



POO (A Minor) v Director of Public Prosecutions & another (Constitutional Petition 1 of 2017) [2017] KEHC 8341 (KLR) (17 August 2017) (Judgment)

P O O (A Minor) v Director of Public Prosecutions & another [2017] eKLR

Neutral citation: [2017] KEHC 8341 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CONSTITUTIONAL PETITION 1 OF 2017**

**HA OMONDI, J
AUGUST 17, 2017**

BETWEEN

POO (A MINOR) PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

SENIOR RESIDENT MAGISTRATE MBITA LAW COURTS 2ND RESPONDENT

Charging one consenting minor for the offence of defilement is discriminatory on the basis of sex

The petitioner was arrested and charged with the offence of defilement and faced an alternative charge of committing an indecent act with a child. The petitioner alleged that at the time of the alleged offence he was 16 years of age. The court held that apart from medical evidence, age could also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense. The court further held that the appellant was discriminated against on the basis of sex in that he was charged alone but in reality they both (the petitioner and the complainant) needed protection against sexual activities. The court also held that it was not in the best interest of the children in conflict with the law to be mixed up with adult offenders. Further, the right of the petitioner not to be detained and when detained to be held separate from adults was infringed.

Reported by June Jumbari and John Ribia

Constitutional Law – fundamental rights and freedoms – rights of the child – right to a fair trial – right to a fair trial of a minor – whether the minor was accorded adequate time and facilities to prepare a defence, to choose, and be represented by an advocate, and to be informed of that right promptly, to be informed in advance of the evidence the prosecution intended to rely on, and to have reasonable access to that evidence – Constitution of Kenya, 2010, article 25 and 50.

Constitutional Law – fundamental rights and freedoms – equality and freedom from discrimination – right to equal protection and equal benefit of the law – where the accused person and the complainant were both minors and incapable of consent in a sexual offence – whether the state discriminated against the accused person directly or indirectly on the ground of sex by not arresting the complainant as well – Constitution of Kenya, 2010, article 27.



Constitutional Law – *fundamental rights and freedoms – rights of a child – right not to be detained or when detained to be detained separately from adults and in a manner that took into account the sex of the child – where a minor was detained with adults – whether the State violated the rights of the minor by detaining a child with adults – Constitution of Kenya, 2010, article 53(1)(f).*

Criminal Law – *defilement – alternative charge of committing an indecent act with a child – where the accused was a minor – where the accused and complainant had consensual sex – whether minors had the legal capacity to consent to sex - whether minors who had sexual intercourse should both be charged with defilement – Sexual Offences Act sections 8(1) and (4).*

Criminal Procedure – *age assessment – age assessment of an accused person – whether age assessment of an accused person could be done by observation and common sense – Children Act, section 143(1).*

Brief facts

The petitioner was arrested and charged at Senior Resident Magistrates Court, Mbita with the offence of defilement contrary to section 8(1) as read with 8(4) of the Sexual Offences Act. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the same Act. He pleaded not guilty to the charges and the matter proceeded to hearing where the complainant and a clinical officer testified. The petitioner was unrepresented. The matter was listed during the children’s service week and that was when an advocate was appointed to represent him. The petitioner told his advocate that at the time of the alleged offence he was 16 years of age, whereupon the advocate made an application for the age assessment report on November 17, 2016. The petitioner claimed that he had informed the trial court on March 15, 2016 that he was a minor being held in a prison for adults and although the trial court directed that he be held at a police station so as to be escorted to hospital for age assessment, the order was not complied with nor did the trial court follow up on the issue.

The respondents contended that charging the petitioner in Mbita had not violated his rights as there was no consensual intercourse between adolescents and that the advocate who was appointed could have made an application before the trial court for recall of the witnesses who had already testified or had the hearing *de novo* so as to be provided with the necessary documents before trial. The respondents also contended that no evidence had been presented to prove that the petitioner was a minor.

Issues

- i. Whether minors had the legal capacity to consent to sex.
- ii. Whether minors who had sexual intercourse should both be charged with defilement.
- iii. Whether age assessment of an accused person could be done by observation and common sense.
- iv. Whether the state discriminated against the petitioner by charging him alone as opposed to alongside the complainant for defilement as they were both minors and incapable of consent.
- v. What should be taken into account by a court when a child was the accused person?
- vi. Whether the State violated the rights of the petitioner by detaining him (a child) with adults.

Relevant provisions of the Law

Sexual Offences Act, No. 3 of 2006

Section 8

Defilement

(1) *A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*

(2) *A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.*

(3) *A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.*

(4) *A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.*



(5) It is a defence to a charge under this section if—

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act (Cap. 92) and the Children's Act (Cap. 141).

