



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
HIGH COURT PETITION NO 397 of 2012

DMO.....PETITIONER/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

AS CONSOLIDATED WITH HIGH COURT PETITION NO 396 of 2012

JB.....PETITIONER/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The consolidated petitions before me arise out of a reference by the Children Court, Nairobi in Criminal Case Nos. 268 and 269 of 2012 in which the petitioners are charged with being in possession of narcotic drugs contrary to section 3(1) as read with section 3(2) of the Narcotic Drugs and Psychotropic Substances Control Act, Act No. 4 of 1994. Following an application by the petitioners under Rules 24, 25 and 26 of the **Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of The Individual) High Court Practice and Procedure Rules, 2006** (the Gicheru Rules), the Children Court, in its ruling dated 4th September 2012, referred the matter to the High Court for determination of three questions as follows:

i. Whether the search of DMO and JPA, persons of apparent minority age, by the respondent and/or its agents, police officers below the rank of Inspector of Police at (Particulars withheld) Police Station in Nairobi on or about 12.6.2012 in the absence and without knowledge of the parents was unlawful and contrary to Articles 25(a), 28, 29(f), 47, 50, 53 of the Constitution as read together with the Children Act Cap 141 Laws of Kenya and Rule 4(3)(4) of the Child Offender Rules.

ii. Whether the search material as may have been obtained during the search of the minors by the respondents and/or agents, policemen at (Particulars withheld) Police Station in Nairobi is unlawful and inadmissible in Nairobi Children's Court Criminal Case numbers 268/2012 and 269/2012 against minors contravenes Articles 25(a), 28, 29(f), 31, 47, and 50(1)(4) of the Constitution as read with Section 19, 128, 194 of the Children Act Cap 141 of the Laws of Kenya, section 79 of the Narcotic and Psychotropic Substances Control Act and Rule 4(3) of the Child Offender Rules.

iii. Whether the minors being in custody before being granted bail contravened their rights under Article 49(1), (g) and (h), 53 (1)(d) and (f) of the Constitution as read with section 6 and 18 of the (Children Act Cap 141) Laws of Kenya and Rule 4 and 5 of the Child Offender Rules.

2. The facts as they appear from the affidavits before me are that DMO (D) and JAP (J) were arrested by Police officers from (Particulars withheld) Police Station on the night of 12th June 2012. The time of arrest is in dispute, with the petitioners alleging that it was at 11.30 p.m on 12th June 2013 while the respondent alleges that it was 12.30 a.m on 13th June 2012. The difference is a period of an hour, and I do not think it is material to the matters before me. It appears that a search of D's hand bag was conducted by the police officers and a roll of bhang found inside. A search of J revealed two rolls of bhang in his pocket.

3. The petitioners were thereafter taken to (Particulars withheld) Police Station, and on 14th June 2012, they were charged before the Children Court with possession of narcotic drugs contrary to section 3(1) as read with section 3(2) of the Narcotic Drugs and Psychotropic Substances Act.

4. The petitioners were, according to their parents, of apparent minority age at the time of their arrest. D was born on 22nd October 1994 and was therefore 5 months or so shy of her 18th birthday. J was born on 22nd May 1995, and was therefore 17 years of age.

5. Upon their arrest and charging in court, the prosecution applied and obtained an order for assessment of the petitioners' ages, to be conducted at the (Particulars withheld) Hospital, the assessment to be produced in court the following day. The assessment was not done and the matter was adjourned to the 18th of June 2012 when the assessment report was produced, indicating that the petitioners were 17 years of age. A plea of not guilty was entered, the petitioners were released on bail, and the matter was scheduled for hearing on 2nd July 2012. However, following the application by Counsel for the petitioners referred to above, the hearing was stayed pending determination of the questions now before the court.

