



**MS alias MDA v Republic (Criminal Appeal 1 of 2019)
[2019] KEHC 1795 (KLR) (21 November 2019) (Judgment)**

MS alias MDA v Republic [2019] eKLR

Neutral citation: [2019] KEHC 1795 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL 1 OF 2019
CM KARIUKI, J
NOVEMBER 21, 2019**

BETWEEN

MS ALIAS MDA APPELLANT

AND

REPUBLIC RESPONDENT

Effect of Failure to Uphold Fair Trial Rights and Best Interests of a Child in Criminal Proceedings

The case was on the trial court's failure to properly recognize and protect the appellant's rights as a minor as was required by the Children Act, 2001 and the Constitution. The instant court held that the trial court erroneously treated the appellant as an adult by imposing a life sentence, which was prohibited for child offenders under section 190 of the Children Act. Additionally, the trial exceeded the statutory timeline for the expeditious disposal of cases involving children, as outlined in rule 12 of the Child Offenders Rules. The appellant's right to a fair trial was further compromised by the lack of legal representation when his appointed counsel failed to appear. Thus, the trial court's neglect to adhere to the constitutional and legal protections afforded to children rendered the proceedings unlawful, leading to the quashing of the conviction and sentence.

Reported by Moses Rotich

Constitutional Law - Bill of Rights - rights of a child - the principle of the best interests of a child - sentencing of minors - where the appellant (a minor) was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, cap 63A - whether the sentence of life imprisonment imposed on the appellant was illegal and unlawful for contradicting the provisions of the Constitution and the Children Act - Constitution, articles 50 (1) and 53(2); Children Act, 2001(repealed), sections 4 & 191, and rule 12 of the fifth schedule.

Criminal Law - trials - the right to a fair trial - where the trial court failed to safeguard the appellant's right to a fair trial during the proceedings - whether the irregularities and errors of law committed by the trial court vitiated the proceedings before the trial court - whether the prosecution case was proved beyond reasonable doubt - whether the sentence imposed on the accused by the trial court was excessive/or illegal - what were the appropriate



orders to be made upon a finding of guilt for a child offender - Constitution, articles 50 (1) and 53(2); Children Act, 2001(repealed), sections 4 & 191, and rule 12 of the fifth schedule.

Brief facts

The appellant lodged an appeal to the High Court following a judgment by the trial court in which he was convicted and sentenced to life imprisonment. He 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 (Sexual Offences Act). Alternatively, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

The appellant's contended that the trial court had erred in law and fact by convicting and sentencing him without any documentary evidence in support of the conviction. He claimed that the trial court convicted him without addressing the material contradictions in evidence vis-à-vis the charge.

Further, the appellant argued that the trial court erred in law and in fact in failing to keep a proper record of the court contrary to section 198 of the Criminal Procedure Code (CPC) and by convicting him in disregard of the provisions of section 190 of the Children Act, 2001. Thus, he reiterated that the court sentenced him to an illegal sentence and which sentence was outside the legally mandated period of determination in terms of the court's jurisdiction.

Issues

- i. Whether the irregularities and errors of law committed by the trial court during trial of the appellant vitiated the proceedings before the trial court.
- ii. Whether the prosecution case on the alleged commission of defilement by the appellant was proved beyond reasonable doubt.
- iii. Whether the sentence imposed on the accused by the trial court was excessive/or illegal for going against the provisions of the Constitution and sections 190 and 191 of the Children Act, 2001.
- iv. What were the appropriate orders to be made upon a finding of guilt for a child offender?

