



REPUBLIC OF KENYA



**AK v Republic (Criminal Revision E116 of 2023)
[2023] KEHC 22468 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22468 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL REVISION E116 OF 2023
RE ABURILI, J
SEPTEMBER 21, 2023**

BETWEEN

AK APPLICANT

AND

REPUBLIC RESPONDENT

*(From the original conviction and sentence in Senior Principal Magistrate's
Court Criminal Sexual Offences Case No. E026 of 2022 at Tamu)*

RULING

1. This file was opened before this court as a revision file. The original trial court file is Tamu SPM, Sexual Offences Case No. E026 of 2022, Republic vs AK. The accused, AK now convict was charged, tried and convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of the [Sexual Offences Act](#).
2. The offence is stated to have been committed between and on the diverse dates of July 2021 to December 2022 in Kipteris location, Chilchila Division in Kipkelion West Sub-county.
3. The child who is the complainant is MC, aged 14 years old. The accused/convict pleaded not guilty to the charge and the case proceeded to full trial. The convict was released on bond pending trial on January 5, 2023 after taking plea on December 28, 2022.
4. Upon conviction by the court vide judgment delivered on September 14, 2023, the convict mitigated and the court sentenced him to serve twenty (20) years imprisonment.
5. On September 18, 2023, the trial court was confronted with a situation which necessitated him to make orders asking this court to review the sentence imposed on the convict on account that the age assessment Report shows that the convict was seventeen (17) years old.



6. I observe that in the trial court record, the convict AK was taken for age assessment on January 17, 2023 at Kericho District Hospital and an examination by Nancy Wendy, a Medical Officer reveals, according to the Age Assessment, that the accused was 17 years of age. The assessment of age was conducted upon the trial court issuing an order on December 28, 2022.
7. That being the case, it is clear that as at the time that the trial court heard and convicted and sentenced the accused to a prison term of twenty (20) years, it ought to have known that the accused was a minor but due to inadvertence, the issue of age never crossed the mind of the trial court and it was only after sentencing that it came to his realisation that the convict was a minor hence the request for revision of sentence.
8. The Children's Act, 2022 came into effect on July 12, 2022 while the charge against the convict was registered on 28th December 2022 hence the proceedings against the convict were to be conducted in accordance with the provisions of the *Sexual Offences Act* and the Children's Act, No. 29 of 2022 specifically, Part XV of the Act which deals with Children in conflict with the law. That procedure is stipulated in section 224 of the new Children's Act No. 29 of 2022.
9. The Act at Section 237 thereof also prohibits the use of the words conviction and sentence of a child in conflict with the law and there are restrictions on punishment at section 238 while section 239 provides for methods of dealing with children in conflict with the law.
10. Section 219(1) of the Act provides for the power of the trial court to remit cases involving children to the children's court having jurisdiction although the proviso thereof does not invalidate proceedings commenced and concluded in a court which is not a Children's Court. The right of the child offender to a fair trial is guaranteed under *the Constitution* at article 50 and reiterated in section 222 of the Children's Act, 2022. Among those rights is the right to legal representation and presence of their parent or guardian during the hearing.
11. In this case, after taking plea, which was done before age assessment, the trial court observed that "probono advocate to be retained should the age assessment show that he is a minor."
12. However, even after the age assessment report was filed on January 17, 2023, no attention was given to it and the case proceeded to hearing as if the suspect was an adult and judgment rendered and prison term sentence of 20 years imposed.
13. Furthermore, there is no evidence that section 233 of the Act was complied with by the court, which section which provides for assistance to child offender in court.
14. Under Section 239 of the Act, the court is given powers on how to deal with a child who is tried and found guilty of the offence. Other than Borstal Institution as a custodial place for a child who is found guilty, prison term is not one of the modes of punishment to be meted out to a child found guilty of an offence.
15. In this case, the offender was found to be aged 17 years when his age was assessed long before commencement of the hearing.
16. It was therefore erroneous for the trial court to have proceeded with the trial of the child offender as if he was an adult and further failed to adhere to the provisions of the law that guarantee child offenders rights and assistance by the trial court.
17. Thus, in this case, apart from the sentence imposed on the now child offender, which sentence is obviously illegal, I find and hold that the child offender suffered a mistrial as stated above.



18. For the above reasons, I find and hold that the conviction of the child offender AK on September 14, 2023 cannot stand. It is hereby set aside and quashed.
19. Consequently, the illegal sentence of twenty (20) years imprisonment imposed on the child offender is hereby set aside.
20. The next question is whether the convicted minor should be set free or should the court order a retrial, bearing in mind the maxim that justice cuts both ways. Musyoka J in *Harrison Ochilo v Republic* [2020] eKLR dealt with the same issue and cited the case of *Obedi Kilonzo Kevevo Vs. Republic* [2015] eKLR, where the Court of Appeal held that:

“Generally, where a suspect has not had a satisfactory trial, the fairest and proper order to make is an order for a retrial. A retrial on the other hand will be ordered only where the interests of justice require it and if it is unlikely to cause injustice to the appellant. In the case of *Muiruri vs. Republic* (2003) KLR 552, the court considered a similar situation and held as follows, inter alia:-

“Generally whether a re-trial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.”

21. In *Jackson Githinji Karani vs. Republic* [2019] eKLR, the court observed that:

“The criminal justice system requires that the court balances the rights of the accused and those of the victim and the society at large.”

Where the trial was flawed, the court orders a retrial. This calls for consideration as to whether the accused has had a proper trial. A retrial will be ordered where a trial was illegal or defective. This depends on the circumstances of each case. A retrial will be ordered where the interests of justice so require and will not occasion an injustice to the appellant.

In the Case of *Muiruri –vs- Republic* (2003) KLR 552, the court considered a similar situation and held as follows, inter alia:

“Generally whether a retrial should be ordered or not must depend on the circumstances of the case.

It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.”

22. The same principle was applied in the case of *William Ambetsa vs. Republic* [2019] eKLR. See also
23. The appellant herein was charged with the offence of defilement which carries a heavy penalty for adult offenders and that is why he was sentenced to a 20-year prison term. Save for the failure of the trial court to follow the procedure for trials of minors, the evidence on record appears to be fairly strong.



24. For that reason, I find that it is in the interest of justice to order for a retrial of the child offender. I hereby order that the child offender AK shall be presented to Kericho Police station forthwith for presentation before Kericho Children's Court for a retrial before a court with jurisdiction over children's matters and the trial process shall adhere strictly to the provisions of the *Children's Act*, 2022.
25. This ruling and order to be served upon ODP, Tamu and Kisumu Regional office.
26. This file is closed.
27. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF SEPTEMBER, 2023

R. E. ABURILI

JUDGE

