



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL REVISION NO. 18 OF 2016

(From original conviction and sentence in Criminal Case No. 607 of 2016 of the Chief Magistrate's court at Garissa- M. Wachira - CM).

AASW..... APPLICANT

V E R S U S

REPUBLIC RESPONDENT

RULING

This matter has been brought to this court under its revision jurisdiction through a letter dated 24th August 2016 by Paul Mugwe Nyaga Advocates. The said letter requests this court to apply the provisions of Section 362 of the Criminal Procedure Code (Cap 75) to peruse the record of the trial court to satisfy itself on the correctness, legality or propriety of the finding, sentence or order recorded or passed and as to the regularity of the proceedings. Counsel in particular emphasized in the letter that the trial court had made a finding that the issue of age had been abused in the past by convicted persons who claimed to be under age with a view to evade justice.

When the matter came before this court on the 14th September 2016, the court ordered that the age of the applicant AASW be medically assessed. As a consequence on the 28th of September 2016 Dr. Abdi Hakim Omar, the Medical Officer in charge of dentistry at the Garissa Referral Hospital attended court and produced the dental assessment report on the age of the applicant.

The doctor testified on oath and was cross examined. He is stated that the molar of the applicant was about to erupt and as such the age was assessed to be 17 years. He stated further in cross examination that the most accurate method of assessing age was through x-ray examination of the bones and that no experts to do age assessment through examination of bones were available at Garissa and most parts of Kenya. He stated that in most parts of Kenya age assessment was done through dental examination procedure.

After the doctors testimony, Mr. Nyaga counsel for the applicant made oral submissions in court and stated that through the trial magistrate had made a finding that none of the accused appeared to be under age, there was now before this court the doctor's evidence to support the contention that the applicant was a minor. Counsel submitted also that Section 189 of the Children's Act 2001 prohibited the use of the words "**conviction**" and "**sentence**" with regard to children. According to counsel, though sentencing could be a way of deterrence, in his view if the court was aware that the applicant was a minor, the trial court would have arrived at a different conclusion. Counsel thus urged this court to review the sentence.

The Prosecuting Counsel Mr. Okemwa in response submitted that this court had admitted additional

evidence, and that if the court will find that the applicant is a minor, then it can apply the provisions of the Children's Act. Counsel however submitted that an offence had been committed and the trial court could not address the issue of age as the defence failed to adduce evidence at the trial on the age of the applicant. The trial court thus did not make a mistake of fact. Counsel urged this court to maintain its previous standards on the way cases of minors had been handled.

I have considered the request for revision herein and the submissions of counsel for the applicant as well as the prosecuting counsel.

This is a matter in which eleven persons were convicted by the trial court on their own plea of guilty and sentenced. The applicant has come to this court asking for exercise of its criminal revision jurisdiction under Section 162 of the Criminal Procedure Code (cap.75). The power of revision under the Criminal Procedure Code is a general power. Where children are concerned, there is additional special power conferred on this court under section 186 (f) of the Children's Act No. 8 of 2001, which provides as follows:-

“186. Every child accused of having infringed any law shall-

(f) If found guilty, have the decisions and any measures imposed in consequence thereof reviewed by a higher court.”

In my view therefore, the Chief Magistrate court being a subordinate court to this court, this court as a higher court, has jurisdiction to exercise review powers on the decision or order or measures made by the Chief Magistrate's Court.

The exercise of review powers under the Children's Act, presupposes that the person who has been found guilty is a child as defined under the Children's Act. Under that Act, a child is a person who is below 18 years. In the present case, an age assessment medical report has been produced in this court. It was dated 27th September

2016 and signed by Dr. Abdi Hakim Ormar, the Dental Department In Charge at Garissa County Referral Hospital. It states in part as follows:-

“ The last molar erups from the age 18 years to 24 years of age (18-24) range. Abdirahim has no the last molar, though it is about to erupt, so in conclusion he is still not yet 18 years.”

The doctor was cross examined by the prosecuting counsel and confirmed that the last molar could possibly appear after 25 years and that dental age assessment is approximate. He stated that the more accurate age assessment is through examination of the bones, which is not widely used in Kenya facilities and expertise.

In my view, the large margin between 18 – 25 years for age assessment, and the answers given by the doctor herein, show that the medical evidence did not establish on the balance of probabilities that the applicant's age was below 18. He thus does not in my view qualify to be a child. He also thus cannot be treated as a child and get advantage of the provisions of the Children's Act. If any revision has to be done herein therefore, it can only be done under the Criminal Procedure Code (cap.75) and not the Children Act 2001.

The powers of the High Court in criminal revisions under the Criminal Procedure Code (cap.75) are spelt under Section 362 – 367 of the Act. Section 364 (5) of the Criminal Procedure Code limits the exercise of revision powers of the High Court in criminal matters where the person who asks for revision has a right of appeal. It states as follows:-

“164(5) when an appeal arises from a finding, sentence or order, and no appeal is brought no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.”

It follows from the above provisions of the Criminal Procedure Code therefore, that any person who has a right of appeal in criminal proceedings should not bring to this court revision proceedings. The court is prohibited from entertaining such revision proceedings. I will thus not entertain these revision proceedings and the application for the applicant herein is thus dismissed.

Revision proceedings do not remove the right of a person to appeal. The applicant herein therefore has a right to appeal. Despite the dismissal of his application for revision herein, he may still file his appeal challenging any part of the trial court's decision, if he so wishes.

Dated and delivered at Garissa this 22nd November 2016.

GEORGE DULU

JUDGE