



**CGN v Republic (Criminal Appeal 55 of 2018)  
[2019] KEHC 2945 (KLR) (23 October 2019) (Judgment)**

*CGN v Republic [2019] eKLR*

Neutral citation: [2019] KEHC 2945 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL 55 OF 2018  
RE ABURILI, J  
OCTOBER 23, 2019**

**BETWEEN**

**CGN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an application against sentence and conviction of Ukwalu  
PMCRC 456 of 2018 dated 30.7.2018 before Hon. G. Adhiambo - SRM)*

**How a trial court ought to conduct itself in a trial involving child offenders**

*The appeal was against the conviction and sentence of the appellant for the possession of narcotic drugs. The court highlighted how a trial court ought to conduct itself in a trial involving child offenders. The court further held that the facts read out to a child offender during plea taking ought to have stated the exact place where the purported narcotic drug was found, for the offence of possession to be proved. The court also held that the age assessment report for the appellant ought to have been ordered for and submitted to court before taking the plea.*

Reported by Kakai Toili

**Criminal Procedure** – criminal trials - plea taking - what information was to be contained in the facts read out to a child offender during plea taking in order to prove the offence of possession of narcotic drugs.

**Criminal Procedure** – criminal trials – criminal trials involving child offenders – submission of an age assessment report to a trial court - at what stage should an age assessment report for a child offender be ordered for and submitted to the trial court - how a trial court was to conduct itself in a trial involving child offenders.

**Criminal Law** – offences – possession of narcotic drugs - whether it was necessary to produce a Government chemist/analyst report in order to prove a substance produced in court was a narcotic drug - Narcotic Drugs and Psychotropic Substances Act (cap 245), section 391.



## **Brief facts**

The appellant (a minor) was charged with the offence of being in possession of narcotic drugs contrary to section 3(1) as read with section 3(2)(9) of the Narcotic Drugs and Psychotropic Substances Act, No 4 of 1994 (Narcotic Drugs Act). The appellant pleaded guilty to the offence and was convicted on her own plea of guilty. The trial court sentenced the appellant to serve 3 years' probation. Dissatisfied with the decision of the trial court, the appellant lodged the instant appeal against both conviction and sentence. It was the appellant's contention that the plea was equivocal and her rights as a child were violated by the trial court as it did not comply with the provisions of the Children Act, 2001 (Children Act).

## **Issues**

- i. How a trial court was to conduct itself in a trial involving child offenders?
- ii. What information was to be contained in the facts read out to a child offender during plea taking in order to prove the offence of possession of narcotic drugs?
- iii. Whether it was necessary to produce a Government chemist/analyst report in order to prove a substance produced in court was a narcotic drug.
- iv. At what stage should an age assessment report for a child offender be ordered for and submitted to the trial court?

## **Held**

1. The facts did not disclose that a search was conducted in the belongings of the appellant. A dormitory was not occupied by one student. The facts ought to have stated the exact place where the purported narcotic drug was found, for the offence of possession to be proved, otherwise all the students who slept in that dormitory would be guilty of possessing the substance.
2. The prosecution produced an exhibit I described by the trial court as "half a gram of bhang wrapped in a white and checked, red serviette. However, no evidence was adduced to prove that it was indeed bhang. No report was produced from the government chemist/analyst to show that the substance was bhang.
3. The law prohibited courts from referring children in conflict with the law as accused persons. They were subjects. The trial court throughout the proceedings referred to the appellant as an accused person.
4. The trial court failed to adhere to the requirements of the law which required child offenders name not to be disclosed in the proceedings. The proceedings in the trial court did not disguise the appellant which was prejudicial to the child.
5. The trial court erred in law and fact in failing to retake the plea in the presence of the appellant's advocate who walked into the court after the charge had been read out to the appellant. The appellant's advocate purported to mitigate after facts were read out, which facts in the court's view, did not disclose an offence of possession of narcotic drugs by the appellant.
6. The age assessment report for the appellant ought to have been ordered for and submitted to court before taking the plea and not merely for purposes of sentencing since the charge sheet showed that the appellant was a minor.
7. The appellant was held in custody after taking the plea in an offence which was not a capital offence. There was no reason why the appellant was not granted bail and placed in the custody of her parents or guardians as required by rule 5 of the Child Offenders Rules.
8. There was no evidence on record to show that at the time of plea and subsequently, the appellant being a child, was accorded protection as required under rule 7 of the Child Offenders Rules which demanded that a court be cleared when dealing with a child offender.
9. The proceedings in the trial court were not conducted in accordance with the law. The Children Act was not enacted in vain. It was intended to protect and promote the welfare of all children whether in contact with the law or in conflict with the law without discrimination. In the instant case, the appellant was prejudiced by failure to follow the stipulated procedure in handling child offenders.



10. Even if the school did not want to take the appellant back, the court ought to have called for child protection or parent or guardian of the appellant to speak to her before the plea was taken and while awaiting sentence and to place her in custody of her parents or into a child protection unit. No child could be said to be comfortable in a courtroom where even adults, most of the time, including regular visitors felt intimidated.

