



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO.236 OF 2003

REPUBLIC PROSECUTOR

VERSUS

SAO..... ACCUSED

RULING

Before me is an application dated 14th December, 2004 by way of Notice of Motion provided under Sections 4(2) and (3) Section 186 (c), 187(1), 194 (1) of the Children Act and Rules 3, 12(1) and (4) of the Child Offenders Rules (Fifth Schedule) along with other provisions under the Act as well as under certain provisions of Civil Procedure Act (Cap 21).

I may as well clarify at the outset that the provisions of Civil Procedure Act do not apply to the proceedings under Criminal jurisprudence.

Be that as it may, the Accused/Applicant prays for her discharge as a result of continued violation of her rights safeguarded under the children Act of 2001 hereinafter referred to as 'the Act'. The application is supported on the grounds stated on the Application and supporting affidavit of one Anne Adhiambo Obuya an aunt and next of kin of the Accused/Applicant.

In any event the fact that the Accused/Applicant took plea on 11th December, 2003 is not disputed. It is also equally true that, after I delivered my ruling releasing the Accused/Applicant on bail, hearing dates have not been either taken or given.

Mr. Onyango now relying on Rule 12(4) of the Child Offenders Rules (5th schedule) made under the Act prays for the discharge of the Accused. Mrs. Oiye the Learned State Counsel urged, in opposition, that the provisions under the Children Act and Rules, so far as the requirements of bail and discharge are concerned, are in violation of Section 72(5) of the Constitution and hence they cannot be applied being ultra vires to the provisions of the Constitution which is supreme law of the land.

Section 72 of the Constitution provides for the process under which right of personal liberty can be curtailed. Section 72(5) thereof stipulates.

“If a person arrested or detained as mentioned in subsection 3(b) is not tried within reasonable time, then without prejudice to any further proceedings that may be brought against him, he shall unless he is charged with an offence punishable by death, be released either unconditionally or

upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.” (emphasis mine)

She further submitted that a person in the said provision includes a child and hence, this court cannot grant prayers as urged by the Accused/Applicant.

She also contended the best interest of Justice shall be served if early hearing dates are fixed.

I have given full and very close considerations to the above submissions. It is true that the Accused/Applicant is charged with offence of murder, which is punishable by death as per Section 204 of the Penal Code.

But in my humble view, that is not so in respect of a Child offender. I shall simply refer to Section 25(2) of Penal Code (cap.63):

“25(2) Sentence of death shall not be pronounced on or recorded against any person convicted of an offence if it appears to the court that the time when the offence was committed he was under the age of eighteen years, but in lieu thereof the court shall sentence such person to be detained during the President’s pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct, and whilst so detained shall be deemed to be in legal custody.”

The above provision in effect stipulates similar provisions as those of Section 18(2) and Section 190(2) of the Children Act, 2001.

Deducing from the above specified provisions of laws, inevitably the provisions of Section 72(5) of the Constitution shall have no effect on the Child offenders. The Child offender even though is charged with offence of murder is not punishable by sentence of death.

I therefore cannot uphold contentions raised by Learned State Counsel and find that Section 18(2), Section 190(2) of the Act and Rule 12 of the Child Offender Rules (fifth schedule) made under the Act are unconstitutional.

The state was reminded of its obligation to complete hearing of the trial as enjoined in Rule 12 (4) of the aforesaid Rules, when I delivered my ruling on 9th November, 2004. but unfortunately that call has reached the deaf ears. The Learned State Counsel did not offer any plausible explanation for not taking hearing dates so that the sting of the provision be removed.

Rule (12) (3) and (4) deal with the proceedings relating to Child Offenders before the High Court. I shall quote them for ready reference.

“Rule 12 (3) where, owing to its seriousness, a case is heard by a court superior to Children’s Court, the maximum period of remand for a child shall be six months, after which the child shall be released on bail”

and

“Rule 12(4) where a case to which paragraph (3) of this rule applies is not completed within twelve months after the plea has been taken, the case shall be dismissed and the child shall be discharged and shall not be liable to any further proceedings for the same offence”

I may note here that our Constitution has stressed on expeditious hearing of all the criminal trials within reasonable time before an impartial and competent court. This court is definitely such court.

If then, any legislation categorically limits or defines that reasonable time by specifying the time limit, as has been done under the Child Offender Rules; in my view, the provision is within the ambit of Section

77 of the Constitution.

The state, without giving any reason for transgressing the period specified to complete the trial, has contravened the legal provision. The state as a result is debarred from taking any further action against the Accused/Applicant herein.

I have to bow down to the provisions of Rules made under the Act which I find constitutional and lawful.

The upshot of all aforesaid is that I have to dismiss the present case and discharge the

Accused/Applicant forthwith, and I do so order.

DATED and SIGNED at Nairobi this 10th day of February, 2005.

K. H. RAWAL

JUDGE

10.2.2005