



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

OF KISII

Crim Misc Appli 18 of 2008

GEOFFREY OMAYO NYABWARI APPLICANT

VERSUS

ATTORNEY GENERAL RESPONDENT

**(From original conviction and sentence of the Senior Resident Magistrate's Court, Nyamira
Criminal Case No.886 of 2007 by S. K. Gacheru – RM)**

JUDGMENT

The appellant was charged with defilement contrary to section 8(3) of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that on the night of 1st and 2nd November, 2007 in Nyangoge sub-location in Nyamira District within Nyanza Province the appellant intentionally and unlawfully defiled L K C, a girl aged 12 years. The appellant was arrested on 2nd November, 2007 but was not arraigned before court until 5th November, 2007.

When the charge was read out to the appellant, he pleaded guilty to the same. The trial magistrate ordered that his age be assessed. On 9th November, 2007 the prosecutor told the trial magistrate that he had received the age assessment report which showed that the appellant was 18 years. There is no indication that the age assessment report was ever shown to the trial magistrate.

The facts of the case were read out to the appellant and he admitted that they were correct. The appellant was thereafter convicted on his own plea of guilty and sentenced to seven years' imprisonment.

The appellant was aggrieved by the said conviction and sentence and preferred an appeal to this court. In a petition of appeal drawn on his behalf by M/S. G. A. Mongare & Company Advocates, the appellant stated, inter alia, that the trial magistrate erred in law in sentencing him to imprisonment without ascertaining his proper age as he was a minor at the time, having been born on 20th September, 1990, according to his birth certificate. He further faulted the trial magistrate for failing to observe that the appellant had been remanded in police custody longer than necessary in contravention of his constitutional right.

Mr. Mongare submitted that the appellant was a child in terms of the Children Act, 2001. It was therefore unlawful to sentence him to jail. The trial magistrate ought to have passed any other appropriate sentence but not imprisonment, he submitted.

Counsel further submitted that the appellant's constitutional right to a fair trial was violated because he was arrested and kept in police custody for three days before he was arraigned in court. No explanation was given by the police for that delay and the trial magistrate did not enquire into the cause of such delay. He urged the court to quash the conviction and set aside the sentence.

Mr. Kemo, learned Principal State Counsel, conceded the appeal, and in my view rightly so, but prayed for a retrial. He agreed that the appellant was a child at the time of conviction and was still a child at the time of hearing this appeal. Mr. Kemo's reason for praying for a retrial was that there was clear evidence that the complainant had been defiled.

I have carefully studied the record of appeal and considered the submissions made before this court. I agree with Mr. Mongare that the appellant was a child. According to his birth certificate that was shown to this court, the appellant was just over seventeen years at the time of the trial. The Children Act, 2001 defines a child as "**any human being under the age of eighteen years.**"

Section 8(7) of the Sexual Offences Act, 2006 states as follows:

"where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children's Act."(sic)

Section 190(1) of the Children Act, 2001 is explicit that no child shall be ordered to imprisonment or to be placed in a detention camp. The learned magistrate should have dealt with the appellant according to the provisions of **Section 191(1)** of the Children Act. The appellant was kept in police custody for three days before he was arraigned in court. No reason was advanced for such delay. The appellant's rights under Sections 72(3)(b) and 77(1) of the constitution were violated. In **ALBANUS MWASIA MUTUA VS REPUBLIC**, Criminal Appeal No.120 of 2004, the Court of Appeal held that unexplained violation of an accused's constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence, which may be adduced in support of the charge.

In view of the foregoing, I allow the appeal, quash the conviction and set aside the sentence that was pronounced by the trial court. The appellant is set at liberty unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at **KISII** this 14th day of April, 2008.

D. MUSINGA

JUDGE.

Delivered in open court in the presence of:

Mr. Mongare for the appellant.

Mr. Kemo, Principal State Counsel for the respondent``

D. MUSINGA

JUDGE.