



**VKR v Republic (Criminal Appeal 7 of 2020)
[2021] KEHC 1336 (KLR) (6 December 2021) (Judgment)**

Vincent Kipngeno Rugut v Republic [2021] eKLR

Neutral citation: [2021] KEHC 1336 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL APPEAL 7 OF 2020
F GIKONYO, J
DECEMBER 6, 2021**

BETWEEN

VKR APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence of Hon. G.N. Wakabiu (C.M)
in Narok CMCR No. 322 of 2019 on 30th December 2019)*

The duties of relevant State Institutions in addressing the needs of children in conflict with the law
The decision dealt with the constitutional and legal rights of a minor who was charged with stealing stock. The appellant, a child, challenged the fairness of his trial and detention, citing several violations of his rights under the Constitution and the Children Act, 2001 (Repealed). The case highlighted the treatment of minors in conflict with the law with the court stressing the importance of protecting the rights of children, ensuring their best interests were prioritized, and the upholding of their constitutional rights during criminal proceedings. The court urged the relevant state institutions tasked with handling child offenders not falter in their duties.

Reported by Moses Rotich

Constitutional Law - fundamental rights and freedoms - enforcement of - rights of a child - right to a fair trial - where the appellant, who was a minor, was charged with the offence of stealing stock - failure to accord legal representation and the advice of a Children’s Officer - whether the appellant’s trial was in accordance with the Constitution and the law on trial of a child - Constitution of Kenya 2010, articles 50(2)(b), 53(1)(f)(i) and 53(2), Children Act, No 8 of 2001 (Repealed), sections 77, 186 (b), 190(1) and 191; Penal Code, cap 63, sections 278, 322 and 322(2).

Constitutional Law - Bill of Rights - rights of a child - the right of a child to be held separate from adults - principle of the best interests of a child - where the appellant, being a minor, was detained with adults for a period of 2 years - Constitution of Kenya 2010, articles 53(1)(f)(ii) and 53(2).



Criminal Law - children in conflict with the law - duties of the courts, the police, the prosecution, and the prison authorities when dealing with a child offender - detention of children - whether a child in conflict with the law was deemed a child in need of care and protection - whether detention of the appellant minor with adults for a period of 2 years fell afoul of the Constitution and the law on the rights of a child - Constitution, articles 21 (3) and 53; Children Act, No 8 of 2001 (Repealed), sections 143 and 186.

Criminal Procedure - trial of child offenders - manner of dealing with a child offender - duties of the courts, the police, the prosecution, and the prison authorities when dealing with a child offender - what was the effect of the failure by the trial court to take into consideration the age of the appellant before sentencing - Constitution of Kenya 2010, articles 21 (3) and 53; Children Act, No 8 of 2001 (Repealed), sections 143 and 186.

Brief facts

The appellant minor was charged with the offence of stealing stock contrary to section 278 of the Penal Code. In the alternative count, the appellant was charged with the offence of handling stolen goods contrary to section 322(1) as read with section 322(2) of the Penal Code. He was convicted of the main charge and sentenced to serve 5 years' imprisonment. Aggrieved by the decision of the trial court, the appellant lodged the instant appeal against the conviction and sentence.

The appellant contended that the trial court erred in law and fact by failing to take into consideration the age and other circumstances of the case of the appellant before it proceeded with the trial. The appellant argued that the sentence of 5 years' imprisonment was harsh and excessive in the circumstances of his case and occasioned a failure of justice since the trial court failed to take into consideration all his mitigating factors.

Issues

- i. Whether the fact that a minor was a child offender meant that the minor would be presumed to be in need of care and protection.
- ii. What were the expected duties of the courts, the police, the prosecution, and the prison authorities when dealing with a child offender?
- iii. What was the effect of the failure by the trial court to take into consideration the age of the appellant before sentencing?
- iv. Whether detention of the appellant minor with adults for a period of 2 years fell afoul of the Constitution and the law on the rights of a child.

Relevant provisions of the Law

Constitution

Article 21 - Implementation of rights and fundamental freedoms

(3) 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.

Article 53 - Children

(1) Every child has the right—

(a) to a name and nationality from birth;

(b) to free and compulsory basic education;

(c) to basic nutrition, shelter and health care;

(d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;

(e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and

(f) not to be detained, except as a measure of last resort, and when detained, to be held—

(i) for the shortest appropriate period of time; and

(ii) separate from adults and in conditions that take account of the child's sex and age.



(2) A child's best interests are of paramount importance in every matter concerning the child.