Held

1. The trial court failed to record the language used during witness testimony, violating procedural fairness. Whenever evidence was tendered, the language that the witness engaged in to communicate his or her testimony to the court ought to, at the very least, be recorded by the court. In the instant case, the language of the testimony was missing.
2. The appellant's trial was governed by the Children Act, 2001 and the Constitution since he was a minor at the time of the offence. However, the trial court did not observe the best interests of the child as required by article 53 of the Constitution and section 4 of the Children Act.
3. Rule 12 of the fifth Schedule to the Children Act mandated the disposal of cases involving minors within three months of plea-taking. The appellant's case exceeded that period, rendering subsequent proceedings illegal. Additionally, the trial court erred in treating the appellant as an adult, contrary to section 190 of the Children Act, which prohibited imprisonment as a punishment for minors. The life imprisonment sentence imposed was thus unlawful and void.
4. Fair trial was the cornerstone of criminal procedure. It was the court's duty to ensure that fairness was neither hampered nor threatened. It encompassed the rights of the accused, the victim, and society, ensuring all parties received a fair and proper opportunity. As a constitutional and human right, a fair trial ought to be upheld under all circumstances, without jeopardy to any individual's rights.
5. The trial court failed to provide the appellant with adequate legal representation, compounding the violation of his right to a fair trial. Procedural and substantive errors, including the court's failure to recognize the appellant's minor status, cumulatively vitiated the trial. A retrial was inappropriate due to the prejudice it would cause, as the prosecution was already aware of the appellant's defence.

Appeal allowed.



Orders

- i. The conviction of the appellant by the trial court was quashed.
- ii. The sentence of life imprisonment imposed on the appellant by the trial court was set aside.
- iii. The appellant was set at liberty unless otherwise lawfully held.

Citations

Cases

Kenya

1. *ADKC v Republic* Criminal Appeal 184 of 2009; [2014] KECA 230 (KLR) - (Explained)
2. *Laban Kimondo Karanja & 2 others v Republic* Criminal Appeal 310, 311& 312 of 2001; [2006] KEHC 3091 (KLR) - (Explained)
3. *Mutua, Albanus Mwasia v Republic* Criminal Appeal 120 of 2004; [2006] KECA 346 (KLR) - (Explained)
4. *SCM v Republic* Criminal Appeal No 55 of 2015 [2023] KEHC 2710 (KLR) - (Explained)
5. *Simiyu, Swahibu Simbauni & another v Republic* Criminal Appeal 243 of 2005; [2006] KECA 354 (KLR) - (Explained)

India

1. *Manu Sharma v State* (2010) 6 SCC 1 - (Explained)
2. *Rattiram v State of MP* AIR 2012 SC 1485 - (Explained)
3. *Satyajit Banerjee & others v State of WB & others* 2004 AIR SCW 6646 - (Explained)

Statutes

Kenya

1. Children Act, 2001 (Repealed) (Act No 8 of 2001) Schedule 5; section 4, 190 - (Interpreted)
2. Constitution of Kenya article 50(2)(h); 53 - (Interpreted)
3. Criminal Procedure Code (cap 75) section 198 - (Interpreted)
4. Sexual Offences Act (cap 63A) In general – (Cited)

Advocates

None mentioned

JUDGMENT

1. The appellant was charged with offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars being that at unknown date of July 2017 at East Sub-County within Wajir County intentionally caused his penis to penetrate the vagina of FID a child aged 11 years.
2. Alternatively, he was charged with offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. Particulars being that at unknown date of July 2017 at East Sub-County within Wajir County intentionally touched the vagina of FID a child aged 11 years with his penis.
3. He pleaded not guilty and after matter was heard he was convicted and sentenced to life imprisonment.
4. He was aggrieved with the verdict above thus he lodged an appeal.
5. During the hearing he canvassed his grounds of appeal set out in supplementary petition of appeal namely:-



- a. That the honourable trial magistrate erred in law and in fact by not keeping a proper record of the court contrary to section 198 of the *Criminal Procedure Code*.
 - b. That the learned trial magistrate erred in law and in fact by convicting and sentencing the appellant without any documentary evidence in support of such conviction.
 - c. The learned trial magistrate erred in law and in fact by convicting the appellant against the relevant section of the *Children Act, 2001*.
 - d. The learned trial magistrate erred in law and in fact by convicting the appellant without addressing the material contradictions in evidence visa vis the charge.
 - e. The learned trial magistrate erred in law and in fact when he left ingredients of the charge not being analyzed and or determined thereby leaving the entire process hanging in suspense.
 - f. That incompetent witnesses were allowed to tender evidence which if the honourable trial magistrate had given proper guidance to the appellant under article 50(2)(h) of the *Constitution of Kenya, 2010* such an absurdity could have been avoided.
 - g. The court sentenced the appellant to an illegal sentence at law and which sentence was outside the legally mandated period of determination in terms of the court's jurisdiction.
6. The parties were directed to file submissions which they did and exchanged.

