



**SNN v Republic (Criminal Revision 104 of 2018)
[2019] KEHC 10748 (KLR) (25 January 2019) (Ruling)**

SNN v Republic [2019] eKLR

Neutral citation: [2019] KEHC 10748 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL REVISION 104 OF 2018
TM MATHEKA, J
JANUARY 25, 2019**

BETWEEN

SNN APPLICANT

AND

REPUBLIC RESPONDENT

Need for law reform to consider handling of sexual crimes committed by children vis a vis when committed by adults.

The question as to whether sexual crimes committed by children should be dealt with in the same way as sexual crimes committed by adults needed to be dealt with through substantive review of the Sexual Offences Act to create a section that spoke to sexual activities among children who had to be protected from others and from themselves as well.

Reported by Mathenge Mukundi

Constitutional Law - fundamental rights and freedoms - equality and freedom from discrimination - claim of discrimination on grounds of sex - whether the applicant had been discriminated for being charged alone for the offence of defilement where there were two were minors at the time the alleged criminal act happened - Constitution of Kenya 2010, article 27 (4).

Criminal Law - criminal responsibility - age of criminal responsibility - whether an applicant was criminally capable and could stand the trial considering that his age was not assessed - Penal Code, (Cap 63), section 14.

Jurisdiction - jurisdiction of the High Court - the revisionary jurisdiction of the High Court- invocation and purpose of the revisionary jurisdiction of the High Court - whether the revisionary powers of the High Court could be invoked for purposes of rejecting the charges preferred against an applicant - Criminal Procedure Code (Cap 75), sections 362, 364 & 367.

Brief facts

The accused subject was facing the charge of attempted defilement with the alternative charge of committing an indecent act with a child. According to the attached certificate of birth the subject was 16 years old at



the time of the alleged offence while the victim was 6 years of age. The applicant's counsel argued that since both the accused subject and the victim were minors, bringing the charges against the accused amounted to discrimination on the basis of sex contrary to article 27 (4) of the Constitution and article 2(5) of the United Nations Convention on the Rights of the Child which prohibited discrimination on the basis of sex. That any continued prosecution of the accused subject was discriminatory and denied him the equal protection of the law.

Issues

- i. Whether an accused person could be said to have been discriminated for being charged alone for the offence of defilement where there were two were minors involved at the time the alleged offence happened.
- ii. Whether an accused person, being a minor, was criminally capable and could stand the trial where his age was not assessed as provided for under section 143(1) of the Children Act.
- iii. Whether the revisionary powers of the High Court could be invoked for the purposes of rejecting the charges preferred against an accused person.

Relevant provisions of the Law

Constitution of Kenya 2010;

Article 27 (4);

The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

Penal Code Cap 63;

Section 14;

(1) A person under the age of eight years is not criminally responsible for any act or omission.

(2) A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.

(3) A male person under the age of twelve years is presumed to be incapable of having carnal knowledge.”

Children Act, No 8 of 2001;

Section 143(1);

Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that such person is under eighteen years of age, the Court shall make due inquiry as to the age of that person and for that purpose shall take such evidence, including medical evidence, as it may require, but an order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court, and the age presumed or declared by the court to be the age of the person so brought before it shall, for the purposes of this Act and of all proceedings thereunder, be deemed to be the true age of the person.

Held

1. It was not contested that the victim was 6 years of age and according to section 14 (1) of the Penal Code she could not be criminally liable. Therefore, she could not be charged alongside the applicant and leaving her out could not be said to be discriminative. There was no express or implied requirement that when two children were involved in sexual activity with each other, both of them should be charged with the offence of defilement. However, there was no legal bar to the prosecution preferring criminal charges against both children. In effect, if the prosecution had reasonable cause to charge both minors, they could do so.
2. The intentions of the Sexual Offences Act were to protect everyone from sexual violence and in particular the vulnerable members of the society who included children. However, the Act appeared



