



WKC v Republic (Petition 1B of 2018) [2019] KEHC 10373 (KLR) (6 February 2019) (Judgment)

WKC v Republic [2019] eKLR

Neutral citation: [2019] KEHC 10373 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
PETITION 1B OF 2018
M NGUGI, J
FEBRUARY 6, 2019**

BETWEEN

WKC PETITIONER

AND

REPUBLIC RESPONDENT

The sentence of 30 years’ imprisonment imposed on a child violated the child’s rights under the Children Act.

The court discussed the requirement for trial courts to be guided by the provisions of the Children Act, 2001 and the Constitution of Kenya, 2010 in sentencing of child offenders. The court further dealt with the need for courts to take into account the age of a child at the time of commission of the offence to ensure that a child offender was punished in accordance with the law for punishment of child offenders.

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 - where the petitioner, who was a minor at the time of commission of the offence of defilement was convicted and sentenced to 30 years imprisonment by the trial court - where upon appeal to the High Court, the sentence of 30 years imprisonment imposed on the appellant by the trial court was enhanced to life imprisonment - whether the sentence of 30 years imprisonment meted on the petitioner by the trial court was unlawful and in violation of the petitioner’s rights under the Children Act - Constitution of Kenya, 2010 article 53 (1) (f); Children Act, 2001 section 190 (1).*

Brief facts

The petitioner (a minor) was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the , No. 3 of 2006 (). After trial, the petitioner was convicted of the offence of defilement and sentenced to 30 years imprisonment by the trial court.

Aggrieved by the judgment of the trial court, the petitioner filed an appeal at the High Court challenging both his conviction and sentence. However, the High Court dismissed the petitioners appeal and in its judgment dated February 21, 2013, the petitioner’s sentence was enhanced from 30 years to life imprisonment.



Thereafter, the petitioner filed a petition to the High Court at Kericho. It was the petitioner's argument that when he first appeared in court, the trial court ordered that an age assessment be done. The petitioner further contended that the results of the age assessment showed that he was below the age of 18 years.

The petitioner argued that the trial court erred in sentencing him to 30 years' imprisonment considering that he was 15 years old at the time when the offence was committed.

Issues

i. Whether the sentence of 30 years' imprisonment meted on the petitioner by the trial court was unlawful and in violation of his rights under the .

Held

1. The of Kenya 2010, (the) was not in force at the time the appellant was tried and sentenced. However, the , 2001 () and the Convention on the Rights of a Child were in force and the petitioner ought to have been dealt with in accordance with their provisions.
2. When the petitioner appealed to the High Court, lost his appeal and his sentence enhanced to life sentence, the court did not take into account his age at the time of commission of the offence. The court dealt with the petitioner in contravention of article 53 of the Constitution.
3. In the instant case, the petitioner, a young boy aged 15 years old, committed a heinous crime; the defilement of a 3-year-old girl. However, the petitioner was also a child. While his conduct deserved punishment, he ought to have been punished in accordance with the law for punishment of child offenders.
4. The law under section 8 (7) of the Sexual Offences Act required that a child offender be placed in a borstal institution or be given any of the other punishments provided under section 191 of the Children Act. The petitioner could also be given a term of imprisonment after he reached the age of majority, if the court was of the view that he merited a more severe punishment.
5. In the instant case, there was no consideration of the provisions of the Children Act with respect to sentencing of children. That was despite the fact that the Sexual Offences Act directed under section 8 (7) that the courts were to deal with a child convicted of an offence under that Act in accordance with the provisions of the Children Act.
6. There was a violation of the petitioner's rights under the Children Act. It was clear that the petitioner did not raise the issue of his age when he lodged his appeal at the High Court. As a result, the High Court did not deal with the issue of whether the sentence of 30 years' imprisonment imposed on the petitioner by the trial court was appropriate.

Petition allowed.

Orders

- i. *In light of the fact that the petitioner was a minor at the time of commission of the offence of defilement and in light of the provisions of section 8 (7) of the Sexual Offences Act, the sentence of 30 years imprisonment meted on the petitioner by the trial court was unlawful.*
- ii. *The sentence of 30 years imprisonment meted on the petitioner by the trial court violated his rights under the Children Act.*
- iii. *The term of 10 years imprisonment that the petitioner had spent in prison since his incarceration was sufficient punishment.*
- iv. *The petitioner was set at liberty unless otherwise lawfully held.*

Citations

Cases

Kenya

1. *JKK v Republic* Criminal Appeal 118 of 2011; [2013] eKLR - (Explained)



