Otieno alias Toto v Republic (Criminal Revision E001 of 2024)
[2024] KEHC 941 (KLR) (7 February 2024) (Ruling)

Neutral citation: [2024] KEHC 941 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL REVISION E001 OF 2024

RE ABURILI, J

FEBRUARY 7, 2024

BETWEEN

FELIX ODHIAMBO OTIENO ALIAS TOTO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(From the original finding of guilt and Committal to Shikusa Borstal Institution in Chief Magistrate's Court Sexual Offences Case Nos. 11 and 13 of 2020 at Kisumu)

RULING

1. On 5th July 2022, the subject F.O.O who is a minor who was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* was committed to Shikusa Borstal Institution for a period of three (3) years which ran from 8th April 2022 when he was found to be in conflict with the law vide Kisumu Chief Magistrate Sexual Offences Case No. 11 of 2020.

2. The minor then aged 16 years as at the time of such committal is therefore expected to remain at the Shikusa Borstal Institution for the next 3 years from 8th April 2022 to 8th April 2025.

3. The victim of the defilement charge was aged 3 years old, a child of a neighbour to the subject. The offence is stated to have been committed on diverse dates between December 2019 and March 2020 at Kaluoro area in Nyalenda 'B' Sub-location in Kisumu Central Sub-county within Kisumu County. As at that time, the subject was aged 14 years.

4. The court when committing the subject to Shikusa Borstal Institution directed that at the Borstal Institution, he should continue with his education and be availed to court during the hearing of another defilement case which was Sexual Offence Case No. 13 of 2020.

5. It so happens that the same subject, vide Kisumu Chief Magistrate Sexual Offences Case No. 13 of 2020, he defiled another victim aged 5 years, W.A.O. The charge sheets in Sexual Offences Case No.

13 of 2020 and Sexual Offences Case No. 11 of 2020 show that the period or dates that the victims in both case files were defiled, were the same, the place was also the same. The victims are sisters and the witnesses are therefore the same.

6. What this court wonders is, why the two charges were not consolidated into one charge sheet so that two counts of defilement are tried together. This was necessary because the victims were defiled at the same time and place by the same subject and the subject being a minor, this would avoid hardship and the inconvenience of the cases being heard at different times and witnesses travelling to court at different times.

7. I also note that the witnesses in the two cases were the same although the hearing was conducted by two different magistrates. That aside, the subject was a student and despite his denial, he was found culpable of defiling the two children of tender ages of 3 years and 5 years respectively.

8. The subject has not appealed against any of the findings of guilt and or the committals to the Shikusa Borstal Institution.

9. In the Sexual Offences Case No. 13 of 2020, which was concluded much later on 11th December 2023, upon the court finding the subject guilty of the offence of defilement, and after hearing mitigations seeking for non-custodial sentence and leniency of the court, the trial court asked for a Children's Officer's Report. However, it is the Probation Officer who filed a report dated 15th January 2024 which the court considered before committing him to Shikusa Borstal Institution for a period of three years, which term will commence after the subject finalizes the three year committal that he is currently serving for the earlier case in SO 11 of 2020.

10. This court does appreciate the dilemma of the trial court since it could not have reviewed the committal order imposed by the other magistrate in Sexual Offences Case No. 11 of 2020 which the subject was still serving, as the court had no powers to review the other sentence which was being served by the subject so that the subject could now serve probation or non-custodial as proposed by the probation officer.

11. On whether the trial court should have given a non-custodial order as proposed by the subject's counsel, and in view of the Probation Officer's report that the subject had reformed and that he wanted to go back to school hence he needed a second chance, my view is that the trial court could not have done so, as that would have had the effect of reviewing the earlier committal and therefore discharging the minor from the Borstal Institution.

12. The Probation Officer's report then recommended that the subject be released on suspended sentence owing to the fact that upon release from the Borstal Institution, he would undergo a Mandatory supervision for two years whose terms and conditions are not fundamentally different from that of a Probation Order. Secondly, that the home environment is conducive to his reintegration since the families of the subject and the victims had reconciled and co-exist harmoniously, unlike in the first instance.

13. It is important to note that sexual offences are not subject to mediation or Alternative Justice System approaches except, off course, where the offender is a minor like in the instant case.

14. It should also be noted that what the Probation Officer was suggesting to the court could not be granted by the court as the subject was already serving a lawful committal at the Borstal Institution. I therefore find no illegality in the committal order by the trial court.

