



REPUBLIC ..... PROSECUTOR

- VERSUS -

MK..... RESPONDENT

### RULING

In this matter the Accused is charged that on 11.9.2003 he murdered one NGERERI NYANGE. The information dated 15.9.2003 was presented to court on 16<sup>th</sup> day of September 2003 on which date the accused was produced before court for plea and he was remanded in custody in prison at Shimo La Tewa. The accused has been examined by a Medical doctor and has been certified to be a child aged 17 years as on 16.3.04.

The Counsel for defence of the accused person has made an application under Section 2,4(2) and (3) 18 (1) 22, 185 (5) 186 (c ) and 194 (1) of the Children Act 2001 on the ground that the accused is a child under the Act and he is entitled to the protection given under the Act to children. Regarding the child offenders Part X111 of the Act makes provisions as to the trial of children accused of the offence of murder. Only the High Court may try such offences under Penal Code and Criminal Procedure Code. Section 194 (1) of the a Act provides:-

*“proceedings in respect of a child accused of having unfriended any law shall be conducted in accordance with rules set out in the fifth schedule (hereof.)”*

These Rules are cited as child offenders Rules. It is in respect of these rules that this application is made on behalf of the accused. Rule 3 thereof states-

*“These Rules shall apply to the proceedings with respect to a child who is charged with any offence.”*

Further rule 2 (1) states every case involving a child shall be handled expeditiously and without unnecessary delay.

Rule 2 (4)

*“where a case to which para. 3 of this rule applied is not completed within 12 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”.*

It is to be noted here that the sub-rule 3 and 4 do not mention the word or murder of the High Court. The instead words used are “**Superior court**” and “**its seriousness**”. The pleas in this case was taken on 30.10.2003. The Counsel submits that in view of the above provinces accused is entitled to be released that, provision being in mandatory terms.

For the state, learned Counsel Mr. Ademba in opposition submitted that the period of 12 months has not

yet expired. He further submitted that the children Rules are subsidiary legislation and should not prevail and that furthermore it is against the public policy to release a person charged with an offence, the punishment of which is death. The society expects such offenders to be punished.

After hearing submissions of both counsel, I find that it is necessary to interpret the Children Offenders Act to find out what Parliament intended by enacting the Act particularly with regard to Children Offenders Rules. This Act is an Act modeled on the International Convention of the Rights of Children of the world. Previously the rights of children were contained in 3 statutes namely:-

- a) The Children & Young Persons Act.
- b) The Adoption Act
- c) The Guardianship of infants Act.

These Acts have been repealed on the enactment of Children Act 2001. The preamble of the Act states:-

*“An Act of Parliament to make provision for parental responsibility, fostering, adoption custody, maintenance guardianship, care and protection of children, to make provision for the administration of children’s institutions to give effect to the principals of the Convention of Rights of the child and the African Charter on the rights and welfare of the child and for connected purposes”.*

The preamble states the facts or state of the law for which it is proposed to regulate by the statute.

*“if any doubt arises from the terms employed by the legislature it has always been held a safe means of collecting the intention to call the ground and cause of making the statute and to have recourse to the preamble, which according to Chief Justice, Dyer in Stowel –vs- Lord Zouch 1562 is a key to open the mind of the maker of the Act and the mischiefs which they intended to redress”.*

However it is a basic law of interpretation that the preamble cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous words. This was said by the House lords in the modern case of Powell –vs- Kempton Park Racecourse Co. (1899) A.C. 193

It is my view that the purpose and the mischief the Children Act was enacted to redress is very clear. It is to give protection to the child by extending the rights of parental responsibility in being placed in fostering, in being adopted, being placed in custody, the maintenance, in appointment of guardianship, care and protection and to give effect to the principles of universal rights of the child. Therefore, the Act has a part XIII dealing exclusively with the arrest remand and detention and trial of child offenders.

