



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL NO. 169 OF 2017

C.K. (A MINOR).....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the original conviction and sentence in Kabarnet

Principal Magistrate's Court Criminal Case No. 311 of 2015

delivered on the 23rd day of October, 2015 by E. Kigen, RM]

JUDGMENT

Introduction

The Appellant, who was unrepresented, was on the 23rd October, 2015 convicted and sentenced to imprisonment for life for the offence of Defilement contrary to section 8(1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that he had on the 16th day of April, 2015 at around 1700hrs at [particulars withheld] in Baringo North Sub-County within Baringo County did unlawfully and intentionally cause his penis to penetrate the vagina of J. R. K. a girl aged 7 years in contravention of the Act.

While the sentencing the Appellant, the trial court (*E. Kigen, RM*) is shown on record as having been urged and determining the sentence as follows:

*“MITIGATION: **I am student and afraid that my life is going to stop.** I pray for forgiveness.*

COURT: I have considered the mitigation as well as the fact that the offender has no previous records. I do find that the offence is a serious offence meted out on a young girl who will live with the trauma for the rest of her life.

The sentence is a mandatory sentence without an option of a non-custodial sentence. I do hereby proceed to sentence the accused to serve life imprisonment.”

The Appeal.

At the hearing of the appeal, the question of the age of the Appellant arose and it was established by the

DPP by production of a Certificate of Birth No [particulars withheld] dated 28/2/2013 that the appellant was born on 1/1/1999, which made him 18 years at the time of hearing of his appeal and 15 years at the time of his trial in the trial court. In addition, the complainant's father and mother on oath informed the court that they wished to forgive the Appellant who was their cousin. However, their information about the age of the complainant was contradictory to that given by the mother in the trial court. When asked by the court the complainant's mother admitted that she had lied to this court about her daughter's age being 8 years and born on 24th June, 2013 so as to coincide with her husband's statement that the girl was born in 2013 May.

Defective trial

Article 53 (1) (h) of the Constitution provides that 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

(ii) separate from adults and in conditions that take account of the child's sex and age.”

Section 77 of the Children Act provides for legal representation of children in court proceedings, general, as follows:

“77. Legal aid

(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.

(2) Any expenses incurred in relation to the legal representation of a child under subsection (1) shall be defrayed out of monies provided by Parliament.”

In a criminal trial for defilement, the consequences of which upon conviction is for adults imprisonment for life, legal aid for a child facing such charge is paramount, in the event he is otherwise, as here treated as an adult. Indeed, section 186 of the Children Act sets out the rights and guarantees of a child in criminal proceedings as follows:

“186. Guarantees to a child accused of an offence

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 respected 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.”

Unfortunately, the trial court did not consider the age of the appellant and of the need to comply with the constitutional and statutory provisions as regards the fair trial of children cases. The trial court had an indication from the evidence of the PW3 clinical officer in cross-examination (p.14 of record) that the appellant was a minor as the witness had responded to a question that “*you are approximately 18 years*”. The court did not enquire into the age of the appellant and in this failure fell into error because as it turned out the appellant is a minor whose fair trial rights under the Children Act for provision of counsel and against imposition of sentence of imprisonment were breached by the trial Court. At sentencing, as shown above, the trial Court is again put into inquiry when the appellant states that he is a student: the court should have enquired into his age before passing the illegal sentence of imprisonment for life.

Clearly, as conceded by the DPP, the trial of the appellant who is shown to have been a minor, without legal representation is illegal and defective, and his sentence to imprisonment for life is illegal and a nullity.

Probation Officer’s report

The DPP, however, requested for treatment of the offender on the basis of the law after a Probation Officer’s report on the circumstances of the case. The Probation Officer’s report dated 15th May, 2018 concluded as follows:

“CONCLUSION

*Your Lordship, the youthful offender was a form one student at [particulars withheld] when he was arrested. He was described by both the local administration leaders and the community as person of prior good conduct before arrest and **therefore deserve to be given non-custodial sentence to enable him continue with his education and get united with his family. Furthermore, the victim father has no objection, if the accused is ordered to serve non-custodial sentence.***

RECOMMENDATION

Considering the positive sentiments echoed above and the fact that he is not a security threat to members of the public, the inmate may be released for his parents to enable him resume his studies and re-unite with the family. However, this subject to court’s discretion.

Julius K. Limo

Probation Officer

Baringo County

Date: 15/5/18”

Principles for retrial

The primary considerations for an order of retrial are that a retrial will usually be ordered where the trial was procedurally defective, and not for want of sufficient evidence and the Appellate Court must consider that if the trial is had afresh, there is evidence upon which a court may properly convict the accused for the offence charged and, further, that retrial shall only be ordered where the interests of justice so demand. See, ***Fatehali Manji v. Republic*** (1966) EA 343; ***Muiruri v. R*** (2003) KLR 552 and ***Mwangi v. R*** (1983) KLR 522.

The Court is mindful of the observation in ***Opicho v. R*** (2009) KLR 369 that in serious charges such as, involving child abuse as in the case, public interest and justice would demand the prosecution of

defilement cases, the Court saying:

“The allegations made against the appellant are extremely serious and of public interest as they relate to child abuse, a phenomenon now topical on the world stage, and in this country, due to its prevalence. It is in the interest of justice that the appellant receives a fair trial and if he is to be acquitted or convicted, then it ought to be seen that it was, in either case, in accordance with the law. We are inclined in all circumstances of this case to order for retrial.”

However, the appellant in this case has since conviction and sentence on 23rd October, 2015 served almost 2 years 8 months of his life imprisonment in jail against the express provision section 190 of the Children Act that:

“190. Restriction on punishment

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

(2) No child shall be sentenced to death.

(3) No child under the age of ten years shall be ordered by a Children’s Court to be sent to a rehabilitation school.”

In addition, the parents obviously lied to this court or the trial court as the age of the complainant as they gave wholly conflicting dates of the age and date of birth of the child before the two courts, raising questions of their credibility. It may be that with their kind of testimony, the offence of defilement of the complainant, in which the evidence of the minor complainant PW1 relies on the mother’s (PW2) corroboration evidence that the complainant had *“informed me that Chebon had removed her pant and did to her bad things...”*, may not be proved if she is found to be untruthful. See **Ndungu Kimanyi v. R** (1979) KLR 282, where it was held as follows:

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

See also **Kiilu v. R** (2005) 1 KLR 174. The Court is, therefore, not satisfied that if a fresh trial is ordered the evidence would lead to a conviction.

The Court may only make a valid order for probation or other non-custodial sentence as urged by the Probation Officer, if there was a valid conviction, which was not the case here. The trial was held in contravention of the appellant’s constitutional and statutory guarantees. The Court has considered the probability of a conviction on retrial and the fact that the appellant has already been prejudiced by serving 2 years and 8 months of unconstitutional and illegal detention in prison under unwarranted life sentence, and it does not find that the interests of justice will be served by reopening the case for a retrial of the appellant.

Orders

Accordingly, for the reasons set out above, this Court quashes the conviction of the appellant for the offence of defilement contrary to section 8(1) [as read with 8] (2) of the Sexual Offences Act and sets aside the sentence of imprisonment for life imposed therefor on the appellant, and consequently makes an order for his immediate release unless he is otherwise lawfully held.

DATED AND DELIVERED THIS 20TH DAY OF JUNE, 2018.

EDWARD M. MURIITHI

JUDGE

Appearances:

The Appellant in person.

Ms. Macharia Ass. DPP for the Respondent.