The Case for the Petitioners

6. The petitions are supported by four affidavits. **Ms. EO**, the mother of **DMO (D)** has sworn an affidavit dated 12th July 2012 and a further affidavit dated 24th January 2013 while **Mr. DAP**, the father of **JAP (Jordan)** swore an affidavit dated 16th July 2012 and a further affidavit sworn on 24th January 2013.

7. The case for the petitioners as presented by Mr. Ojiambo is that the acts of the police officers who arrested the petitioners on 12th June 2012 was in breach of the Constitution and the Children Act. The petitioners were arrested next to the (Particulars withheld) School of Theology in (Particulars withheld), 200 metres from their homes.

8. They allege a violation of their rights under the Constitution and the Children Act by the arresting police officers in that upon arresting the petitioners who were of apparent minority age, they failed to contact their parents contrary to section 18(4) of the Children Act. They contend that this section contains a clear requirement that parents of children in such circumstances should be contacted. They claim that the parents or guardians of the two children were never contacted, and no attempt was made to find out who the parents were, and they therefore contend that there was a clear attempt to keep the children from their parents.

9. The petitioners further contend that the police officers who accosted the minors interviewed them and asked them to open their bags; that they searched the petitioners in the absence of their parents and guardian; that the female minor should not have been searched by the two male officers as this was contrary to section 76 of the Narcotics Drugs and Psychotropic Substances Act and Section 128 of the Children Act, and that the only search where a warrant is not required is where the search is conducted by

a person of a rank not lower than an inspector.

10. The petitioners also complain about their treatment at the police station. They allege that they were incarcerated with no effort made to contact their parents or give them bail, contrary to Rule 5 of the Child Offender Rules. They also take issue with the conduct of the trial court with regard to the minors. They allege that the court failed to comply with Rule 9 of the Child Offender Rules which required the court to grant the petitioners bail; that it could also have made an order that the age assessment be done while the petitioners were in the custody of their parents; that the petitioners were held in custody for 5 days between the 12th and 18th of June 2012, a violation of Article 53(2) on the best interests of the child.

11. They submit that as vulnerable children, their rights under Article 50 were violated, and the evidence obtained against them should be expunged. They therefore ask that the questions referred to the High Court by the Children's Court be answered in the affirmative.

The Response

12. The respondent opposes the petitions and asks that the matter be remitted back to the Children Court for trial. In presenting the case for the respondent, Mr. Njogu relied on the affidavit of the Investigating officer in charge of the petitioners' cases, Criminal Case Nos. 268 and 269 of 2012, **Sgt. Dalmas Kakui, Force No. 33889**, sworn on 14th December 2012.

13. According to Sgt Kakui, the petitioners were passengers in a taxi, motor vehicle registration KAX 242Y; that they were detained first by the officer in charge of security at Africa International University at around 12.30 a.m on 13th June 2012; that the officer, who had detained the petitioners allegedly for displaying rowdy behaviour, then alerted police on patrol. Sgt. Kakui avers that the petitioners did not have proof of identification.

14. The respondent contends that upon a quick search, J was found with two rolls of bhang (cannabis sativa). A search of D's bag, which, according to Sgt. Kakui she opened upon request by the officers, revealed two more rolls of bhang which disclosed an offence under section 3(1) of the Narcotic Drugs and Psychotropic Substances Control Act, Cap 245 Laws of Kenya.

15. The respondent denies that the petitioners' parents were not informed of the charges facing the petitioners. Sgt. Kakui avers that on 13th June 2012, J's father, Mr. DAP, went to the (Particulars withheld) Police Station and saw the office-in-charge who informed him of the charge facing his son, and that Mr. P informed the officer that his son was under 18 years.

In D's case, she was called by the Officer Commanding Station at Karen Police Station for a charge and caution in the presence of her mother. It was therefore untrue for the petitioners to allege that their parents were not informed about the arrest. The respondent also asserts that on both the 14th and 15th June 2012, the petitioners' parents were present in court and had already been informed of the charges facing the petitioners. The respondent submitted that there is no requirement that the parent of a minor should be present during arrest, search or during charge and caution.

