



**JKF v Republic (Criminal Appeal 3 of 2018)
[2019] KEHC 6509 (KLR) (13 June 2019) (Judgment)**

JKF v Republic [2019] eKLR

Neutral citation: [2019] KEHC 6509 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI**

CRIMINAL APPEAL 3 OF 2018

WK KORIR, J

JUNE 13, 2019

BETWEEN

JKF APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from original Conviction and Sentence by L. N. Juma, RM on 31st July, 2017 in Kilifi SPM Court Criminal Case No. 612 of 2015, Republic v JKF)

Legality of a trial of a child offender without being accorded a legal representative at state expense
The case related to the right to legal representation of a child accused of an offence. The court held that it had a duty to ensure that a child offender was accorded legal representation during trial to avoid miscarriage of justice.

Reported by Kakai Toili

Constitutional Law - Bill of Rights - rights of a child - the right to a fair trial - where the appellant, being a minor, was charged with 2 counts of sexual assault contrary to section 5 (1)(a)(i) as read with section 5(2) of the Sexual Offences Act-where the appellant was not accorded legal representation at state expense during trial - whether the trial of the appellant who was a minor was vitiated on the ground that the appellant was not accorded legal representation contrary to provisions of section 77 of the Children Act-Constitution of Kenya, 2010, article 5(2)(b); Children Act, 2001 sections 77 and 186(b)-Sexual Offences Act, No 3 of 2006 sections 5(1)(a)(i) and 5(2).

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 appellant who was a minor was convicted of 2 counts of sexual assault and sentenced to 10 years imprisonment for each count-whether the sentence of 10 years imprisonment imposed on the appellant who was a minor violated provisions of article 53 of the Constitution and section 190(1)of the Children Act-Constitution of Kenya 2010, article 53(1)(f); Children Act, 2001 section 190(1).



Brief facts

The appellant (a minor) was faced with 3 counts at trial. In count 1, he was charged with the offence of incest contrary to section 20 (1) of the Sexual Offences Act, No 3 of 2006 (Sexual Offences Act). In count 2, the appellant was charged with sexual assault contrary to section 5(1)(a)(i) as read with section 5(2) of the Sexual Offences Act. In count 3, the appellant was charged with sexual assault contrary to section 59(1)(a)(i) as read with section 5(2) of the Sexual Offences Act. At the conclusion of the trial, the appellant was found guilty and convicted of count 2 and 3 and sentenced to serve 10 years imprisonment on each count. The trial court ordered the sentences to run concurrently.

Aggrieved by the decision of the trial court, the appellant filed an appeal against both conviction and sentence. It was the appellant's case that the trial court erred in law and facts, in failing to consider that the sentence of 10 years imprisonment imposed on the appellant was manifestly harsh and excessive given that the appellant was a minor. Further, the appellant contended that the sentence of 10 years imprisonment imposed on him by the trial court was unlawful as it breached article 53(1)(f) of the Constitution of Kenya 2010 (the Constitution) and sections 188, 189, 190 and 191 of the Children Act, 2001 (Children Act).

Issues

- i. Whether the trial of a child offender was vitiated on the ground that they were not accorded legal representation contrary to provisions of section 77 of the Children Act, 2001.
- ii. Whether the sentence of 10 years' imprisonment imposed on the appellant who was a minor violated understanding that he was a child in conflict with the law.
- iii. Whether children in conflict with the law had a right to be provided with legal aid at the expense of the state.

Held

1. Although the provision of legal aid to children in conflict with the law was not made mandatory as the word "may" was used in section 77 of the Children Act, it was important for trial courts to ensure that every child in conflict with the law was provided with counsel at the expense of the state.
2. The trial court appeared to be doubtful about the age of the appellant. The trial court ought to have taken the precaution of ascertaining the age of the appellant in good time. The appellant was faced with serious charges and it was necessary to provide him with legal aid from the outset.
3. The concession by the prosecution was in order. The trial court's record was clear that the appellant was a child at the time he was presented in court. Therefore, the appellant's prosecution ought to have proceeded on the understanding that he was a child in conflict with the law. The appellant had been in prison for close to 2 years and a retrial would not serve justice in the circumstances of his case.

Appeal allowed.