Children Act, section 143(1)

Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that such person is under eighteen years of age, the court shall make due inquiry as to the age of that person and for that purpose shall take such evidence, including medical evidence, as it may require, but an order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court, and the age presumed or declared by the court to be the age of that person so brought before it shall, for the purposes of this Act and of all proceedings thereunder, be deemed to be the true age of the person.

Constitution of Kenya, 2010

Article 50(2)

Every accused person has the right to a fair trial, which includes the right to-

(c) *have adequate time and facilities to prepare a defence*

(j) *be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence*

(h) *have an advocate assigned to the accused person by the State and at State expenses, if substantial injustice would otherwise result and to be informed of this right promptly;*

Article 53(1)

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*

Held

1. Article 23(1) of Constitution of Kenya, 2010, provided that the High Court had the jurisdiction in accordance with article 165 of the Constitution to hear and determine applications for redress of denial, violation and infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. In particular, article 165(3)(d) stated that the High Court had jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or any law was inconsistent with, or in contravention with the Constitution. The High Court had supervisory jurisdiction over administrative actions in ensuring that the Constitution was upheld by all the administrative bodies as well as the lower courts.

2. The petitioner had not submitted any document upon arrest or before the trial court to indicate that he was a minor, neither was any evidence submitted by his relatives to indicate his age. Apart from medical evidence, age could also be proved by birth certificate, the victim's parents or guardian and by observation and common sense. However, it was on record in the trial court's proceeding that the petitioner brought to the trial court's attention that he was a minor. The trial court gave an order to have the petitioner's age assessed at Homa Bay



District Hospital on March 15, 2016. Unfortunately, from the trial court's records, there was no evidence of follow-up by either the 1st or the 2nd respondent in relation to whether age assessment of the petitioner was conducted.

3. On the children's service week, an advocate was appointed by the trial court for the petitioner; that clearly showed that the trial court considered the petitioner a minor, bearing in mind that the petitioner's age was yet to be assessed. That fitted in with the cited observation and common sense that could be used to presume age.

4. It would be fallacious to vilify the respondents for not getting the doctors to conduct an age assessment considering that the time the trial court issued the order for age assessment the doctors were on strike. The 1st respondent had no power to force the striking defiant doctors to comply. However, the petitioner made the same application in his first appearance in court, almost a month before the doctors went on strike and still the age assessment report was yet to be provided.

5. Section 143(1) of the Children's Act was clear on the presumption of childhood, but it was not at the court's instance that the issue of the petitioner's status arose. The petitioner was the one who raised it, and the court simply acted on that. The basis of making the presumption under section 143 could be the person's physical appearance and not just because one pegged a certain figure to his age. There had to be a rational basis for making that presumption.

6. The court did not have the advantage of seeing the petitioner and making an assessment so as to make the presumption being suggested. The entire conduct of the trial court in relation to the petitioner indicated that the court was actually persuaded that he was a minor. That was why he was assigned an advocate at the State's expense to represent him, and his matter was listed during the children's service week. There was a presumption made by the trial court that the petitioner was a child and the provisions of section 143 of the Children's Act applied.

7. Article 2(6) of the Constitution provided that any treaty or convention ratified by Kenya would form part of the law of Kenya. Article 2(5) of the United Nations Convention on the Rights of the Child, which Kenya had ratified, provided that no child was to be subjected to discrimination on the grounds of sex. The discriminatory application of a law, if it was established, was wrong. But such a conduct by the person who exercised it did not render the law itself discriminatory.

8. In exercising its prosecutorial powers, the Director of Public Prosecution ought to have paid fidelity to section 4 of the Office of the Director of Prosecutions Act, 2013 which provided that in fulfilling its mandate, the Office would be guided by the Constitution and the fundamental principles of-

1. impartiality and gender equity;
2. the rules of natural justice; and
3. the need to serve the cause of justice, prevent abuse of the legal process and public interest.

9. What transpired in the instant matter did not live up to the ideals espoused in the ODPP Act. The mere assertion by the petitioner that he was a child ought to have been investigated at the first instance and a children's officer should have been assigned the duty of getting more information about the minor. The appellant was discriminated against on the basis of sex in that he was charged alone but in reality they both needed protection against sexual activities.

10. The order to provide the petitioner with witness statements was made in the trial court, however the same was not complied with. The 1st respondent was not keen on prosecuting that matter and most especially in upholding the Constitution, and as such infringed on the petitioner's rights.