Appellant's Submissions:

7. Under section 198 of the *Criminal Procedure Code*, the language of this court is either English or Kiswahili. Whenever evidence is recorded and proceedings taken, they shall be so taken in the language of the court.
8. On the June 28, 2018, when plea was taken the plea court did rightly record the language that the plea was taken on being Kisomali language. Much as the record is not clear who the interpreter was and how (language) the appellant respondent thereto.
9. On the September 19, 2018 when PW1 took the witness stand the record appearing at page 5 of the typed proceedings indicate thus, "PW1 is sworn and states as follows."
10. The same manner of recording replicates itself in proceedings that followed when PW2 testified which appears at page 6 line 26 of the typed proceedings when the court had to record thus:

"Court – The complainant understands nature of an oath. She is sworn and states that....."
11. PW3 evidence at page 8 line 20 also testified in the manner and style the 2 previous witnesses had testified so was PW4 at page 7 line 27.
12. The pertinent question therefore will be the language that all the four witnesses used to tender their respective testimonies which he did submit that, it is unknown.
13. It is now a settled legal principle and holding by the superior courts that whenever evidence is tendered, the language that the witness engages in to communicate his testimony to the court should be at the very least be recorded by the trial court. In the instant case, the language of the testimony is but missing.
14. In the case of *Swahibu Simbuani Simiyu & another vs Republic* [2006] eKLR and that of *Albanus Mwasia Mutua vs Republic* [2006] eKLR the superior court found and held that there was a gross



violation of the appellant's right to fair trial on account of the court not recording the language that the proceedings were taken.

15. Once that holding was reached as to the violations, it is his submission that there was a blatant violation on the appellant's right as to the non-keeping of the record of the court. He urges the court to reach a similar findings of fact on the non-compliance of the statute as relates the record keeping by the court.
16. There were several facets relating to the documentary evidence so tendered which did not support the charge. At the onset of the trial, on the June 27, 2018, the record will show that the learned prosecutor had issues with the names of the subject before the court (appellant herein) and sought for more time to regularize on the issue of the name.
17. The next day on the June 28, 2018, MAA M alias MDA was charged. PW1 referred the appellant to as MDAS who defiled her daughter. PW2 named the defiler as MD. PW4 talked of MDA whereas the appellant described himself as MAD.
18. PW1 and PW2 being the principal witnesses had all testified and given the defiler's name to be MD being an alias name. No one gave the description of the defiler to be MAM.
19. Interestingly, exhibit 6 being the PRC form indicated among others that the assailant was a known childhood boyfriend who only indulged in sex once resulting to the pregnancy. The PRC form relates to a patient by the name DF born on the January 1, 2006 though the birth certificate for that complainant is one for MSF born on the same day ie 1/1/2006.
20. The child born out of the sexual union whose acknowledgment of a birth notification for parents produced as exhibit 7 indicates that the child was born on the May 13, 2018 whereas PW1 indicated that the child was born in June of 2018 where the mother of the child is DYH and not the complainant.
21. The other issue as to contradictions is on the date of the defilement compared with the date of the child born out of the union of the defilement. If indeed there was a defilement in July 2017, taking gestation period in humans to be 9 months, the most probable expected delivery date should have been on or before end of April of 2018. The child herein was born on May 13, 2018. The connection between the child born and the date of alleged defilement is gaping.
22. With these glaring discrepancies in documentation as compared with the oral evidence tendered, and without the trial court really addressing its mind as to resolving the discrepancies in support of the conviction, it is his submission that the findings of guilt on the part of the appellant was not safe and the benefit ought to have gone to his favour.
23. The proceedings at page 14 regarding the sentence meted out on the appellant clearly acknowledged the appellant to have been born on the February 2, 2000 vide birth certificate No 0908447 (which was not tendered in evidence). The offence is alleged to have been committed in July, 2017.
24. Taking the February 2, 2000 as the birth date of the appellant as acknowledged by the court through the birth certificates, for all purposes and intent, the appellant had not attained majority age as at the date of the alleged offence. He was a subject of being governed by the *Children Act, 2001*.
25. The fifth schedule of the *Children Act* regarding the children offender's rules provides guidelines in regard to duration of cases under rule 12 which provides for expeditious disposal of the cases and provides that if a case in which a child is involved is not resolved within 3 months from the time of plea, the case shall be dismissed and the child shall not be liable to any further proceedings for the same offence.