- to have overlooked the fact that children could involve themselves in various forms of sexual activity at different developmental stages, and that there was a need to provide for that.
3. Every sexual infraction that was committed by children and whose facts brought it within the Sexual Offences Act was dealt within the ambits of criminal law. Courts had struggled with efforts to have children who were of same age group and who indulged in consensual sexual activity treated as children in need of care and protection. The question as to whether sexual crimes committed by children should be dealt with in the same way as sexual crimes committed by adults needed to be dealt with through substantive review of the Sexual Offences Act to create a section that spoke to sexual activities among children who had to be protected from others and from themselves as well.
 4. The charge sheet indicated the apparent age of the accused as juvenile and the lower court throughout the proceedings had been treating the accused as a minor and even ordered for his custody at a juvenile home. On January 12, 2018, the lower Court noted that the accused was a student and gave him a personal bond of Kshs. 50,000/-. On February 26, 2018 when the matter came up for hearing, the prosecution indicated that the accused was a minor and sought for directions on him being represented by counsel. The court consequently allowed a counsel to come on record for the accused. The entire conduct of the trial court in relation to the applicant indicated that the lower court was actually persuaded that the applicant was a minor. The record however did not indicate that the accused's age was determined. The non-compliance with section 143 (1) of the Children Act did not occasion injustice to the minor.
 5. The revisionary powers of a High Court were very wide. Such powers were intended to be used by the High Court to decide all questions as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed by a subordinate criminal court and even as to the regularity of any proceeding of any subordinate court. The object of conferring such powers on the High Court was to clothe the court with a jurisdiction of general supervision and superintendence in order to correct grave failure or miscarriage of justice arising from erroneous or defective orders. Section 364 (1) (a) of the Criminal Procedure Code conferred on the High Court all the powers of an appellate court. The revisionary powers were entirely discretionary. There was no vested right of revision in the same sense in which there was a vested right of appeal. The sections did not create any right in the litigant, but only conserved the powers of the High Court to see that justice was done in accordance with the recognized rules of criminal jurisprudence and that subordinate criminal courts did not exceed their jurisdiction, or abuse the powers vested in them by the Criminal Procedure Code.
 6. The proceedings were at preliminary stage as only one hearing had taken place. The court would allow the proceedings at the lower court to continue subject to the lower court conducting an inquiry on the age of the accused before the hearing started. The objections to the charges facing the applicant were unsustainable and there was nothing to revise at that stage. The matter was to be returned to the lower court for hearing and determination.

Application dismissed.

Citations

Cases

Kenya

1. *CKW v Attorney General & another* Petition 6 of 2013; [2014] KEHC 3657 (KLR) - (Explained)
2. *GO v Republic* Criminal Appeal 155 of 2016; [2017] KEHC 6758 (KLR) - (Explained)
3. *POO (A Minor) v Director of Public Prosecutions & another* Constitutional Petition 1 of 2017; [2017] KEHC 8341 (KLR) - (Explained)
4. *Republic v Anthony Thuo Karimi* Criminal Revision 131 of 2014; [2016] KEHC 7045 (KLR) - (Explained)

United Kingdom



R v G (Appellant) [2008] UKHL 37 - (Explained)

Statutes

Kenya

1. Children Act (Repealed) (cap 141) section 143(1); 190(1); 191(1)- (Interpreted)
2. Constitution of Kenya article 23(1); 27(4); 165- (Interpreted)
3. Penal Code (cap 63) section 35(1)- (Interpreted)
4. Sexual Offences Act (cap 63A) section 9- (Interpreted)

Instruments

Convention on the Rights of the Child (CRC), 1989 article 2(5)

RULING

1. *Vide* a letter dated July 25, 2018 and filed on the August 31, 2018, the accused subject's advocate GM Gori requested that the Mukurweini PMCRC (SO) No 1/2018 *Republic v SNN* be placed before the Hon Judge to examine and revise the charges preferred against the said subject and find it fit to reject the same.
2. The minor faces the charge of attempted defilement contrary to section 9 of the *Sexual Offences Act* No 3 of 2006 with the alternative charge of committing an indecent act with a child contrary to section 11(1) of the same act.
3. The particulars of the charge are that on 30th day of December 2017 in Mukurwe-ini Sub County within Nyeri County he intentionally attempted to cause his penis to penetrate the vagina of EW, a child aged 6 years. In the alternative, on the same date, same place, same time he intentionally touched the vagina of EW a child aged 6 years with his penis.
4. According to the attached certificate of birth the subject was 16 years old at the time of the alleged offence. It is counsel's argument that since both the accused subject and the victim are minors, bringing these charges against the accused subject amounts to discrimination on the basis of gender contrary to article 27(4) of the *Constitution* and article 2(5) of the *United Nations Convention on the Rights of the Child* which prohibits discrimination on the basis of sex. That any continued prosecution of the accused subject is discriminatory and denies him the equal protection of the law.
5. Counsel pointed out that the subject had complied with section 143(1) of the *Children Act* No 8 of 2001 and urged the court to adopt the approach of the court in the case of *GO v Republic* Siaya Criminal Appeal No 155 of 2016 where it was held:-

“I find that the appellant was discriminated against on the basis of sex in that he was arrested, charged instead of the prosecution charging both the complainant and the appellant for the offence of defilement...in the instant case, I find that at the time of the commission of the offence, both the appellant and the complainant were minors. I find indeed the complainant was a senior to the appellant and blame should not have been wholly shifted to the appellant, and both being minors, they need protection against harmful sexual activities and none should have been sent to prison”
6. He also urged that in choosing to charge the boy, the ODPP had acted contrary to the DPP Act 2013 which requires that in the fulfilment of its mandate it shall be guided by the *Constitution* and other principles of law including gender equity.