11. The 2nd respondents commenced the trial without taking into account the fact that the petitioner was not represented, even after noting that he alleged to be a minor and making an order that an age assessment report be furnished by the 1st respondent. Moreover, there was no evidence indicating that the 2nd respondent assigned the children's officer to locate the petitioner's adult relatives in order to assist him.

12. The criminal justice system ought to take account of a defendant's age, level of maturity, and emotional capacity. It was only by doing so that the system could redress the imbalance which was the inevitable result



where a child or young person was confronted by the power of the criminal justice. The petitioner was left on his own to conduct a hearing in an offence which was complex and which attracted a minimum prison sentence of 15 years. He certainly suffered substantial disadvantage.

13. Article 50(2)(h) of the Constitution; that provided that every accused person had the right to a fair trial which included the right to have an advocate assigned to the accused person by the State and at State expenses if substantial injustice would otherwise result; and article 37(d) of the United Nations Convention on the Rights of the Child, which provided that any child deprived of his/her liberty had a right to prompt access to legal and other appropriate assistance; unambiguously illustrated that the petitioner being a minor with limited knowledge of his rights and even how to express those rights suffered substantial injustice in the absence of legal aid or assistance from an adult. There was a basis for presuming that the petitioner was a minor, the petitioner's right to be provided with legal representation at the expense of the State was violated.

14. The record of the trial court clearly reflected that the petitioner requested for witness statements on six different occasions, and although the trial court gave orders directing the supply, he was not furnished with them until May 6, 2016 after PW1 had testified. After receiving those statements, he requested that the case be heard *de novo* but no direction was given and the next time the matter came for hearing it proceeded with the next witness.

15. The petitioner was supplied with only one witness' statement and on May 31, 2016 he informed the court that he was not ready to proceed because he did not have copies of the witness statements. There was nothing on record to suggest that he was furnished with the remaining statements as on July 12, 2016, a month after PW2 had testified, the petitioner again informed the court that he did not have witness statements for other witnesses and that he was not supplied with the complainant's statement. By September 22, 2016 the petitioner still did not have the remaining statements. By that time, the trial court ought to have intervened by summoning the investigating officer to explain why witness statements were not availed or direct the prosecutor to photocopy the copies in the file being used to prosecute and give to the minor.

16. There was need to emphasize that a child remains a child whether the victim of an offence or a child in conflict with the law. Policy No 5.10 of The National Children Policy stated that all children deserved protection in matters regarding the law, whether they were in conflict with the law or required legal assistance.

17. It ought to have been clear to the respondent that the petitioner being a minor and the fact that the children's officer was not assigned the work of locating his next of kin, it was close to impossible for him to be bailed out of remand.

18. It was not in the best interest of the children in conflict with the law to be mixed up with adult offenders. That was why the law was unambiguous that they ought to be put separately, as was provided in article 53(1)(f) of the Constitution as well as Bail and Bond Policy Guidelines. The conduct of the respondents contravened article 53(2) of the Constitution of Kenya; the best interest of the child was not taken into consideration. The right of the petitioner not to be detained and when detained to be held separate from adults was infringed; the said contravention might bruise the petitioner for the rest of his life.

19. Whereas the petitioner was granted bail whose term he could ill afford, the court should have called for a pre-bail report so as to assess whether he could benefit from free bond. The court shuddered to think of the possible abuses the petitioner might have been subjected to while sharing remand facilities with adult men.

20. It was presumed that at the time of the commission of the alleged offence, the petitioner was a minor, presumption that was neither rebutted by the 1st nor the 2nd respondent; hence they were estopped from rebutting it then. In addition, as a minor, the petitioner had constitutional rights innate to minors and the same were enshrined in article 53 of the Constitution. It had also been demonstrated how the same were infringed without any substantial justification from the respondents. Moreover, petitioner's right to fair trial was infringed too, not to mention right to equal treatment in application of the law. The petitioner had been detained for almost a year. Consequently, the ordering for *de novo* hearing or a recall of the witnesses would not heal the constitutional violations the petitioner had suffered.



21. The acts of the respondents necessitated the filing and prosecution of the instant petition. The undue delay in the lower court and the several infractions of the petitioner's constitutionally guaranteed rights, coupled with the manner in which those infractions were made, set that matter as an exception to the rule of not awarding costs in litigation of such matters.

22. The court was guided by the provisions of article 23(3) of the Constitution which provided for reliefs where there was violation of fundamental rights and freedoms. An award of damages was necessitated by the fact that the violations in the instant case were made by agents of the State.