Children Act, No 8 of 2001 (Repealed)

Section 143 - Presumption and determination of age

(1) 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.

(2) A certificate purporting to be signed by a medical practitioner as to the age of a person under eighteen years of age shall be evidence thereof and shall be receivable by a court without proof of signature unless the court otherwise directs.

Section 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.

Held

1. The Constitution, the Children Act, No 8 of 2001 (the Children Act), and international instruments on the rights of children were explicit about the protection and rights of children, especially when they came into conflict with the law. A child in conflict with the law was presumed to be in need of protection and care. Article 21 (3) of the Constitution obligated the Judiciary, as an arm of government to address the needs of, *inter alia*, children while article 53 entrenched the rights of children. Section 186 of the Children Act prescribed the manner in which to deal with a child offender.
2. The appellant was aged 17 years at the time he was charged with the offence of stealing stock contrary to section 278 of the Penal Code. He was therefore a child in need of care and protection but was hauled through the criminal justice system, alone and scared without legal counsel or even the benefit of the advice of a children's officer. He was detained with adults for 2 years. In light of the constitutional obligation on courts and other state organs in respect of the appellant who was a minor at the time of the commission of the offence, his trial fell afoul of the Constitution and the law on the rights of a child.
3. The appellant was committed to a custodial sentence without an explanation that the custodial sentence was necessary or that of last resort. He had to spend the past 2 years in prison with adults. That included one year he was a minor and when he ought to have been protected by the law and implementing state institutions, the police, DPP, court and prisons from such detention. That was an exposure that infringed the law and was also quite detrimental to the well-being of the child - the very unpleasant result the law sought to prevent.
4. By not taking into account that the appellant was a minor at the time of the commission of the offence and trial, the trial court proceeded as if he was an adult, thereby denying him the staple protections of the law due to a child. Thus, his trial was not faithful to the law. The courts should not falter in their



- duty as spelt out in section 143 of the Children Act; the duty to do thorough pre-trial conference to avoid such impulsive omissions.
5. In every case involving a child, the police officers who made the arrest, the prosecutor who charged, the courts which conducted trials and appeals, and the prison authorities which held the appellant in remand or prison, ought to address the needs of a minor in conflict with the law. In the instant case, a great blunder occurred as the needs of the appellant minor were not catered for appropriately at the time of commission of the offence and charging.
 6. An order for retrial could not remedy the breach of law and rights of the appellant. In the circumstances, the right course of action was to relieve him of the burden he had endured under the custodial sentence by ordering his immediate release. What he had endured was more than enough.
 7. **[Obiter]:** "Trial courts especially magistrate courts are overwhelmed by great number of cases they have to deal with on a daily basis which include plea-taking. Obviously, the ratio of judicial officers to the litigants they serve must be made proportionate by recruitment of more judicial officers. JSC should take appropriate action on this. Couple this dilemma with the long hand recording of proceedings by judicial officers in Kenya; still in use at this time and age? The result, inter alia, is that the judicial officer is overburdened, and focus and attention to the tenor of the proceedings, observe demeanour of a witness or age of a person charged before them is completely lost or greatly compromised or impaired. That notwithstanding, courts are faced with the herculean task to follow the Constitution and the law, protect, promote and prevent infringement of rights and fundamental freedoms in the Bill of Rights, and it does so despite these predicaments. The court will not and should not falter on its duty spelt out in section 143 of the Children's Act."

Appeal allowed.

Orders

An order issued that the appellant be released forthwith unless he was otherwise lawfully held.

Citations

Cases

Kenya

1. *Kabinga, Joseph Kabaria & 9 others v Republic* Criminal Appeal 1 of 2011; [2014] KECA 151 (KLR) - (Applied)
2. *Mohammed, Abamad Abolfathi & another v Republic* Criminal Appeal 135 of 2016; [2018] KECA 743 (KLR) - (Applied)
3. *Njoroge v Republic* Criminal Appeal 149 of 1986; [1987] KECA 4 (KLR); [1987] KLR 19 - (Applied)
4. *Opondo, Francis v Republic of Kenya* Criminal Appeal 13 of 2015; [2017] KEHC 6636 (KLR) - (Applied)

Regional Court

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

Statutes

Kenya

1. Children Act (cap 141) sections 143, 186, 191 - (Interpreted)
2. Constitution of Kenya articles 21(3); 50(2)(p); 53; 159 - (Interpreted)
3. Criminal Procedure Code (cap 75) sections 333(2); 350(2) - (Interpreted)
4. Penal Code (cap 63) sections 35(1); 278; 322(1)(2) - (Interpreted)
5. Probation of Offenders Act (cap 64) In general - (Cited)

