DMM v Republic (Criminal Appeal 65 of 2016)
[2019] KEHC 9227 (KLR) (18 March 2019) (Judgment)

DMM v Republic [2019] eKLR

Neutral citation: [2019] KEHC 9227 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL 65 OF 2016

LW GITARI, J

MARCH 18, 2019

BETWEEN

DMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

Any doubts in the prosecution case are to be resolved in favour of the accused person

The case dealt with the failure by a trial court to evaluate and analyze evidence presented before it by the prosecution against the evidence adduced by the defence before arriving at a decision. It also pointed out that where there were contradictions which cast doubts in the evidence presented by the prosecution, the doubts were to be resolved in favour of the accused person. The case also discussed the issue of legality of death sentence in cases involving child offenders.

Reported by Moses Rotich

Constitutional Law *- Bill of Rights - rights of a child-right of a child not to be detained except as a measure of last resort-where the appellant, being a minor, was convicted of robbery with violence and sentenced to death by the trial court - whether the detainment; failing to conduct trial in a Children's Court; and failing to provide legal representation to an accused person, who was a minor at the time of the offence, violated the best interests of a child under the Constitution and Children Act - Constitution, article 53(1)(f); Children Act, 2001 section 190(1).*

Evidence *- burden of proof - contradictory and inconsistent evidence - where the appellant (a minor) was charged with the offence of robbery with violence - where the evidence adduced by the prosecution witnesses was contradictory and inconsistent and cast doubt as to the weapon that was used in commission of the offence and who committed the offence - whether contradictions and inconsistencies in the testimony of a complainant and witnesses as to identity of assailants rendered the identification of a suspect flawed - Penal Code, cap 63, section 296(2); Evidence Act, cap 80, section 107.*

Brief facts

The appellant, a minor, was charged before the trial court with the offence of robbery with violence contrary to section 296(2) of the Penal Code, He denied the charge. A full trial was conducted and the appellant was convicted and sentenced to death.

The appellant filed the instant appeal faulting the trial court for failing to consider the blatant inconsistencies and falsehoods in the prosecution's evidence, the improper identification of the accused, and the prosecution's failure to prove its case beyond reasonable doubt. Furthermore, he maintained that the trial court disregarded the appellant's sworn defense evidence and overlooked the fact that the accused was a minor at the time of arrest and conviction. Consequently, the judgment and sentence amounted to a miscarriage of justice, characterized by shallow reasoning inconsistent with the proceedings, and should therefore be set aside in the interest of justice.

Issues

i. Whether the prosecution proved its case of robbery with violence against the appellant beyond reasonable doubt.

ii. Whether contradictions and inconsistencies in the testimony of a complainant and witnesses as to identity of assailants rendered the identification of a suspect flawed.

iii. Whether the detainment; failing to conduct trial in a children's court; and failing to provide legal representation to an accused person, who was a minor at the time of the offence, violated the best interests of a child under the Constitution and Children Act.

Held

1. There were doubts as to the type of the weapon that was used to stab the complainant. When the particulars of the charge stated the weapon used, it was upon the prosecution to prove the particulars beyond reasonable doubt.
2. During cross-examination the complainant stated that the appellant stabbed her with a knife. There were contradictions. The complainant alluded to the appellant having used a sharp object, a knife and a nail cutter. It was not clear what kind of nail cutter could cause a deep cut and it was not clear whether a sharp object or a knife was used. The inconsistencies raised doubt in the prosecution's case.
3. There were inconsistencies which raised doubt in the prosecution's case. First, it was on who caused injury on the complainant. The evidence of the complainant was that another person stabbed her. On the other hand, she said that she was stabbed by the appellant. The complainant had only one injury which was documented, which was a wound on the face. The P3 form stated that the injury was a deep cut wound on the face near the eye. The P3 form did not state which side of the face the injury was. The self-contradictory evidence by the complainant raised doubt on the credibility of her testimony. The evidence tendered by the prosecution had glaring inconsistencies. The trial court did not consider the contradictions and arrived at conclusions which were not supported by evidence.
4. The trial court did not adequately consider or evaluate the prosecution's case. Had the trial court adequately analysed the prosecution case, it would have noted the inconsistencies and contradictions. The trial court in finding and noting that the evidence by the prosecution was truthful, found so without any basis for such finding.
5. The trial court did not consider the evidence as it was required to do. That was why its judgement was at variance with the evidence tendered. Where the trial court had failed to consider the evidence tendered before it and arrived at a judgement which was one sided, the appellate court could not uphold such a judgement. The first appellate court would evaluate the evidence and reach an independent finding.
6. The complainant stated that she had not seen the appellant prior to the incident. That was contradicted by the investigating officer who in his evidence stated that he could not conduct a parade because the complainant knew the appellant. The identification of an accused person was very crucial and ought

