



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO 99 OF 2017

J N M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 1333 of 2014 in the Principal Magistrate's Court at Githunguri delivered by Hon M. Ochieng (SRM) on 15th November 2016)

JUDGMENT

INTRODUCTION

1. The Appellant herein, J N M, was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code Cap 63 (Laws of Kenya). The particulars of this charge were that on 20th day of November 2014 at about 2.00 am within Kiambu County, jointly with others not before the court, they robbed Peter Muigai Wanjiku (hereinafter referred to as "PW 1") one mobile phone make Q7 valued at Kshs 1,000/= and at immediately before or immediately after the time of such robbery wounded him.
2. He had also been charged with the alternative charge of handling property to Section 322(1) of the Penal Code. The particulars of this charge were that on the aforesaid date at about 9.00 am within Kiambu County, otherwise than in the course of stealing, he dishonestly received or retained one (1) mobile phone make Q7 knowing or having reason to believe them to be stolen good.
3. The Learned Trial Magistrate, Hon M. Ochieng, Senior Resident Magistrate convicted him on the main charge and sentenced him to suffer death.
4. Being dissatisfied with the said judgment, on 10th January 2017, the Appellant filed a Chamber Summons application seeking leave to file his appeal out of time, which application was allowed. The Record of Appeal was filed on 19th July 2017. He relied on fourteen (14) Grounds of Appeal. He filed his Written Submissions and Bundle of Authorities on 22nd March 2018.
5. When the matter came up for the hearing of the Appeal herein on the said date, counsel for the State indicated that the State would not be filing its Written Submissions for the reason that it was conceding to the Appeal herein.
6. In oral submissions by its counsel, the State submitted that the Appellant herein was wrongfully sentenced to death as at the time he was arraigned in court for the first time on 21st November 2014, he was aged seventeen (17) years and was in Form Three (3). He pointed out that the Trial Court at the time ordered that a Birth Certificate or any school document be furnished with a view to confirming the Appellant's age.
7. A letter dated 1st December 2014 indicating that the Appellant was a student in Form Two (2) was subsequently presented to the said Learned Trial Magistrate on 5th December 2014. The State contended that the said Learned Trial Magistrate failed to ascertain the Appellant's age as that would have informed him of how the trial would have been conducted.
8. It averred that the Children Act was clear on how proceedings relating to a child were to be conducted and that Article 53(2) of the Constitution of Kenya, 2010 provided that the best interests of a child must be safeguarded. It also pointed out that Sections 77 and 186 of the Children Act provided that a child should be represented in court while Section 190 of the said Children Act was clear that no child shall be sentenced to death.

9. It was therefore its submission that the Learned Trial Magistrate erred when he sentenced the Appellant to suffer death and that in the absence of certainty of the Appellant's age, the trial was fatally defective. It contended that the defectiveness of the trial could not be cured by a re-trial for the reason that this appellate court must first ascertain that the initial trial was properly conducted, the evidence was properly taken and a conviction was properly arrived at.

10. It added that since the Appellant had been in prison for about one and a half (1 ½) years, the same was sufficient punishment in the event he had been guilty of the said offence.

11. It further pointed out that the Learned Trial Magistrate erred when he directed that the Charge Sheet be amended from the offence of assault to that of robbery with violence. It argued that although the Learned Trial Magistrate had power to order for amendment of charges under Section 214 of the Criminal Procedure Code Cap 75 (Laws of Kenya), the mandate to decide whether or not to amend charges sheets lay solely with the Office of Director of the Public Prosecution (ODPP) under the provisions of Article 157 of the Constitution of Kenya.

12. Further, it stated that the Learned Trial Magistrate erred when he refused the Appellant and PW 1 to reconcile and directed that the matter proceeds for full trial.

LEGAL ANALYSIS

13. Despite the State conceding to the Appeal herein, this court found it prudent to consider if the reasons it gave for conceding to the appeal were fair and reasonable. Appreciably, an appellate court should consider the facts of a case even where the State has conceded to an appeal to establish if such a concession should be granted.

14. In the case of **Mwanguo Gwede Mwarua vs Republic [2015] eKLR**, the Court of Appeal made a similar observation when it stated as follows:-

“The concession notwithstanding, it is still our duty as a second appellate Court to consider the issues of law raised by the respondent as grounds for conceding the appeal in order to determine whether the said concession is merited.”(See NORMAN AMBICH MIERO & ANOTHER VS REPUBLIC, CR.APP.NO.279 OF 2005 (NYERI)).”

15. A perusal of the proceedings shows that when the Appellant was first arraigned in court on 21st November 2011, he informed Hon J. D. Kwena SPM that he was aged seventeen (17) years and that he was a student at [particulars withheld] Secondary School in Form Three (3). On 5th December 2014, Hon E.O. Wambo RM noted that he was enrolled at the aforesaid school as Admission Number [particulars withheld] and was in Form Two (2). He expressed his displeasure at the Appellant's dismissal performance in school and on account of his age, admitted him to free bond with two (2) personal sureties.

16. This court noted that during the entire proceedings, the Appellant herein was not represented by counsel. This was contrary to Section 186 (b) of the Children Act No 8 of 2011 which provides that a child must be provided with legal representation where he cannot afford legal counsel. The same stipulates as follows:-

“Every child accused of having infringed any law shall if he is unable to obtain legal assistance, be provided by the Government with assistance in the preparation and presentation of his defence”

17. There was nothing that was indicated in the decision of the Learned Trial Magistrate to demonstrate that he enquired whether the Appellant he could afford to hire counsel to represent him and if he was unable to, for legal assistance to be accorded to him at the expense of the Government of Kenya. The fact that the trial proceeded without the Appellant being represented by counsel, this rendered the entire proceedings defective and a nullity.