Orders

- i. *The conviction of the appellant was quashed.*
- ii. *The sentence of 10 years' imprisonment imposed on the appellant by the trial court was set aside.*
- iii. *The appellant was set free unless otherwise lawfully held.*

Citations

Cases

Kenya

Macharia, David Njoroge v Republic Criminal Appeal 497 of 2007; [2011] eKLR - (Explained)

Statutes

Kenya

1. Children Act (cap 141) sections 77(1); 188; 189; 190; 191 - (Interpreted)
2. Constitution of Kenya article 53(1)(f)- (Interpreted)
3. Sexual Offences Act (cap 63A) sections 5(1)(a)(i)(2); 20(1); 59(1)(a)(i) - (Interpreted)



Advocates

None mentioned

JUDGMENT

1. The appellant, JKF, was faced with three counts at the trial. In count 1, he was charged with incest contrary to section 20(1) of the *Sexual Offences Act, 2006*. The particulars of the offence stated that on November 20, 2015 at Mnarani Township within Kilifi County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of RKF, a child aged 11 years who is to his knowledge his sister.
2. In count 2 he was charged with sexual assault contrary to section 5(1)(a)(i) as read with section 5(2) of the *Sexual Offences Act, 2006*. It was sated that on November 20, 2015 in [Particulars withheld] Township in Kilifi County the appellant unlawfully used his fingers to penetrate the vagina of JA, a child aged 4 years.
3. Finally, the appellant was charged with sexual assault contrary to section 59(1)(a)(i) as read with section 5(2) of the *Sexual Offences Act, 2006*. It was stated that on November 20, 2015 at [Particulars withheld] Township within Kilifi County the appellant unlawfully used his fingers to penetrate the anus of JM, a child aged 8 years.
4. At the conclusion of the trial the appellant was found guilty and convicted in respect of counts 2 and 3 and sentenced to serve ten years imprisonment on each count. The sentences were ordered to run concurrently.
5. Being aggrieved by both conviction and sentence the appellant has appealed to this court on the amended grounds of appeal filed on November 19, 2019 as follows:-
 - “ 1. That the learned trial magistrate erred in law and fact by failing to consider unlawful detention in prison custody of the appellant in breach of article 53(1) (f) of the *Constitution of Kenya 2010* and sections 188, 189, 190 and 191 of the *Children Act, 2001*.
 2. That the learned trial magistrate erred in law and fact by failing to consider that the sentence imposed was manifestly harsh and excessive in the circumstances.”
6. Through the amended grounds of appeal the appellant therefore reduced his appeal to the question of unconstitutionality and illegality of his sentence. Nevertheless through submissions dated November 15, 2018 and filed in court on the same date, Mr Vincent Monda, Senior Assistant Director of Public Prosecutions urged this court to vitiate the trial on the ground that the appellant who was a minor was tried without the benefit of counsel contrary to the requirement of section 77(1) of the *Children Act, 2001*.
7. Section 77 of the *Children Act, 2001* provides that:-
 - “ (1) Where a child is brought before a court in proceedings under this Act or any other written law, the court may, where the child is unrepresented, order that the child be granted legal representation.



- (2) Any expenses incurred in relation to the legal representation of a child under subsection (1) shall be defrayed out of monies provided by Parliament.”

8. In *David Njoroge Macharia v Republic* [2011] eKLR the Court of Appeal held that:-

“Under the new Constitution, state funded legal representation is a right in certain instances. Article 50(1) provides that an accused shall have an advocate assigned to him by the State and at state expense, if substantial injustice would otherwise result (emphasis added). Substantial injustice is not defined under the Constitution, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of article 2 (6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.

We are of the considered view that in addition to situations where “substantial injustice would otherwise result”, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission.”

9. Although the provisions of legal aid to children in conflict with the law is not made mandatory, as the word “may” is used in section 77(1) of the *Children Act*, it is important for trial courts to ensure that every child in conflict with the law is provided with counsel at the expense of the public. This is indeed a practice that most magistrates have adopted all over Kenya.
10. In the instant case, the trial magistrate appears to have all along been doubtful about the age of the appellant and she ought to have taken the precaution of ascertaining his age in good time. The appellant was faced with serious charges and it was necessary to provide him with legal aid from the outset.
11. I find the concession by the Director of Public Prosecutions in order in this case. The trial court’s record is indeed clear that the appellant was a child at the time he was presented in court. His prosecution ought to have therefore proceeded on the understanding that he was a child in conflict with the law.
12. The appellant has been in prison for close to two years and a retrial will not serve justice in the circumstances of this case. In the circumstances, I allow the appeal, quash the conviction and set aside the sentence imposed by the trial court. The result is that the appellant is set free unless otherwise lawfully held.

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF APRIL, 2019

W. KORIR,

JUDGE OF THE HIGH COURT

DATED, COUNTERSIGNED AND DELIVERED AT MALINDI THIS 13TH DAY OF JUNE 2019

R. NYAKUNDI,

JUDGE OF THE HIGH COURT

