



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HC.CR. MISC. NO.19 OF 2011

M.M.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

(1) M.M. (the Applicant/Appellant) was charged with the offence of defilement contrary to section 8(1) (2) of the Sexual Offences Act [No.3 of 2006] in that on the 8th October, 2010 at around 6.00 p.m. at K[...] Village in Mutomo District of the Eastern Province, he defiled a child aged 12 years. He was convicted on his own plea of guilty and sentenced by the Mutomo Resident Magistrate on the 19th October, 2010 to serve twenty years imprisonment.

(2) On the 11th February, 2011, the Applicant filed an application by way of Chamber Summons seeking orders to be admitted to bond/bail pending the hearing and final determination of his appeal filed on the 28th October, 2010. The application is brought on the grounds that the Applicant was a child at the time the offence was committed and at the time he appeared before the learned trial Magistrate; that the Mutomo Resident Magistrate's court is not gazetted as a Children's Court under the Children's Act, 2001 and accordingly the conviction and sentence are both unlawful and illegal; and that the plea of guilty was equivocal. The application is supported by the affidavit of Alfonse Musembi Kionzi, Esq., Advocate, learned counsel for the Applicant, and that of the Applicant both made on the 11th February, 2011.

(3) In his submissions, Mr. Kilonzi, contended that the age of the Applicant had not been established by the learned trial Magistrate and as the Applicant was aged sixteen years at the time, the proceedings before the learned Magistrate were a nullity. Learned counsel also pointed out a defect in the charge sheet which refers to section 8(1) (2) of the Sexual Offences Act No.3 of 2001; no such section, in fact, exists. Further, the learned trial Magistrate failed to disclose the language in which the Applicant's plea was taken.

(4) In reply and in opposition to the application, Mrs. Christine Gakobo, learned Senior State Counsel, argued that the Applicant clearly admitted to his age being eighteen years and cannot now resile from that position. Learned counsel also challenged the Birth Certificate and Age Assessment Report dated the 16th December, 2010 and the 8th December, 2010 respectively on the basis that they were obtained after the Applicant was convicted and sentenced. Finally, learned counsel contends that the Applicant has not been prejudiced by any defect in the charge sheet.

(5) Having considered the application in light of the respective submissions of both learned counsel, I have noted in particular that the Respondent has not filed any replying affidavit in answer to the averments respectively deposed to in the Applicant's

affidavit and that of this learned counsel in support of the application.

On the 15th October, 2010 when the Applicant was brought before the learned trial Magistrate for plea, the proceedings are recorded as follows:-

“Language – English/Kikamba

Charges read to the accused person in a language he understands and on being asked he replies:-

Accused – It is true”

The Applicant has denied that he pleaded guilty to the offence in paragraphs 11 – 14 of his affidavit.

(6) On the aspect of the Applicant’s age, the trial court was informed by the Police Prosecutor on the 18th October, 2010 that:

“The facts are ready. The age of the accused is 18 years old”

The Prosecution then produced three exhibits in support of the facts as read to the Applicant but failed to produce any evidence in respect of his age. There is on record an age assessment report dated the 15th October, 2010. Its author is undisclosed nor was it produced in evidence. It states:

“The above alleges to have been born in 1994, but according to age assessment medically he showed 18 years old”.

Though this document bears the rubber stamp of “Mutomo Dispensary” it does not appear to have been signed by one Daniel Mulwa, the Registered Clinical Officer (R.C.O) at the Dispensary who signed the complainant’s police medical examination Report (P3 form) on the 14th October, 2010. The Applicant has produced an Age Assessment Report dated the 8th December, 2010 duly signed by a medical doctor at the Kitui District Hospital. In addition, the Applicant has also produced a certificate of Birth dated the 16th December, 2010. Both documents show that the Applicant was sixteen (16) years of age at the material time.

(7) This evidence strongly suggests that the proceedings before the learned trial Magistrate may well have been in violation of the provisions of Part XIII of the Children Act, 2001 and in particular sections 184 – 194 thereof.

In **Dominic Karanja vs. Republic [1986] KLR 612**, it was held that the most important issue to consider in an application of the nature of the one now before me is if the appeal had such overwhelming chances of success, there was no justification for depriving the Applicant of his liberty and the other minor relevant considerations would be whether there were exceptional or unusual circumstances. I am satisfied for the reasons I have given hereinbefore that the Applicant has an arguable appeal and I will accordingly allow the application.

(8) In the result, the application is the Chamber Summons dated and filed on the 11th February, 2011 succeeds and orders admitting the Applicant to bond be and are hereby granted upon the following conditions:

(a) I grant the Applicant a personal free bond together with two (2) sureties of the value of KShs. Twenty Thousand (KShs.20,000/=) each, the sureties each to submit recognizances to be verified by the Deputy Registrar.

(b) In addition to attending court on all mention and hearing dates (unless expressly excused by the court), the Applicant shall appear in person before the Deputy Registrar at least once every calendar month and is also prohibited from coming into contact with the complainant, K.M., for any purpose, whatsoever, until the hearing and final determination of his appeal.

Orders accordingly.

Dated and delivered at Machakos this **23rd** day of **June**, 2011.

P. Kihara Kariuki,
Judge