SK v Republic (Criminal Revision E004 of 2023)
[2023] KEHC 670 (KLR) (14 February 2023) (Ruling)

Neutral citation: [2023] KEHC 670 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL REVISION E004 OF 2023

HM NYAGA, J

FEBRUARY 14, 2023

BETWEEN

SK ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. This court has been invited by the applicant's advocate, to exercise its power of revision under Section 362 of the *Criminal Procedure Code* (CPC).

2. In a letter dated January 31, 2023 advocate for the Applicant invoked the court's powers on the following grounds:-

    a. That the trial court failed to recognize that the applicant was under 18 years old at the time of alleged commission of the offence. As a result, a minor was condemned to serve a custodial sentence in an adult facility contrary to express facility contrary to express provisions of the law.

    b. That the applicant was not provided the necessary protection in law by the trial court including the right to legal representation.

    c. That the trial magistrate erred in admitting the charge sheet with 5 suspects without ascertaining the age of each suspect.

d. The applicant was not informed of the gravity of the offence, that the court had the responsibility of assisting the applicant through the proceedings as provided for the *Constitution* under Article 50(2) (h).

> "1. (h) (An accused person has a right) to have an advocate assigned to the accused person by the State and at State expense, if substancial injustice would otherwise result, and to be informed of this right promptly;"

e. That the applicant was at the time of the trial left on his own to conduct a hearing of an offence which was complex and which attracts a minimum sentence of 6 months imprisonment for each count contrary to provisions of Section 222 of the *Children's Act, 2022* which reserves the right to legal representation and the right to the presence of a parent of guardian.

f. The Applicant was also charged with criminal offence where she sought to have been considered to be in need of care and protection.

g. The Applicant seek that the court finds that he was minor under age at the time of commission of the alleged offence, that he had a right to be accorded legal representation at the expense of the state. That the charges should be quashed and acquit the subject.

3. The gist of the application is that the applicant was and is a child under the law and as such, the sentencing was unlawful and contrary to the provision of Section 222 of the C*hildren's Act 2022*.

4. Even without going to the merits of the matter, I have noted some glaring errors in the proceedings in the lower court record.

5. From the court record, it is not known which court/ magistrate tried the applicant and his co-accused. The Coram section is blank to that effect. Further it is not known who the prosecutor was, who the court assistant/interpreter was and in what language the charges were read to the accused. The coram section is actually blank!

6. In *Julius Matheka and 2 Others vs Republic*; Criminal Appeal Number 83 of 2002, the court considered a case where the magistrate had failed to record the Coram as stated as follows;

> a. "Although no authority was referred to us on the submission, we are aware of this court's decision in Bernard Lolimo Ekimat Vs Republic Cr Appeal Case No 151 of 2004 (ur) where the trial was declared a nullity on account of the failure by the trial magistrate to record the coram the one day the trial commenced and was concluded. The only record visible on that day was, "order: hearing to proceed." The preceding record made 12 days earlier was simply, "coram as before," while a week earlier the case was for mention only had no full coram was recorded. The full record of the coram appears to have been made only at the time of taking the plea in the case. With respect, the appeal before us is distinguishable on the facts and we are not inclined to apply our earlier decision to this appeal. This court has nonetheless had occasion to stress, and it bears repeating, the need to keep clear records of proceedings and has, in particular, deprecated the use of such abbreviations as are complained about in this matter. They betray unacceptable levels of indolence even when it is appreciated that trial magistrates work under pressure from the numerous trials and mentions of cases that come before them daily."

7. On the issue of the language used, I refer to the decision in the case of *Kiyato vs Republic* (1982 – 1988) KAR 418 in which the Court stated that;

   a. "(1) It is fundamental right, under the Constitution of Kenya Section 77 (2) (the old constitution) that an accused person is entitled without payment, to the services of an interpreter who can translate the evidence to him and through whom he can put questions to the witnesses, make statutory statement, or give his evidence. Moreover, the Criminal Procedure Code (Cap 75) section 198 (1) also requires that evidence should be interpreted to an accused person in a language that he understands.

   b. (2) It is the standard practice in the courts to record the nature of the interpretation used or the name of the interpreter. The trial magistrate in this case made no note of the language into which the evidence of the witnesses was being interpreted.

   c. (3) There had been no compliance with the Constitution of Kenya section 77(2) and the Criminal Procedure Code (Cap 75) section 198 (1) in this case....."

   d. In view of the short comings clearly shown in this judgment of the trial court, we find that there is a basis for the state to conceed to the appellant's appeal...."

8. This court has powers under section 365 of the *CPC* to request the parties to address the court on Revision, but in this instance, the error on the court record is fundamental and no amount of submissions by the state can cure it.

9. I find that the proceedings of January 20, 2023 were a nullity and I proceed to quash the conviction of the applicant. By the same breath the other convictions are quashed for the same reasons.

10. While I appreciate that the magistrate's courts, especially those dealing with the so called petty cases may be working under immense pressure, it is important that the basics of a trial are in place. It may be that even the trial magistrate, who from the warrant of commitment to prison appears to have been Hon R Kefa (Principal Magistrate), was so busy that he/she failed to notice the missing Coram.

11. I would urge that trial courts do take extra care in recording court proceedings.

12. Having quashed the convictions, the next question is the order to make. Should I refer the matter back to the magistrate's court for fresh plea taking or set the applicant at liberty?

13. I note that the Applicant has already served over three (3) weeks in custody. The offence he was charged with is a misdemeanour. I am of the view that a retrial would not be in the best interest of the Applicant.

14. I therefore order that the Applicant be set at liberty unless he is lawfully held.

15. I further direct that the 2nd accused in the lower court case, namely John Barasa, if still in custody to also be set at liberty forthwith unless lawfully held.

16. As for the accused who had paid the fine, I refrain from addressing their issue at this stage.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 14TH DAY OF FEBRUARY, 2023.

HESTON M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Ms Sabaya For Applicant

Ms Murunga For the State/Respondent