



**DMM v Republic (Criminal Appeal 959 of 2003)  
[2005] KEHC 3171 (KLR) (Crim) (20 December 2005) (Judgment)**

*David Moiga Mwangi v Republic [2005] eKLR*

Neutral citation: [2005] KEHC 3171 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL**

**CRIMINAL APPEAL 959 OF 2003**

**JW LESSIT, J**

**DECEMBER 20, 2005**

**BETWEEN**

**DMM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original conviction(s) and Sentence(s) in Criminal Case No. 8764 of 2003 of the Chief Magistrate's Court at Thika (Betty Rashid –SPM))*

**Conviction of an alleged minor without age assessment was unlawful and unjustifiable.**

*The appellant, charged with defilement and indecent assault, pleaded guilty to the latter but claimed to be 16. Despite an order for age assessment, a different Magistrate sentenced him to 5 years. The court failed to ascertain his age before sentencing, contrary to the Children's Act. The conviction for indecent assault was upheld, but the sentence was deemed unlawful. After over 2 years in jail, the appellate court substituted the sentence with time served, emphasizing the failure to determine the appellant's age properly.*

Reported by John Ribia

***Criminal Law** - indecent assault on a female - appeal against conviction and sentence - appellant having been charged convicted on the alternative count of indecent assault on a female - appellant having admitted to touching the complainant indecently - accused allegedly being a child not being subjected to an age assessment that was ordered by the trial court before conviction - effect of - factors the court considers in sentencing - validity of order - whether the conviction and sentence imposed for the crime of defilement without age assessment of the accused who contended that he was a minor was proper - whether the trial court's failure to wait for the results of the age assessment that it had previously ordered before sentencing was unlawful and unjustifiable - whether conviction for indecent assault based on a confession could be considered unjustified considering the accused, an alleged minor,*



*was not subjected to age assessment - Penal Code (cap 63) sections 144(1), 145(1); Children Act (Act No 8 of 2001) section 190.*

### **Brief facts**

The appellant was charged with the offences of defilement and in the alternative indecent assault on a female. A plea of guilty was entered for the alternative count but the appellant stated that he was 16 years of age. The trial Magistrate ordered an age assessment, but the case was subsequently taken over by another Magistrate who though aware of the pending age assessment proceeded to sentence him to 5 years imprisonment. The appellant thus appealed against whether the conviction and sentence imposed against the appellant was proper conviction and sentence.

### **Issues**

- i. Whether the conviction and sentence imposed for the crime of defilement without age assessment of the accused who contended that he was a minor was proper.
- ii. Whether the trial court's failure to wait for the results of the age assessment that it had previously ordered before sentencing was unlawful and unjustifiable.
- iii. Whether conviction for indecent assault based on a confession could be considered unjustified considering the accused, an alleged minor, was not subjected to age assessment.

### **Held**

1. The appellant's admission that he indecently touched the complainant's private parts was a full confession to the alternative count, was unequivocal and consequently the conviction entered was safe and could not be challenged.
2. The Children's Act defined a child as any human being below the age of 18 years. Once the appellant alerted the court that he was below that age and since an order for assessment of that age was made, then it only meant that the court was persuaded that there was a need to inquire into his age. In those circumstances it became imperative for the court to receive the appellant's age either assessed by a doctor or proved through documentary evidence. If the court found it difficult to wait for the two to ascertain the appellant's actual age, then, it had to go by the appellant's apparent age as a matter of principle.
3. The trial court did not observe the appellant to ascertain his apparent age. Consequently, the trial court failed to apply any known principles before passing sentence. The exercise of the courts discretion to pass the sentence of imprisonment in the circumstances was unlawful and could be interfered with.
4. Conviction for the alternative count of indecent assault contrary to section 145(1) of the Penal Code was proper and upheld. The sentence was however unlawful and unjustifiable. Consequently, the sentence was set aside.
5. The appellant had been in jail since October 2003, a period of 2 years and 2 months. Given the peculiar circumstances of the case that appellant's age was never ascertained and given the fact that he claimed it was below the age punishable by imprisonment, the instant court substituted the sentence to the period already served.

*Appeal allowed in part; sentence substituted for period already served. Appellant was to be set at liberty unless he was otherwise lawfully held.*

### **Citations**

#### **Cases**

None referred to

#### **Statutes**

#### **Kenya**

1. Children Act (Repealed) (cap 141) section 190 - (Interpreted)
2. Penal Code (cap 63) sections 144(1); 145(1) - (Interpreted)



## Advocates

*Mr Wandaka* for the appellant

*Mr Makura* for the State

## JUDGMENT

1. The appellant, DMM was charged with one main count of defilement contrary to section 145(1) of the [Penal Code](#) and in the alternative indecent assault on a female contrary to Section 144(1) of the [Penal Code](#). The facts of the case as led by the prosecution read as follows: -

“On September 30, 2003 at [particulars Withheld] in Thika District within Central province had carnal knowledge of MRA a girl under the age of 16 years.”