not to cast any doubt. Contradictions which raised doubt on the credibility of a witness were fatal and the court could not disregard them.

7. The evidence by the prosecution cast doubt on whether the complainant properly identified the appellant or whether she recognized the appellant. The contradictions cast doubt on her evidence. It followed that any doubts in the prosecution case were to be resolved in favour of the appellant. It was not proved beyond any reasonable doubt that the complainant identified the appellant as one of the robbers.

8. Accordingly, the trial court violated the rights of the appellant under article 53(1)(f) of the Constitution. The appellant was also denied the protection under the Children Act. The failure to accord the appellant the rights under the Constitution and the Children Act could not be blamed on the trial court or the prosecution because it was never brought to their attention that the appellant was a minor. On the other hand, the appellant was a minor whose rights were violated resulting to a miscarriage of justice.

Appeal allowed.

Orders

i. *The conviction of the appellant by the trial court was quashed.*
ii. *The death sentence imposed on the appellant by the trial court was set aside.*
iii. *The appellant was set at liberty unless otherwise lawfully held.*

Citations

Cases

Kenya

1. *Aketch, David Ochieng v Republic* Criminal Appeal 30 of 2015; [2015] KEHC 679 (KLR) - (Followed)
2. *CMK v Republic* Criminal Appeal 27 of 2013; [2015] KEHC 2584 (KLR) - (Explained)
3. *JKK v Republic* Criminal Appeal 118 of 2011; [2013] KECA 241 (KLR) - (Explained)
4. *KMM v Republic* Criminal Appeal 114 of 2015; [2015] KEHC 346 (KLR) - (Followed)
5. *RKS v Republic* Criminal Case 25 of 2016; [2018] KEHC 6112 (KLR) - (Explained)

Regional Court

Okeno v Republic [1972] EA 32 — (Explained)

Statutes

Kenya

1. Children Act (cap 141) sections 73, 77(1); 186(b); 190(2) - (Interpreted)
2. Constitution of Kenya article 53(1)(f)- (Interpreted)
3. Penal Code (cap 63) section 296(2)- (Interpreted)

Advocates

Gichuki Karuga & Company Advocates for the appellant.

Mr G Obiri, Assistant Director of Public Prosecution, for the respondent.

JUDGMENT

1. The appellant DMM was charged before the Senior Principal Magistrate's Court Wang'uru Law Courts with the offence of robberywith violencecontrary to section 296(2) of the *Penal Code* in Criminal Case No 162/2016. He denied the charge. A full trial was conducted and the appellant was convicted and sentenced to death.

