



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Criminal Appeal 144 of 2004

**M K J.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT**

***(Being an Appeal from the sentence and conviction in Machakos Chief Magistrates Court
P& D Case No. 21 of 2002 P.M. Muriuki, R.M. on 25.8.2004)***

JUDGEMENT

1. The appellant herein, **M K J** was the accused person in Machakos Chief Magistrate's Court P&A Case No.21 of 2002 where he had been charged with the offence of neglecting his own child contrary to section 20 of the Children's Act No.8 of 2001.
2. The particulars of offence were that between January, 1998 and July, 2002 he willfully neglected one **M K** aged 6 years thus causing him unnecessary suffering. In a judgment rendered on 16.4.2004, P.M. Muriuki Esq, Resident Magistrate found him guilty of the offence and ordered that the Appellant be sentenced to serve 3 months in prison. Later in this appeal, he was ordered to pay Kshs. 1500/= per month as maintenance for the minor. At the hearing of the Appeal, parties agreed that he had been consistent in making those payments to-date.
3. The appeal is conceded on the ground that one **G.N. Kitili** who prosecuted the case as a Children's Officer was in fact not such an officer lawfully gazetted to conduct prosecutions and the trial was a nullity. Similarly one, **Cpl Ngela** who is said to have conducted part of the prosecution was also unqualified to do so by dint of section 85(2) of the Criminal Procedure Code. A retrial is sought for reasons that since the subject of the charge was a minor, now aged 11 years, his interests would override all other considerations and that there would be sufficient evidence to sustain a retrial.
4. The prayer for a retrial is opposed because in Mrs Nzei's view on behalf of the Appellant, there was in fact no valid charge before the trial court since the alleged offence was committed before the Children's Act came into force and that the law was never meant to operate retroactively. The point was partly conceded by Mr. Omirera who stated that the offence transcended the Children's Act and yet on the other hand since neglect is continuous, the charge was properly framed. Further that section 382 of the Criminal Procedure Code properly applied to the circumstances of this case since the Appellant was represented by counsel in the trial court and the issue now raised could have been raised at that court and not on appeal.
5. I have considered the rival submissions and I agree that there is no evidence whatsoever that one **G.N. Kitili** was a qualified Children's Officer with the relevant power to prosecute any case where a child is involved. The power to prosecute cases is delegated by the Attorney General and where no such

delegation is recorded, this court cannot but hold that there was no competent prosecutor and following the decision in *Elirema -vs- Republic [2003] KLR 537* any such trial will be rendered a nullity. This proposition is conceded by learned Principal State Counsel and quite rightly so. As to the status of Cpl. Ngela, I note that he actually never participated in the trial save that he appeared on number of occasions when the matter was set down for mention and the issue to that extent is moot.

6. Even if the trial was not a nullity I think I should address one other issue that arose in submissions i.e whether there was a valid charge before the trial court. The Children's Act was enacted in the year 2001 with Presidential Assent being given on 31.12.2001. The date of commencement was 1.3.2002 through Legal Notice No. 23/2002. The alleged date of the offence is said to be "***January, 1998 to July 2002.***" Obviously, any offence contrary to section 20 of the Children's Act cannot be validly laid if it was committed before 1.3.2002 and once the charge sheet is that defective, proof of the offence cannot be made because the charge cannot thereafter be valid. I say this because a charge sheet cannot in my view be read in bits and only the legitimate part taken as lawful. Either a charge sheet is defective or not defective and as was said in *Yongo -vs -Republic [1986] KLR 323.*

"In our opinion, a charge is defective under section 214(1) of the Criminal Procedure Code where:-

a. it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or

b. it does not, for such reasons, accord with the evidence given at the trial; or

c. it gives a misdescription of the alleged offence in its particulars."

7. Since the present charge sheet was not amended to accord with section 214 (1) of the Criminal Procedure Code, it follows that the trial was flawed and the resultant conviction and sentence were unlawful.

8. On the above two grounds therefore, the trial in the subordinate court was wholly irregular and the conviction is quashed and sentence must be set aside.

9. Should a retrial then be ordered? I think not. Granted, the whole trial rotated around the alleged neglect of a minor said to be a son of the Appellant. He has been paying a monthly sum of Kshs. 1500/= to the mother of the minor as upkeep. To subject him to a retrial would be unfair and prejudicial to him. Further, the prosecution may have the chance to amend the defective charge sheet and the purpose of a retrial would be to aid it to do so. Lastly, the trial was concluded more than 4 years ago and I see no justification to reopen old wounds that are clearly healing. In any event the issues obtaining between the parties can at best be resolved in civil proceedings and the Appellant is already paying for the upkeep of the minor.

10. In the end, while allowing the Appeal, no retrial should be ordered. The Appellant is now at liberty unless he is otherwise lawfully held.

11. Orders accordingly.

Dated and delivered at Machakos this 3rd day of April 2008

ISAAC LENOLA

JUDGE