26. Having that specific section/rule in mind, the case against the appellant pending at the trial subordinate court should have concluded on or before the September 28, 2018 being the legally provided for period. Anything done over and above the said date presented on illegality.
27. On other flaw against the Children Act provisions is the finding that the appellant was an adult whilst the alleged offence was committed. Section 190 of the Children Act, 2001 ought to have come into play since imprisonment is banned as a punishment for child offenders. Therefore the sentencing not for a day but for a lifetime in prison was not only illegal and unlawful but against the set provisions of the law as no child should be subjected to the cruel sentence as meted out.
28. The charge sheet has Count 1 for the charge of defilement with an alternative count of committing an indecent act with a child. The trial court having found the appellant guilty of the main count ought to have addressed its mind to the alternative to hold it in abeyance.
29. Sadly, no mention is made in the judgment of the alternative charge that the court was trying. Even when the law and precedent is that the court only deals with the main count in the event of a finding of guilty, it ought to have addressed the issue of the alternative charge by then suspending it and holding it in abeyance.
30. However and most importantly is the aspect that the defilement happened in the month of July 2017. The said defilement was only known to have happened in May of the following year. The only way the issue of the alleged defiler could have been established was for the prosecution to call for DNA results for the perpetrator to be known through it.
31. That didn't happen the only thing that was left to the court was speculation that probably the appellant might have been the one who engaged in the defilement. That lacuna ought to have been filled and the court was bore to make any determination without the actual calling of the reports. That suspension should go into the favour of the appellant.
32. Article 50(2)(h) of the Constitution provides thus regarding fair trial rights:
 - “(h) To have an advocate assigned to the accused person by the State at State expense, of substantial injustice would otherwise result and to be informed of his right promptly.”
33. The appellant is/was a minor when the proceedings were happening. The court failed to safeguard his rights as to fair and it ought to have guided him over his rights including choosing for him an advocate to offer legal representation. It is therefore a fault on the part of the trial magistrate not to call for extra representation for the minor when the initial legal team failed to turn up.
34. On that the court sentenced the appellant to an illegal sentence at law and which sentence was outside the legally mandated period of determination in terms of the court's jurisdiction, this ground almost relates and resonates with ground 3 of the petition.
35. It was not available for the court to send the appellant to serve life in prison when infact he was a minor during the commission of the offence. Section 190 of the Children Act doesn't envisage a situation of life imprisonment but rather gives a myriad of remedies available at law to deal with child offenders. This therefore means that the sentence that the appellant is serving is illegal.

Respondent's Submissions:

36. On age ingredient, the complainant was 11 years at the time of the offence. Exhibit 7 was a birth certificate indicating the date of birth as 1/1/2006.