7. The said section 143(1) of the [Children Act](#) provides for presumption and determination of age as follows: -

(1) Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that such person is under eighteen years of age, the court shall make due inquiry as to the age of that person and for that purpose shall take such evidence, including medical evidence, as it may require, but an order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court, and the age presumed or declared by the court to be the age of the person so brought before it shall, for the purposes of this Act and of all proceedings thereunder, be deemed to be the true age of the person}”

8. Counsel for the minor filed written submissions and relied on [GO v R](#) [2017] eKLR above and the English case [R v G \(Appellant\)](#) (on Appeal from the Court of Appeal (Criminal Division)) [2008] UKHL 37 cited in [POO\(a Minor\) v DPP & anor](#) [2017] eKLR, quoting the stamen of Baroness Hale of Richmond in her opinion in the House of Lords that:

“As sexual touching is usually a mutual activity, both the children involved might in theory be prosecuted...the person penetrated might be the offender...Obviously...there will be wide variations in the blameworthiness of the behavior...both prosecutors and sentencers will have to make careful judgements about who should be prosecuted and what punishment if any is appropriate.”

9. At the hearing Mr Magoma for the state and the applicant’s counsel Mr Kinuthia made oral submissions, the latter, adopting the written submissions.

10. Mr Kinuthia argued that in cases of defilement where both the accused and the complainant were minors, there has been over the years an emerging school of thought on the bench where judges have expressed their views on the shortcomings of the [Sexual Offences Act](#). He cited the Hon Justices Chitembwe, Majanja, and Makau. That it was time for us as a country to address the shortfalls in the law with regard to minors.

11. The state in opposing the application submitted that there is a very huge age gap between the accused and the complainant to state that they could be in *pari delicto*. The complainant was 6 years whereas the accused was 16 at the time of the alleged offence. It was argued that the complainant at this age could not be able to understand the nature and consequences of the alleged crime. Consequently, there was no discrimination in charging the applicant.

12. The issues for determination are; whether the applicant has been discriminated against contrary to article 27 of the [Constitution](#) based on his sex and/ gender; and whether the applicant is criminally capable and can stand trial considering that his age was not assessed as required by section 143(1) of the [Children Act](#).

13. It is important to examine the relevant provisions of the law in view of the issues raised in this revision. Article 23(1) provides that the High Court has jurisdiction in accordance with article 165, to hear and determine applications for redress of denial, violation and infringement of, or threat to a right or fundamental freedom. Particularly, article 165(3)(d) of the [Constitution](#) provides that the High Court has jurisdiction to hear any question on the interpretation of the [Constitution](#) including the issue of whether anything said to be done under the authority of the [Constitution](#) or any law is inconsistent



with, or in contravention of the Constitution. Under section 362 of the Criminal Procedure Court the High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

14. On the first issue: Whether the applicant has been discriminated against contrary to article 27 of the Constitution based on his sex/gender?

Article 27 of the Constitution provides for the right of protection against discrimination based on inter alia gender. The term sex is not used by the Constitution. This right is not absolute and is subject to other laws including the Penal Code cap 63 of the Laws of Kenya. Section 14 of the Penal Code deals with criminal responsibility in relation to immature age. It provides; -

- (1) A person under the age of eight years is not criminally responsible for any act or omission.
- (2) A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.
- (3) A male person under the age of twelve years is presumed to be incapable of having carnal knowledge.”

It is not contested that the complainant herein is 6 years old and according to section 14(1) she cannot be criminally liable. Therefore, she could not be charged alongside the applicant herein and leaving her cannot be said to be discriminative. The authorities cited by the applicant’s advocates, GO v R and POO (A minor) vs DPP & another, are distinguishable. In the former decision, the complainant was in fact older than the accused. In the latter the court warned that there are wide variations in the blameworthiness of sexual behaviours and therefore the prosecutors and sentencers have to make careful judgments about who should be prosecuted and what punishment, if any, is appropriate. In any event in CKW v Attorney General & another (2014) eKLR the court dismissed an allegation of discrimination based on the prosecution charging one child and leaving another thus: -