23. **[Obiter]** The complainant knew the petitioner as they attended the same church, and they would spend a long time talking. He requested her to go to his home and she obliged. They removed their clothes and had sex. This kind of scenario has bothered my mind ever since the harsh penalties in the Sexual Offences Act came into operation. These are minors-both in their teens when hormones are raging madly. They decide to experiment on their prowess mutually-then lo and behold the girl gets pregnant and an enraged parent reports to the police, who in turn arrest the boy [I say this because the prosecutor addressed the court on 17/11/2016 as follows "I pray DNA test be done. A child has been born out of the offence." Does a boy under 18 years have the legal capacity to consent to sex" Haven't both children defiled themselves" Shouldn't both then be charged or better still shouldn't the Children's Officer be involved and preferably a file for a child in need of care and protection ought to be opened for both of them. I think these are children who need guidance and counseling rather than criminal penal sanctions." I really think in this kind of situation should be re-examined in the criminal justice system.

Petition allowed.

Orders

1. *The proceedings pending at Mbita Law Courts were quashed.*
2. *The Petitioner was entitled to damages for violation of his rights and awarded a conservative figure of Kshs. 200,000.*
3. *Costs to the Petitioner.*

Citations

Cases

1. G.O. v Republic (Criminal Appeal 155 of 2016) — Applied
2. Francis Omuroni vs Uganda (Civil Case No.2 of 2000) — Explained
3. HC (a child by his litigation friend CC) and The Secretary of State for the Home Department & The Commissioner of Police of the Metropolis ([2013 EWHC 982 (Admin)) — Explained

Statutes

1. Children Act (No. 8 of 2001) — section 143(1) — Interpreted
2. Constitution of Kenya, 2010 (Const2010) — article 2(6); 23(1)(3); 27; 50; 53(1)(f); 165 — Interpreted
3. Office of The Director of Public Prosecutions Act (No. 2 of 2013) — section 4 — Interpreted
4. Penal Code Act (CAP. 63) — section 14(2) — Interpreted
5. Sexual Offences Act (No. 3 of 2006) — section 8(1)(4); 11(1) — Interpreted

International Instruments

1. United Nations Convention on the Rights of the Child (UNCRC), 1989 — article 2(5); 37(c)

Advocates

None mentioned



JUDGMENT

1. The petitioner (POO) claims to be a minor and alleged that his constitutional right has and continues to be infringed by the respondents. The constitutional rights that he alleged to have been contravened are as follows;
 1. He was discriminated against in application of the law in comparison to the female complainant in Mbita Senior Resident Magistrate Criminal Case No 7 of 2016.
 2. He was not afforded the services of an advocate at the onset of his trial thus compromising his right to fair trial
 3. He was not accorded adequate facilities to enable him prepare for his trial such as witnesses statements.
 4. He continues to be held in custody for an inordinately prolonged period in an adult facility. As a result of this prolonged stay he has missed school and his education has suffered. Article 53(2) the child best interest was not taken in to account.
2. The background to this matter is that the petitioner was arrested on February 14, 2016 and charged at Senior Resident Magistrates Court, Mbita on February 15, 2016 with the offence of defilement contrary to section 8(1) as read with 8(4) of the *Sexual Offences Act*. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the same Act in Criminal Case No 7 of 2016.
3. He pleaded not guilty to the charges and the matter proceeded to hearing where the complainant and a clinical officer testified-he was unrepresented. Later on the matter was listed during the children's service week (14th – November 18, 2016) and that was when the advocate was appointed to represent him in the matter.
4. Consequently, the petitioner told his advocate that at the time of the alleged offence he was 16 years of age, whereupon the advocate made an application for the age assessment report on November 17, 2016. The petitioner claims that he had informed the trial court on March 15, 2016 that he was a minor being held in a prison for adults and although the trial magistrate directed that he be held at Magunga police station so as to be escorted to hospital for age assessment, the order was not complied with nor did the trial court follow up on the issue-to-date no age assessment report has been presented.
5. The petitioner prays that due to the aforementioned the charges pending before Mbita Court should be quashed and the court makes a declaration that the initiation and continued prosecution of Criminal Case No 7 of 2016 is discriminatory and denies him the equal right and protection of the law. The petitioner also seeks a declaration that his being detained in an adult remand prison is unconstitutional and also violates his right to education. He urges this court to declare that in the best interest of the child, the petitioner be released forthwith. Further that he is entitled to damages as redress in respect of the above rights that were infringed and continue to be infringed.
6. In their response, the respondents stated that charging the petitioner in Mbita has not violated his rights as there is no consensual intercourse between adolescents. They further stated that the counsel appointed could have made an application before the trial court for recall of the witnesses who had already testified or have the hearing de novo so as to be provided with the necessary documents before trial. Moreover, that the petitioner was granted a release on a bond of Kshs100, 000 with a surety of



Kshs 50,000; the same was later reduced to Kshs 20,000 upon his application, hence with such leniency the respondents cannot be blamed on the petitioner failure to attend school. It was further stated that the application made by the petitioner on January 27, 2017 was the cause of delay in finalizing the matter and in any event, no evidence has been presented to prove that the petitioner is a minor.