2. After these facts were read out to the Appellant, he stated:

“Accused: it is true that I indecently touched her private parts.”

3. A plea of guilty was entered for the alternative count. Then the appellant said that he was 16 years old whereupon the trial magistrate ordered an age assessment of the appellant. That plea was taken by Mr Boaz Olao, CM. Subsequently Mrs Betty Rashid took over the case and without waiting for the age assessment, despite being informed of its requirement by the appellant, proceeded to sentence him to 5 years imprisonment. It is against both the conviction and the sentence that the Appellant now appeals.
4. Mr. Wandaka argued the appeal on behalf of the appellant while Mr Makura represented the State. The appeal was unopposed.
5. I have carefully considered the charge and facts of the case as led by the state and the manner in which the plea was handled and the sentence entered.
6. Mr Wandaka challenged the conviction on the basis that despite the fact that the charge was defilement, the facts led by the prosecution supported the charge of indecent assault. Mr Makura on his part submitted that after the facts were read over to the appellant, he did not admit them but rather specifically admitted to indecent assault.
7. I do not think that anything turns on this issue. The appellant was charged with defilement contrary to section 145 (1) but in the alternative to Indecent assault contrary to section 145(1) of the [Penal Code](#). The facts led by the prosecution fell short of disclosing either count. On the charge of defilement the prosecution merely stated that the appellant locked the complainant in his house and defiled her. Those facts, barely as they were given were not sufficient to establish that any defilement was committed by the appellant on the complainant. The facts did not suggest the alternative count. In the appellant’s admission, he fully demonstrated that he not only understood both charges alleged against him but understood what constituted them. He said in admission that he indecently touched the complainant’s private parts, which was exactly what the particulars of the alternative charge alleged against him. The admission was a full confession to the alternative count, was unequivocal and consequently the conviction entered was safe and cannot be challenged.
8. The learned counsel for the appellation challenged the sentence imposed against the appellant on grounds that it flouted the [Children’s Act](#).
9. Section 190 of the said [Act](#) provides:



“S.190

- (1) No child shall be ordered to imprisonment or to be placed in a detention camp.
- (2) No child shall be sentenced to death.
- (3) No child under the age of ten years shall be ordered by a Children’s Court to be sent to a rehabilitation school.”

10. Mr Wandaka submitted that five years imprisonment was unlawful and also excessive. Mr Makura submitted that after the court ordered for the age assessment to find out the appellant’s age, it was not done, meaning that his age was unknown. He submitted that since the appellant’s age was unknown, then, he has been punished enough and should be set free.
11. The *Children’s Act* is very clear as to who is a child. Any human being below the age of 18 years. Once the appellant alerted the court that he was below that age and since an order for assessment of that age was made, then it only meant that the court was persuaded that there was a need to inquire into his age. In those circumstances it became imperative for the court to receive the appellant’s age either assessed by a doctor or proved through documentary evidence. If the court found it difficult to wait for the two to ascertain the appellant’s actual age, then, it had to go by the appellant’s apparent age as a matter of principle.
12. I have perused the record of the proceedings and I find nothing to show that Mrs Rashid, who sentenced the appellant, ever observed the appellant to ascertain his apparent age. Consequently the learned trial magistrate failed to apply any known principles before passing sentence. The exercise of the courts discretion to pass the sentence of imprisonment in the circumstances was unlawful and can be interfered with.
13. Having considered this appeal I find that the conviction for the alternative count of indecent assault contrary to section 145(1) of the *Penal Code* was proper and I uphold it. The sentence was however unlawful and unjustifiable. Consequently I set it aside.
14. I have considered that the appellant has been in jail since October 2003, a period of 2 years and 2 months. Given the peculiar circumstances of the case that appellant’s age was never ascertained, and given the fact that he claimed it was below the age punishable by imprisonment, I will substitute the sentence to the period already served. I order that the appellant be set at liberty unless he is otherwise lawfully held.

**DATED AT NAIROBI THIS 20TH DAY OF DECEMBER 2005.**

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**LESIT, J.**

**JUDGE**

**READ, SIGNED AND DELIVERED IN THE PRESENCE OF;**

.....

**LESIT, J.**

**JUDGE**

