



**JMG v Republic (Criminal Appeal 227 of 2010)  
[2016] KEHC 2021 (KLR) (18 November 2016) (Judgment)**

*J M G v Republic [2016] eKLR*

Neutral citation: [2016] KEHC 2021 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL APPEAL 227 OF 2010**

**J NGAAH, J**

**NOVEMBER 18, 2016**

**BETWEEN**

**JMG ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from original conviction and sentence in Othaya Resident Magistrates' Court Criminal Case No. 165 of 2010 (Hon. B.M. Nzakyo, Resident Magistrate) on 25th August, 2010)*

**Safeguards in proceedings against child offenders**

*The instant case highlighted the rights of a child offender. The court noted the requirement by courts to observe safeguards which relate to proceedings against child offenders including the right to legal representation, prohibited words during proceedings and ensuring the privacy of a child offender during trial.*

Reported by Kakai Toili

**Constitutional Law** – fundamental rights and freedoms - rights of a child - right to a fair trial - right to privacy - whether failure to assign a child offender an advocate at the State's expense to represent them during trial violated his/her right to fair trial – whether conducting the trial of a child offender in public violated his/her right to privacy - Constitution of Kenya, articles 50(2)(b) and 53(2); Children Act, 2001, sections 77 and 186(b).

**Criminal Law** – child offenders – judgments against child offenders – whether the use of the words 'conviction' and 'sentence' in a judgment against a child offender contravened section 189 of the Children Act which provided safeguard in relation to the proceedings against a child particularly where he's found guilty of an offence - Children Act, 2001, section 189.

**Brief facts**

The appellant (a minor) was charged with the offence of attempted defilement contrary to section 9 of the Sexual Offences Act, No 3 of 2006 (Sexual Offences Act). After trial, he was convicted of attempted defilement and sentenced to 10 years imprisonment. Being dissatisfied with the judgment of the trial court, the appellant



lodged an appeal against both conviction and sentence. It was the appellant's contention that the trial court erred in law and fact in conducting criminal proceedings against him contrary to the provisions of Children Act, 2001 (Children Act). Further, the appellant argued that the trial court erred in convicting him without evidence that the offence of attempted defilement had been committed. It was the appellant's claim that the prosecution did not prove its case of defilement beyond reasonable doubt.

#### **Issues**

- i. Whether failure to assign a child offender an advocate at the State's expense to represent him/her during trial violated his/her right to fair trial.
- ii. Whether conducting the trial of a child offender in public violated his/her right to privacy.
- iii. Whether the use of the words 'conviction' and 'sentence' in a judgment against a child offender contravened section 189 of the Children Act.

#### **Held**

1. The appellant was aged 17 years old at the time of his trial. That was what was indicated in the charge sheet as the appellant's age. Section 2 of the Children Act defined a child as any human being below the age of 18 years, the appellant was a child and therefore subject to the provisions in that Act which regulated criminal proceedings against any child who was in conflict with the law.
2. Save for the exceptions provided in section (1)(a) and (b) of the Children Act, a child offender should be tried in a special court. For avoidance of doubt section 185 (1) of the Act was clear that where for one reason or another, a child was charged in a court other than the children's court, yet he was not charged with the offence of murder or was not charged with an adult or adults, then it was incumbent upon the court in which he had been charged to remit the case to a children's court.
3. The magistrate who tried the appellant was gazetted to preside over cases involving children on January 23, 2009 and therefore had the jurisdiction to preside over the appellant's trial. However, as much as the magistrate (trial court) was clothed with the appropriate jurisdiction, there were certain provisions in the Children Act, that the court overlooked and in the process prejudiced the appellant's right to a fair trial. Those provisions primarily related to the safeguards to be accorded to a child offender.
4. Section 186 of the Act mapped out some of those rights; the section essentially prescribed the basic rights that a child offender was entitled to including such rights as the right to legal representation and the right to privacy. Section 189 of the Act provided a further safeguard in relation to the proceedings against a child particularly where he's found guilty of the offence with which he was been charged. There was no evidence on record that the trial court observed any of the safeguards in relation to proceedings against the appellant. The record, for instance, indicated that the appellant represented himself. There was also nothing on record to show that during the appellant's trial, his right to privacy was considered.
5. The trial court used the prohibited words of "conviction" and "sentence" in its judgment against the appellant. The use of such language was in contravention of section 189 of the Children Act. The trial court proceeded to imprison the appellant in breach of section 190 of the Children Act which proscribed incarceration of children in conflict with the law.
6. In the face of the violations of the law, the trial of the appellant was invalid. The trial of the appellant was a mistrial at the very least and in such circumstances the appellant's conviction could not be sustained.
7. There was no appropriate case for a retrial mainly for two reasons:
  - a. It was quite unlikely that the infringement of the appellant's rights would be mitigated by a retrial. The appellant had attained the age of the majority and if he was subjected to a fresh trial



he would obviously be tried as an adult. Those rights which the appellant would have enjoyed as a child offender were no longer available to him.