7. The respondents contend that the case facing the petitioner cannot be dismissed unless it is established that he is less than 12 years of age as at the time of commission of the offence in terms of s 14(2) of the *Penal Code*. As such, it is proposed that the only legal avenue available is to grant orders that the age assessment be done and the counsel on record be at liberty either to recall witnesses or make the application before the trial court for the case to start *de novo*.
8. In the petitioner's further affidavit, he states that in case of gross constitutional violation as laid down in his petition dismissal should follow; hence section 14(2) would not apply. He further stated that the recall of witnesses could not have cured the gross constitutional violations suffered by the petitioner as a result of inactions of the respondents which had him in custody in a remand facility meant for hardened adult criminals for nine months prior to the said appointment of counsel.
9. The petitioner further stated that not furnishing an adolescent child with witness statement in a complex case where gross injustice would occur in the absence of legal representation and proceeding with trial in the absence of such legal representation despite numerous pleading by such a child was gross oversight by the respondents. In addition, giving a cash bail of kshs 20,000/= to orphaned child with an unemployed grandmother is tantamount to denial of the same. Consequently, blaming the petitioner as the cause of delay in prosecuting Cr No 7/2016 is disingenuous, as the trial records speaks for itself.
10. It is contended that the petitioner told his advocate that he was 16 years of age at the time of commission of the alleged offence; hence in the absence of any rebuttal by the 1st respondent they are estopped from denying that assertion.

Issues for Determination

1. Whether the petitioner is a minor
 2. Whether the petitioner's constitutional right to be treated equally before the law (article 27 of the *Constitution*) was infringed by the respondents
 3. Whether the petitioner's right to fair trial was infringed (article 50 of the Constitution)
 4. Whether the petitioner's constitutional rights as a child were infringed
11. Article 23(1) of *Constitution* provides that the High Court has the jurisdiction in accordance with article 165, to hear and determine applications for redress of denial, violation and infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. In particular, article 165(3) (d) of the *Constitution* state that the High Court has jurisdiction to hear any question respecting the interpretation of the constitution including the determination of the question whether anything said to be done under the authority of this constitution or any law is inconsistent with, or in contravention of the constitution.
 12. Certainly the High Court has supervisory jurisdiction over administrative actions in ensuring that the Constitution of the Republic of Kenya is upheld by all the administrative bodies as well as the lower court.



1. Whether the petitioner is a minor

13. Counsel for the petitioner submitted since the petitioner had consistently said that he was a minor, and since no age assessment has ever been availed, then the court ought to apply the provisions of section 143(1) of the *Children Act* which states that:

“Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that such person is under eighteen years of age, the court shall make due inquiry as to the age of that person and for that purpose shall take such evidence, including medical evidence, as it may require, but an order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court, and the age presumed or declared by the court to be the age of that person so brought before it shall, for the purposes of this Act and of all proceedings thereunder, be deemed to be the true age of the person”

14. Counsel argued on behalf of the petitioner, that childhood may be presumed, and the fact that his matter was listed to be dealt with during the children’s service week, was an indication that the trial magistrate presumed he was a child.
15. Mr Oluoch on behalf of the respondents argued that the prosecution had not declined to have the petitioner’s age assessed, and that the trial court had the powers to compel the doctor seized of the matter to attend court. It was his contention that the only legal avenue is for the court to give an order for the petitioner’s age assessed, then counsel on record be at liberty either to recall witnesses who have testified, or apply for hearing de novo.
16. The petitioner did not submit any document upon arrest or before the trial court to indicate that he was a minor, neither was any evidence submitted by his relatives to indicate his age. The case of *Francis Omuroni vs Uganda* CC No 2 of 2000 held that apart from medical evidence age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense. However, it is on record in the trial court’s proceeding that the petitioner brought to the trial Magistrate attention that he was a minor. Indeed the trial magistrate gave an order to have the petitioner’s age assessed at Homabay district hospital on 15/3/2016. Unfortunately from the trial court’s records there is no evidence of follow-up by either the 1st or the 2nd respondents in relation to whether age assessment of the petitioner was conducted.
17. On the children’s service week, an advocate was appointed by the SPM Mbita for the petitioner; this clearly shows that the Magistrate considered the petitioner a minor, bearing in mind that the petitioner’s age was yet to be assessed. This fits in with the cited Ugandan case, No 2 of 2000, where observation and common sense can be used to presume age.
18. The 1st respondent claims that the petitioner cannot be considered a minor since the assessment report has not been provided. It begs the question that who was in charge of furnishing the court with age assessment report of the petitioner?
19. The 1st respondent indicated that at the time that the court issued the order for the petitioner to be taken for age assessment, the doctors were on strike. In my humble opinion, this order was issued on 15/3/16 and the doctors’ strike kicked off on the 5/12/16 and lasted just slightly over 3 months. It meant that the even though 1st respondent had sufficient time to ensure that the trial court order was not rendered futile; it had no power to force the striking defiant doctors to comply. I take judicial notice that indeed during that period the Drs remained defiant to orders by the Executive and even



