



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT LODWAR**

**HIGH COURT CRIMINAL PETITION NO. 1 of 2018**

**PHILIP LOSIKE ..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

**BACK GROUND**

1. The petitioner was charged with the offence of defilement contrary to **section 8(1) as read with section 8(4) of the sexual offences Act no.3 of 2006 in Lodwar criminal case No.170 of 2016** the particulars of which were that in the month of October, 2015 in Turkana Central sub-county within Turkana County intentionally caused his penis to penetrate the vagina of J.A.E a child of 17 years of age.

2. The Petitioner plea pleaded guilty to the said charge and the facts thereon were stated that the complainant and the petitioner had been lovers since the year 2015 without the parents of the complainant knowing until the complainant's mother noticed that her belly was big. On medical examination being taken, it was noted that she was pregnant. She then confirmed that they had been having sex for about one year. The age of the petitioner was confirmed to be 18 years old at the time. On these facts the petitioner was sentenced to fifteen (15) years imprisonment.

3. Being aggrieved by the said sentence the petitioner preferred an appeal to this court being criminal appeal No.68 of 2016 and raised the following grounds for purposes of the petition.

*a) Proper procedure was not followed by the trial magistrate in not indicating the language in which he responded to the charges*

*b) The learned trial magistrate erred in law and facts in adopting the age assessment report on the complainant who alleged date of birth was 1998 and taking into account the date of trial of 2016 the charge of defilement could not stand*

*c) His age assessment layout was not correct as he was 17 years old.*

4. He therefore pleaded for retrial based on these grounds and the fact that the facts of the case were not read and explained to him properly.

5. The appeal was heard by Riechi J who found that the petitioner plea was unequivocal and therefore held that the appeal against conviction was without merit but did not say anything on the extend and legality of the sentence.

**PETITION**

6. The petitioner opted not to file an appeal against the judgment of justice Riechi and filed a constitutional petition No.88 of 2018 at Kitale in which he raised the following grounds;

**THAT** he was arrested, charged, tried and sentenced to 15 years in circumstances that was beyond his consent

**THAT** the complainant in that case is currently his wife and stays at home with his parents having attained the age of 18 years

**THAT** before his arrest he performed all the necessary cultural procedures of his community including paying dowry to the parents of the complainant

**THAT** the complainant having attained the age of 18 years then petitioner is therefore serving unlawful sentence.

## HEARING

7. When the petitioner came up for hearing before me on 4/12/2018 the petitioner who was not represented stated that he had come to court to seek assistance as the complainant in the original trial was not young having been issued with an identity card and that the petitioner had paid dowry to the parents.

8. Due to the novelty of the issues raised by the petitioner I directed the probation office to make social inquiry on this case and to present a report thereon in court which was submitted on 9/1/2019 and in which the following issues were raised:-

**a) The petitioner is aged 19 years old. This therefore means that as at 2016 when the same was tried and convicted for the offence of defilement he was aged 17 years and as at 2015 when they started having sex he was 16 years.**

**b) They have a child aged two (2) years old with the complainant who according to the report had turned 18 years by the time the petitioner was arrested and had applied for identity card which was issued on 21/8/2016 with the date of birth been 11/2/1998.**

**c) It was further stated that the complainant lives with the mother of the petitioner who supports and treat her as officially and lawfully daughter in-law because all Turkana Cultural procedures were fully adhered to and marriage dowry fully paid.**

**d) It was confirmed that the complaint was engineered by the uncles of the complainant who were not given their share of dowry as per the tradition.**

9. In support of his petition the petitioner stated that at the time of his trial he had not attained the age of majority even though he was married to the complainant who at the time of trial had attained the age of majority. He submitted that the complainant who was lawfully his wife was present in court and she confirmed that she was indeed married to the petitioner and had a child with him in court.

10. Mr. Mongare for the state stated that looking at the circumstances of the petition; he was not opposed to the same being granted as the petitioner was a minor at the time of the trial which was not taken into account.

## ANALYSIS AND DETERMINATION

11. This petition raises fundamental constitutional issue which the court has to look into and make some pronouncements thereon being the following matters:

**a) Whether this court has jurisdiction to hear and determine this petition on the issue of violation of the petitioners constitutional rights when the same had filed an appeal arising from his trial in the same court which appeal has been determined**

**b) Whether the petitioners rights to free and fair trial and in particular the right to be tried as a minor were violated**

**c) What order should the court make.**

12. The constitution of Kenya 2010 at chapter four thereof established the Bill of Rights as an integral part of Kenya's democratic State and in article 22 gives provisions for the enforcement of Bill of Rights and specifically states in Article 22 (1) that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. Article 23 gives that authority of court to uphold and enforce the bill of rights as stated at sub rule 23(1) that the High Court has jurisdiction in accordance with Article 165 to hear and determine applications for redress of a denial, violation infringement of or of or threat to a right or fundamental freedom in the Bill of Rights.

13. The Constitution in Article 23 (3) provides that in any proceedings brought under Article 22 the court may grant appropriate relief including:-

**a) A declaration of right**

**b) An injunction**

**c) A conservatory order**

**d) A declaration of invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24.**

**e) An order for compensation and**

**f) An order of judicial review.**

14. Article 165 (3) (d) gives this court the jurisdiction to hear any question respecting the interpretation of the constitution including the determination of

(i) The question whether any law is inconsistent with or in contravention of the constitution.

(ii) The question whether anything said to be done under the authority of the constitution or of any law is inconsistent with or in contravention of the constitution.