2. The appellant was dissatisfied with the conviction and sentence and filed this appeal. He subsequently filed Amended Petition of Appeal raising the following grounds:-

   i) That the learned trial magistrate erred in law and fact by arriving at his decision without considering that the prosecution evidence is full of blatant lies and flaring inconsistencies.

   ii) That the learned trial magistrate erred in law and fact by arriving at his decision without considering the fact that proper identification was not done.

   iii) That the learned trial magistrate erred in law and fact by failing to appreciate the fact that the prosecution did not prove its case to the required standards.

   iv) That the learned trial magistrate erred in law and fact by failing to consider the sworn defence evidence of the appellant.

   v) That the learned trial magistrate erred in law and fact by failing to consider that the accused was a minor at the time of his arrest and subsequent conviction.

   vi) That on the whole, the Judgment and sentence amounts to a miscarriage of justice and in the interest of justice, the same should be set aside. On the whole, the reasoning in the Judgment is shallow and does not conform to the proceedings thereof.

   The appellant prays that the Judgment of the trial magistratebe set aside.

3. The parties agreed to proceed by way of written submissions. For the appellant submissions were filed by Gichuki Karuga & Company Advocates. For the respondent, the submissions were filed by Mr G Obiri Assistant Director of Public Prosecution.

4. This is a first appeal and this court has a duty to analyse the evidence, consider it and evaluate it and come to its own independent finding but bearing in mind it had no opportunity to see the witnesses when they testified and assess their demeanor and leave room for that. That was the holding by the Court of Appeal in the case of *Okeno v R* [1972] EA 32 where it was stated:-

> " An appellant on a 1st appeal is entitled to expect the evidence as a whole to be subject to a fresh and exhaustive examination (*Padya v R* [1957] EA 3365) and the appellant court's own decision on the evidence. The 1st appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal Mr Ruwala v R* [1957] EA 570). It is not the function of the 1st appellate court to scrutinize the evidence to support the lower courts finding and conclusion, it must make its own finding and draw its own conclusion. Only then can it decide whether the Magistrate's finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses and leave room for that".

Brief Facts of the Case:-

5. The complainant Jackline Wangari (PW1-) was at her place of work on October 25, 2015 at around 8.00 PM. She called a motor bike rider to come and drop her home. The rider came and they proceeded towards Njaka Primary School. The rider suddenly told the complainant to alight. He stopped the motor bike and ordered the complainant to hand over her porch to him. There was another motor cycle coming from behind. The rider hit the complainant on the nose and she started nose bleeding. The rider stabbed the complainant above the eye. He took the porch containing Kshs 40,000 and took her mobile phone make Samsung Galaxy. The rider had been joined by another suspect and is the one who took the porch containing Kshs 40,000. The attackers left. Another rider took the

complainant to Wang'uru Police Station where she reported the matter. The complainant identified the appellant as one of the attackers. The complainant was referred to Kimbimbi sub-county hospital for treatment. Later the complainant spotted the attacker and called the police. The appellant was arrested and charged with the offence.

Analysis of the Evidence:-

6. PW1- Samuel Njogu is a Clinical Officer attached at Kimbimbi sub-county hospital. He filled a P3 form for the complainant on 30/01/16. The clothes were soaked in blood. She had a deep cut on head near the right eye. The injury was one day old, caused by a sharp object. He produced the P3 form as Exhibit -1-. The P3 form shows it was signed on 30/10/2015.

7. The treatment notes Exhibit 3 do not have a date. The date given in court by PW1- must be a typing error as the P3 form clearly shows that it was filled on 30/10/15.

8. PW2- Jackline Wangare is the complainant. She testified that she is a butcher employed by her brother in a butchery near Machere Driving School.

9. On 25/10/15 at 8.00 PM, she called a boda boda called Samuel to take her home. On the way the boda boda rider told her to alright and give him her porch. Another boda boda rider was behind them and came to where she was Samuel stabbed. The 2nd rider Mugendi came on motor cycle and stopped. Samuel stabbed PW1- and she started bleeding. When the accused came to the scene he took out a sharp object and stabbed PW1- on top of the eye and took her phone from her hand while the other took her porch which contained Kshs 40,000. The suspects left. She had not seen the accused before that incident. She identified the suspects left. She had not seen the accused before that incident. She identified the suspects from the headlights of the motor bikes.