15. What I find irregular is the fact that the trial court ought to have been aware that by 8th April 2025, the subject will be 18-19 years old and at that age, he would no longer be a minor to serve the extra three

years at the Borstal Institution. In other words, the minor would have outgrown the age for custody at the Borstal institution.

16. The only way that the trial court could have assisted the subject is to suspend the sentence until the subject completes the 3 years committal before deciding what punishment would be appropriate for him, and in line with the *Children's Act* 2022.

17. Section 225(1) of the *Children's Act*, 2022, provides that every court in dealing with a child who is brought before it shall have regard to the best interests of the child and shall, in a proper case take steps for removing him or her from undesirable surroundings and for securing that proper provision may be made for his or her maintenance, education and training.

18. In addition, Section 239 of the *Children's Act* 2022 provides for methods of dealing with children in conflict with the law.

19. Under Section 239(b), the orders imposed on a child upon a finding of guilt shall be proportionate to the circumstances of the child, the nature of the offence and the public interest, and a child shall not be treated more severely than an adult would have been treated in the same circumstances.

20. With the above considerations, it is clear that whereas the trial court had no option but to commit the child as by law as any other order would have had the effect of reviewing the orders made in Sexual Offences Case No. 11 of 2020 and without jurisdiction, I find that the prosecution of the child should have taken into account the best interests of the subject as well as the victims who are very, very young indeed and it is unfortunate that a 14 year old embarked on the journey of growing up the wrong way by defiling toddlers.

21. In the instant case, the best interest of the subject who was only 14 years would have been the joinder of charges by charging the subject with two counts of defilement.

22. A count constitutes a single offence alleged to have been committed. It is permissible in law for several offences to be charged together provided they are founded on the same facts or form part of a series of offences of the same or similar character.

23. Joinder of counts prevents a situation where two or more of separate trials are held with the same witnesses being recalled to repeat the same evidence, which exercise would be time and resource consuming and an inconvenience and therefore courts only order for separate trials where they feel that the accused may be embarrassed or prejudiced in his defence by reasons of an overloaded charge sheet (see Section 135 of the *Criminal Procedure Code*).

24. In this case, the witnesses in the two cases were the same, save for the complainant victims.

25. Section 136 (a-f) of the *Criminal Procedure Code* also allows the joinder of more than one person to be joined in one charge sheet and albeit the offences were committed against different persons/victims, they took place at the same time and same place.

26. By separating the two charges of defilement against two minor sisters, which offences took place at the same place and time, this in my view was not in the best interest of the subject herein and was also a great inconvenience to the witnesses who were the same and had to travel to court at different times to testify against the same subject offender before different magistrates.

27. It is that situation that has caused the irregularity which I observe, that the trial Magistrate was in a dilemma as to how to treat the second finding of guilt such that not even the Probation report could offer the solution.

28. Regrettably, under Section 2 of the *Borstal Institutions Act*, a youthful offender who can be admitted or committed to the Borstal institution is one who at the time of being found guilty of the offence charged and tried and has attained the age of fifteen years but to be under the age of 18 years. The maximum period that a youthful offender can be held at the Borstal institution is three years.

29. It follows that sending the subject to the Borstal Institution for 3 years to take effect consecutive with the earlier committal in SO 11 of 2020, after the subject has finalised the initial 3 years which will be after he attains 19 years would be illegal. The Principal Prosecution Counsel Mr. Marete therefore rightly conceded to this aspect.

30. I must however endeavour to resolve this dilemma and guidance can be found in the persuasive decision of Prof Joel Ngugi J as he then was in the High Court at Nakuru in *Republic V PMK* Nakuru High court Criminal case No. 71 of 2016, [2018] eKLR. In that case, the learned Judge after finding the subject minor guilty of murder under section 204 of the Penal Code, had the subject committed to Shikusa Borstal Institution for three years and ordered further that upon the subject attaining 18 years, he was to be transferred to an adult prison to serve another two years so as to be rehabilitated and to reform. The rationale for this was, and I concur, that three years in a Borstal Institution was insufficient to reform and rehabilitate the subject offender.