2. *Kiprotich, Daniel Langat v State* Criminal Petition 3 of 2015; [2018] KEHC 6153 (KLR) - (Explained)
3. *Republic v Dennis Kirui Cheruiyot* (Criminal Appeal 184 of 2009) [2014] KECA 230 (KLR) - (Mentioned)

Statutes

Kenya

1. Children Act (cap 141) section 191 - (Interpreted)
2. Constitution of Kenya articles 2(4)(5)(6); 20(2); 22; 50(6); 53(1)(f)(ii) (2); 160(1); 165(3)(d)(i)(ii); 260 - (Interpreted)
3. Criminal Procedure Code (cap 75) section 87(a) - (Interpreted)
4. Sexual Offences Act (cap 63A) section 8(1)(2)(7) - (Interpreted)

International Instruments

Convention on the Rights of the Child (CRC), 1989 — article 37(a)(b)

Advocates

Mr Eric Nyadimo for the petitioner

Mr Ayodo for the Director of Public Prosecutions

JUDGMENT

1. The petitioner, WKC, was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, No 3 of 2006, in Criminal Case No 2005 of 2008 before the Court in Molo. The particulars of the offence were that on the November 16, 2008 at [Particulars withheld] farm in Molo, he unlawfully and intentionally caused his penis to penetrate the vagina of SC, a child aged 3 years. When the matter came up for plea on 20/11/2008 before Hon Soita (PM) the prosecutor requested that an age assessment be done on the petitioner, and the court granted the order. On 24/11/2008, the prosecutor indicated that the report the petitioner was below 18 years and he applied to withdraw the case under section 87(a) of the *Criminal Procedure Code*, which prayer was granted by the trial court. Thereafter, the petitioner was charged before the Principal Magistrate's Court in Kericho in Criminal Case No 2182 of 2008.
2. He was tried and convicted, and was sentenced to 30 years imprisonment in the judgment of the trial court dated July 31, 2009.
3. Thereafter, the petitioner filed an appeal, High Court Criminal Appeal No 46 of 2009. The appeal failed, and in a judgment by Hon Mutava J dated February 21, 2013, the appeal was dismissed and the petitioner's sentence was enhanced from 30 years to life imprisonment. The petitioner informed this court that he has filed an appeal before the Court of Appeal which is yet to be heard.
4. The petitioner then filed the present petition which is dated January 18, 2018. He argues in his petition that he was charged in Criminal Case No 2005 of 2008 in Molo. When he appeared in court, the trial Magistrate ordered that an age assessment be done, and thereafter, that he should be taken for trial before the Children's Court in Nakuru as the age assessment showed that he was under 18. However, he was instead charged before the Chief Magistrate's Court in Kericho, found guilty and convicted. He argues that he was 15 years old when he was sentenced in 2008 by the court in Kericho.
5. When the matter came up before me, I directed that a copy of the petitioner's birth certificate should be furnished to the court. While a birth certificate was not produced, a clinic card was produced which showed that the accused was born on May 28, 1993. I further requested and Mr Nyadimo agreed to represent and assist the petitioner in prosecuting his petition.



6. In his submissions on behalf of the petitioner, Mr Nyadimo noted and summarized the facts of the matter as set out above.
7. Mr Nyadimo then identified three issues as arising for determination in this matter as follows:
 - i. Whether the court has jurisdiction to hear the petition
 - ii. Whether the accused person was a minor during the conviction and sentencing for the offence.
 - iii. If he establishes that he was a minor, whether his constitutional rights were violated.
 - iv. Whether the subsequent sentencing in relation to sections 8(1) and 8(2) *Sexual Offence Act* were in contravention of article 53(f)(ii) as read with article 2(4) and (6) of the *Constitution*.

The Court's Jurisdiction

8. With respect to jurisdiction, learned counsel submitted that article 165(3)(d)(i) and (ii) of the *Constitution of Kenya* vests power in the High Court to hear any question in respect to the interpretation of the Constitution. Such power includes the jurisdiction to determine whether any law is inconsistent with the constitution. In his view, this court has the jurisdiction to determine the present petition.

The age of the Minor

9. With respect to the question whether the petitioner was a minor at the time of his sentence, Mr Nyadimo argued that a minor is any person below 18 years of age and is dependent on others for care and protection. He also referred to article 260 of the *Constitution* which defines a child as an individual who has not attained age 18, as well as the *Children Act* which states that a child is a person who has not attained the age of 18 years. Counsel noted that according to the clinic card provided to the court, the petitioner was a minor at the time of the offence, a fact which is supported by the record of the lower court in Molo.