16. The respondent further denies that D was searched by male police officers. Sgt. Kakui depones that she was searched by a female officer, one Amina Hussein; that she was not confined in a cell with adults contrary to the allegations by the petitioners, nor were the petitioners detained for five days, with the respondent pointing out that two of the days in question were on a weekend when the court does not sit.

17. According to the respondent, the police have a mandate, under Article 245(4)(b) and section 24 of the National Police Service Act, to conduct investigations in relation to any person and persons, or offences. The respondent also contends that it was necessary for an age assessment to be carried out. At the time of the arrest, D was only 4 months shy of attaining her 18th birthday, and the police officers could not tell with certainty that the petitioners were minors as they had no documents with them.

18. Mr. Njogu therefore submitted that there was no violation of the petitioners' rights, and the questions placed before the court by the trial court should be answered in the negative, and the matter sent back to trial. In the alternative, he argued that even if there had been a violation of the petitioners' rights as alleged, that did not entitle the petitioners not to be tried, but only entitled them to damages for such violation as may be found to have occurred. He relied on the decision in **Julius Kamau Mbugua –vs– Republic Court of Appeal Civil Appeal No. 50 of 2008** for the proposition that even if there was a violation of any of the rights of the petitioners, the petitioners would be entitled to damages, but if a criminal offence was disclosed, they were still liable to trial for the offence(s). He asked the court to disallow all the prayers as the facts show that a cognizable offence was committed, and the Children Court is best placed to assess the evidence.

Determination

19. Put simply, the three questions referred to this court by the Children's Court which are set out above seek a determination of whether the arrest and search of the petitioners was lawful; whether the material found pursuant to the search is admissible in the trial before the Children's Court, and whether there was a violation of the petitioners' rights as a result of their being held in custody prior to being granted bail.

20. The starting point in answering these questions is an examination of the constitutional and statutory provisions with regard to the treatment of child offenders. The petitioners have relied on the provisions of section 6 and 18 of the Children Act Cap 141 Laws of Kenya and Rule 4 and 5 of the Child Offender Rules and alleged that by contravening these provisions, the respondent has violated the petitioners' rights under Articles 25(a), 28, 29(f), 47, 49(1), (g) 50 and (h), 53 (1)(d) and (f) of the Constitution.

Arrest and Search

21. The petitioners have alleged that their arrest and search in the absence and without the knowledge of their parents was in violation of the Constitution and the Children Act. They allege specifically violation of Articles 25(a), 28, 29(f), 47, 50 and 53 of the Constitution as read with the Children Act Cap 141 Laws of Kenya and Rule 4(3)(4) of the Child Offender Rules.

22. Section 6 of the Children Act states that:

6. (1) A child shall have a right to live with and to be cared for by his parents.

(2) Subject to subsection (1), where the court or the Director determines in accordance with the law that it is in the best interests of the child to separate him from his parent, the best alternative care available shall be provided for the child.

(3) Where a child is separated from his family without the leave of the court, the Government shall provide assistance for reunification of the child with his family.

23. Set out in Part II of the Children Act titled '**Safeguards for the Rights and Welfare of the Child,**' when considered in the context of the entire Act, this section appears intended to cover those situations where a child, in his best interests, is taken away from his parents and placed, for instance, in foster care or an institution. It does not appear to me to be intended to cover a situation in which a child has been arrested on suspicion of having committed a criminal offence.

24. The provisions of Section 18 of the Children Act, which the petitioners have also relied on, apply to such circumstances. This section provides as follows:

18. (1) No child shall be subjected to torture, cruel treatment or punishment, unlawful arrest or deprivation of liberty.

(2) Notwithstanding the provisions of any other law, no child shall be subjected to capital punishment or to life imprisonment.

(3) A child offender shall be separated from adults in custody.

(4) A child who is arrested and detained shall be accorded legal and other assistance by the Government as well as contact with his family.

