



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL (REVISION) CASE NO. 14 OF 2015

REPUBLIC..... APPLICANT

VERSUS

E M..... RESPONDENT

RULING

This is a ruling on an application for revision brought by the Republic against the orders of Siakago Resident Magistrate J. Omwange made on 16/04/2015. The applicant in its application dated 30/04/2015 and filed on the same day.

The facts leading to this application are that the respondent in Siakago Criminal case No. 203 of 2015 was charged with an unnatural offence contrary to Section 162(a)(i) of the Penal Code. The charge was read and explained to the respondent who pleaded not guilty. The facts were read by the prosecutor to the court which the respondent denied. A plea of guilty was then entered.

The defence counsel then raised the issue of the tender age of the respondent. He argued that Section 14(3) of the Penal Code exonerated the respondent of criminal liability. The Counsel asked the court to interrogate the issue of the respondent's age and make a finding on it. He further stated that if the court found that the respondent was of tender age, then it follows that the charges cannot stand.

The State through prosecutor Ndolo argued that the court ought to determine the status of the minor in relation to Section 12 of the Penal Code before any submissions can be made by the counsels in that regard. The counsel termed the application by the defence premature and urged the court to find that it ought to be raised when both parties have closed their case. The prosecutor also applied to the court to send the minor for age assessment.

The court then called upon the prosecution to avail the minor's birth certificate.

On 16/04/2015, the court made a ruling that Section 14(3) has an irrebutable presumption that a male child under the age of 12 years is not capable of having carnal knowledge. The charge was dismissed and the minor set free.

The state has brought this application for revision of the orders of the learned magistrate based on the following grounds:-

- 1. That the trial court did not consider the provisions of article 53(1)(d) of the constitution which provides for the protection of the rights of every child.*
- 2. That the court failed to assess the maturity of the minor to establish whether he understands the*

consequences of his actions and whether he had not he had knowledge of the same.

3. That the court failed to consider that it is the prosecution's duty to prove or rebut presumption.

4. That the indisputable age of criminal responsibility is eight (8) years.

5. That the learned magistrate acted on irrelevant section 89 (1) of the Criminal Procedure Code in acquitting the accused.

It is important to examine the relevant provisions of the law in view of the issues raised in this revision.

Article 53(1)(d) of the Constitution provides,

Every child has the right -

(d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labor.

Section 14 of the Penal Code deals with criminal responsibility in relation to immature age. It provides;-

14(1) A person under the age of eight years is not criminally responsible for any act or omission.

(2) A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.

(3) A male person under the age of twelve years is presumed to be incapable of having carnal knowledge.

The provisions of Article 53(1)(d) accord every child protection from abuse, inhuman treatment and all forms of violence among other violations. The complainant and the respondent are equally entitled to this protection of the law. The court is the custodian of the bill of rights among other legal rights. In a criminal case, the court has a duty to protect the right of the accused and that of the complainant in equal measure in the course of administering justice.

The provisions of Section 14(2) amounts to a rebuttable presumption generally in criminal cases. All children of 12 years and below are considered of immature age. Under this provision the court is under the obligation to assess the capacity and knowledge of the subject and to make a finding to that effect.

Section 14(3) has an express provision relating to criminal responsibility of a male person under the age of 12 years in relation to sexual offences. Any male person in the said aged bracket is presumed to be incapable of having canal knowledge. The provision does not place any obligation on the court to assess the capacity or knowledge of the respondent concerning criminal responsibility. This presumption is distinguishable from the one provided under Section 14(2).

It is not indicated in the court record whether the birth certificate of the respondent was produced. However, on perusal of the court file, there is a birth certificate of D R E M which name I suppose refers to the respondent in this application. It shows that the respondent was born on the 29/1/2004. The offence was allegedly committed on 20/2/2015. The respondent was therefore 11 years old on the 20/2/2015. He is therefore covered by the presumption provided for in Section 14(3).

The ruling of the learned magistrate was clear that Section 14(3) consists of an irrebutable presumption. The applicant argues that the court was obligated to make a finding as to the capacity and knowledge of the respondent for criminal responsibility. As I have said earlier, the provisions of Section 14(3) do not have such a requirement. I find that the ruling of the magistrate was correct given the facts of the case.

It was argued that Section 89(1) of the Criminal Procedure Code was not the correct one in dismissing the charges. The section deals with institution of complaint and the charge. The magistrate used the wrong section in that regard. However, this anomaly does not affect the substance of the proceedings. This is an error that can be corrected under the relevant provisions of the law.

I find this application for revision not merited and it is hereby dismissed.

DELIVERED, SIGNED AND DATED AT EMBU THIS 24TH DAY OF JUNE, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Matere for State

Mr. Mungai for the respondent