Violation of the Petitioner's Rights

10. On the third issue, Mr Nyadimo submitted that by the trial court sentencing the petitioner to 30 years imprisonment and the High Court enhancing the sentence to life imprisonment, there had been a violation of the petitioner's rights under article 53(1)(f) of the *Constitution*. This provisions states that every child has a right not to be detained except as a measure of last resort. Further, that article 53(f) (1) states that such detention should be for the shortest period of time, and that the child should be separated from adults and in conditions that take account of his age. Learned counsel further cited article 53(2), which provides that a child's best interests are of paramount importance in every matter concerning the child.
11. Mr Nyadimo further referred the court to the *United Nations Convention on The Rights of the Child*, articles 37(a) of which provides that neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by person below 18 years. He further noted that under article 37(B) of the said Convention, detention or confinement of a child shall be in conformity with the law and shall be used as a measure of last resort and for the shortest time possible. His submission was that Kenya is a signatory to the Convention whose provisions are, by virtue of article 2(5) of the *Constitution*, imported into domestic law.
12. His conclusion was that this court has jurisdiction to hear the petition, the petitioner was a minor at the time of the commission of the offence and at his conviction and sentence; that section 8(i) and



- 8(ii) of the *Sexual Offence Act* were in contravention of article 53 (1)(f)(i) and (ii) and article 53(2) and article 2(4) and (5) as well as article 160(1) of the Kenya *Constitution*, and the court should therefore allow the petition and direct:
- i. That section 8(1) and 8(2) are unconstitutional with respect to the sentencing of minors;
 - ii. That to the extent that the petitioner was sentenced to life imprisonment, his sentence was unlawful and violates the principle of constitutionalism under the Constitution;
 - iii. That the petitioner's sentence be set aside and the petitioner be released forthwith as the sentence itself is unlawful;
 - iv. That to the extent that the petitioner has already served 10 years in prison that should be punishment enough for the offence.
13. Learned Counsel also sought an order directed at the Attorney General and Parliament to make such amendments as may be necessary to ensure that the punitive provisions in section 8(1) and 8(2) conform with article 53 and 160 of the *Constitution*.
14. In submissions on behalf of the state, learned prosecution counsel, Mr Ayodo, submitted that the petitioner had only sought two prayers in his petition dated January 18, 2018 namely:
- i. Whether this court has jurisdiction to hear this petition after the petitioner has exhausted all his appeals.
 - ii. Whether his rights were violated during trial as the issue of his age was overlooked.
15. Mr Ayodo agreed with the submissions on behalf of the petitioner that the court has jurisdiction to hear this petition under article 50 and 53 of the *Constitution*.
16. He further confirmed that after perusing the proceedings on record and the petitioner's clinic card, he had noted that at the time of commission of the offence, the petitioner was 15 years old. This fact was, however, overlooked by all the courts during the hearing of the initial trial and the appeal, in which the High Court enhanced the sentence to life imprisonment. The state was therefore willing to concede the petition to the extent that the minor had been sentenced to 30 years imprisonment and his sentence enhanced without consideration of the fact that he was a minor at the time of commission of the offence. Mr. Ayodo urged the court to make appropriate orders if satisfied with the facts that had emerged from the record of the trial court.
17. Learned counsel, however, opposed the prayers set out at paragraph (a) and (c) in the petitioner's submission, pertaining to declaration of section 8(1) and (2) unconstitutional and the prayer for directions to Parliament, on the basis that they were not issues to be canvassed in this petition. Counsel noted that the *Sexual Offences Act* gives clear provisions with respect to sexual offenders who are below 18 years. That it provides that such an offender shall be referred to a Borstal Institution. He therefore urged the court to disallow the two prayers sought by counsel for the petitioner and to make appropriate orders with respect to the petition.
18. In submissions in response, Mr Nyadimo noted that child offenders are charged and sentenced using sections that are different to those that apply to adult offenders. This was not done in this case, either by the lower court or the High Court.

Analysis and Determination

19. I have before me a young man, now 25 years of age, who has spent the last ten years of his life in an adult prison. At the time he was sentenced to prison for 30 years, he was aged 15, as his clinic card illustrates.