10. The next day she spotted the appellant at a garage but she did not call the police. The appellant was later arrested. The complainant evidence is that she did not know the appellant before.

11. PW3- John Kinyua testified that he saw the accused as there was moonlight. He said he had seen accused before at Ngurubani. PW4- PC Peter Njagi testified that he is the Investigating Officer. On 26/10/2015 he was instructed by the OCS to investigate the matter. He referred the complainant to hospital. Later the complainant spotted the appellant on 14/03/2016 and called the police. The appellant was arrested and charged.

12. The appellant gave a sworn defence and could not tell about the date the offence was committed. He was arrested from a bar after he broke a bottle. The complainant demanded Kshs 20,000 and said he would teach him a lesson.

    I have considered the evidence tendered.

Determination:-

13. It is submitted by the counsel for the appellant that the trial magistrate erred in law and fact by arriving at his decision without considering that the prosecution evidence is full of blatant lies. It is submitted that the evidence is full of inconsistencies.

14. Firstly the charge sheet indicates that the appellant was armed with a knife whereas the Investigating Officer alleges that the appellant was armed with a nail cutter. The prosecution amended the charge sheet on 20/04/2016 to include a knife as the weapon used.

15. For the state it is submitted that the assailant took a sharp object and stabbed the complainant on top of her eye. That whatever that the object was, the same caused a serious injury. That the object could be a knife or a metal bar, such objects are not only offensive but dangerous.

16. This submission by the State shows there are doubts as to what was used to stab the complainant. When the particulars of the charge states the weapon used, it is upon the State to prove that particular beyond any reasonable doubts.

17. As submitted by the defence the charge sheet states that the dangerous weapon was knife. At page 34 of the record line 16 states – ' the complainant was hurt with a nail cutter on the left eyelid'. Page -7- of the record line 10 states that the prosecution wanted to amend the charge sheet to involve the used (knife). The initial charge sheet did not indicate the dangerous weapon used. The complainant in her testimony stated that she was stabbed with a sharp object.

18. During cross-examination the complainant stated that the accused stabbed him with a knife. There are contradictions. The complainant saying a sharp object, a knife and a nail cutter. It is not clear what kind of nail cutter could cause a deep cut and it is not clear whether a sharp object or a knife was used. The inconsistencies raised doubts in the prosecution case.

19. The appellant raised the issue on medical evidence. It is submitted that PW1 said he filled the P3 form on 30/01/2016 and the injury was one day old. That the complainant testified that she was wounded on October 25, 2015 and taken to Kimbimbi Sub county Hospital.

20. I have looked at the evidence. My view is that the date of 30/01/2016 is most likely a typing error as the date on the P3 form is 30/10/2015. It shows the complainant was reported on 25/10/2015. The treatment notes exhibit -3- shows that complainant was treated though the treatment note has no date and does not know where the complainant was treated. The notes say she was assaulted by a person known to her using a sharp object. The treatment notes states that the clothes were soaked in blood. She had a wound on the face. The contradiction is not material as the Clinical Officer made reference to the treatment notes.

21. The appellant made reference to contradictions on the date the appellant was arrested. It is submitted that the charge sheet shows that appellant was arrested on 124/3/2016 while the Investigating Officer said the accused was arrested on 25th.

22. I find that the line has a typing error because the line states – The complainant was arrested on the night of 25th. The statement does not make reference to the accused and the complainant was not arrested. PW4- testified that appellant was arrested on 14/3/16. The appellant admitted in cross-examination that he went to the club on 13/3/16 and that is when he was arrested. I find that there is no contradiction in the date the appellant was arrested.

23. The appellant raised an issue on who stabbed the complainant. It is submitted that the complainant gave evidence that she was stabbed by Samuel. At page 17 Paragraph 22 she says that the accused stabbed her on top of her left eye whereas at Para -7- she says that it is the accused who stabbed her. This was quite surprising as the P3 form indicates that she had only one deep cut on the right eye.

