



1. Criminal Law
2. Criminal Practice and Procedure
3. Subject of main Case:-
 - (i) Murder Contrary to Section 203 as read with Section 204 of the Penal Code.
 - (ii) Three subjects accused for offence
 - a) **Subject No. 1 below 14 years old.**
 - b) **Subject No. 2 below 17 years old.**
 - c) **Subject No. 3 below 17 years old.**
 - (iii) No plea taken.
 - (iv) Three Subject raise Preliminary Objections.
 - a) **That the subjects were minors at the time the offence was committed.**
 - b) **That they were unlawfully held for over a period of 24 hours prior to being brought to court**
 - (v) Court gave time to the Republic to put in replying affidavit
(Ruling No. 1 of 6th May, 2010)
 - (vi) Answer received that offence is one of murder, therefore:
 - a) **The police have a right to hold a minor in custody for 14 days as provided by law.**
 - b) **The 3rd subject was an adult and therefore cannot rely on arguments put forward.**
 - c) **Parliaments intention not have prosecution of children**
4. Held
 - a) **Convention of the Rights of the Child.**
 - b) **1 and 3 minors at time officer committed.**
 - c) **Leave to hold minor in custody over 24hours must be sought from court even in murder cases**
 - d) **3rd subject an adult**
 - e) **1 and 3 set at liberty unless atherwise held.**
5. Case Law
 - a) **Kazingu Kasiwa Mkubwa and Swaleh Kambi Chai Versus Republic CRA 239/2004 (Mombasa) Omolo Bosire Githinji J.J.J**
 - b) **Republic Versus Henry Kingetich Kosgei and Emmanuel Cheruyot Langat CRA 30/2007 (Eldoret) Bauni J.**
6. Advocate:
 - (i) J.K. Chirchir Senior State Counsel instructed by the office of the Attorney General
 - (ii) Mr. Rotich Advocate instructed by the Firm of Rotich & Company Advocate for the 1st Subject
 - (iii) Mr. Koros Advocate instructed by the Firm of Koros & Company Advocate for the 2nd Subject
 - (iv) Mr. Kigamwa Advocate instructed by the Firm of Kigamwa & Company Advocate for the 3rd Subject

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 8 OF 2009

REPUBLIC.....APPLICANT

VERSUS

N.K.....1ST RESPONDENT
M.N.....2ND RESPONDENT
J.N.A.....3RD RESPONDENT

RULING NO. 2

(PRELIMINARY OBJECTION)

I. Introduction

1. Subject No. 1, 2 and 3 were jointly charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. No plea had been taken on 19th February 2009 (Mwilu J) as the 3rd subject was absent having been admitted to hospital. The courts attention was brought to the fact that subject 1 and 3 were minors. It was as a result of this that orders were later made (28th May 2009) (Ibrahim J) that the minors be taken for age assessment.
3. The results of the report of age assessment by way of skeletal radiologist assessment was that subject No. 1 was aged 14 years old. Subject No. 2 was aged over 18 years old. Subject No. 3 was aged under 18 years old.
4. Their advocates claim that subject 2 and 3 are persons who were actually 17 years old at the time the offence was alleged to have been committed. To this end the subjects each raised a preliminary objection in their case.

II. Preliminary Objection

5.

i. Subject No. 1.

- a) The subject argued that he was a minor
- b) That his rights had been infringed when he was held for a period bigger than provided.
- c) That at the time of his interrogation no parent, guardian or Children's Officers was present
- d) That he has been in custody exceeding six months

ii. Subject No. 2.

- a) The subject No. raised a Preliminary Objection dated 23rd June 2009 that his rights and liberty under Section 72 of the Constitution of Kenya had been contravened in that he was not brought to court within 14 days from the date of arrest.
- b) He required protection under Section 77 (2) of the constitution of Kenya.

iii. Subject No. 3.

- a) At the time the offence was committed he was a minor.
- b) He was brought to court after 24 hours.
- c) That he was not informed promptly and directly to charges against him.
- d) That leave of the court was never sought to bring him to court.
- e) The presence of his parents, guardian or advocate was not sought by the police.

