



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO 67 OF 2014

DKK.....APPELLANT

VERSUS

REPUBLICSTATE

(Being an appeal from the Judgment of Honourable J. N. Nthuku - Resident Magistrate, delivered on 13th March, 2014 in Nakuru Chief Magistrate's Court Criminal Case No. 198 of 2011)

JUDGMENT

1. The Appellant, DKK, was arraigned before the Nakuru Chief Magistrate's Court and charged with a single count of defilement contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence read as follows:

On the 10th day of October, 2011 at [particulars withheld] Njoro in Nakuru District within the Rift Valley province, unlawfully and intentionally committed an act by inserting a male genital organ (penis) into a female genital organ (vagina) of DC a child aged 13 years which caused penetration.

2. The Appellant also faced an alternative charge of committing an indecent Act with a child contrary to section 11(1) of the Sexual Offence Act 3 of 2006. The particulars of victim, time and place are the same as in the main charge.

3. The Appellant denied the charge and the case proceeded to full hearing. At the conclusion of the case, the Learned Trial Magistrate convicted the Appellant of the main charge and sentenced him to twenty (20) years imprisonment.

4. On appeal, although the Appellant filed a "home-grown" Grounds of Appeal, his advocate Mr. Obutu who appeared first before he was appointed a Prosecutor, and Mr. Maragia, who took over from him, dropped all the other grounds of appeal and urged one: that the Appellant was a minor at the time he allegedly committed the offence, and during his trial and sentencing. As such, they argued, the trial was a nullity as was the conviction and sentence since all the procedural safeguards for the trial of minors were not adhered to. Besides, argued Mr. Maragia in his Written Submissions, the trial was unlawful because it amounted to impermissible discrimination to charge the Appellant alone who was as much as a minor as the alleged victim. For this, Mr. Maragia relied on the decision in ***P.O.O. v Director of Public Prosecutions [2017] eKLR***. In that case, the Learned Hellen Omondi found that it was a violation of the Equality clause of the Constitution to charge and convict a minor male for engaging in consensual sexual conduct with a female minor. The Learned Judge also found that the fundamental rights of the minor had been infringed by not providing him with legal counsel and holding him an adult facility.

5. In the present case, the Appellant appeared visibly youthful. However, he had no Birth Certificate to prove his actual age. In a bid to do justice to the case, I summoned his mother and the Area Chief and any other person who could shed light on his actual age. I applaud Mr. Chigiti, the State Prosecutor, for cooperating rather than inhibiting the attempts to find actual information to help the Court do substantive justice. It does no one a favour for a juvenile to be condemned in an adult jail for an act which, due to age, would not amount to a crime.

6. When the Appellant's mother, JM, appeared in Court, she testified on oath that the Birth Certificate of the Appellant was burnt during the Post-Election violence in 2008. She, however, produced an Immunization Card which had survived the fire that razed their house. That card shows that the Appellant's date of birth is 07/01/1997. The mother orally confirmed this to be the date of birth.

7. I found Josephine to be a truthful and credible witness. So did I the Area Chief, Sammy Kirui. He is the Assistant Chief in Sigotik Sub-location in Nesuit Location where the Appellant hails from. He testified that he knows the Appellant and his family very well. He told the Court that the Appellant was in Standard six when he was charged in Court; and that he was confident that he was fifteen years old at the time.

8. Mr. Chigiti conceded that there was overwhelming evidence that the Appellant was underage at the time. He, however, faulted him for not disclosing the fact to the Trial Court.

9. I have had occasion to address the issue of what the appropriate course of action is when it turns out on appeal that the Appellant was a minor at the time he was convicted of an offence under the Sexual Offences Act. This was in **Peter Kuria v Republic [2019] eKLR**. In that case, I did a comprehensive scan of the various provisions that govern juvenile justice in Kenya before concluding as follows:

Looking at this four sets of legal provisions which guide the treatment of children in the Criminal Justice System and looking at the Trial Court record in its entirety as a first appellate Court is required to do (Okeno v Republic [1972] EA 32), it is readily obvious that once it is conceded that the Appellant was a minor at the time of the trial, one must come to the conclusion that the Appellant's trial fell afoul the fair standards guarantees in the Constitution and statute. This is so for all the four reasons given by Counsel for the Appellant:

- a. The Appellant was not afforded legal representation or any other assistance in his defence;*
- b. 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 fourteen months of the pendency of his trial;*
- c. The Appellant was held in detention an adult facility despite the fact that he was a minor; and*
- d. 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 take into account section 191 of the Children's Act in sentencing the Appellant.*

Mr. Chigiti would prefer that the matter is sent back for re-trial. However, that would be no cure for the wrong suffered by the Appellant. The genie cannot be put back in the bottle. He is already past the age of majority. He has had to spend the past seven years in a facility with adults – that included one year of what was supposed to be innocent years of his life. He went through a trial which, by law, was unfair. When an Appellant has gone through an unfair trial in circumstances such as this one, an order for re-trial inherently compounds the unfairness. The right course of action is to acquit. A child who was in need of care and protection 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. That is enough suffering for that individual. It is time to bring an end to it.

10. The situation is on all fours with the present case. The outcome will be the same.

11. Given the circumstances of this case, 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.

12. Orders accordingly.

Dated and delivered at Nakuru this 5th day of March, 2020

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JOEL NGUGI

JUDGE