“In Kenya, there is no express or implied requirement that when two children are involved in sexual penetration with each other, both of them should be charged with the offence of defilement. However, there is no legal bar to the prosecution preferring criminal charges against both the children. In effect, if the prosecution had reasonable cause to charge both minors, they could do so”

15. Unlike in some other jurisdictions where a distinction is made between sexual activity among children of various ages and sexual activities between adults and children, our Sexual Offences Act does not clarify the former, despite the clear recognition that a child is as defined in the Children Act.
16. It is not in doubt that intentions of the Sexual Offences Act were great, to protect everyone from sexual violence and in particular the vulnerable members of society who include children. However it appears to have been overlooked that children would involve themselves in various forms of sexual activity at



different developmental stages, and that there was need to provide for that. This aspect is very well captured in the English case *R v G*. This is how Lord Hope of Craighead put it

36. I would not go so far as to say that it was disproportionate for a child under 15 to be prosecuted for committing a sexual act with a child under 13 just because it was consensual. The offences which the 2003 Act has created are expressed in very broad terms. They recognize that the circumstances in which mutual sexual activity may take place between children of the same or the opposite sex, and the acts that they may perform on one another as fashions change, will inevitably vary greatly for case to case. But there is great force in the point that McLachlin J made in *R v Hess; R v Nguyen* [1990] 2 SCR 906 about the need for children to be protected. Their need to be protected against themselves is as obvious as is their need to be protected from each other. There is much to be said for the view that where acts are perpetrated on children under 13 by children of a similar age intervention of some kind is necessary for the protection of their physical and moral health.

17. Speaking to the dilemma faced by prosecutors in pressing charges when children are involved, his Lordship observed and I quote

37. But this case is about the choices that are available where the prosecutor is satisfied that the conduct was consensual or, as consent could not in law be given, was mutual. Moreover it is about the choices that ought to be made where the participants in sexual conduct which was mutual were both children.

Quoting Scotland's Commissioner for Children and Young Persons, he pointed to the existence of a special procedure in Scotland referred to as the Children's Hearing System which she said provided a better way of dealing with consensual sex between underage young people than charging them with a criminal offence, whereby a more effective intervention was likely to be secured if the response was changed from a criminal one to a welfare response through the Children's Hearing system.

18. Kenya is unlike Scotland does not have any special procedures. Every sexual infraction that is committed by children and whose facts bring it within the SOA is dealt within the ambit of criminal law. Judges and Magistrates have struggled with efforts to have children who are of same age group and who indulge in consensual sexual activity treated as children in need of care and protection. This question as to whether sexual crimes committed by children should be dealt with in the same way as sexual crimes committed by adults needs to be dealt with through substantive review of the *Sexual Offences Act* to create a section that speaks to sexual activities among children who must be protected from others and from themselves as well.

19. The reason? It matters. As put by Baroness Hale of Richmond in the same case.

48. What difference can it make that the possessor of the penis is himself under 16? There was a great deal of anxiety in Parliament about criminalizing precocious sexual activity between children. The offences covered by section 13 in combination with section 9 cover any sort of sexual touching however mild and however truly consensual. As sexual touching is usually a mutual activity, both the children involved might in theory be prosecuted. Indeed, section 9 expressly contemplates that the person penetrated may be the offender. Obviously, therefore, there will be wide variations in the blameworthiness of



the behaviour caught by sections 9 and 13. Both prosecutors and sentences will have to make careful judgments about who should be prosecuted and what punishment, if any, is appropriate. In many cases, there will be no reason to take any official action at all. In others, protective action by the children's services, whether in respect of the perpetrator or the victim or both, may be more appropriate. But the message of sections 9 and 13 is that any sort of sexual activity with a child under 16 is an offence, unless in the case of a child who has reached 13 the perpetrator reasonably believed that the child was aged 16 or over. There are many good policy reasons for the law to convey that message, not only to adults but also to the children themselves

20. Clearly therefor even if one was to consider the P&C way, the applicant herein was far much older than the complainant. His case cannot be considered at the same par as that of GO or POO or even 'mutual touching' referred to in R v G
21. On the second issue Whether the applicant is criminally capable and can stand trial considering that his age was not assessed as required by section 143(1) of the Children Act
22. The applicant has alleged that section 143(1) of the Children Act has been violated as quoted above. This provision states that where a person brought before the court appears to be under eighteen years, the court shall make due inquiry as to the age of such person including medical evidence. The charge sheet indicates the apparent age of the accused as juvenile and the lower court throughout the proceedings has been treating the accused as a minor and even ordered for his custody at Ruringu Juvenile Remand home. On January 12, 2018, the lower court noted that the accused is a student and gave him a personal bond of Kshs 50,000/-. On February 26, 2018 when the matter came up for hearing, the prosecution indicated that the accused was a minor and sought for directions on him being represented by counsel. The court consequently allowed Mr. Gori to come on record for the accused. The entire conduct of the trial court in relation to the applicant indicates that the court was actually persuaded that the applicant is a minor. The record however does not indicate that the accused's age was determined. The importance of compliance with section 143(1) of the Children Act is portrayed in MABI v Republic (2018)eKLR the Court of Appeal held:-

