



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC CRIMINAL CASE NO. 63 OF 2018

EKN(Minor)Suing through

the Mother as next friend) CWN.....APPLICANT

V E R S U S

DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

RESIDENT MAGISTRATE'S COURT (GICHUGU).....2ND RESPONDENT

RULING

1. The applicant a minor was charged with defilement of a minor under **Gichugu No. 25 of 2018** and is seeking to quash the said proceedings since the case involves minors that are the accused and the complainant. In addition, the matter be referred to the children officer for counseling and advise of the two minors. That the prosecution has applied discriminative attitude towards the accused by charging him with defilement while leaving the complainant and both are minors. That what the two minors need is counseling and advise from their parents.

2. The respondent in his response stated that they were executing their mandate provided for under **Article 167 of the Constitution** and the **ODPP Act**. That the charge sheet is clear that the applicant was charged under **Section 8(1) and (7) of the Sexual Offences Act**. That the sentence is provided where the accused is a minor.

3. Issues arising;

As per the charge sheet, the appellant is clearly indicated as a minor and the prosecution confirmed he was aged 17 years. His age is therefore not in dispute.

4. The applicant was charged under **Section 8(1) and (7) of the Sexual Offences Act** which provides:

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children's Act.

5. Counsel for the applicant submits that there is neglect by the parents and that the children involved needs guidance and can be advised in a joint effort by the parents and the Children Officer. The counsel relied on the case of **P.OO (A minor) –V- Director of Public Prosecutions & Another (2017) eKLR** where the complainant testified that she knew the petitioner as they attended the same church and they would spend a long time talking. He requested her to his home and she obliged. They removed their clothes and had sex. Justice Hellen Omondi found that the children decided, **“to experiment their prowess mutually.”** The court was so commenting as the facts of the case were laid before it as the complainant had already testified at the time the petition was presented before her.

6. In this case the Director of Public Prosecution submits that the applicant is charged under **Section 8(1) & (7) of the Sexual Offences Act** provides for the sentence where the accused is a minor.

7. I find that no law prevents a minor from being charged with an offence under the **Sexual Offences Act**. This is the reason why provision is made under **Section 8(7) of the Sexual Offences Act** to provide for the sentence where a minor is charged. Each case must be taken on its own set of circumstances. Whether or not the applicant has been discriminated depends on the circumstances of the case. The case cited the minors were said to have decided to **“experiment their prowess.”** This has not been shown to be the case in the present case.

8. The applicant has not proved that the state contravened any law by charging the applicant. It is too early to say that the applicant was discriminated without hearing the victim's side of the story. The courts are mandated to do justice to all irrespective of status, **Article 159(2)**

(a) of the Constitution. It would be applying the law selectively to say minors committing sexual offences with minors should be charged while minors who commit other Criminal offences are charged and tried. This as submitted by the State Counsel would be setting a bad precedent as minors can run amok committing sexual offences knowing that they will not be charged.

9. Where a minor is charged like in any other criminal trial all that the court is required to do is afford the minor a fair hearing. This includes giving the minor legal representation as provided under **Section 186 of the Children's Act** which provides:-

“Every child accused of having infringed any law shall-

(a) Be informed promptly and directly of the charges against him;

(b) If he is unable to obtain legal assistance be provided by the Government with assistance in the preparation and presentation of his defence;

(c) Have the matter determined without delay;

(d) Not be compelled to give testimony or to confess guilt;

(e) Have free assistance of an interpreter if the child cannot understand or speak the language used;

(f) If found guilty, have the decisions and any measures imposed in consequence thereof reviewed by a higher court;

(g) Have his privacy fully represented at all the proceedings;

(h) If he is disabled, be given special care and be treated with the same dignity as a child with no disability.” and **Section 191** which provides for methods of dealing with minor offenders. The applicant has legal representation and the charge sheet clearly states that he is a minor. The applicant pleaded not guilty. My view is that the case should be heard and determined on its own facts and circumstances.

10. In Conclusion:-

The law recognizes that a male aged person under the age of twelve years is presumed to be incapable of having carnal knowledge. **Section 14(3) of the Penal Code** provides:-

“A male person under the age of twelve years is presumed to be incapable of having carnal knowledge”

The applicant is said to be seventeen (17) years old and is therefore excluded from the above provision.

2. There is no law that has been contravened by charging the applicant.

3. This court is not seized of the circumstances under which the offence was committed that is to say whether force was used on the complainant, in which case **Section 8(1) & (7) of the Sexual Offences Act** applies or whether the Sexual Act was mutual. It is therefore premature to quash the proceedings in the circumstance.

4. I find that that the application lacks merits and is dismissed.

11. I direct that the Gichugu Law Courts Criminal Case No. 25/2018 shall be heard and be determined on its own merits.

Dated at Kerugoya this 24th day of January 2019.

L. W. GITARI

JUDGE