- b. The appellant had been in prison for the past 6 years serving what in effect was an unlawful sentence based on an erroneous conviction. Subjecting the appellant to a retrial would effectively be perpetuating the illegalities which had been visited upon him by the trial court.

*Appeal allowed.*

### **Orders**

- i. *The conviction of the appellant by the trial court was quashed.*
- ii. *The sentence of 10 years imprisonment imposed on the appellant by the trial court was set aside.*
- iii. *The appellant was set at liberty unless otherwise lawfully held.*

### **Citations**

#### **Cases**

None referred

#### **Statutes**

1. Children Act (cap 141) sections 2, 184, 185(1); 186; 189; 190(1); parts XIII— (Interpreted)
2. Criminal Procedure Code (cap 75) First schedule, parts II, VII -(Interpreted)
3. Penal Code (cap 63) section 14(3) — (Interpreted)
4. Sexual Offences Act (cap 63A) section 9 — (Interpreted)

#### **Advocates**

None mentioned

## **JUDGMENT**

1. The appellant was tried and convicted of the offence of attempted defilement contrary to section 9 of the *Sexual Offences Act* No 3 of 2006. According to the particulars of the offence, on the 14<sup>th</sup> day of April, 2010 in Nyeri South district within central province, the appellant willfully and unlawfully attempted to defile EW, a girl aged eight. He was sentenced to 10 years' imprisonment but being dissatisfied with the decision of the subordinate court he appealed to this honourable court against both the conviction and sentence; the grounds upon which he appealed can be summarised as follows: -
  1. The learned magistrate erred both in law and in fact in conducting criminal proceedings against the provisions of the *Children Act*, cap 141.
  2. The learned magistrate erred both in law and in fact in convicting the appellant without evidence that the offence of attempted defilement had been committed and therefore the case against him was not proved beyond reasonable doubt.
2. Counsel for the appellant submitted that the appellant was a child, a fact that the trial court was well aware of from the very beginning. That being the case, so he submitted, the appellant ought not to have been tried as an adult. Secondly, it was submitted on behalf of the appellant, that there was no medical evidence of any sexual assault
3. Counsel for the state, on the other hand, opposed the appeal and in particular argued that since the appellant was aged 17 he was liable to criminal liability under section 14(3) of the *Penal Code*, cap 63. She however conceded that section 189 of the *Children Act* was not complied with because the words "conviction" and "sentence" were used in the learned magistrates' judgement. Counsel also conceded that the sentence meted out against the appellant was illegal as it was contrary to the provisions of



section 190(1) of the [Children Act](#) which provides that no child should be ordered to imprisonment or be placed in a detention camp. Counsel urged the court to uphold the conviction of the appellant but review the sentence.

4. It is common ground that the appellant was aged 17 at the time material to his trial; indeed, this is what was indicated as his age in the charge sheet. Under section 2 of the [Children Act](#) which defines a child as any human being under the age of 18 years, the appellant was a child and therefore he was subject to those provisions in that Act which regulate criminal proceedings against any child who is in conflict with the law. These provisions are found in part XIII of the [Act](#) and of particular interest to this appeal are sections 184, 186, 189 and 190 thereof. It is necessary to consider each of these provisions in detail.
5. Section 184 deals with the jurisdiction of the children’s court and it states:
  - (1) Notwithstanding the provisions of parts II and VII of the [Criminal Procedure Code](#) (cap. 75), a Children’s Court may try a child for any offence except for—
    - (a) the offence of murder; or
    - (b) an offence with which the child is charged together with a person or persons of or above the age of eighteen years.
  - (2) References to subordinate courts of any class, in the First Schedule to the [Criminal Procedure Code](#) (Cap. 75), include a Children’s Court.
6. It is apparent that save for the exceptions provided in subsection (1)(a) and (b) a child offender should be tried in a special court. For avoidance of doubt section 185 (1) of the Act is clear that where for one reason or another, a child is charged in a court other than the children’s court, yet he is not charged with the offence of murder or is not charged with an adult or adults, then it is incumbent upon the court in which he has been charged to remit the case to a children’s court.
7. Hon Benson M Nzakyo who tried the appellant was gazetted to preside over cases involving children on January 23, 2009 and therefore had the jurisdiction to preside over the appellant’s trial. This being the case, the question whether the case should have been remitted to a court of competent jurisdiction did not arise. However, as much as the leaned magistrate was clothed with the appropriate jurisdiction, there are certain provisions in the Act, that the court appears to have overlooked and in the process prejudiced the appellant’s right to a fair trial. These provisions primarily relate to the safeguards to be accorded to a child offender. Section 186 of the [Act](#) maps out some of these rights; it states:
  186. Guarantees to a child accused of an offence Every child accused of having infringed any law shall—
    - (a) be informed promptly and directly of the charges against him;
    - (b) if he is unable to obtain legal assistance, be provided by the Government with assistance in the preparation and presentation of his defence;
    - (c) have the matter determined without delay;
    - (d) not be compelled to give testimony or to confess guilt;
    - (e) have free assistance of an interpreter if the child cannot understand or speak the language used;
    - (f) if found guilty, have the decisions and any measures imposed in consequence thereof reviewed by a higher court;