(Emphasis added)

25. It is indisputable that the law prohibits the unlawful arrest and deprivation of liberty of a child, and is explicit that no child shall be subjected to torture and other cruel and degrading treatment. Indeed, this provision of the Children Act is now constitutionally underpinned in Articles 25(a), 29 and 53 of the Constitution. The question is whether the facts in this case indicate a violation of the statutory and constitutional provisions cited.

26. The facts indicate that the petitioners, who were in a taxi at about 11.30 p.m. or 12.30 a.m., were allegedly found in possession of cannabis sativa, which possession constitutes a criminal offence under Section 3(1) of the Narcotics Drugs and Psychotropic Substances Control Act, a serious offence for which the law provides a penalty of ten(10) years' imprisonment. If the facts as alleged by the respondent were correct, then the arrest of the petitioners cannot have been unlawful, and so there would have been no violation of the petitioners' rights under the above provisions of the Children Act or the Constitution.

Pre-Arrest Detention

27. The petitioners have alleged violation of their rights under Rule 4 of the Child Offender Rules. This rule states as follows:

4. (1) where a child is apprehended with or without a warrant on suspicion of having committed a criminal offence he shall be brought before the court as soon as practicable.

Provided that no child shall be held in custody for a period exceeding twenty four hours from the time of his apprehension, without the leave of the court.

(2) Where a child is held in police custody the officer in charge of the police station shall as soon as practicable inform:

(a) the parents or guardians of child ;or

(b) the Director of the arrest.

(3) The police shall ensure that the parent or guardian of the child, or an advocate appointed to represent the child is present at the time of any police interview with the child.

(4) Where a child's parent or guardian cannot immediately be contacted or cannot be contacted at all, a Children's Officer or an authorized officer shall be informed as soon as possible after the child's arrest so that he can attend the police interview.

28. The petitioners were arrested on the night of 12th -13th June 2012, and were produced before the Children Court on 14th June 2012. They were therefore, in my view, produced in court '***as soon as practicable***'. Further, they were brought before the court within the period prescribed by Article 49 of the Constitution, which is in the following terms:

49. (1) An arrested person has the right—

(f) to be brought before a court as soon as reasonably possible, but not later than—

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

(g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.'

Entitlement to Bail

29. The petitioners have placed reliance on Rule 5 of the Child Offender Rules and Article 49(g) and (f) and contended that there was a violation of their rights for failure to release them on bond or bail. Rule 5 states as follows:

'Where a person apparently under the age of eighteen years is apprehended with or without warrant and cannot be brought forthwith before a court, the police or officer to whom such person is brought shall inquire into the case, and may in any case, and unless -

(a) the charge is one of murder or manslaughter or other grave crime; or

(b) it is necessary in the interests of such person to remove him or her from association with any undesirable person; or

(c) such officer has reason to believe that the release of such person would defeat the ends of justice, release such person on a recognizance being entered into by his parent or guardian or other responsible person, with or without sureties, for such amount as will, in the opinion of such officer, secure the attendance of such person upon the hearing of the charge.'

30. The operative words in Rule 5 in making a determination on whether or not an arrested person who is apparently below the age of eighteen years should be granted bail by the police are ***'and cannot be brought forthwith before a court'***. It appears to me that where, as in this case, the petitioners were brought before a court within the period stipulated by the Children Act and the Constitution, there cannot be a basis for complaint about violation of the above provisions.