the Employment and Labour Relations Court; and even imprisonment for disobeying the court did not weaken their resolve. It would therefore be fallacious to vilify the respondents for not getting the doctor's to act. .

20. I however take note that the petitioner's advocate made the same application in his first appearance in court on 8/11/16, almost a month before the doctors' went on strike and still the age assessment report is yet to be provided.
21. Section 143(1) of the *Children's Act* as submitted in the petitioner's submission is clear on the presumption of childhood, but it was not at the court's instance that the issue of the petitioner's status arose-he is the one who raised it, and the court simply acted on that. What would be the basis of making the presumption under section 143? I think it could be the person's physical appearance and not just because one pegs a certain figure to his age. There must be a rational basis for making that presumption.
22. I have not had the advantage of seeing the petitioner and making an assessment so as to make the presumption being suggested. Having said that, I think the entire conduct of the trial magistrate in relation to the petitioner indicates that the court was actually persuaded that he was a minor-that is why he was assigned an advocate at the State's expense to represent him, and his matter was listed during the children's service week. I would concur with Mr Ochieng that there was a presumption made by the trial court that the petitioner was a child and the provisions of section 143 of the Children's Act apply.

2. Whether the petitioner's constitutional right to be treated equally before the law (art 27 of the Constitution) was Infringed By the respondents

23. The charge indicates that the victim was a minor-the offender was also a minor at the time the offence occurred. The petitioner's counsel submitted that although there cannot be a consensual sexual intercourse between minors, and as much as the male genital are the ones that can penetrate a female genital, it is discriminatory to charge the male minor and leave the female minor, in instance where non claim to have been forced in to the intercourse.
24. Article 27 of the *Constitution of Kenya* provides:
 - (1) Every person is equal before the law and has the right to equal protection of the law.
 - (2)
 - (3)
 - (4) The State shall not discriminate directly or indirectly against any person on any ground including...sex...
25. Article 2(6) of the *Constitution of Kenya* is clear on the place of International Law in Kenya. In addition, the *United Nations Convention on the Rights of the Child* was ratified; Article 2(5) of the said convention provides that no child shall be subjected to discrimination on the grounds of sex.
26. Mr Ochien'g referred to the decision in Eldoret Constitutional Petition No 6 of 2013 where the Ochieng J, stated:-

“In Kenya the law does not distinguish between the girl and the boy, in section 8 of the *Sexual Offences Act*. In effect, the law as enacted does not discriminate. The petitioner said he was charged because he was a boy whilst the girl was let scot free. The DPP said the decision to prefer the charge against the petitioner was not based on gender. It will therefore be a matter of evidence....why the petitioner was charged with defilement whilst his willing female partner was not charged...but even if ultimately it is proved that the



petitioner was charged largely because he is a boy(as opposed to being a girl), that would not render the statutory provisions discriminatory. The discriminatory application of a law if it is established is wrong. But such a conduct by the person who exercises it does not render the law itself discriminatory”. I share these sentiments to the extent that the law is not discriminatory rather its application is what may be discriminatory.

27. Mr Ochieng urged this court to adapt the approach in Siaya Criminal Appeal No 155 of 2016; *GO v Republic* where Makau J, stated:-

“I find that the appellant was discriminated against on the basis of sex in that he was arrested, charged instead of the prosecution charging both the complainant and the appellant for the offence of defilement....In the instant case, I find that at the time of the commission of the offence, both the appellant and the complainant were minors. I find indeed the complainant was a senior to the appellant and blame should not have been wholly shifted to the appellant but should have been apportioned against both the complainant and the appellant, and both being minors , they need protection against harmful sexual activities and none should have been sent to prison”.

