REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPLEAL NO 7 OF 2014

P K ……….……..………………………………APPELLANT

VERSUS

REPUBLIC.…………………………………… RESPONDENT

(Being an appeal from the Judgment of Honourable V. Ochanda Resident Magistrate, delivered on 10th January, 2013 in Nakuru Chief Magistrate's Court Adult Criminal Case No. 270 of 2012)

JUDGMENT

1. The singular issue taken up on appeal in this case is what the legal implications are when an Appellant was a minor at the time of commission of a sexual offence as well as during trial but the Appellant was tried and sentenced as an adult. That is the story of PK, the Appellant in this case. His case was argued by Ms. Rahab Muthoni who agreed to take up the matter pro bono on appeal.

2. PK was arraigned before the Chief Magistrate's Court at Nakuru on 20/11/2012 charged with a single count of defilement contrary to section 8(1) as read together with section 8(2) of the Sexual Offences Act. It was alleged that on the 17th day of November, 2012, at [particulars withheld] Market in Gilgil district within Rift Valley Province, PK intentionally and unlawfully committed an act by inserting his male genital organ (penis) into the female genital organ (vagina) of NC, a girl aged 9 years which caused penetration.

3. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The alternative charge was based on the same facts save for the offending action: touching the private parts of NC as opposed to penetrating her vagina.

4. The Appellant pleaded not guilty and the Prosecution called five witnesses. At the close of the Prosecution case, the Appellant was put on his defence. He gave a sworn statement. At the conclusion of the trial, the Learned Trial Magistrate made a finding that the principal charge had been proved beyond reasonable doubt and convicted the Appellant. She then sentenced him to life imprisonment as mandatorily required under section 8(2) of the Sexual Offences Act.

5. The Appellant was dissatisfied with the conviction and sentence and appealed to this Court. He filed a "home-made" Grounds of Appeal which contained found grounds of appeal. He later amended these when he submitted his Written Submissions. By that time, he did not have counsel. When the matter came up for hearing, however, Ms. Rahab Muthoni had taken up the case on behalf of the Appellant. She made oral submissions on his behalf. She abandoned all the other grounds of appeal and took up a single one: that the Trial Court erred by not taking into consideration that the Appellant was a minor and therefore ended up presiding over an unfair trial whose conviction cannot stand.

6. When the appeal was listed for hearing before me on 19/02/2019, I noted that the Appellant was of youthful appearance. I inquired of his age. He informed the Court that he was 23 years old. Noting that the alleged offence, according to the charge sheet was committed on 17/11/2012, it appeared to the Court that the Appellant might have been a minor at the time of the commission of the crime and during trial.

7. Upon inquiry, the Appellant indicated that he did not have his Birth Certificate or any documents that could prove his age because they were all burnt during the Post-Election Violence in the [particulars withheld] area where they lived at the time. I indicated to the Appellant that, in the circumstances, the Court would admit the viva voce evidence of his relatives to determine his age. The Appellant was unrepresented at the time.

8. On 20/02/2019, the Appellant's mother, T W and his aunt, M M, appeared before the Court. They each testified on oath that the Appellant was born on 10/11/1995. He was born at home so the fact of his birth is not recorded in any hospital; but it was reported afterwards and he obtained a Birth Certificate. The mother told the Court on oath that after birth she took him to Miti Mingi clinic where all his immunization vaccines were given. She further testified that all their civic identity documents were burnt down together with their house during the Post-

Election violence in 2007. Lastly, the mother testified that the Appellant had not yet taken a National Identity Card because he was still a minor before his arrest.

9. M M, the aunt corroborated this story.

10. Mr. Chigiti, the State Prosecutor, did not find it necessary to cross-examine either witnesses though the Court gave him the opportunity.

11. I formed the opinion that both the witnesses were candid and truthful. Based on their evidence and the provisions of section 143 of the Children's Act, I concluded that the Appellant's date of birth was 10/11/1995. This made the Appellant exactly seventeen years (and seven days!) at the time of the alleged commission of the offence. He was, therefore, a minor at the time. He was still a minor during most of his trial and had barely turned eighteen at the time he was sentenced.

