010 and also based on the findings in G.O. -v- Republic, Siaya High Court Criminal Appeal no. 155 of 2016?

d) Whether the right to a fair trial under article 50 of the Constitution of Kenya, 2010 and the protection against a minor being sentenced to imprisonment upon conviction based on section 190 (1) of the Children Act, 2001 are likely to be breached by proceeding with the trial of the applicant as an adult instead of a minor and taking into account the authority in MABI -v- Republic, (2018) eKLR?

e) Whether the court at the time of taking plea ought to have addressed its mind to the provisions of section 77 of the Children Act, 2001 and article 50 of the Constitution of Kenya, 2010 and as to according to legal aid to the applicant?

Yours faithfully,

WAMBUA KIGAMWA

ADVOCATE

Encl: Certificate of birth.

C.C. DIRECTOR OF PUBLIC PROSECUTION,

P.O. BOX 110 – 30400,

KABARNET.

Email: kabarnet@odpp.go.ke”

[2] The court has considered the application and oral submissions of counsel for the applicant and for the DPP by Zoom video conferencing.

Constitutional question

[3] The question of constitutionality of the trial as being discriminative of the minor who was charged for defilement alone without the other minor subject of the defilement charge. The issue is a substantive motion which should be taken by a suitable constitutional application in that behalf and not by the simple revision procedure under section 362 of the Criminal Procedure Code. Constitutional application by substantive originating motion would afford the parties and the court opportunity to fully canvass the applicable issues before arriving at a comprehensive, fair and just determination of any legal dilemma asserted.

Trial as a minor

[4] As regards the trial rights of the minor, the court record indicates that the court had on found as follows:

“06.02.2020

Court:

I have received the age assessment report indicating that accused herein is above that age of 18years. He will therefore be remanded at Eldama GK Prison.

Hon. A Towett

Senior Resident Magistrate.”

[5] However, subsequent proceedings on 30th June 2020 indicate that the court gave directions on the basis that the applicant is a minor as follows:

“30.06.2020

Court:

Hearing on 27th August 2020 in terms section 186 of the Children Act. The subject be assigned legal assistance before then.

Hon. J. L. Tamar

Principal magistrate.”

[6] The trial court having already set the matter for hearing on the basis that the applicant is a minor and consequently gave directions for the appointment of legal assistance for the minor, in accordance with section 186 of the Children Act, it must be deemed to have reviewed its finding that the applicant was of a minor, and it not having been shown that the trial court is not a competent Children Court for purposes of the Children Act, no further action by this court is necessary at this stage. The applicant shall be remanded for his trial in a facility appropriate to his age status.

Orders

[7] The application for revision with regard to the trial of the applicant as a minor, which was launched on 13th July 2020 two weeks long after the court had on 30th June 2020 given the directions for hearing on the basis that the accused was **a minor**, was unnecessary and the same is, therefore, declined.

[8] This ruling is without prejudice to any further or other motion under the Constitution and relevant law, as the applicant may be advised by his counsel to institute, and, for avoidance of doubt, this court does not prohibit or in any way stay the criminal proceedings in the trial court Eldama Ravine Principal Magistrate's Court Criminal (Sexual Offences) Case NO. 2 of 2020, **R v. VK**.

Order accordingly.

DATED AND DELIVERED THIS 26TH DAY OF AUGUST 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Mogambi instructed by Wambua Kigamwa & Co. Advocates.

Mr Abwajo, Prosecution Counsel for the Respondent.