Post-Arraignment Detention in Custody

31. The petitioners have also complained about their being held in custody following their first appearance in court in violation of their rights under the Child Offender Rules. Rule 4(1) of the Child Offender Rules relied on by the petitioners which is reproduced in paragraph 27 above requires that the child offender be brought before a court as soon as reasonably practicable and should not be held for longer than 24 hours without the leave of the court. The detention of the petitioners in custody after the 14th of June was pursuant to an order of the Court. It was therefore in compliance with the proviso to Rule 4(1) that a minor cannot be held in custody for longer than 24 hours after his arrest ***'without the leave of the court.'***

32. The facts before me indicate that the petitioners were produced in court on 14th June 2012, which was a Thursday, an age assessment was ordered, and they were to be produced in court on 15th June 2012, a Friday. Since the age assessments had not been done on Friday, 15th June, the court ordered that they be produced before it after the age assessment on the 18th of June, 2012, which was a Monday. One may take issue with the order of the court that the age assessment should be done while the minors were in custody. This was, however, within the court's discretion, and was not unreasonable in the circumstances. At any rate, the holding of the petitioners in custody after the 14th of June 2012 was with the leave of the court, and accords with the provisions of the law.

Interviews In the Absence of Parents

33. The petitioners have alleged that they were interviewed in the absence of their parents, and in the case of D, that her bag was searched by a male officer. They have also alleged that they were held with adults. The respondents have denied all these allegations.

34. With regard to searches of women, Section 27 of the Criminal Procedure Code states that:

‘Whenever it is necessary to cause a woman to be searched, the search shall be made by another woman with strict regard to decency.’

Section 76 of the Narcotic Drugs and Psychotropic Substances Act also provides that a female should only be searched by a female and a male only by a male.

35. In my view, the wording of section 27 of the Criminal Procedure Code and section 76 of the Narcotic Drugs and Psychotropic Substances Control Act above make it clear that the search contemplated relates to a search of the person, not of bags or luggage. The respondent has indicated that the search of D was conducted by a female officer, whom they have named as Amina Hussein. In any event, I can find nothing in the law, and nothing has been referred to me by the petitioners, that would prohibit a search of the bag of an arrested person by an officer of the opposite sex.

36. The case that I have found persuasive in this regard is the United States Supreme Court decision in **Wyoming v. Sandra Houghton 526 U.S. 295 119 S.Ct. 1297 143 L.Ed. 2d. 408**. In that case, a patrol officer stopped a motor vehicle with three passengers. One of them had a hypodermic syringe in his pocket and admitted to using it for drugs. The police officer then searched a purse belonging to the respondent, Sandra Houghton, in which he found drug paraphernalia, a syringe and 60ccs of methamphetamines. In her trial for felony possession of methamphetamines, the respondent applied for suppression of all evidence obtained from the purse on the basis that it was obtained in violation of the Fourth and Fourteenth Amendments to the U.S. Constitution. The trial court denied the motion and she was convicted, but the Wyoming Supreme Court reversed the conviction. On appeal by the State to the Supreme Court, the Court reversed the decision of the Wyoming Supreme Court and upheld the conviction. It stated that police officers with reasonable cause to search a car may inspect passengers’ belongings found in the car that are capable of concealing the object of the search.

37. While the issue did not arise in that case, it is clear that the search of the female passenger’s bag was conducted by a male police officer. It appears to me therefore that there is nothing in law or reason that would prevent a male officer from searching the possessions of a female in circumstances such as those in the present case where the petitioners were found in a car in the night, and cannabis sativa was found in the possession of the male passenger.

38. The petitioners also complain about their arrest and search in the absence of their parents. From the provisions of the Child Offenders Rules set out above, I can find nothing that requires the presence of a parent at the time of the arrest of a person below the age of eighteen years. Indeed, given the nature of and circumstances in which offences are committed, it would be a tall order to require that arrests only take place in the presence of parents. At any rate, I can find nothing in the law that imposes such an obligation on the respondent.

39. Rule 4(2) of the Child Offender Rules requires that the parents or guardian of a child held in police custody be informed as soon as practicable, and if not available, that the Director of Children Services be so informed; that the parent, guardian or an Advocate is present during any interview with the child, and in the absence of the parent or guardian, that a Children Officer be present.