6. In reply the state opposed the preliminary objection. The three subjects having been charged with a capital offence required by law to be brought to court. There was no distinction between adults and children in this regards. The 2nd subject was an adult.

7. The court gave an opportunity for the investigating officer to put in an affidavit which was duly done on 25th May 2010. That confirmed these facts by the state.

8. No further submissions was made by the advocates.

III. Findings

9. The first issue this court must look into is whether or not the three subjects are minors to be able to rely on the Children's Act.

10. From the age assessment taken subject No. 1 was indeed 14 years old at the time of arrest and according to the P3 form before this court on his assessment of age. I therefore hold that he is a minor and qualified to raise the said issues before court.

11. Subject No. 2 was assessed through the skeletal radiologist examination and found to be over 18 years old. He is said to be an adult and as in Kenya the age of majority is 18 years old, the said subject No. 2 is an adult. He can therefore not rely on the children's act. His reliance appears to be under the Constitution of Kenya.

12. Subject No. 3 was at the time the offence was committed aged under 18 years old. This court would agree that he was under 18 years old. The reliance on the P3 form as per the doctors report was actually filled in by a police officer and not a medical doctor at the introduction section of the forms. I would therefore hold that the 3rd subject was a minor at the time the offence was committed.

13. The arguments put forward by the advocate are similar and would continue then for ease of reference.

14. According to rule 4(1) of the Child Offender Rules, a minor who has been arrested must be brought to court within 24 hours. If this is not done leave of the court must be first sought. The advocates relied on the case law of **Henry Kingetich Kosgei and Emmanuel Cheruyot Langat, High Court Criminal Case No. 30/2007 Bauni J.** in which the Police failed to seek leave of the court to hold minors longer than the required 24 hours period.

15. The state argued that the Hon. Judge (as he then was)(now deceased) had not been brought to the attention the Case Law of: **Kazungu Kasiwa Mkuzo & Swaleh Kambi Chai Omolo, Bosire Githinji JJA Court of Appeal CRA 239 of 2004 (Mombasa)**

16. The Children's Act was not meant to shield the offenders from liability. Justice must be done.

17. The second argument was that the time the minors were arrested, they were never informed of the offence they faced; they were never accorded the presence of their parents, guardian or advocate at the time of interrogation. Failure to have these persons required the presence of the children's officers. None of the named persons were ever called, as a result, the subjects should be discharged of the offence before court.

18. I find herein that the purpose of the Children's Act is to safe guard the very delicate rights of such children to be persons of good morals, standing and credible citizens. The laws are therefore placed in order to ensure that a child's character is not further damaged as they walk through the criminal justice system.

19. In this case, I find that subject No. 1 and 3 being a minor must at all times be interrogated in the presence of his parents, a guardian, or advocate and or the children's officer. This was never done according to the affidavit put in by the State, there being no mention of this.

20. I further hold that the court interpretation of the Children's Act and Rules is that all Children must

appear to court within 24 hours. This is mandatory. They are though permitted to be released on bail by the police except for offence of “**manslaughter, murder or grave offences.**” Where this occurs, the police must seek leave of the court to hold such minors longer than 24 hours.

21. What the act requires is a report to the courts that a minor will be detained for over 24 hours regardless that the Criminal Law provides for 14 days for capital offences.

22. I would therefore uphold the preliminary objection for subject 1 and 3 and accordingly discharge them of the offence before Court.

23. As to the 2nd subject, he is an adult, he was detained in police custody within 14 days as required by law. He will stand trial for the offence before court against him.

Dated this 29th day of September 2010 at ELDORET

M. A. ANG’AWA

JUDGE

Advocates:

- (i) J.K. Chirchir Senior State Counsel instructed by the office of the Attorney General.
- (ii) Mr. Rotich Advocate instructed by the Firm of Rotich & Company Advocate for the 1st Subject.
- (iii) Mr. Koros Advocate instructed by the Firm of Koros & Company Advocate for the 2nd Subject.
- (iv) Mr. Kigamwa Advocate instructed by the Firm of Kigamwa & Company Advocate for the 3rd Subject.