18. Further, once he convicted the Appellant herein, the said Learned Trial Magistrate did not address his mind to the Appellant's age. This was a gross miscarriage of justice bearing in mind that the Appellant was a minor and could not be sentenced to death even if he had been rightly convicted, a fact that the State rightly pointed out.

19. It was therefore the view of this court that if it had upheld the Appellant's conviction, it could not have sentenced him to death because the law expressly prohibits such a sentence where minor has been convicted. Indeed, Section 190 of the Children Act restricts the types of punishments that can be meted upon a minor. The same provides as follows:-

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

2. No child shall be sentenced to death.

20. Going further, the Appellant could not be incarcerated for a lengthy period by virtue of Section 53(f) (i) of the Constitution of Kenya, 2010 which provides as follows:-

“Every child has the right

(f) not to be detained, except as a measure of last resort, and when detained, to be held-

(i) for the shortest appropriate period of time; and

21. The only penalties that were open to the Learned Trial Magistrate had he convicted the Appellant herein were limited to those that have been expressly set out in Section 191 of the Children Act that stipulates as follows:-

“In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways—

- a. **By discharging the offender under section 35(1) of the Penal Code (Cap. 63);**
- b. **by discharging the offender on his entering into a recognisance, with or without sureties;**
- c. **by making a probation order against the offender under the provisions of the Probation of Offenders Act (Cap. 64);**
- d. **by committing the offender to the care of a fit person, whether a relative or not, or a charitable children’s institution willing to undertake his care;**
- e. **if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;**
- f. **by ordering the offender to pay a fine, compensation or costs, or any or all of them;**
- g. **in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;**
- h. **by placing the offender under the care of a qualified counsellor;**
- i. **by ordering him to be placed in an educational institution or a vocational training programme;**
- j. **by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act (Cap. 64);**
- k. **by making a community service order; or**
- l. **in any other lawful manner.**

22. From the types of punishments stipulated in Section 191 of the Children Act, it was the considered opinion that the maximum detention the Appellant herein could have been subjected to is detention in a borstal institution for a period of three (3) years as is envisaged in Section 6(1) of the Borstal Act Cap 92(Laws of Kenya) that provides as follows:-

“Where the High Court or a subordinate court of the first class or a juvenile court is satisfied, after considering the matters specified in [section 5](#) of this Act, that it is expedient for his reformation that a youthful offender should undergo training in a borstal institution, it may, instead of dealing with the offender in any other way, direct that the offender be sent to a borstal institution for a period of three years.”

23. Notably, Article 53(f)(i) of the Constitution of Kenya provides that he could only have been detained for the shortest appropriate time. The Appellant had since been incarcerated for slightly about one and a half (1 ½) years. In the event, this court would have found that he was guilty of the offence he had been charged with and upheld the conviction against him, then the punishment he had suffered herein was sufficient as the said offence was said to have been committed when he was still a minor. On this ground alone, this court came to the firm conclusion that the Appellant’s Appeal was successful.

24. Whereas the State had pointed out that power to amend the charges sheets lay with the ODPP and that the Learned Trial Magistrate erred when he declined to allow the Appellant to reconcile with PW 1, this court found this argument had been rendered moot as the proceedings before the Trial Court were a nullity *ab initio*.

25. However, this court considered nonetheless considered whether a re-trial would have been appropriate in the circumstances of the case herein in view of the aforesaid actions by the Learned Trial Magistrate. Notably, ordering a re-trial is not automatic. It can only be ordered where it does not prejudice an appellant.

26. In arriving at this conclusion, this court fully associated itself with the holdings in the cases of [Ahmedi Ali Dharamsi Sumar vs Republic \[1964\] E.A. 481](#) and re-stated in [Fatehaji Manji vs Republic \[1966\] E.A. 343](#) that Mutende and Thurairaja Jaden JJ cited in the case of [Jackson Mutunga Matheka vs Republic \[2015\] eKLR](#) where it was stated as follows:-

“... a retrial will only be ordered when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution fill up gaps in its evidence at the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on particular facts and circumstances and an order for retrial should only be made where the interest of justice required it and not ordered where it is likely to cause an injustice to the accused.”

27. It was also the considered opinion of this court that even if had found that there was overwhelming evidence against the Appellant herein, putting him through another trial for an omission that was occasioned by the Trial Court would have definitely occasioned him injustice.

28. As the State rightly pointed out, this court found that this was not a suitable case where a re-trial could be ordered for the reason that the entire proceedings were a nullity *ab initio*, the Appellant having proceeded with the trial without any legal representation. The evidence was not properly taken and the sentence was unlawful.

29. Consequently, in view of the foregoing conclusions, this court did not therefore find any value in analysing the State's submissions that the Learned Trial Magistrate erred when he directed that the Charge Sheet without seeking the input of the ODPP or that the Learned Trial Magistrate erred when he declined to allow the Appellant and PW 1 reconcile. The nullity of these proceedings also dissuaded it court from analysing the evidence that was adduced in the Trial Court.

DISPOSITION

30. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 10th October 2016 was successful and there was merit in the State conceding to the said Appeal. The same is hereby allowed.

31. This court hereby quashes the conviction and sets aside the sentence that was meted upon the Appellant by the Trial Court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

32. It is so ordered.

DATED and DELIVERED at KIAMBU this 23rd day of March, 2018.

J. KAMAU

JUDGE

In the presence of:-

Njehu for the Appellant

Kinyanjui for State

Nancy Mburu– Court Assistant