- (g) have his privacy fully respected at all the proceedings;
  - (h) if he is disabled, be given special care and be treated with the same dignity as a child with no disability
8. This section essentially prescribes the basic rights that a child offender is entitled to including such rights as the right to legal representation and the right to privacy.
  9. Section 189 provides a further safeguard in relation to the proceedings against a child particularly where his found guilty of the offence with which is been charged; it says:
    189. Words “conviction” and “sentence” not to be used of child
 

The words “conviction” and “sentence” shall not be used in relation to a child dealt with by the Children’s Court, and any reference in any written law to a person convicted, a conviction or a sentence shall, in the case of a child, be construed as including a reference to a person found guilty of an offence, a finding of guilt or an order upon such a finding, as the case may be.
  10. And where he has been convicted the child cannot be sentenced as if he is an adult; the *Act* is clear in section 190 that a child cannot be subjected to imprisonment nor can he be sentenced to murder or sent to a rehabilitation school if he is under the age of 10 years.
  11. There is no evidence on record that the trial court gave any regard to these safeguards; the record shows, for instance, that the appellant represented himself. There is also nothing on record that suggests that during the appellant’s trial, his right to privacy was considered at all.
  12. In further breach of the law, the court proceeded to use the prohibited words of “conviction” and “sentence” in its judgement against him. This is what the learned magistrate said in conclusion of his judgement:
 

“For the reasons above said this court finds the accused person is guilty as charged and I therefore convict him with the offence of attempted defilement and the provisions of section 215 CPC.”
  13. The trial court went further to state;
 

“The accused person is not remorseful at all for what he did. The offence committed is serious. I therefore sentence accused person to serve 10 years time imprisonment.”
  14. The learned magistrate’s use of language was clearly in contravention of section 189 of the *Act*. Apart from the use of prohibited language, it is also clear that the learned magistrate imprisoned the appellant in breach of section 190 of the *Act* which proscribes incarceration of children in prison.
  15. In the face of these violations of the law, it is not difficult to conclude that the trial of the appellant was invalid; it was a mistrial at the very least and in such circumstances the appellant’s conviction cannot be sustained.
  16. I have agonised over whether this is an appropriate case for a retrial but am hesitant to take that course mainly for two reasons; it is quite unlikely that the infringement of the appellant’s rights will be mitigated by such a course- he is obviously an adult now and if he was subjected to a fresh trial he would certainly be tried as such; those rights which he would have enjoyed as a child offender are no longer available to him.



17. Secondly, he has been in prison for the past six years serving what in effect is an unlawful sentence which in itself is based on an erroneous conviction. Subjecting the appellant to a fresh trial will effectively be perpetuating the illegalities that have been visited upon him; in my humble view, a more just course would be to set him free.
18. It is appreciated that the resolution of this appeal has turned much on law rather than on facts; I find it unnecessary to evaluate the evidence that was proffered at the trial in these circumstances. I am of the humble view that a fresh examination of the evidence would be nothing more than an academic exercise for the simple reason that it will not be of any consequence; whether my findings on facts are consistent or inconsistent with those of the learned magistrate the end result would remain the same—that the appellant’s trial was a mistrial.
19. For the foregoing reasons, I allow the appeal quash the appellant’s conviction and set aside the sentence. The appellant is set at liberty unless he is lawfully held.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 18<sup>TH</sup> DAY OF NOVEMBER, 2016**

**NGAAH JAIRUS**

**JUDGE**