28. The complainant SOO (PW1) testified to the effect that she knew the petitioner as they attended the same church, and they would spend a long time talking. He requested her to go to his home and she obliged. They removed their clothes and had sex. This kind of scenario has bothered my mind ever since the harsh penalties in the *Sexual Offences Act* came into operation. These are minors-both in their teens when hormones are raging madly. They decide to experiment on their prowess mutually-then lo and behold the girl gets pregnant and an enraged parent reports to the police, who in turn arrest the boy [I say this because the prosecutor addressed the court on 17/11/2016 as follows “I pray DNA test be done. A child has been born out of the offence”.]

29. Does a boy under 18 years have the legal capacity to consent to sex? Haven’t both children defiled themselves? Shouldn’t both then be charged or better still shouldn’t the Children’s Officer be involved and preferably a file for a child in need of care and protection ought to be opened for both of them. I think these are children who need guidance and counselling rather than criminal penal sanctions. ? I really think in this kind of situation should be re-examined in the criminal justice system. In the English case of *R v G* (appellant) the Baroness Hale of Richmond in her opinion in the House of Lords stated that:-

“As sexual touching is usually a mutual activity, both the children involved might in theory be prosecuted...the person penetrated may be the offender... Obviously ... there will be wide variations in the blameworthiness of the behaviour... Both prosecutors and sentencers will have to make careful judgments about who should be prosecuted and what punishment, if any, is appropriate”

30. Mr Oluoch’s sentiments are taken in account but I honestly think that in exercising its prosecutorial powers, the DPP ought to pay fidelity to section 4 of the *Office of the Director of Prosecutions Act* 2013 (ODP Act) which provides that “In fulfilling its mandate, the Office shall be guided by the Constitution and the following fundamental principles-

- (b) impartiality and gender equity;
- (c) the rules of natural justice;
- (f) the need to serve the cause of justice, prevent abuse of the legal process and public interest



31. What transpired in this matter did not in my opinion live up to the ideals espoused in the *ODP Act*. The mere assertion by the petitioner that he was a child ought to have been investigated at the first instance and a children's officer should have been assigned the duty of getting more information about the minor. I find that the appellant was discriminated against on the basis of sex in that he was charged alone but in reality they both needed protection against sexual activities.

3. Whether the petitioner right to fair trial was infringed

a) Article 50(2)(c) and (j) right to adequate time and facilities to prepare for defence and to be provided with evidence the prosecution intends to rely on

32. The trial court records clearly indicate that the petitioner requested to be issued with the witness statements, but he was not issued with them. The 1st respondent has not refuted this statement neither provided any reasons why this was not done instead he proposes it as one of the orders that this honourable court should grant. The order to provide the petitioner with witness statement was made in the trial court however the same was not complied with, in my opinion the 1st respondent was not keen in prosecuting this matter and most especially in upholding the constitution, and as such infringed on the petitioner's rights as above mentioned.

Article 50(2) of the Constitution provides that:

“Every accused person has the right to a fair trial, which includes the right to-

- (c) have adequate time and facilities to prepare a defence
- (j) be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence
- (h) have an advocate assigned to the accused person by the state and at state expenses, if substantial injustice would otherwise result...”

33. The above article provides that in the instances where substantial injustice would result, the state should assign an advocate to the accused person. Article 2(6) of the *Constitution* provides for the place of International Law in Kenya. Taking a close look at *United Nations Convention on the Rights of the Child* at article 37(d) provides that any child deprived of his/her liberty has a right to prompt access to legal and other appropriate assistance.

34. The 2nd respondents commenced the trial without taking in to account the fact that the petitioner was not represented, even after noting that he alleged to be a minor and making an order that an age assessment report to be furnished by the 1st respondent. Moreover, there is no evidence indicating that the 2nd respondent assigned the Children's Officer to locate the petitioner's adult relatives in order to assist him. The petitioner's counsel has referred to the English case of the Queen on the Application of *HC (a child by his litigation friend CC) and The Secretary of State for the Home Department & The Commissioner of Police of the Metropolis* [2013 EWHC 982 (Admin)] where the court pointed out that:

“...The underlying principle is that the criminal justice system should take account of a defendant's age, level of maturity, and emotional capacity. It is only by doing so that the system can redress the imbalance which is the inevitable result where a child or young person is confronted by the power of the criminal justice”