31. I will cite the decision of the Court here in extenso. This is what the learned professor stated:

> 14 I dealt with the lacuna in the law regarding juvenile justice in Nakuru Criminal Petition No. 3 of 2015: *Daniel Langat v R*. After citing from two recent Court of Appeal decisions (*R v Dennis Kirui Cheruiyo*t [2014] eKLR and *JKK v Republic* (2013) eKLR), I remarked as follows:
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> > By relying on section 191(1)(l) of the *Children's Act* to fashion an appropriate sentence for the child offender in both cases, the Court of Appeal is drawing attention to the lacuna in our law regarding juvenile justice. Our statutory scheme envisages only two types of offenders: child offenders – those who are under eighteen years old – and adult offenders – those who have attained eighteen years of age. The statutory scheme does not, in any nuanced manner, distinguish the different developmental stages of children – especially those in teenage years who are, typically, both in need of care and protection but can be dangerous to the society due to their deviant behaviour. The statutory scheme stipulates that a child above sixteen years old can only be held in a borstal institution for a period not exceeding three years.
> >
> > This often creates a dilemma for trial courts which may be faced with a juvenile who is only slightly below eighteen years old but who committed a serious offence such as (depraved heart) murder or rape or particularly vicious armed robbery. Since the statutory scheme provides that such a child cannot be sent to prison and since the law further provides that such a child can only be sent to a borstal institution for no more than three years, the options are limited to trial Courts even where on analysis and evidence such a Court might be persuaded that the almost-adult it is dealing with is a danger to society; and has failed to acknowledge or come to terms with his or her errors.
> >
> > A similar dilemma is created when the offender has already turned eighteen at the time of conviction or at the time of appeal as is the case here. Where the offence committed was a particularly vicious or serious one, the option of releasing such

an offender back to the society is not an attractive one. It may even be downright dangerous for the society. Further, it might deny the individual offender a true opportunity to reflect on his actions in a custodial setting and take the rehabilitative turn.

15. This case squarely presents the dilemma I pointed out above. Still, in the circumstances, I am required to use all the tools at my disposal to fashion an appropriate sentence for the Subject. In doing so, I will rely on section 191(1)(l) of the *Children's Act*. I am properly guided by the best interests of the Subject; the need to rehabilitate him as well as the need to fit the punishment to the crime as a way of enunciating the society's denunciation of the criminal act by the Subject. Further, I have taken into consideration that the almost-adult Subject is, at least at present, a danger to his family and society and there is need to give him an opportunity to reflect on his actions so that he can take the truly reformation and rehabilitative turn.

16. I am also convinced that in the circumstances of this case, the maximum three years to which the Subject can be sent to aBorstal Institution is not sufficient custodial sentence to serve the triple purpose of communicating the society's strong condemnation of the Subject's actions; the need to rehabilitate the Subject and giving him an opportunity to reflect on his actions; and the need to protect the family and public at large from the violent tendencies of the Subject.

17. According to our laws, the Subject can only be held in custody in a Borstal Institution for a maximum of three (3) years. In the present case, my view is that this period is not enough to fully rehabilitate the Subject and to ensure public and family safety and security.

18. Looking at the tapestry of our laws related to children who are in conflict with the law, I have not seen anything that prohibits a combination sentence in a Borstal Institution and, after serving in such a Borstal Institution, having reached the age of majority, to continue serving in an adult prison.

19. In the circumstances of this case, therefore, I sentence the Subject as follows:

    a. He shall be held in custody at Shikusa Borstal Institution for a period of three years.

    b. Thereafter, the Subject shall be transferred to an adult prison to serve a further sentence of two years.

32. What the above decision essentially says is that the trial court in this case having faced the dilemma that she did, she could have applied the above decision.

33. Accordingly, having called into this court Kisumu Chief Magistrate Sexual Offences Case No. 11 of 2020 and SO 13 of 2020, I hereby revise the findings of the trial court in Sexual Offences Case No. 11 of 2020 and 13 of 2020 and direct that the committal of the subject to Shikusa Borstal Institution for 3 years in Sexual Offences Case No. 13 of 2020 is hereby quashed and set aside and substituted with an order placing the subject on probation for a period of two years from date of release from Borstal Institution upon service of this order by the probation officer.

34. Regarding Sexual Offences Case No. 11 of 2020 wherein the subject is serving his second year at Shikusa Borstal Institution, as the probation report is positive that the subject has reformed and ready to be reintegrated back into the society despite the heinous offence committed against the two minors, I revise the order of committal and substitute it with an order that the subject shall now be released to serve two years' probation to be closely supervised by the probation officer who will be filing reports to this court on the conduct and behaviour of the subject and on a monthly basis from date of service of this order.

35. Accordingly, the two non-custodial (probation orders) as issued herein shall be served concurrently

36. This Ruling and order to be served upon the trial court at the Chief Magistrate's Court at Kisumu and the Officer in-charge, Shikusa Borstal Institution for compliance.

37. The two lower court files to be returned forthwith.

38. This file is closed.

I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 7TH DAY OF FEBRUARY, 2024

R. E. ABURILI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR