



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 28 OF 2019

NKR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being appeal from the judgment dated 4th April, 2019 by the Hon R. Amwayi (SRM) in Sexual Offence Case No. 507 of 2018 at Molo Chief Magistrate's Court)

JUDGMENT

1. The Appellant herein was presented before the Molo Chief Magistrate's Court charged with a single count of gang rape contrary to section 10 of the Sexual Offences Act, No. 3 of 2006. The particulars of the offence as alleged in the charge sheet were that the Appellant was said to have intentionally and unlawfully caused his penis to penetrate the vagina of MC, a girl aged 15 years in association with another person who was not before the Court. The offence was alleged to have occurred on the 9th January, 2018 at Kapno village in Kuresoi sub-county within Nakuru County.
2. The Appellant also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The specifics of victim, venue and time are the same as those in the main charge.
3. The Appellant was unrepresented at the trial. He pleaded not guilty and the case proceeded to hearing. The State called four witnesses and the Appellant gave an unsworn statement. At the conclusion of the trial, the Learned Trial Magistrate convicted the Appellant of the main charge and sentenced him to life imprisonment.
4. The Appellant filed the present appeal citing a motley of grounds. When he was first brought before the Court, it was apparent that he was of extreme youthfulness. Upon inquiry, he stated that he was not yet eighteen years old. The Court asked him to request his parents to bring his Birth Certificate to Court. They did. The ODPP, at the Court's request, asked the Directorate of Criminal Investigation to confirm the authenticity of the Birth Certificate. The DCI wrote back confirming the authenticity of the Birth Certificate.
5. As per the Birth Certificate, the Appellant was born on 13/11/2002. The offence was committed on 09/01/2018. This would have made the Appellant 15 years and two months old at the time the offence was committed. He was barely 16 years old at the time of conviction. He is now only 18 years and 7 months. He has been in an adult custody since 12/01/2018 – that is three years and 5 months. Of this time, for a little less than two years, he was a minor. A minor in adult remand; then in an adult prison.
6. Many things clearly went wrong in the processing of the Appellant in this case. The arresting officer did not detect that he was a minor. The investigating officer did not ask or did not faithfully record that the Appellant was a minor. The ODPP Officer who signed the charge sheet failed to detect it as well. The Magistrate who took the plea and conducted the trial, as well, did not detect the extreme youthfulness of the Appellant. As a result, throughout, the Appellant was treated as an adult. He was tried as one. He was placed in an adult remand home. He was later imprisoned in an adult prison. He was, also, not afforded the guarantees our law requires for children. He was described as an Accused Person. He was incarcerated without consideration whether that was, absolutely, the last resort. And he was not afforded legal representation at the State's pay.
7. This, then, raises the only consequential issue in this appeal: what is the legal implication when an Appellant was a minor at the time of commission of a sexual offence as well as at the time of conviction but the Appellant was tried and sentenced as an adult?
8. The State did not support the conviction, in essence conceding to the Appeal.
9. Both the Kenyan Constitution and the Children's Act have explicit provisions for the protection of children especially when they come into contact with the law. This is true both when a child is in conflict with the law and when he is in need of protection and care. Indeed,

every child who comes into contact with the law is deemed to be in need of protection and care.

10. Article 21(3) of the Constitution provides as follows:

All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.

11. This constitutional provision places a categorical duty on all Public Officers who are carrying out their duties and exercising authority under the Constitution, to specifically address the needs of children (among other vulnerable groups) as they carry out their duties. In this case, it was incumbent upon the Police Officers who made the arrest of the Appellant; the Prosecutor who made the charging decision; the Learned Magistrate who took plea as well as the one who conducted the trial; and the Prison's Authorities who held the Appellant in remand to have addressed the needs of the minor who was alleged to be in conflict with the law. This did not happen: none of the organs and Public Officers who dealt with the case even realized that the Appellant was a minor.

12. Second, Article 53 of the Constitution contains three important directives:

a. The first one is, really, the "Prime" Directive when children come into contact with the law and the legal system. That is Article 53(2) of the Constitution: A child's best interests are of paramount importance in every matter concerning the child.

b. The second one is in Article 53(1)(f): Every child has a 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.

c. The third one is also found in Article 53(1)(f): Every child has a right, when detained, to be held separate from adults and in conditions that take account of the child's sex and age.