12. Ms. Muthoni argued that the fact that the Appellant was a minor when he allegedly committed the offence and when he was arraigned in Court but was not treated as one fatally tainted the trial. She argued that this was so in at least four ways:

> a. First, that the Appellant was not provided with legal counsel as the law demands.
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> b. Second, that the Appellant was detained in an adult prison during the trial and not separated from adults as the law requires.
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> c. Third, that the Appellant was given bail terms which were excessive in the circumstances given that he was a minor.
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> d. Fourth, that the Appellant was eventually sentenced to an adult prison or given custodial sentence at all.

13. In the circumstances, Ms. Muthoni urged the Court to reverse the conviction and acquit the Appellant. Ms. Muthoni relied on ***POO (A Minor) v Director of Public Prosecutions & 2 Others [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.

14. Mr. Chigiti, the State Prosecutor, conceded that with the establishment of the age of the Appellant, the conviction cannot stand. However, Mr. Chigiti was of the opinion that the appropriate thing to do in the circumstances would be to declare a mistrial and remand the case back for re-trial.

15. Both the Kenyan Constitution and the Children's Act have explicit provisions for the protection of children especially when they come into contact with the law. This is true both when a child is in conflict with the law and when he is in need of protection and care. Indeed, every child who comes into contact with the law is deemed to be in need of protection and care.

16. A good place to begin the analysis is Article 21(3) of the Constitution. It 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, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.*

17. This constitutional provision places a categorical duty on all Public Officers who are carrying out their duties and exercising authority under the Constitution, to specifically address the needs of children (among other vulnerable groups) as they carry out their duties. In this case, it was incumbent upon the Police Officers who made the arrest of PK; the Prosecutor who made the charging decision; the Learned Magistrate who took plea as well as the one who conducted the trial; and the Prison's Authorities who held the Appellant in remand to have addressed the needs of the minor who was alleged to be in conflict with the law. This did not happen: none of the organs and Public Officers who dealt with the case even realized that PK was a minor.

18. Second, Article 53 of the Constitution contains three important directives:

> a. The first one is, really, the "Prime" Directive when children come into contact with the law and the legal system. That is Article 53(2) of the Constitution: A child's best interests are of paramount importance in every matter concerning the child.
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> b. The second one is in Article 53(1)(f): Every child has a right not to be detained, except as a measure of last resort, and when detained, to be held for the shortest appropriate period of time.
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> c. The third one is also found in Article 53(1)(f): Every child has a right, when detained, to be held separate from adults and in conditions that take account of the child's sex and age.

19. Third, the Children's Act contains certain guarantees for children who are alleged to be in conflict with the law. They are found in section 186 of the Act. That section provides 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.

20. It is in obedience of this section of the law, which is in keeping with the International Convention on the Rights of the Child, to which Kenya is a treaty member, that Courts always ensure that a child facing a criminal offence is represented by an Advocate; and further that the trial takes place in camera so as to protect the privacy of the child.

21. Lastly, the Children's Act also has provisions on sentencing children. Section 191 of the Children's Act provides 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 recognisance, 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.

22. 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.

23. 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.

24. Before ending, it is important to return to the duty of the Trial Court in a situation such as this one. Our Trial Courts are often overwhelmed by the sheer number of cases they have to deal with especially during plea-taking. It is quite understandable that the Presiding Officer may not realize that the person before them is a minor. It may not be practical to make that specific inquiry during plea. However, Learned Magistrates should assume that specific duty more robustly in cases where Accused Persons are charged with serious criminal offences. Even if the Court taking plea inadvertently fails to make that inquiry during plea taking, it is incumbent upon the Court that conducts the trial to do so during the pre-trial conference or, in any event, before the trial commences. This is, indeed, one of the virtues of conducting pre-trial conferences in criminal cases. This is good practice in all cases so as to be faithful to the constitutional duty provided in Article 21(3) of the Constitution. However, it is required by the law in the cases of persons who appear to be minors. That duty is stipulated in section 143 of the Children's Act. It states 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.

25. **In the present cases, given the circumstances explained above, 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**.

26. Orders accordingly.

Dated and delivered at Nakuru this 6th day of June, 2019

JOEL NGUGI

JUDGE