



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kitheka v Republic (Criminal Appeal 51 of 2019)
[2021] KEHC 5447 (KLR) (18 June 2021) (Judgment)**

Juma Kitheka v Republic [2021] eKLR

Neutral citation: [2021] KEHC 5447 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL 51 OF 2019**

A. ONG'INJO, J

JUNE 18, 2021

BETWEEN

JUMA KITHEKA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction and sentence passed by Hon.
E. Kagoni PM on 29.8.19 in Kwale CMC S.O No. 414 of 2013)*

The sentence of 20 years' imprisonment imposed on a child was illegal as it violated article 53 (1) (f) of the Constitution of Kenya 2010

The case underscored the need for courts to order for age assessment of a child offender before commencement of a trial. It found that determining the age of a child was important because it played a vital role in helping the court decide on how to sentence the child offender. While discussing and applying the provisions of section 6 (1) of the Borstal Institutions Act it held that that the maximum sentence which could be imposed to a child with the age of 16 years was 3 years.

Reported by Moses Rotich

Constitutional Law - Bill of Rights - rights of a child - the right of a child not to be detained except as a measure of last resort - principle of the best interests of a child - where the appellant, being a minor, was charged with the offence of defilement - appellant convicted and sentenced to 20 years' imprisonment by the trial court - appellant detained together with adults - whether the sentence of 20 years' imprisonment imposed on the appellant who was a minor aged 16 years at the time of commission of the offence was lawful - Constitution of Kenya, 2010, articles 53(1)(f) and 53(2); Children Act, 2001, section 190 - Sexual Offences Act, No 3 of 2006, sections 8(1) and 8(3).

Brief facts

The appellant (a minor) was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, No 3 of 2006 (Sexual Offences Act). After trial, the trial court convicted him



of defilement and sentenced him to 20 years' imprisonment. Aggrieved by the judgment of the trial court, the appellant filed an appeal on both conviction and sentence. The appellant contended that the trial court erred in convicting him of defilement without considering that the age of the complainant was not proved. Further, it was the appellant's contention that the complainant deceived him into believing that she was above 18 years old. The appellant argued that the sentence of 20 years' imprisonment imposed on him by the trial court was harsh, unfair, unjust and unconstitutional given that he was a minor at the time of commission of the offence.

Issues

- i. Whether the sentence of 20 years' imprisonment imposed on the appellant, who was a minor at the time of commission of the offence was lawful.

Held

1. There was need to emphasize that a child remained a child whether the victim of the offence or a child in conflict with the law. From the record, the appellant did not have any legal assistance. Before the appellant was granted bond he was detained together with adults.
2. Considering that the appellant was charged with an offence that attracted a heavy jail term, his age ought to have been considered by the trial court since it played an important role, in case the appellant was found guilty. The appellant ought to have been sentenced as a minor hence the sentence of 20 years' imprisonment imposed on him by the trial court was illegal.
3. According to section 6(1) of the Borstal Institutions Act, Cap 92 Laws of Kenya, it was clear that the maximum sentence which could be imposed on a child of the age of 16 years was 3 years.
4. During the time of commission of the offence the appellant was 15 years old and the complainant was aged 14 years old. If the trial court had addressed the issue of age of the appellant, it would not have imposed a sentence of 20 years' imprisonment on the appellant.

Appeal allowed.

Orders

The appellant was set at liberty unless otherwise lawfully held.