24. I have considered the submission. I find that there are inconsistencies which raise doubt in the prosecution case. First is on who caused the injury on the complainant. The evidence of the complainant is that Samuel stabbed her. On the other hand she said she was stabbed by the accused. The appellant had only one injury which was document, that is a wound on the face. The P3 form says that the injury was a deep cut wound on the face near the eye. The P3 form does not state which side of the face injury was. The self –contradictory evidence by the complainant raises doubts

on the credibility of her testimony. I find that the evidence tendered by the prosecution has glaring inconsistencies. The trial Magistrate did not consider the contradictions and arrived at conclusions which are not supported by the evidence. At page 45 the trial Magistrate says accused took out a knife and stabbed her whereas the complainant never mentioned a knife - she said it was a sharp object. PW1- had also said Samuel stabbed her. The trial Magistrate considered the contradictions, he could have arrived at a different finding. The trial Magistrate did not consider the issues raised during cross-examination which case down on the testimony of the witnesses. In a persuasive decision in *David Ochieng Aketch v R*(2015)eKLR it was held that:-

> "Having analysed the evidence of PW1,2, & 3 I find the evidence to have glaring inconsistencies and contradictions.
>
> I have very carefully perused the trial courts judgment and note that the trial Magistrate did not adequately consider or evaluated and analysed the prosecution's case and had the court done that it would have noted the inconsistencies and contradictions goes to the roof of the charge should not be relied upon. I therefore find the trial court in finding and noting that the evidence by the prosecution was truthful did find so with no basis for such finding."

25. The trial Magistrate did not consider the evidence as he was required to do. That is why his Judgment is at variance with the evidence tendered. Where the trial Magistrate has failed to consider the evidence tendered before him and arrive at a Judgment which is one sided, the appellate court will not uphold such Judgment. The 1st appellate court will evaluate the evidence and reach an independent finding.

26. The appellant submits that the Learned trial Magistrate erred in law and fact by arriving at his own decision without considering that proper identification was not done.

27. The complainant stated that she had never seen the appellant prior to the incident. Page 17 line 12 she stated:-

> 'I had not seen the accused before that incident.'

This was contradicted by the Investigating Officer PW4 at Page 35 line 20 where he stated:-

> "We could not conduct a parade because the complainant knew you and the witness saw what happened. This is why we could not conduct a parade."

28. This despite the fact that the complainant said she did not know the appellant before. The complainant at Page 19 line alluded to a parade, she stated:-

> "When parade was done at police station."

The identification of an accused person is very crucial and should not cast any doubt. The complainant testified that she identified the accused through the head lights of the motor cycle. When PW1- was cross-examined, it was not clear where the motor bike was. First she said the motor bike came and stopped behind. When the statement was read she said the motor bike stopped infront then reversed. In her statement to the police however, she had not recorded that the motor bike reversed. With these contradictions it is hard to tell where the lights of the motor bike were and how they assisted her to identify a stranger. These casts doubts as to whether PW2- was telling the truth. Contradictions which raise doubts on the credibility of a witness are fatal and the court cannot disregard them. The evidence by the prosecution has cast doubt on a very material particular, that is whether the accused was identified, that is complainant identifying a stranger or whether she recognized the appellant. The contradiction case doubt on the evidence and doubts in a prosecution case must be resolved in favour

of appellant. I find that it has not been proved beyond any reasonable doubts that the complainant identified the appellant as one of the robbers. There are reasons to doubt the complainant. At page 17 of the record the appellant said she saw the appellant at a garage the following day. She says she decided to keep silent. At page 19 the complainant in cross-examination said she met appellant at a car wash and he said he had sold the phone. When her statement was read she said she saw appellant as she went to hospital. The complainant when she was re-examined at Page 20 she stated that identification parade was conducted. Despite this the trial Magistrate at Page 45 line 16 stated:-

> " I find that indeed the complainant did see the accused face on the motor cycle's headlights and was able to identify him. There was therefore no need of an identification parade. Since the evidence is one of recognition and not identification."

29. This finding was in error as PW1- stated that she had not seen the accused before. The trial Magistrate failed to address the anomaly that PW1- said a parade was conducted while he ruled that the appellant was recognized and there was no need of a parade. I find that the trial Magistrate clearly erred by stating that the appellant was recognized when he was not supported by the evidence on record.

30. Having analysed the evidence on identification of the appellant as the assailant, it is shrouded in doubts and is most un reliable. The evidence of identification must be treated with caution. In this case it is doubtful and it must be resolved infavour of the appellant. I find that evidence of PW3 is not reliable. He had refuse to attend court and only attended after Warrant of Arrest was issued. It was not possible for him to witness the incident at night when he was one Kilometre away. He said there was moonlight PW3- contradicted the PW1- on material particulars.

31. PW3- was not an independent witness as he said the complainant hails from his family. I find that his evidence is not reliable. For these reasons I find that the evidence on identification is doubtful and I give the appellant the benefits of doubts and find that he was not identified as the person who committed the robbery.

32. The defence submits that the trial Magistrate erred in law and fact by failing to consider that the accused was a minor at the time of his arrest and subsequent conviction.

33. It is submitted that the lower court treated the appellant as an adult whereas he was a minor. The charge sheet indicated that the appellant was an adult. The appellant never informed the trial Magistrate that he was a minor. Appearance can mislead. The trial Magistrate may have failed to note that the appellant owing to his appearance. The defence of the appellant he said he had gone to his shamba then to his house then went to Crucid Club where he drunk beer upto midnight. There is nothing to suggest that he was a minor. The birth certificate tendered which is not clear as it is a photocopy shows that he was born in 1999. The birth certificate was issued on 2/5/2018. It was obtained long after he was sentenced. The question is why the appellant did not raise the issue with the trial Magistrate. It seems the birth certificate was obtained for the purpose of this appeal.

34. There was no application for the age of appellant to be assessed. Had the issue been raised, the court would have ordered that the age be assessed.

The issue has been dealt with in various decisions as follows:-

KMM v Republic [2015] eKLR

The court dealt with a case whereby a minor was convicted of his own plea for the offence of robbery with violence and sentenced to suffer death. It stated;

> Illegality in the proceedings where a minor was tried without the benefit of representation by Counsel which is statutorily required under sections 77(1) and 186(b) of the *Children Act* and for the defective sentence of death on a minor in contravention of section 190(2) of the *Children Act*. The said provisions of law provide as follows:

77.

(1) Where a child is brought before a court in proceedings under this Act or any other written law, the court may, where the child is unrepresented, order that the child be granted legal representation.

186. Every child accused of having infringed any law shall-

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

190.

(1) No child shall be ordered to imprisonment or to be placed in a detention camp.

(2) No child shall be sentenced to death."

In making an order for retrial the appellate court must take the

> "view that had the case been properly prosecuted and admissible evidence adduced, a conviction might fairly be said to have resulted."

A retrial will not be ordered where on the evidence before the trial court, the appellate court does not consider that a conviction is possible....

The appeal was based on the contention that

> "[t]he entire proceedings in this case were inept, incurably and fatally flawed, illegal and *void ab initio*".

I agree and specifically find that the trial of the appellant by the trial court was illegal and defective for contravening the statutory provisions of section 77(1), 186(b) and 190(2) of the *Children Act* relating to legal representation of a child and restriction on punishment. The errors in the proceedings and judgment were not caused by the prosecution nor can they be blamed on it.