Advocates

Ms Torosi for the respondent



JUDGMENT

Minor Committed to Custodial Sentence

1. The appellant who was a minor, was charged with the offence of stealing stock contrary to section 278 of the *Penal Code*. It was alleged that on the 28th day of April 2019 at [Particulars withheld] area in Narok South Sub County within Narok County with others not before court stole fourteen (14) head of cattle valued at Kshs 560,000 the property of Nasuju Keiwua.
2. In the alternative count, the appellant was charged with handling stolen goods contrary to section 322(1) as read with section 322(2) of the *Penal Code*.
3. The appellant was convicted on the main charge and sentenced to serve five years' imprisonment.
4. Being dissatisfied with the said conviction and sentence he preferred an appeal as set out in his amended grounds of appeal pursuant to section 350(2) *CPC*;
 - i. that the learned trial magistrate erred in law and in fact in convicting and sentencing the appellant to serve 5 years yet failed to take into consideration all the mitigating factors raised by him which was manifestly harsh and excessive in the circumstances and occasioned a failure of justice.
 - ii. That the learned trial magistrate erred in law in convicting and sentencing the appellant minus considering section 333(2) of the CPC.
 - iii. That the trial magistrate failed to take into consideration one of the major issues in the case that is to establish the age and circumstances of the case of the appellant before proceeding.
5. The appellant argued that he was not given time to mitigate but in this appeal he has now raised the following issues in mitigation;
 - i. that he pleaded not guilty,
 - ii. he was a school going child,
 - iii. that he was coming from the Shamba
 - iv. that he was never given an opportunity of a non-custodial sentence
 - v. That he is a young person aged 19 years.
 - vi. That he was a first time offender.
 - vii. That he was a guest of the 1st accused person who is his brother.
6. The appellant has relied on the following authorities;
 - i. *Joseph Kaberia Kabinga & 11 Others v Attorney General* [2016] eKLR
 - ii. section 333(2) of the CPC.
 - iii. Article 159 of the *Constitution*.
 - iv. Article 50(2)(p) of the *Constitution*.
 - v. *Francis Opondo v Rep*[2017] eKLR



- vi. [Abamad Abolfathi Mobammed & Another v Republic](#) [2018] eKLR
7. Ultimately, he prayed that this appeal be allowed and sentence be quashed.

Respondent's Submission

8. Mr Karanja, the prosecution counsel, submitted for the state that whereas no one saw the appellant steal the said animals they were found in the possession of the appellant in such a short period of time that one could only presume that it is the appellant who was involved in the stealing of the animals. That the appellant, according to PW3, lead the officers to where the initial missing animals were and two more animals were recovered. The recovered animals were part of those that had been reported to have been stolen by PW1. Therefore, the appellant was rightly convicted under the doctrine of recent possession.
9. The respondent submitted that they concede that trial court ought to have considered the fact that at the time of the commission of the offence the appellant was a minor and ought to have sentenced him as per the provisions of section 191 of the [Children's Act](#). The appellant herein did submit to the trial court a birth certificate that indicated that he was born on August 5, 2003. The offence was committed on April 28, 2019 as per the charge sheet. From the charge sheet the age of the appellant is indicated as 17 years. On February 13, 2020 the matter came up for sentencing, the age assessment was produced in court showing that the appellant had reached 18 years. Therefore, the respondent conceded that the trial court erred in handing out a custodial sentence upon the appellant without factoring that the appellant was a minor during the commission of the offence.

Analysis and Determination

Court's duty

10. As first appellate court; I should re-evaluate the evidence afresh and arrive at own independent conclusions. I am however reminded to bear in mind that I neither saw nor heard the witnesses and give due regard for that. See [Njoroge v Republic](#) (1987) KLR, 19 & [Okeno v Republic](#) (1972) EA, 32.

Issues

11. The overall issue is whether the appellant's trial herein was in accordance with the [Constitution](#) and the law on trial of a child. However, the specific strands argued by the parties in the amended grounds of appeal, submissions of the respective parties and the record of appeal are on:
- i. The effect of failure of the trial court to take into consideration the age of the appellant before sentencing; and
 - ii. The legality or otherwise or appropriateness of the sentence herein.

Rights of a Child in Conflict with the Law

12. The [Constitution of Kenya, 2010](#), the [Children's Act](#) as well as international instruments on rights of children are explicit on protection and rights of children especially when they come into conflict with the law; that such child in conflict. Such child is presumed to be in need of protection and care.



