



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL APPEAL NO. 500 OF 2004**

*(From Original Conviction and Sentence in Criminal Case No.17780 of 2004 of the Chief Magistrate's Court at Makadara- Ms Karani, SRM).*

**OLIVE BETT CHEPCHUMBA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

According to the birth Certificate produced in Court at the hearing of this Appeal at the instance of the Court, the Appellant is aged 16 years. On 1<sup>st</sup> September, 2004 the Appellant Olive Bett Chepchumba was arraigned before the Principal Magistrate's Court Makadara, on one count of assault causing actual bodily harm contrary to Section 251 of the Penal Code. The Appellant entered a plea of guilty to the charge. She was accordingly convicted on her own plea of guilty and sentenced to 6 months imprisonment. Being aggrieved by the conviction and sentence the Appellant lodged this Appeal through Mrs. Maina Makome & Co. Advocates. The grave man of the Appellant's Appeal is that the trial Magistrate erred in law in failing to appreciate that the Appellant was a person under the age of majority and consequently her trial ought to have been held before the Children's Court. The Appellant has also raised secondary issues regarding failure by the Magistrate to inquire from the Appellant whether she had any mitigation to make prior to the passing of the sentence. Finally the Appellant claims that the sentence imposed was severe.

When the Appeal came up for hearing before me, the State Counsel, readily conceded to the Appeal. In conceding to the Appeal, Learned State Counsel submitted that the learned trial Magistrate was not alive to the fact that the appellant was a minor. That being the case, the proceedings ought to have been conducted before the Children's Court. Counsel further submitted that considering the nature of the offence and sentence imposed, the state was not seeking a retrial.

Mr. Maina, Learned Counsel appeared for the Appellant. While appreciating the state's gesture in conceding to the Appeal, Counsel pointed out however that the Appellant had served 1 month and 5 months imprisonment before being released on bail pending Appeal.

It would appear that as at the time the appellant was arraigned in Court as aforesaid, she was aged 14 years. She was therefore a minor. The Learned Magistrate was duty bound to inquire from the Appellant as to her age before taking the plea. She failed in this duty. Had she done so she would have established that the Appellant was a person under the age of majority and consequently referred the matter to children's Court for hearing and determination. Pursuant to Section 73 of the Children Act, a Children's

Court is established for the purposes of:-

(a) .....

(b) **Hearing any charge against a child, other than a charge of murder or a charge in which the child is charged together with a person or person of or above the age of fifteen years.**

(c) .....

According to the Act, a child is defined as:-

**“.....Any human being under the age of eighteen yeas.....”**

From the foregoing extracts from the children Act, it is quite clear that the Appellant ought to have been tried by the Children’s Court. To that extent therefore proceedings in the Makadara Law Courts were a nullity. The Learned State Counsel was therefore right in conceding to the Appeal. I would in the premises allow the Appeal, set aside the conviction and sentence.

The next issue that calls for my consideration is whether I should order a retrial. A retrial should only be ordered where the initial proceedings were a nullity, where it will not cause an injustice or prejudice to the Appellant. Further before making an order for retrial the Court must be satisfied that on the admissible or potentially admissible evidence if tendered again a conviction may result. (See **MANJI VS REPUBLIC (1966) EA 343 AND MWANGI VS REPUBLIC (1983) KLR 522.**)

Having carefully considered the circumstances of the case, the nature of the offence and sentence imposed I am in agreement with Learned State Counsel that an order for retrial would not be the appropriate or suitable order to make in the circumstances of this case. Accordingly I decline to make an order for retrial. Instead I order that the Appellant be released forthwith unless otherwise lawfully held. I note though that the Appellant is on bail pending Appeal.

Dated at Nairobi this 24<sup>th</sup> day of May 2006.

.....

**MAKHANDIA**

**JUDGE**