(iii) Any matter relating to constitutional powers of state organs in respect of County Government's and any matter relating to the constitutional relationship between the levels of government and

(iv) A question relating to conflict of laws under Article 191

15. Article 159 states that the judicial authority is derived from the people and vests in and shall be exercised by the courts and in exercising judicial authority, the courts and tribunal shall be guided by the following principles:-

a) Justice shall be done to all irrespective of status

b) Justice shall not be delayed

c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3)

d) Justice shall be administered without undue regard to procedural technicalities.

16. Article 159(3) provides that traditional dispute resolution mechanisms shall not be used in a way that

a) Contravenes the Bill of Rights

b) Is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality or

c) Is inconsistent with this constitution or any written law.

17. A clear reading of the constitutional provisions on the enforcement of the Bill of Rights clearly shows that this same Article 22 is stand alone and is not dependent on the availability of any other remedies. This position has been confirmed in the case of **MAHARAS J – V – THE ATTORNEY GENERAL [1976] 2 ALLER 670** where the Privy Council had this to state:

**“the right to apply to the High Court for redress conferred by section 6(1) as expressed to be without prejudice to any other action with respect to the said matter which is lawfully available. The clear intention to create a new remedy whether there was already some other existing remedy or not”**

18. In **KHARAK SINGH – V – STATE OF UTTAH PRADESH ( 1983) AIR 1292** as regards right of access to the supreme court of India for purposes of enforcement of guaranteed rights the court had this to say-

**“ it is wholly erroneous to assume that before the jurisdiction of this court under Article 32 could be invoked the applicant must either establish that he has no other remedy adequate or otherwise or that he exhausted such remedies as the law affords and has yet not obtained proper redress for when once it is proved to the satisfaction of this court that by State action the fundamental rights of the applicant under Article 32 has been infringed, it is not only right but the duty of this court to afford relief to him by passing appropriate order in that behalf”**

19. Closer home. Justice H. A. Omondi in High Court of Kenya at Homabay constitutional petition No.1 of 2017 stated as follows:

**“11. Article 23(1) of the constitution provides that the High Court has jurisdiction in accordance with Article 165 to hear and determine application for redress of denial, violation and infragant of or threat to a right or supervisory tradition in the Bill of Rights.....**

**12. Certainly the High Court has supervisory jurisdiction over administrative actions in ensuring that the constitution of the Republic of Kenya is upheld by all the administrative bodies as well as the Lower court”.**

20. I therefore find and hold that this court has jurisdiction to determine the petition herein, the fact that the petitioner had filed an appeal to this court and that he still has an additional remedy of filing an appeal against this courts determination on the said appeal notwithstanding as the issue herein is that of the violation of his constitutional right which has not been adjudicated upon.

21. On whether the petitioners fundamental rights were violated a clear look at the record herein shows that both the petitioner and the complainant were minors as at the time of the commission of the alleged offence. As stated here the petitioner was at the time of his trial aged 17 years. Whereas there was an alleged age assessment report presented in court a look at the Said reports shows that the makers thereon did not confirm the ages of both the petitioner and the complainant but only indicated that the petitioner be treated as 19 years old while the complainant be treated as 17 years old. It was for the trial court once the issue of the age was raised to make a finding thereon which he failed to so do. There is further evidence that based on the presumed year of the birth of the complainant she had reached the age of majority as at the time of the trial herein.

22. The petitioner was therefore entitled to be treated as a minor and in failing to do so his rights under Article 27 of the constitution to equal treatment and protection under the law were violated. In this regards I find support in the holding by **Makau J in Siaya criminal appeal No.165 of 2016 G.O versus Republic** where the good Judge had this to say:

**“I find that the appellant was discriminated against on the basis of sex in that he was arrested, charged instead of the prosecution charging both the complainant and the Appellant for the offence of defilement. In the instant case I find that at the time of the commission of the offence, both the appellant and the complainant were minors. I find that indeed the complainant was senior to the appellant and blame should have been apportioned against both the complainant and the appellant and both being minors they needed protection against harmful sexual activities and none should have been sent to prison”.**

23. Further Article 53 provide for the right of a child with **Article 53 (e)** providing for right to parental care and protection which includes equal responsibility of 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. **Article 52(2) provides** that a child’s best interests are of paramount importance in every matter concerning the child. In this matter as a result of the sexual activity between the petitioner and the complainant, a child was born who is now aged two years old and in passing sentence against the petitioner the court was under a constitutional duty to take into account the best interest of the said child which he failed to do thereby violating the fundament right of the said child.

24. Having taken into account all the material placed before me I find and hold that the petitioner has proved that his fundamental rights were violated in that he was not tried as a minor and was further discriminated based on his sex. The issue born out of the sexual activity between the petitioner and the complainant was also discriminated upon as the court did not take into account his best interest.

25. on the remedy available having found that the petitioner’s constitutional rights were violated I find that and hold that the best remedy in the circumstances herein is to order that the same be set free forthwith notwithstanding the fact that his conviction was confirmed by this court on appeal as the issue of the violation of his right were not adjudicated upon.

26. In the final analysis I allow the petition and order that the petitioner be set free forth with so as to provide parental support to the issue born herein and it is so ordered.

**Dated, delivered and signed at Lodwar this 17<sup>th</sup> day of January, 2019.**

.....

**J WAKIAGA**

**JUDGE**

**In the presence of:-**

\_\_\_\_\_ **for the accused**

\_\_\_\_\_ **for the state**

**Accused** \_\_\_\_\_

\_\_\_\_\_ **Court assistant**