Obligation to protect children in conflict with the law

13. Judiciary as an arm of government is under obligation to address the needs of, *inter alia*, children. See article 21(3) of the Constitution which 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, and youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities. [Underlining mine]

Guiding principles

14. Of greatest significance in these proceedings is article 53 of the Constitution, in particular: -
- i. The overriding principle: A child's best interests are of paramount importance in every matter concerning the child. (article 53(2));
 - ii. The right of every child not to be detained, except as a measure of last resort, and
 - iii. When detained, to be held —
 - a. for the shortest appropriate period of time; and
 - b. separate from adults and in conditions that take account of the child's sex and age.
15. Also significant are the statutory guarantees for, and the manner in which to deal with children in conflict with the law.
16. The guarantees to a child in conflict with the law are expressed in section 186 of the Children Act 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.
17. And, the manner to deal with a child offender is prescribed in section 191 of the Children's Act 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 recognizance, 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.
18. The foregoing provisions are in keeping with the International Convention on the Rights of the Child, to which Kenya is a state party.

Appellant was a child

19. The appellant was aged seventeen (17) years at the time of charging, and therefore, a child who was in need of care and protection but was hauled through the Criminal Justice System; alone and scared – without legal counsel or even the benefit of the advice of a Children’s Officer; and then detained with adults for two years. In light of the constitutional obligation on courts and other state organs in respect of the appellant who was a minor at the time of the commission of the offence and trial, the appellant’s trial fell afoul of the *Constitution* and the law; statute and international instruments on rights of the child.
20. It bears repeating that the appellant was committed to a custodial sentence without any explanation that the custodial sentence was necessary and or last resort. He also has had to spend the past two years in prison with adults – that included one year he was a minor and when he ought to have been protected by the law and implementing state institutions, the police, DPP, court and Prisons from such detention. This is an exposure that infringed the law and also quite detrimental to the wellbeing of the child- the very unpleasant result the law seeks to prevent through the provisions above stated.



21. In addition, by not taking into account that the appellant was a minor the trial court proceeded with his trial as if he was an adult thereby denying him the staple protections of the law due to a child. Accordingly, his trial was not faithful to the law.

A necessary detour

22. Before I close, I should comment: Trial Courts especially magistrate courts are overwhelmed by great number of cases they have to deal with on a daily basis which include plea-taking. Obviously, the ratio of judicial officers to the litigants they serve must be made proportionate by recruitment of more judicial officers. JSC should take appropriate action on this. Couple this dilemma with the long hand recording of proceedings by judicial officers in Kenya; still in use at this time and age? The result, *inter alia*, is that the judicial officer is overburdened, and focus and attention to the tenor of the proceedings, observe demeanour of a witness or age of a person charged before them is completely lost or greatly compromised or impaired. That notwithstanding, courts are faced with the herculian task to follow the Constitution and the law, protect, promote and prevent infringement of rights and fundamental freedoms in the Bill of Rights, and it does so despite these predicaments. The court will not and should not falter on its duty spelt out in section 143 of the Children's Act thus: -

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

23. I need not overemphasize the need to do thorough pre-trial conference to avoid such implosive omissions.
24. The other implementing state organs should also do their part and bring to the attention of the court such important matters as may have or come to their notice such as age of the person charged especially if a minor. See article 21(3) of the Constitution which 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, and youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.

25. Needless to state that, in every case involving a child; the Police Officers who make the arrest; the Prosecutor who charges; the court which conducts trials and appeals child; and the Prison's Authorities which holds the Appellant in remand or prison; must address the needs of the minor in conflict with the law. in this case, a great blunder occurred; the needs of the appellant who was a minor at the time of commission of the offence and charging herein, were not catered for appropriately. The prosecution admits this fact.
26. The situation in this case could have been avoided had the police and the prosecution expressly stated the age of the appellant to the court at the inception of the proceedings. I hope to end my career as a judge without having to deal or remedy a sorry situation such as this which was foreseeable amongst the implementing state organs herein, and averted. Amen.



Back to the main

27. I am aware of the rights of victims. Nevertheless, I am not even persuaded to make an order for re-trial as that will not remedy the breach of law and right of the appellant. In the circumstances, the right thing to do is to relieve him of the burden he has suffered under the custodial sentence and order his immediate release. What he has endured is enough. I order that the appellant be released forthwith unless otherwise lawfully held. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 6TH DAY OF DECEMBER, 2021

F. GIKONYO M.

JUDGE

In the presence of:

Appellant

Ms. Torosi for Respondent

Kasaso - CA