That part reserves the trial of child offender to Children Court except in the offence of murder which is reserved to be tried in the High Court. As I said, that is the offence in this case. This part makes provision as to jurisdiction of court in Criminal matters, guarantees to a child accused of an offence, the atmosphere of the children’s court restrictions of punishment, and in this regard Section 190 (1) provides no child shall be ordered to imprisonment or to be placed in detention camp and Section 190 (2) no child shall be sentenced to death. The punishments that may be meted out to child offender are specified under Section 191. It will be noticed that some of the specified punishments are also contained in the Penal Code (Cap 63) as punishment of an offender in ordinary cases.

It will also be seen that while those convicted of murder have to be punished by death in case of child offender, no punishment by death is permitted. The procedure arrest and charge and provisions as to bail and remand arrangements of a child offender and the organization for court in certain cases to shield the children cases of death or morality is set out clearly. The period of remand are stated as six months in case of offence punishable with death. And rule 12 in case of serious offence the trial must be completed within 12 months failing which the child offender shall be discharged and case shall be dismissed and the child offender shall not be made liable again for the same offence. These provisions are at variance with provisions with the ordinary procedure of conducting criminal cases. The penal code Cap 63 Section 204

provides death penalty for the offence of murder.

Criminal Procedure Code Cap 75 provides the procedure to be followed in a trial on a charge of murder. After plea of Not Guilty the arrangements for trial shall be made and the trial shall take its course until its completion. There is no time limited for completing the trial. Except however, it is a guarantee of human right that the trial shall be conducted “**within a reasonable time**” Section 77(1) Constitution. The Children Act therefore has changed the procedure drastically in favour of child offender by saying that simply because the time has expired the court must without examining the merits of the charge murder must be dismissed and the child offender walk away free. Is this what parliament intended? The State Counsel says it cannot be. He submitted the Act and Rules are in consistent with the Constitution. Section 70 and 72 and Criminal Penal Code Section 123. He referred to the ruling made in this file by Hon. Mr. Justice Maraga regarding the question of bail under r rule 12/10 where the judge expressed his view that such inconsistency exists.

In the present case the court is being asked to terminate this case before hearing any witnesses. Counsel further submitted that it is against public policy to terminate the proceedings at this stage.

The issue of rules being subsidiary legislation it will be observed that Section 194(1) of the Act simply says-

*“proceedings in respect of a child accused of having infringed any law shall be conducted in accordance with the rules set out in the fifth schedule 194 (2) the Minister by regulations may amend the rules in accordance with subsection (1) (above).”*

Upon examination of the scheme of the whole Act it does appear to me the fifth schedule is to be read as part of the statute not a subsidiary made after the enactment which has to be laid before parliament for approval. It will be seen that Section 22(3) power to make rules is left to Chief Justice. Similarly with section 29, 112 and 183. However, section 72 the Minister may make regulations and under Section 152 the parliament had before their eyes rules contained in the rules contained in the “**4<sup>th</sup> schedule**” but power to amend given to the Chief Justice under section 153. With regard to Section 194(1) the rules set out under 5<sup>th</sup> schedule were before the eyes of the legislature at the material time but power to amend by regulations was given to the Minister. It is correct therefore to say that the rules contained in the 5<sup>th</sup> schedule are as much part of statute and as much enactment as any other party. Considering what I have stated above I am convinced that the intention of parliament in enacting Section 194 and the fifth schedule “**Children Cffender Rules**” Parliament intended to make law just as they have written. The meaning of the Section is clear and unambiguous. No amendments appear to have been made by the Minister yet or parliament intended Kenya to stand shoulder to shoulder with other nations of the world to protect the rights of the children of the world. And this is in keeping with modern international law.

It is clear to me that they meant just as they stated that the child offenders trial shall not be unduly delayed beyond the period of 12 months. This is also in keeping with the Constitution Section 72 thereof. From the record the period of 12 months shall expire on 30-10-04. I allow this application and order that if the accused trial shall not have been completed on that day (30-10-04) he MK shall be discharged and be set at liberty immediately.

Dated this 27<sup>th</sup> day of October 2004.

**J. KHAMINWA**

JUDGE

**27-10-04**

Mrs. Mwangi - I apply for a copy of the ruling.

Court - Let the same be supplied forthwith.

J. KHAMINWA

**JUDGE**

Assessors present to be paid today's allowances.