*Appeal allowed.*

### **Orders**

- i. *The conviction of the appellant by the trial court was quashed.*
- ii. *The sentence of 3 years probation service was set aside.*
- iii. *The appellant was set free unless otherwise lawfully held.*

### **Citations**

#### **Cases**

None referred to

#### **Statutes**

##### **Kenya**

Children (Practice and Procedure) (Child Offender) Rules, 2002 (cap 141 Sub Leg) rules 5, 7 - (Interpreted)

Children Act (cap 141) In general - (Cited)

Narcotic Drugs and Psychotropic Substances (Control) Act (cap 245) section 3(1)- (Interpreted)

#### **Advocates**

*Miss Bagwazi* h/b for *Mr. Onyango* for appellant

*Mr Okachi* Senior Principal Prosecution Counsel for State

## **JUDGMENT**

1. This appeal arises from the judgment and sentence passed by Hon G Adhiambo, SRM in Ukwala SRM Cr Case No 456 of 2018 wherein the appellant minor herein was convicted on his own plea of guilty and was sentenced to serve three years' probation.
2. The Charge facing the appellant minor CG read that the appellant was in possession of narcotic drugs and the particulars were that the appellant was on July 20, 2018 at [Particulars withheld] Girls Secondary School Ugunja Sub county of Siaya County she was found in possession of half gram of cannabis sativa with a street value of KShs 10 in contravention of section 3(1) as read with subsection 2(9) the *Narcotic Drugs and Psychotropic Substances Act*, No 4 of 1994, which substance was not in medical preparation form.
3. The facts as read out to the appellant stated that the teachers of the school where the appellant was a pupil, on receiving information, searched her desk but recovered nothing. They went to her dormitory and searched dry green plant material which they identified to be bhang. They then reported to Ugunja Police Station with bhang.
4. Dissatisfied with the judgment and sentence, the appellant filed this appeal contending that the plea was equivocal and that her rights as a child were violated by the trial court as it did not comply with provisions of the *Children's Act* and the *Child Offenders Act*.
5. The prosecution opposed the appeal maintaining that the plea was unequivocal and that the sentence was appropriate.



6. I have considered the appeal as a whole and the submissions by both the appellant's and the respondent's counsel.
7. This appeal must succeed for the following reasons. First is that the facts as read out to the appellant minor do not disclose that the search was conducted in the belongings of the appellant. A dormitory is not occupied by one student. The facts should have stated the exact place where the purported narcotic drug was found, for the offence of possession to be proved, otherwise all the students who slept in that dormitory would be guilty of possessing the substance.
8. Second, is that the prosecution produced an exhibit I described by the trial magistrate as:

“ Half a gram of bhang wrapped in a white and checked, red serviette produced as exhibit –J)”
9. However, there was no evidence that this was bhang. No report was produced from the Government Chemist/Analyst to show that the substance was bhang.
10. Third, the appellant was a minor subject. The Law prohibits Courts from referring to children in conflict with the Law as Accused persons. They are subjects. The trial Court throughout the proceedings referred the minor as Accused Person subject.
11. Fourth, is that the trial court failed to adhere to the requirements of the Laws that Child offenders' names should not be disclosed in the proceedings. The proceedings do not disguise the appellant which is prejudicial to the child.
12. Fifth, is that the trial court erred in Law and fact in failing to retake the plea in the presence of the appellant's Advocate who walked into court only after the charge had been read out to her and he only purported to mitigate after facts were read out, which facts did not in my humble view, disclose an offence of possession of the narcotics drug.
13. Sixth, is that the age assessment report for the minor should have been ordered for and submitted to court before taking the plea and not merely for purposes of sentencing since the charge sheet showed that she was a minor.
14. Seventh, is that the subject was held in custody after taking the plea in an offence which was not a capital offence. There is no reason why she was not granted bail and placed in the custody of her parents or guardians as required by rule 5 of the *Child Offenders Rules*.
15. In addition there is no evidence on record to show that at the time of plea and subsequently, the appellant being a child, was accorded protection as required under rule 7 of the *Child Offenders Rules* which demand that a Court be cleared when dealing with a child offender.
16. In my humble view, the proceedings in the trial Court were not conducted in accordance with the Law. The *Children's Act* was not enacted in vain. It was intended to protect and promote the welfare of all children whether in contact with the Law or in conflict with the Law without discrimination. In this case, I find that the appellant was prejudiced by the failure to follow the stipulated procedure in handling child offenders.
17. Even if the school did not want to take the child back as submitted by Counsel for the Respondent, which submission is evidence since the trial court record does not show that the school rejected her, the court should have called for child Protection or guardian or parent of the child to speak to her before the plea was taken and while awaiting sentence, place her in custody of her parents or into a child protection unit. No child can be said to be comfortable in a Courtroom set up where even adults most of the time, including regular visitors, feel intimidated.



18. On whether a retrial would be viable, I observe that the case was handled expeditiously on July 23, 2018 and sentence imposed on July 30, 2018. Having found that there was no evidence that the substance was bhang and or that it was found in her possession as the facts read out did not disclose the element of possession, I find no ground upon which I can order for a retrial.
19. Accordingly, and for the reasons advanced herein, I find this appeal merited. I allow it, quash the conviction of the appellant C.G. on her own plea of guilty by the trial Court and set aside the sentence of 3 years probation service meted out on her.
20. Therefore, unless otherwise lawfully held, the appellant CG be and is hereby set at liberty to continue with her studies, and advised to avoid peer pressure.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 23<sup>RD</sup> DAY OF OCTOBER, 2019**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

Mr. Okachi Senior Principal Prosecution Counsel for the State

Appellant present

Miss Bagwazi h/b for Mr. Onyango for the appellant

CA: Brenda and Modestar