Citations

Cases

Kenya

1. *JWM v Republic* Criminal Appeal 20 of 2012; [2014] eKLR - (Explained)
2. *POO (A Minor) v Director of Public Prosecutions & another* Constitutional Petition 1 of 2017; [2017] KEHC 8341 (KLR) - (Explained)

Regional Court

Okeno v Republic [1972] EA 32 - (Explained)

Statutes

Kenya

1. Borstal Institutions Act (cap 92) section 6(1) - (Interpreted)
2. Children Act (cap 141) sections 4(2); 18(3)(4) - (Interpreted)
3. Constitution of Kenya article 53(1)(e) - (Interpreted)
4. Sexual Offences Act (cap 63A) section 8(1)(3)(5) - (Interpreted)

Advocates

Ms Karanja for the respondent



JUDGMENT

Introduction

1. Juma Kitheka was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006.
2. After trial, the trial court found the appellant guilty of the offence and he was convicted and sentenced to serve twenty (20) years imprisonment.
3. Being aggrieved by the conviction and sentence, the appellant filed his appeal on the following grounds:
 - a) That the learned trial magistrate erred in law and fact in convicting me the appellant considering that age being an essential element in a case of defilement was not proved beyond reasonable doubt.
 - b) That the learned trial court magistrate erred in law and fact in convicting me the appellant without that I appellant had a consensual sexual intercourse and that the complainant herein deceived the appellant into believing that she was above the age of 18 years pursuant to section 8(5) of the *Sexual Offences Act* No 3 of 2006.
 - c) That the learned trial court magistrate erred in law and fact in convicting me the appellant without considering that charges that were brought against me the appellant were born out malice and ill-will.
 - d) That the learned trial court magistrate erred in law and convicting me the appellant without considering that the sentence meted out on me the appellant was harsh, unfair, unjust, unconstitutional and unproportional to the offence committed.
 - e) That the learned trial court magistrate erred in law and fact in convicting me appellant without considering that my rights as a child were greatly and continue to be violated contrary to article 53 of the *Constitution*.

Submissions

4. The appellant filed his written submissions and relied on the same. The appellant submitted that the age of the complainant was not ascertained. He submitted that the birth certificate was not adduced in court and if it was adduced, then it was not admitted in evidence. He submitted that there was also no age assessment, baptismal card in the trial court file.
5. The appellant submitted that he was deceived into believing that the complainant was an adult of over 18 years and the trial court ought to have considered it as a defence.
6. He submitted that the charges against him were lodged out of ill-will. That he had a relationship with the complainant, which even her parents knew about it but the dispute arose when he got the complainant pregnant and denied it and also refused to pay some money as demanded by the complainant's family.
7. The appellant submitted that the sentence meted out on him by the trial court was harsh, unfair, unjust, unconstitutional and unproportional. This is because he was having consensual sex with the complainant and has a right to bring up his child under article 53(1)(e) of the *Constitution*.



8. The appellant submitted that he was a child during his arrest and he was entitled both in the Constitution and in the Children Act to protection. He submitted that he should have been subjected to age assessment to ascertain his real age.
9. The respondent submitted that at the time of the arrest, the appellant was a juvenile, he did not possess an identification card. There is no record of the trial court having addressed itself to this fact as it was not brought up either by the appellant, prosecution nor did the court look into the same *suo moto*. Respondent submitted further that the appellant produced an age assessment form dated March 8, 2021 which states the appellant's approximate age as 24 years old at March 8, 2021. This means that in 2012 at the time of offence the appellant was 15 years old.
10. The respondent submitted that the appellant's rights as a minor were infringed upon. The trial court ought to have protected the rights of the appellant as a minor and accorded him the legal safeguards guaranteed for fair trial as per the constitution and the Children's Act. therefore, the court sentencing of the appellant to 20 years' imprisonment went contrary to the provisions of the Children's Act.

Determination.

11. This being the first appellate court, it is imperative that I must examine and analyze all the evidence adduced in the trial court afresh and arrive at my own independent finding and conclusions on both the facts and the law. This is the principle espoused in a plethora of cases including *Okeno v Republic* [1972] EA 32 where the Court of Appeal on the duty of the court on a first appeal held that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R*, [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M Ruwala v R*, [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post*, [1958] EA 424.”

