



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

MISC. APPLICATION NO. 173 OF 2018

IN THE MATTER OF TNS (MINOR)

NBA.....APPLICANT

(suing as the next friend and Mother of the child)

-VERSUS-

DIRECTOR OF CHILDREN'S SERVICES.....RESPONDENT

REVISION

1. This revision concerns a female child TNS who is aged 8. On 2nd October 2018 she was admitted at Nairobi Hospital with a history of having fallen from the 4th floor of their residential house in South C, [particulars withheld] Estate. She sustained multiple fractures and injuries. She had bruises around the labia on the outer genitalia, minimal bruises and blood on the vagina and the anus area had fresh bruises on the outside and old septic injuries and bruises on the rectum.
2. On 15th October 2018 a case of Care and Protection was opened at the Children Court at Nairobi by the Children Officer. The child was on 16th October 2018 ordered to be admitted at the Nairobi Hospital for treatment. On this day, the children officer informed the court that owing to suspected sexual assault on the child a report was made at Langata Police Station who began to investigate. On 19th October 2018 the prosecution informed the court that the matter was still under police investigations. By this time the parents of the child had come into the matter and were seeking to introduce their own doctor and specialists into the case. This was opposed by the prosecution. They did not want the investigations interfered with. The court allowed the parents to bring in their own specialists. The child was, in the meantime ordered to be kept at Thomas Barnados Children Home. Subsequently, the court allowed the parents' specialists to file separate reports. What is currently happening before the court is a hearing, to receive and cross-examine the evidence of the doctors and specialists. It is clear that the child's parents, the doctors and specialists are all talking to the child.
3. It is material that the parents of the child are suspects in the alleged sexual assault. Police are investigating them.
4. On 7th December 2018 the Director of Public Prosecution moved to the High Court, Criminal Division Milimani, on revision, complaining that the trial court had, instead of dealing with the case under **section 120** of the **Children Act** as a Care and Protection issue, begun to investigate and inquire into the circumstances of the alleged sexual assault; that such investigations belonged to the police and therefore the court was usurping that role. Relying on **sections 362** and **364** of the **Criminal Procedure Code**, the Director asked the court to call for and examine the record of proceedings and orders so as to satisfy itself on their legality and propriety and to make appropriate orders. There were other prayers.
5. The Children Court at Milimani falls under the Family Division of the High Court. The Judge in the Criminal Division of the High Court did not deal with the matter but referred it to this Division.
6. The matter was placed before me on 18th December 2018 to deal with. M/s Atina and Ms Ndambiri appeared for the DPP while Mr Muchiri and Ms Mungai appeared for the family of the child. Counsel for the family had filed a preliminary objection attacking the jurisdiction of the court to deal with the revision. Citing **section 80** of the **Children Act**, their contention was that the Family Division of the High Court does not have jurisdiction to hear the revision; and that, in any case, this was a children matter and not a criminal matter and therefore **sections 362** and **364** of the **Criminal Procedure Code** do not apply. The counsel for the DPP were of the conviction that the court had powers under **Article 165(6)** and **(7)** of the Constitution to stop the apparent irregular proceedings going on before the Children Court. Reference was also made to the best interests of the child under **Article 53** of the Constitution and the need for substantial justice

under **Article 159(2)(d)** of the Constitution.

7. This, in my view, is a simple and straightforward matter. The Children Court that is dealing with the matter is supervised by the Family Division of the High Court. I preside over the Division that has several other judges of the High Court. Without even going into the issue whether the proceedings before the Children Court are criminal or not, it is clear under **Article 165(6)** of the Constitution that this court has supervisory jurisdiction over any subordinate court. Under **Article 165(7)**, the High Court may call for any record of proceedings before any subordinate court and make any order or give any direction it considers appropriate to ensure fair administration of justice. The Children Court is a subordinate court.

8. Reference was made to **section 80** of the **Children Act**. The **section** provides that, in any civil or criminal proceedings in the Children Court, an appeal shall lie to the High Court and a further appeal to the Court of Appeal. I agree with counsel for the family of the child that appeals from the Children Court shall lie to the High Court. However, the proceedings before this court are not an appeal from the proceedings in the Children Court. These are revision proceedings. The Director of Public Prosecutions is invoking the supervisory jurisdiction of the High Court. This is allowed under **Article 165(6)** and **(7)** of the Constitution.

9. In short, the preliminary objection raised by the family of the child has no legal basis. It is not sustained. This court has jurisdiction to deal with the revision request that has been made.

10. The parties did not address me on the merits of the request to revise the proceedings and orders of the subordinate court. The court will nonetheless deal with the merits. This is because today is the last day of the term. The next time this court will be sitting will be 15th January 2019. This child is in a children home away from its parents. The police to whom the alleged sexual assault was referred have not undertaken investigations because of the proceedings in the Children Court. Such investigation will also await the decision of this court. Under **Article 53(2)** of the Constitution and **section 4** of the **Children Act**, this court has the responsibility to ensure that the best interests of the child are a primary consideration. Depending on how the investigations go, the child will be allowed to rejoin her family.

11. Under **section 119(1)(n)** of the **Children Act** the child, being the subject of alleged sexual assault, was in need of care and protection. The trial court acted lawfully by removing it from its usual environment where the offence was allegedly committed and ordering it to be kept at children home. This was a place of safety. The keeping of the child in the children home was to allow for the police to carry out investigations. Ultimately, the Director of Public Prosecutions will have to make a decision whether to charge, whom to charge and with which offence. Under **Article 245(4)** of the Constitution, no person may give direction to the Inspector General of Police with respect to the investigation of any particular offence or offences. Neither this court nor the Children Court can direct the Inspector General in this regard.

12. The trial court is receiving evidence from doctors and specialists who examined the child. These doctors and specialists were appointed by the court at the instance of the parents of the child, despite protestation from the prosecution. The aim of the parents of the child is to absolve themselves from blame in relation to the injuries suffered by the child, so that ultimately the child is released to them. The exercise in which the court is engaged, I find, is well beyond the determination whether the child is in need of care and protection under **sections 119** and **120** of the **Children Act**. It is an exercise that is serving the purposes of the parents of the child who are suspects in the matter. It is a process that is compromising the investigations that the police were asked, through the report made at Langata Police Station, to conduct. The proceedings are interfering with the responsibility that the Constitution has bestowed on the police, and which the police cannot share with any other person or authority. It is a responsibility the police cannot share with the court. I determine that the proceedings going on before the children court are irregular and illegal.

13. In conclusion, I call into this court the proceedings before the Children court and revise them. They are being undertaken without jurisdiction. The only regular and legal order that was made was to order the child to be kept and accommodated at Thomas Barnados Children Home to allow for investigations into the alleged sexual assault. The rest of the proceedings are null and void. I direct that the police investigations be conducted and whatever recommendation to the Director of Public Prosecutions be done, all within 7 days, so that the trial court will determine whether or not to continue to keep the child in the Home. I direct that the trial court mentions the matter on **27th December 2018** for appropriate orders to be made.

DATED and DELIVERED at NAIROBI this 20TH DECEMBER 2018

A.O. MUCHELULE

JUDGE