35. In this instance the petitioner was left on his own to conduct a hearing in an offence which was complex and which attracts a minimum sentence of 15 years imprisonment-he certainly suffered substantial disadvantage.
36. The provision of the Constitution and United Nations Convention on the Rights of the Child unambiguously illustrate that the petitioner being a minor with limited knowledge of his rights and even how to express those rights suffered substantial injustice in the absence of legal aid or assistance from an adult. Of course such finding would only hold water if there was proof or a basis for presuming that the petitioner is a child. Having found that there is a basis for presuming that the petitioner is a minor, I declare that the petitioner's right to be provided with legal representation at the expense of the State was violated.
37. As regards the witness' statements, the record of the trial court clearly reflects that the petitioner requested for witness statements on six different occasions, and although the trial magistrate gave orders directing the supply, he was not furnished with these until 6/5/2016 after PW1 had testified. In fact after receiving those statements he requested that the case be heard de novo but no direction were given and the next time the matter came for hearing it proceeded with the next witness.
38. Apparently the petitioner was supplied with only one witness' statement and on 31/05/2016 he informed the court thus:
- “I am not ready to proceed. I do not have copies of witness statement for the witness”
39. There is nothing on record to suggest that he was furnished with the remaining statements as on 12/07/2016 again a month after PW2 had testified, the petitioner again informed the court that: “I do not have witness' statement for other witnesses. I was only supplied with the complainant's statement”, and by 22/09/2016 the petitioner still did not have the remaining statements. Surely by this time the trial court ought to have intervened by summoning the investigating officer to explain why witness statements were not availed or direct the prosecutor to photocopy the copies in the file being used to prosecute and give to the minor.
40. I need not say more in this regard, I declare that the petitioner's right to a fair trial were grossly violated.

b) Detention in an adult facility.

41. Article 37(c) of the UN Convention on the Rights of the Child (which Kenya is a signatory to provides that :
- “...in particular every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so...”
- Article 53(1)(f) of the Constitution of Kenya provides that
- “Every child has the right not to be detained, except as a last resort, and when detained, to be held –
- (i) for the shortest appropriate period of time
 - (ii) separate from adults and in conditions that take account of the child's sex and age.
42. There is need to emphasize that a child remains a child whether the victim of an offence or a child in conflict with the law. Indeed Policy No 5.10 of the National Children Policy states that all children



deserve protection in matters regarding the law, whether they are in conflict with the law or requiring legal assistance!

43. It ought to have been clear to the respondent that the petitioner being a minor and the fact that the Children's Officer was not assigned the work of locating his next of kin, it was close to impossible for him to be bailed out of remand.
44. It is not in the best interest for the children in conflict with the law to mixed up with adult offender, that is why the law is unambiguous that they should be put separately, it is provided in article 53(1) (f) of the *Constitution* as well as bail and bond policy guidelines. This is further buttressed in the High Court Siaya, Criminal Appeal No 155 of 2016; *GO versus Republic* (2017) eKLR. As a matter of fact, the conduct of the respondents contravened article 53(2) of the *Constitution of Kenya*; the best interest of the child was not taken into consideration. In my view, the aforementioned rights of the petitioner were infringed; the said contravention may bruise the petitioner for the rest of his life.
45. Whereas the petitioner was granted bail whose term he could ill afford, I think the court ought to have called for a pre-bail report so as to assess whether he could benefit from free bond. I shudder to think of the possible abuses the petitioner may have been subjected to while sharing remand facilities with adult men. I do think of any other way in which such cruel exposure can be cured

4. Whether, the petitioner is entitled to costs and damages

46. It is presumed that at the time of the commission of the alleged offence the petitioner was a minor, presumption that was neither rebutted by neither the 1st nor the 2nd respondent; hence they are estopped from rebutting it now. In addition as a minor the petitioner has constitutional rights innate to minors and the same are enshrined in article 53 of the *Constitution*, it has also been demonstrated how the same were infringed without any substantial justification from the respondents. Moreover, petitioner's right to fair trial was infringed too, not to mention right to equal treatment in application of the law. The petitioner has been detained for almost a year; consequently the ordering for de novo hearing or a recall of the witnesses will not heal the constitutional violations the petitioner has suffered. The only way to deal with this injustice is to quash the proceedings pending at Mbita Law Courts and I hereby order so.
47. Mr Ochien'g submitted that the acts of the respondents necessitated the filing and prosecution of the present petition. He contends that the undue delay in the lower court matter and the several infractions of the petitioner's constitutionally guaranteed rights, coupled with the manner in which those infractions were made, sets this matter as an exception to the rule of not awarding costs in litigation of such matters.
48. He has also urged the court to be guided by the provisions of article 23(3) of the *Constitution* which provides for reliefs where there is violation of fundamental rights and freedoms. Since these violations were made by agents of the State, counsel urges this court to award damages to the petitioner. I agree.
49. I find that the petitioner is entitled to damages for violation of his rights and a conservative figure of Kshs 200,000/- is adequate. I award costs to the petitioner.

DELIVERED AND DATED THIS 17TH DAY OF AUGUST, 2017 AT HOMA BAY

H.A.OMONDI

JUDGE

