



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL REVISION NO. 10 OF 2016

F M M V. REPUBLIC

[FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 3 OF 2016 OF THE CHIEF MAGISTRATE'S COURT AT MACHAKOS]

RULING

1. The applicant herein is a child aged 16 years who was charged and convicted for the offence of unnatural offence contrary to section 162 (a) of the penal Code and sentenced to serve an imprisonment term for 12 years on 12th January 2016.
2. The District Children Officer, Machakos brought the matter to the attention of the Deputy Registrar, High Court of Kenya at Machakos by letter of 22/3/2016 and requested for the court to 'review the case so that the minor can be released from Prison and possibly be rehabilitated in a borstal institution instead.' A copy of the child's birth certificate No.4729827, Child Health Card and Baptism Card, all indicating the child's date of birth as 17th April 2000 were attached.
3. The Court has powers of revision under section 364 of the Criminal Procedure Code, so far as material as follows:

“364. (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may -

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

4. Counsel for the DPP, Mr. Machogu, did not support the conviction and sentence pointing out that the Children Act provides that a child facing criminal charges must be represented by an advocate under section 186(b) of the Act and that upon conviction the child will be treated in accordance with section 191 of the Act depending on the age of the child. For a child who has attained the age of 16 years, punishment should be by placement in a borstal institution.
5. The accused minor was convicted on a plea of guilty in a trial conducted against him without the assistance of counsel as required by sections 77 and 186 (b) of the Children Act. The trial was defective for breach of the child's right to legal representation under section 186(b) of the Children Act. Moreover, the sentence of imprisonment term is prohibited against a child offender in terms of section 190 of the Children Act as follows:

““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.”

6. Under section 354 (3) of the Criminal Procedure Code, the Court may quash the conviction or set aside the sentence as follows:

“(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may -

(a) in an appeal from a conviction -

(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or

(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or

(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;

(b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;”

7. For the Court to accede to the request by the Children officer to send the accused child to a borstal institution is to confirm the finding of guilt on the child. However, as the trial of the trial of the child was defective for want of legal representation in accordance with section 186 (b) of the Children act, his conviction on a plea of guilty cannot stand. The same must be set aside, rather than quashed as the court has not determined the merits of the case. The sentence of imprisonment term for 12 years is illegal for contravening section 190 of the Children Act and is, therefore, set aside.

8. In accordance with section 354 (a) (i) of the Criminal Procedure Code, the Court directs that the child be released from prison custody and that he be retried for the offence charged before a competent court differently constituted.

DATED AND DELIVERED THIS 26TH DAY OF APRIL 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Francis Njagi Kariuki Children Officer for the Applicant

Mr. Machogu for the DPP

Ms. Doreen - Court Assistant.