"Regarding the age of the appellant, serious doubts were raised from the beginning of the trial as to whether the appellant was above 18 years when he committed the offence. If the appellant was under the age of 18 years, he was then a child in terms of section 2 of the Children Act which defines a "child" to mean any human being under the age of 18 years. When the appellant was first arraigned in court, he was in school uniform, and that was noted by the trial magistrate. During the trial, the appellant's advocate told the court that the appellant was born on February 5, 1996; although no documentary evidence was availed to prove that allegation. However, as pointed out earlier, the appellant told the trial magistrate that as at the date of the trial he was 17 years old and was in form four at [particulars withheld] Secondary School. To ensure a fair trial and obviate the possibility of dealing with a child offender as an adult, the trial court ought to have ordered that the appellant's age be assessed by a doctor. Alternatively, the trial court ought to have made due inquiry as to the appellant's age, in accordance with section 143(1) of the Children Act... Here was a young person who was presented to court in school uniform, he told the investigating officer and the trial court that he was a minor; that he was a student; and without any inquiry as to his age, the trial court proceeded with the trial on the presumption that he was an adult. In the circumstances, we are satisfied that the lower courts' finding that the appellant was



not a minor, in the absence of any inquiry to his age, might have occasioned a miscarriage of justice.

Had the trial court found that the appellant was a minor but had defiled the complainant, who was also a minor, it would have dealt with him in any of the ways prescribed under section 191(1) of the *Children Act*. Such ways include discharging the offender under section 35(1) of the Penal Code. Section 190(1) of the Children Act expressly provides that no child shall be ordered to imprisonment or to be placed in a detention camp”

23. Having concluded that the trail Magistrate did not conduct an inquiry as required under section 143(1) of the Children’s Act. It is important to check the powers of this Court in Revision. In *Republic v Anthony Thuo Karimi* (2016)eKLR it was held:-

“The revisional powers of a High Court are very wide. Such powers are intended to be used by the High Court to decide all questions as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed by an inferior criminal court and even as to the regularity of any proceeding of any inferior court. The object of conferring such powers on the High Court is to clothe the highest court in a state with a jurisdiction of general supervision and superintendence in order to correct grave failure or miscarriage of justice arising from erroneous or defective orders. Section 364(1)(a) confers on the High Court all the powers of the appellate court as mentioned in sections 354, 357 and 358.

The revisional powers are entirely discretionary. There is no vested right of revision in the same sense in which there is vested right of appeal. These sections do not create any right in the litigant, but only conserve the powers of the High Court to see that justice is done in accordance with the recognized rules of criminal jurisprudence and that subordinate criminal courts do not exceed their jurisdiction, or abuse the powers vested in them by the Code.”

24. As seen in the abovementioned Court of Appeal decision (*MABI v Republic* (2018) eKLR) the essence of complying with section 143 (1) of the *Children’s Act* is to ensure that a child is not treated as an adult during the proceedings and at the conclusion of the proceedings. At the conclusion of the proceedings, for example, a child who is adjudged to have defiled another is not be be sentences as an adult. The court would have deal with such a child in any of the ways prescribed under section 191(1) of the *Children Act*. Such ways include discharging the offender under section 35(1) of the *Penal Code*. Section 190(1) of the *Children Act* also expressly provides that no child shall be ordered to imprisonment or to be placed in a detention camp.
25. In the instant revision, the proceedings are at preliminary stages at the Magistrate’s Court. No single hearing has taken place. So far nothing shown to be done in the proceedings indicate that the non-compliance with section 143(1) of the *Children Act* has occasioned injustice to the minor. Consequently this court should allow the proceedings at the lower court to continue subject to the lower court conducting an inquiry on the age of the accused before the hearing starts.
26. In the upshot I find that the objections to the charges facing SNN are not sustainable. There is nothing to revise as this stage. The application is dismissed. The matter be returned to the lower court for hearing and determination.

DATED, DELIVERED AND SIGNED AT NYERI THIS 25TH DAY OF JANUARY 2019.

MUMBUA T MATHEKA

JUDGE