13. Third, the Children's Act contains certain guarantees for children who are alleged to be in conflict with the law. They are found in section 186 of the Act. That section provides as follows:

186. Guarantees to a child accused of an offence

Every child accused of having infringed any law shall—

(a) be informed promptly and directly of the charges against him;

(b) if he is unable to obtain legal assistance, be provided by the Government with assistance in the preparation and presentation of his defence;

(c) have the matter determined without delay;

(d) not be compelled to give testimony or to confess guilt;

(e) have free assistance of an interpreter if the child cannot understand or speak the language used;

(f) if found guilty, have the decisions and any measures imposed in consequence thereof reviewed by a higher court;

(g) have his privacy fully respected at all the proceedings;

(h) if he is disabled, be given special care and be treated with the same dignity as a child with no disability.

14. This section explains why Courts always ensure that a child facing a criminal offence is represented by an Advocate paid for by the State; and further that the trial takes place in camera so as to protect the privacy of the child.

15. Lastly, the Children's Act also has provisions on sentencing children. Section 191 of the Children's Act provides as follows:

(1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways—

(a) By discharging the offender under section 35(1) of the Penal Code (Cap. 63);

(b) by discharging the offender on his entering into a recognisance, with or without sureties;

(c) by making a probation order against the offender under the provisions of the Probation of Offenders Act (Cap. 64);

(d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;

- (e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;*
- (f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;*
- (g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;*
- (h) by placing the offender under the care of a qualified counsellor;*
- (i) by ordering him to be placed in an educational institution or a vocational training programme;*
- (j) by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act (Cap. 64);*
- (k) by making a community service order; or*
- (l) in any other lawful manner.*

16. These four sets of legal provisions guide the treatment of children in the Criminal Justice System and must be scrupulously adhered to. As part of this Court's obligation as a first appellate Court (See *Okeno v Republic [1972] EA 32*), this Court must scrutinize the Trial Court record to ensure that the provisions were complied with. It requires no belaboured analysis in this case to conclude that the Appellant's trial fell afoul the fair standards guarantees in the Constitution and statute. This is so for at least five reasons:

- a. *First*, the Appellant was not afforded legal representation or any other assistance in his defence;
- b. *Second*, no consideration was given to the fact that the Appellant was a minor when admitting him to bail with the result that he was given prohibitive conditions which he could not meet. He, therefore, ended up in detention during the pendency of his trial;
- c. *Third*, the Appellant was treated as, and described as an adult throughout his trial and the trial was held in public;
- d. *Fourth*, the Appellant was held in detention at an adult facility despite the fact that he was a minor; and
- e. *Fifth*, there was no consideration of the fact that he was a minor during the commission of the offence when he was sentenced. As a result, the Court did not (and could not) take into account section 191 of the Children's Act in sentencing the Appellant. This is how the Appellant ended up in an adult prison.

17. There is no question, therefore, that the conviction must be quashed on these procedural and substantive due process grounds.

18. The question must arise is whether the matter should be sent back for re-trial. During the appeal, the Appellant readily admitted that he committed the offence and blamed his childishness and the influence of the wrong company of a young adult. He expressed deep remorse for his actions and claimed that he has "grown up" in the three or so years he has been in custody.

19. I have formed the opinion that this is not a fit case for a re-trial. The Appellant is now already past the age of majority. The trial can no longer be conducted as it would have were he a child. The failures of the system have also been quite consequential on the Appellant – he having irreversibly spent more than three years in adult facilities – the very consequence the law was attempting to shield him from. The only fair outcome is to bring to an end the ordeal and hope that everyone involved – including the Appellant – have learnt life-long lessons in the process. The Appellant, at least, verbally stated in his address to the Court that he has learnt a lot from the process. For one, he says he has learnt to respect women and he now understands the importance of respecting the bodily autonomy of others.

20. For us in the Judiciary, the lesson is to take to heart section

143 of the Children's Act. It stipulates as follows:

Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the Court that such person is under eighteen years of age, the Court shall make due inquiry as to the age of that person and for that purpose shall take such evidence, including medical evidence, as it may require, but an order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court, and the age presumed or declared by the court to be the age of the person so brought before it shall, for the purposes of this Act and of all proceedings thereunder, be deemed to be the true age of the person.

21. **The upshot is that in the present cases, given the circumstances explained above, it is the duty of this Court to quash the conviction and set aside the sentence imposed which I hereby do. The Appellant shall be set at liberty unless otherwise lawfully held in custody.**

22. Orders accordingly.

Dated and Delivered at Nakuru this 1st day of July, 2021

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.