20. The *Constitution of Kenya 2010* was not in force at the time he was tried and sentenced. However, the *Children Act* and the *Convention on the Rights of the Child* were in force, and the petitioner should have been dealt with in accordance with their provisions.
21. Further, when he appealed, lost his appeal and his sentence was enhanced to life imprisonment, the court did not take into account his age at the time of commission of the offence. It therefore dealt with him in contravention of article 53 which provides that a child has the right:
- (f) not to be detained, except as a measure of last resort, and when detained, to be held –
 - (i) for the shortest period of time; and
 - (ii) separate from adults and in conditions that take account of the child’s sex and age.
22. However, in fairness to both the trial and appellate courts, I have perused the record and noted that the issue of the appellant’s age never arose before either court.
23. The state has conceded that the petitioner was sentenced without his age being taken into account, and has asked the court to make appropriate orders with respect to his petition.
24. I have noted that the petitioner did appeal to the High Court, and that a judge of concurrent jurisdiction dismissed his appeal. It went further, and enhanced his sentence to life imprisonment, noting that this is the penalty provided in law for the offence of defilement of a child of 11 years or less.
25. I am concerned about the appearance of seeming to, as it were, sit on appeal on a decision of a court of concurrent jurisdiction. However, I note that the state has also conceded the jurisdiction of this court to deal with the present petition. Further, I take the view that in accordance with article 22 and 165 of the *Constitution*, this court has jurisdiction to determine whether there has been a violation of a right or fundamental freedom. Article 165(3)(d) also provides *inter alia* that the High Court shall have jurisdiction to:
- (b) determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.
26. In this case, the petitioner, a young boy of 15, committed an admittedly heinous crime: the defilement of a 3 year old girl. However, he was a child himself, 15 years of age, and while his conduct deserved punishment, he ought to have been punished in accordance with the law for treatment of child offenders.
27. Section 8(7) of the *Sexual Offences Act* provides that:
- (7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act (cap 92) and the Children’s Act (cap 141).
28. The law under the legislation referred to in section 8(7) required that he is placed in a Borstal Institution or given any other of the penalties provided under section 191 of the *Children Act*. He could also have been given a term of imprisonment after he reached the age of majority, if the court was of the view that he merited a more severe punishment. This would have accorded with the provision that the court can make an ‘appropriate lawful order’ under section 191(1)(l) of the *Children Act*.
29. The issue of sentencing of minors was recently considered by Prof Joel Ngugi J in *Daniel Langat Kiprotich v State* [2018] eKLR in which the petitioner, who had been sentenced to death for robbery with violence, petitioned for a retrial under article 50(6) and 20(2) of the *Constitution*. The crux of his



petition before the court was that he was a minor at the time of his trial and conviction, and therefore both his trial and sentence were irregular.

30. The court relied on the decisions of the Court of Appeal in *R v Dennis Kirui Cheruiyot* [2014] eKLR and *JKK v Republic* [2013] eKLR and sentenced the applicant to two consecutive terms of imprisonment for 12 years. In that case, he noted that the circumstances of the case- that the appellant was accompanied by five others in committing the robbery, that they were armed with a gun and pangas, that they committed two separate acts of robbery, and they committed the offences on the highway, and that the only mitigating factor was that the appellant was a minor-required that he should get a serious penalty even though he could not under the provisions of the Children Act be sentenced to death.
31. In this case, there was no consideration of the provisions of the *Children Act* with respect to sentencing of children. This despite the fact that the *Sexual Offences Act* directs at section 8(7) that the court deals with children in accordance with the provisions of the *Children Act*.
32. There was therefore, in my view, a violation of the petitioner's rights under the Children Act. It is clear from the record that the petitioner did not raise the issue of his age when he canvassed his appeal, and the High Court did not therefore deal with the question whether the sentence of 30 years was appropriate. If he had, I doubt that the court would have enhanced the sentence to life imprisonment.
33. In the circumstances, I find that the petition dated January 18, 2018 is merited. I accordingly grant the following orders:
 - i. In light of the fact that the petitioner was a minor at the commission of the offence of defilement and in light of the provisions of section 8(7) of the *Sexual Offences Act*, the sentence of 30 years imprisonment imposed on the petitioner by the Chief Magistrate's Court in Kericho was unlawful;
 - ii. The sentence violated the petitioner's rights under the *Children Act*;
 - iii. The term of ten (10) years that the petitioner has spent in prison since his incarceration is sufficient punishment.
34. Accordingly, I direct that the petitioner shall be released forthwith unless otherwise lawfully held.
35. In closing, I emphasise and I ask the petitioner to note that though a child at the time of the offence, he committed a truly heinous offence. He defiled an innocent, defenceless three year old child. Had he not been 15 years old at the time of commission of the offence, he would have spent the rest of his life in prison in accordance with the sentence of the High Court which enhanced his sentenced on appeal. He now has a chance, at a relatively young age of 25 or 26, to turn his life around.

DATED DELIVERED AND SIGNED AT KERICHO THIS 6TH DAY OF FEBRUARY 2019

MUMBI NGUGI

JUDGE

Mr. Eric Nyadimo for petitioner

Mr. Ayodo for the Director of Public Prosecutions.