40. The petitioners allege that they were interviewed in the absence of their parents, and that in the case of J, he was given a statement to sign. The respondent disputes this. The law is clear that an interview by police of a person under the age of eighteen years cannot take place in the absence of his or her parents or guardian, an advocate appointed by his parents or guardian or a Children’s Officer. The respondent

disputes that such an interview took place; that no confession was obtained from the petitioners, and that what was done was a charge and caution of the petitioners.

41. The question is what is the position if such an interview does take place? Does it entitle the child not to be tried with the criminal offence that he or she is accused of? In my view, the importance of this requirement is to ensure that a minor does not make any incriminating statements, and I agree with the submissions of Counsel for the petitioners that minors are vulnerable and can be intimidated. However, in my view, should an interview take place in contravention of the law, what it ought to lead to is a rejection by the trial court of such statement as is obtained if it is sought to be relied on in the prosecution. It should not be seen as entitling the child offender not to be tried.

42. I have noted the cases relied on by the petitioners. In Republic –vs- N.K & 2 Others Criminal Case No. 8 of 2009, the court relied on the provisions of rule 4(1) that required that the child offender be brought to court within 24 hours, and if this is not done, the leave of the court must be sought. In the present case, the petitioners were produced in court within the time stipulated in the rules, and their subsequent detention was pursuant to orders of the court.

43. I also agree with the sentiments of the court in **Anthony Muriithi –vs- OCS Meru Police Station and 2 Others Meru High Court Petition No. 79 of 2011** that evidence, in that case samples of blood, obtained through the use of force without the consent of the petitioner was illegally obtained and was therefore inadmissible.

44. The question of the admissibility of evidence is important, but it needs to be asked whether such admissibility is a matter for determination of a court exercising jurisdiction under the Constitution, or for the trial court. In my view, such a question should be left to the trial court. It is the trial court which is charged with the responsibility of weighing evidence presented to it, hearing witnesses and making a determination on whether or not such evidence is admissible. I believe that the courts charged with the trial of persons accused of committing offences have the constitutional mandate and the capacity to consider matters pertaining to the evidence before them and determining whether such evidence is admissible.

45. The petitioners have also alleged violation of Article 53 (1) (d) and (f) of the Constitution, which provide as follows:

(1) 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 labour;

(f) not to be detained, except as a measure of last resort, and when detained, to be held—

(i) for the shortest appropriate period of time; and

(ii) separate from adults and in conditions that take account of the child's sex and age.

46. The question is whether the facts before this court demonstrate violation of the petitioners' rights under these provisions. The evidence before me with regard to the conditions in which the children were held is conflicting. Their parents claim that they were held in custody with adults, while the respondent alleges that there were no other persons at (Particulars withheld) Police Station on the nights in question. It is difficult to make any determination one way or the other on this point on the material now before me.

47. However, in considering this point and the questions posed by the trial court, I must bear in mind the decision of the Court of Appeal in **Julius Kamau Mbugua –vs- Republic Court of Appeal Civil Appeal No. 50 of 2008**. In this case, the Court of Appeal has set what I believe is the proper standard with regard to alleged violation of constitutional rights in the course of arrest and arraignment in court. It has set a balance between the interests of an accused person and those of the State and the larger public

interest in the apprehension of offenders and prosecution for criminal offences. After analyzing several High Court decisions in which it had been held that a trial of a person whose rights had been violated was a nullity, the court held that a person in such circumstances was entitled to be compensated in damages, but he was not entitled not to be tried.

48. In the circumstances and in light of my findings above, I respond to the three questions posed by the trial court in the negative, and direct that the trials in Nairobi Children's Court Criminal Case Numbers 268/2012 and 269/2012 against the petitioners should proceed in accordance with the provisions of the Children Act relating to child offenders.

Dated Delivered and Signed at Nairobi this 13th day of May 2013

**MUMBI NGUGI
JUDGE**

Mr. Ojiambo instructed by the firm of Kaplan & Stratton Advocates for the Petitioners

Mr. Njogu instructed by the Office of the director of Public Prosecution