



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT BUNGOMA**  
**MISC. APPL. NO.41 OF 2010**

**C.J.W Guardian ad litem for D.W.....APPLICANT**

~VRS~

**REPUBLIC.....RESPONDENT**

**RULING**

This is a ruling on an application dated 19/10/2010 seeking for dismissal of Bungoma Chief Magistrate Criminal Case No.2244 of 2009 and subsequent discharge of the accused person who is a minor.

The facts are that the accused was arraigned before the court on 25/09/09 charged with defilement of a child contrary to section 8 of the Sexual Offences Act, Act no.3 of 2006. In the alternative, the accused faced a charge of an indecent act with a child contrary to section 11 of the same Act. The case commenced hearing and was closed after five (5) witnesses were heard. The court ruled that the Applicant had a case to answer. When this application was filed, an order for stay of the criminal proceedings was issued.

The grounds supporting this application are as follows:

- a) ***That the case was not heard expeditiously as required by the law;***
- b) ***That the procedure laid down for trial of children's criminal cases was not followed.***

Mr. Waswa relied on the provisions of section 22 of the Children's Act the Child Offenders Rules and section 219 of the Criminal Procedure Act.

The application was opposed by the state on grounds that the delay in disposing of the case was caused greatly by the defence who applied for adjournment several times. The applicant was represented in the lower court and it was expected that the counsel would bring it to the attention of the court that the Applicant was a minor. The case is now at an advanced stage and it should be allowed to proceed.

Section 22 of the Children's Act provides for enforcement of the rights of a child which rights are spelt out in sections 4 – 19 of the Act. The section provides that the Chief Justice shall make rules with respect to the time within which applications for violation shall be brought and references shall be made to the High Court.

Rule 12 of the Child Offenders Rules provides in part:

***“ 12 (1) Every case involving a child shall be handled expeditiously and without unnecessary delay.***

***(2) Where the case of a child appearing before a Children's court is not completed within 3 months after his plea has been taken, the case shall be dismissed and the child shall not be liable to any further proceedings for the same offence.***

On perusal of the proceedings in Criminal Case No.2244 of 2009, it is clear that the case was registered in court on 25/09/2009 as an ordinary criminal case. During the plea, the applicant told the court that he was aged sixteen (16) years. The case came for hearing on 04/11/2009. It could not proceed because the defence had not been supplied with witness statements. On 08/12/2009 the prosecutor said he did not have the police file and could not proceed. The matter was adjourned to the 27/01/2010. On that day the defence counsel was not present in court. The case came up for hearing again on the 29/01/2010 when it was adjourned on grounds that the defence had not obtained witness statements. On 03/02/2010, three witnesses were heard. The Applicant who was out on bond failed to attend court on 01/03/2010 and a warrant of arrest was issued. The next hearing date was on 23/07/2010 when the prosecution called two witnesses and closed their case. On 13/09/2010 the court ruled that the applicant had a case to answer. The case was pending defence hearing when this application was lodged. The Applicant told the court during the plea that he was sixteen (16) years old, and this fact was recorded. The magistrate proceeded with the hearing of case. Section 75 of the Children's Act requires that the court be cleared when a person under 18 years is called as a witness. The same case applies when a child is facing a criminal trial. From the proceedings, the complainant who testified as PW1 was a std 6 pupil aged 16 years. The court had a duty to clear the courtroom during the hearing of the case. This is a case where the Applicant was represented by an advocate. It would have been prudent for the counsel to remind the court that his client was a minor so that the laid down procedure would be followed. The counsel for reasons known to himself did not bring up the issue to the attention of the court. Advocates are officers of the court and it is prudent that they live up to the expectations of the profession. The doctor's report dated 25/11/2010 assessed the Applicant's age as sixteen (16) years on orders of this court. The file was said to be with the State Counsel initially whose office is a stone – throw from the the court. The counsel is stationed in Bungoma town and he ought to have used due diligence to follow up the supply of witness statements with the prosecutor or the State Counsel. This would have assisted in the expeditious disposal of the case. The counsel was absent from court on one occasion. The prosecutor did not have the police file on one occasion. This is an indication that the station did not follow up the file which was with the State Counsel. The accused was absent from court for hearing on one occasion. Both the defence and the prosecution contributed to the delay in this case with the defence bearing the greater responsibility.

The provisions of rule 12 (2) are that any criminal case facing a child shall be concluded within three months failure to which the case shall be dismissed and the child offender discharged. The trial limit period has been faced with many challenges in various courts. These include non-availability of prompt hearing dates any time the case is adjourned. The other reasons include adjournments which may be occasioned by the prosecution, the defence or even by the court itself for various reasons. In the case before me, the defence applied for adjournment three times. On two occasions, they said that the prosecution had not supplied witness statements.

This case was heard by the station's Children's Magistrate Pamela Achieng. Although it was not registered as a children's criminal case as it should, it must be assumed that the magistrate followed all the necessary procedures during the hearing. In the event that the requirement of clearing the court was not complied with, the question which arises is whether the Applicant suffered any prejudice. In my considered opinion, the minor did not suffer any prejudice. The supporting affidavit does not state or suggest such a thing.

Has the constitutional rights of the Applicant been violated by the delay in this case? The Applicant was granted bail and released only four (4) days after the plea was taken. The delay for one year has not caused the Applicant to suffer prejudice because his freedom has not been curtailed in anyway. I have analysed the cause of the delay of this case which is justifiable. I find no violation of the Applicant's Constitutional Rights. This is a case of defilement and release of the applicant would seriously affect the complainant who is also a minor and deny her any legal remedy.

I find no merit in this application and I decline to grant the orders sought. The trial court is hereby directed to finalize the matter on priority basis.

**F. N. MUCHEMI**  
**JUDGE**

Ruling dated and delivered on the 24<sup>th</sup> day of May, 2011 in the presence of the State Counsel Mr. Ogoti and Mr. Waswa counsel for the Applicant.

**F. N. MUCHEMI**  
**JUDGE**