RKS v Republic [2018] eKLR

In a similar case where the issue of age was raised during appeal, the court stated,

> It is important to point out that when the issue of the age was first raised, this court made an order on 02/05/2017 that the appellant be subjected to comprehensive radiography tests to determine his exact age. The results of that test came in the form of a letter dated 13/07/2017 by Dr Kalande of the Provincial General Hospital, Nakuru. The radiological assessment showed that the Appellant was, at the time of the examination, over 18 years but below 21 years old.

> The arraignment of the appellant was in 2010 and the sentence was imposed in 2013. That means that the Appellant was, disturbingly, about 14 years old at the time of arraignment; and about 17 at the time the sentence was imposed.....

In reaching its decision in the Dennis Kirui Cheruiyot Case (supra), the court relied on *JKK v Republic* (2013) eKLR. This is a decision of the Court of Appeal sitting in Nyeri. In that case, a minor charged with murder was convicted and sentenced to death. The Court of Appeal found that the Appellant was under 18 years of age at the time of committing the offence although at the time of the sentence four years had elapsed making him about 21 years of age. The Court of Appeal reduced the sentenced from the death penalty to a custodial sentence of 12 years.

It was also dealt with in the case cited by the appellant.

In *CMK v Republic* it was held as follows:-

> "...On the issue of the rights of the appellant, there is evidence on record that at the time of his trial he was aged 17 years old and thereafter a child within the definition of a child under *Children Act* section 17(3) of the *Children Act* stated that a child offender shall be separated from adults in custody. section 73 of the Act provides for the establishment of Children's Court and section 73 (b) gives the court jurisdiction to hear a charge against a child rather than a charge of murder or a charge in which the child is charged together with a person or persons of or above the age of 18 years.
>
> Section 184(c) of the *Children Act* provides that children Court may try a child of any offence save for the exceptions provided for under section 73(b) and under section 185 requires a court trying a matter to remit the same to children court. section 186(b) provides for legal assistance, (c) thereof to have the matter determined without delay while section 189 provides that words "conviction" and "sentence" shall not be used in relation to a child dealt with by the children court.
>
> Section 190(c) provides that no child shall be ordered to imprisonment or to be placed in a detention camp while section 190 provides for how to deal with a child offender.
>
> This rights have now been given constitutional basis under article 53(1) (f) which states that every child has a right not to be detained except as a measurer of last resort and when detained for the shortest appropriate period of time.
>
> It is therefore clear that the appellants rights aforesaid were violated. There is no indication that the same was tried by children court and further the sentence mated to the appellant was unlawfull and therefore null and void which I hereby quash as the court used words which are statutory out lawed. It should also be pointed out that the appellants rights under article 53(2) were violated as the court did not take into account his best interest."

35. The appellant submits that whole trial, the Judgment and sentence amounts to a miscarriage of justice. Indeed the trial violated the rights of the appellant under article 53(1)(f) of the *Constitution* which provide that every child has a right not to be detained except as a measure of last resort and when detained for a shortest appropriate period of time. The appellant was also denied the protections under the Children's Act which are section 73 to be tried in a Children's Court, provision of legal representation and the manner to deal with him when found guilty under section 190 of the Act. If indeed he was a child, his rights were grossly violated. However since it is only the birth certificate which has been produced very late in the day and his age has not been assessed and radiography tests done to determine his exact age, the issue of his age has not been exhaustively determined. There would have

been a need to verify the birth certificate as it has been produced too late in the proceedings. The failure to accord the appellant the rights under the Constitution and the children cannot be blamed on the court or the prosecution because it was never brought to their attention that the appellant was a minor. On the other hand the appellant was a minor, his rights were violated and there was a miscarriage of justice

36. Having considered the evidence tendered, and having evaluated it and for the reasons I have stated I find that the appeal has merits. I allow it. I order that the conviction be quashed, the sentence be set aside and the appellant be set at liberty unless otherwise lawfully held.

DATED AT KERUGOYA THIS 18TH DAY OF MARCH 2019.

L. W. GITARI

JUDGE