



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. CRIMINAL APPLICATION NO. 16 OF 2016

C M Z.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. In the process of dealing with the applicant's application dated 1st March, 2016 for leave to file an appeal out of time this court's attention was drawn to the fact that the applicant could be a minor, a fact which was not brought to the attention of the trial court at the time she was tried and convicted of the offence of child stealing contrary to Section **174 (1) (a) of the Penal Code**.
2. This court therefore called for an age assessment report from Kisii Teaching and Referral Hospital which report has been filed today (31/3/2016). The report indicates that the applicant is a minor aged between 16 and 17 years.
3. It is the revelations contained in the age assessment report that has made this case take a whole new dimension with Mr. Otieno counsel for the state conceding that the trial before the lower court was a nullity as the applicant was tried and convicted as an adult after which she was jailed for 3 years. Mr. Otieno therefore suggested that the applicant should be taken back to the lower court for a retrial.
4. Mr. Obure for the applicant, on his part, vehemently opposed the proposal for a retrial while arguing that the minor's constitutional rights had been grossly violated courtesy of a null trial and judgment that led her to be held in an adult's prison for the last 4 months.
5. According to Mr. Obure, the minor applicant has been subjected to unconstitutional processes for which she has suffered greatly and therefore, her 4 months stay in an adult's jail should be treated as sufficient punishment and as such she should not be subjected to any further court processes.
6. I have considered the rival submissions made by the learned counsels for the state and the applicant. It is conceded by both parties that the trial before the lower court was a nullity in view of the fact that the applicant herein was tried as an adult and sent to adult's jail where she has been for the last 4 months. In view of the above circumstances, the fact that the applicant's constitutional rights and rights guaranteed to her under the Children Act 2001 have been violated cannot be gain said.
7. The question that now begs this court an answer is if, under those circumstances, this court should order a retrial. I do not think so.
8. It is my humble view and I concur with the submissions of the applicant's counsel that the minor has already suffered a grave injustice and that the period she has been in jail is sufficient punishment for, her

if indeed she committed the offence.

9. In the case of **Fatehali Manji vs Republic [1964] EA.A 431** the court of Appeal stated as follows on retrials:

“even where a conviction is initiated by a mistake of the trial court which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.”

10. In this instant case, the applicant has already suffered an injustice of an irregular and null trial. She has been in prison for the last 4 months. Subjecting her to a fresh trial will in my humble view cause a great injustice and prejudice to her.

11. Consequently, I hereby invoke the powers conferred to this court under Section 362 and 364 of the Criminal Procedure Code and revise the irregular orders of the trial court and set aside the proceedings and sentence.

12. The applicant shall be set free forthwith unless she is otherwise lawfully held.

13. Accordingly Kisii HCCRA NO. 10 of 2016 which had already been filed in respect to the applicant is hereby withdrawn.

Delivered, dated and signed in at Kisii on **31st** day of **March**, 2016.

W.A. OKWANY

JUDGE

In the presence of:

- Mr. Otieno for the State
- Obure for the Accused
- Omwoyo court clerk