12. I have perused the record of appeal and from the charge sheet it is evident that the appellant was charged and convicted for the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No 3 of 2006. From the said charge sheet, it is noteworthy that the apparent age of the appellant at the time he was arraigned in court is indicated as juvenile. By an order dated January 25, 2021, the Officer in Charge GK Prison Shimo la Tewa was instructed to escort the appellant to Coast General Hospital for age assessment as a result of the appellants ground no 5 where he complained that the trial Magistrate convicted him without considering his rights as a child were greatly violated contrary to article 53 of the Constitution.
13. Article 53(1)(f) of the Constitution provides that, “Every child has the right not to be detained, except as a measure of last resort, and when detained, to be held for the shortest appropriate period of time; and separate from adults and in conditions that take account of the child's sex and age. The Children's Act No 8 of 2001 defines a child as any human being under the age of 18 years. Section 4(2) of that Act provides, “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” Section 18(3) and (4) provides for a child offender to be separated



from adults in custody and for a child who is arrested and detained to be accorded legal and other assistance by the government as well as contact with his family.

14. There is need to emphasize that a child remains a child whether the victim of an offence or a child in conflict with the law. Indeed, Policy No 5.10 of The National Children Policy states that all children deserve protection in matters regarding the law, whether they are in conflict with the law or requiring legal assistance! From the record, the appellant did not have any legal assistance. Before he was granted bond on 4/4/2013 he had been detained with adults. Justice Hellen Omondi expressed herself in *P O (A Minor) v Director of Public Prosecutions & another* [2017] eKLR “Does a boy under 18 years have the legal capacity to consent to sex? Haven’t both children defiled themselves? Shouldn’t both then be charged or better still shouldn’t the Children’s Officer be involved and preferably a file for a child in need of care and protection ought to be opened for both of them. I think these are children who need guidance and counseling rather than criminal penal sanctions? I really think in this kind of situation should be re-examined in the criminal justice system.”
15. By a letter dated March 8, 2021 SP Charo S Sumuni for the Officer in Charge forwarded an age assessment report in respect of the appellant. The age assessment form emanated from Shimo la Tewa health Centre indicated as signed by the Dental Officer. It also indicated that the appellant’s approximate age to be 24 years. The charge sheet is evident that the offence the appellant was charged with happened between May 19, 2012 and October, 2012 which would mean that at the time, the appellant must have been 15 years old.
16. In light of the above, and in consideration of the fact that the appellant was charged with an offence that attracts a heavy jail term, the age of the appellant should have been considered by the trial magistrate since it played an important role, in case the trial court found him guilty. Accordingly, the appellant ought to have been sentenced as a minor thus the sentence imposed against him was illegal.
17. Section 6(1) of the *Borstal Institutions* Act provides that:

“Where the High Court or a subordinate court of the first class or a juvenile court is satisfied, after considering the matters specified in section 5, that it is expedient for his reformation that a youthful offender should undergo training in a borstal institution, it may, instead of dealing with the offender in any other way, direct that the offender be sent to a borstal institution for a period of three years”.
18. In light of section 6(1) of the *Borstal Institution Act*, it is clear that the maximum sentence that can be imposed to a youth meaning a child above the age of 16 years, is 3 years. The court in *JWM v Republic* [2014] eKLR held that:

“Record shows that the appellant availed to court an age assessment report which indicated he was eighteen (18) years old at the date of conviction. He thus committed the offence when he was seventeen (17) years old but which factor the trial court ignored.

In the result, I uphold the conviction. I however set aside the twenty (20) years imprisonment jail term. Given that the appellant has already served two years’ jail term which he ought not to have, I will consider it as sufficient punishment so far. I order that he be forthwith set free unless he is otherwise lawfully held”.
19. In the instant case, during committal of the offence, the appellant was 15 old; the complainant was 14 years old. I believe if the trial court addressed the issue of age of the appellant, it would not have imposed such a sentence on the appellant. It is therefore my considered opinion that the appellant should be discharge from his sentence. In the upshot, the appellant is set at liberty unless otherwise lawfully held.



It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 18TH DAY OF JUNE, 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel – court assistant

Ms. Karanja for Respondent

Appellant – Absent in custody

HON. LADY JUSTICE A. ONG'INJO

JUDGE

18.6.2021