37. On penetration, the complainant (PW2) testified that they had sex with the appellant in July 2017. PW3 the clinical officer who examined the complainant found the hymen to be torn and complainant was pregnant. Ultra sound was carried out and the clinical officer confirmed there was penetration, a precursor to the pregnancy.
38. On regard to identification, the complainant evidence indicates the appellant was a person she knew prior to the date of the incident. In fact after the incident, they used to converse whence she told the appellant she had missed her menses. She also told the court that it is the appellant who impregnated her.
39. On the contentions by the appellant, on the failure by the court to keep proper record, and in particular the issue of language, it is clear from the record that the proceedings of June 28, 2016 when plea was taken the charges were read in Kiswahili, the language the accused understood.
40. In the subsequent hearings, it is apparent that the proceedings were done in Kiswahili but interpreted to Kisomali for the benefit of the accused person. He participated in the trial through cross examining witnesses. He understood what the trial was all about.
41. On the contention that the magistrate erred in law and in fact by committing and sentencing the appellant without documentary evidence in support of conviction, from the record there is a birth certificate for the complainant. There are medical documents *inter alia* the discharge summary medical notes, obstetric scan, P3 form which support the case against the appellant.
42. On the contention that the appellant was convicted against the relevant section of the [Children's Act 2001](#), indeed the appellant was about 17 years old at the time of the commission of the offence but had attained the age of maturity at the time of conviction and sentence.
43. In [SCM vs Republic](#) Criminal Appeal No 55 of 2015, High Court of Kenya at Naivasha the court stated thus:
 - i. “With regard to the sentence, I have as earlier pointed out; found that the appellant was a child at the time of committing the offence. Accordingly, the trial magistrate ought to have prescribed any of her lawful sentence pursuant to section 19(i)(g) and (i) of the Children’s Act and the authorities herein cited.
 - Accordingly, I hereby reduce the appellant’s sentence to a custodial sentence of ten (10) years.”
44. In [Republic vs Dennis Kirui Cheruyot](#) [2014] eKLR, the appellant was a minor when he committed the offence, 15 years but 20 years at the time of conviction and sentenced to 15 years which Court of Appeal reduced to 10 years’ imprisonment.
45. In the instant case, custodial sentence is called for. But the life sentence can be interfered with by this court.

Evidence Adduced:

Prosecution’s Case:

46. PW1 testified that FID told her that the accused person went to their home, grabbed her and proceeded to defile here. PW1 told the court that they reported the matter to the police and accused was arrested.



47. In cross examination PW1 testified that the accused person defiled FID on a Saturday and on a Sunday. It was PW1's testimony that the FID was alone when she was defiled.
48. FID (PW2) testified that on a date she could not recall in the month of July 2017 the accused person impregnated her. It was her testimony that on the material day around 7.00 AM the accused person visited her at their home. PW2 testified that she was alone at the time. The accused person greeted her and held her hand. PW2 testified that the accused person led her to a Somali traditional hut. According to PW2, the accused person forced her onto a bed and removed all her clothes. PW2 testified that the accused person proceeded to have sex with her. She explained that she was lying on her back and the accused person was on top of her doing the act.
49. PW2 testified that after the act the accused person wore his clothes and left. She also wore her clothes and continued with her work. PW2 told the court that when PW1 returned home she did not tell her what had happened out of fear. It is only after she missed her periods that she informed PW1 of the incident.
50. PW2 testified that after PW1 found out that she was pregnant she took her to Wajir County Referral Hospital. At the hospital that she told the mother about the person who had defiled her. They reported the matter to the police and the accused person was arrested. PW2 testified that the accused person was their neighbour. It was PW2's testimony that before the incident she had not engaged in sex with the accused person.
51. Robert Otieno Ogallo, a clinical officer at Wajir County Referral Hospital (PW3) testified that he examined PW2 and filled a P3 form for her. On examination he found that her clitoris had been mutilated but the external genitalia was normal. According to PW3, the hymen was broken. There was no discharge. Also, there was no blood on the vulva. PW3 found that PW2 was pregnant. He concluded that she had a normal pregnancy secondary to defilement.
52. From a discharge summary that PW3 identified PW2 was admitted at Wajir County Referral Hospital on 13th May 2018 while in labour. Due to her age caesarian section was done. She was discharged from the facility on 16th May 2018. She gave birth to a female baby called SID.
53. PW3 produced the P3 form dated April 12, 2018 as exhibit 1, discharge summary dated May 13, 2018 as exhibit 2, obstetric scan as exhibit 3, laboratory results as exhibit 4, medical notes dated April 12, 2018 as exhibit 5, Post Rape Care form as exhibit 6, PW2's birth certificate as exhibit 7 and the new born's birth notification as exhibit 8.
54. On cross examination PW3 admitted that he could not tell who impregnated PW2.
55. No. 100111 PC David Mutua of Wajir Police Station (PW4) testified that on April 12, 2018 around 12.00 pm PW1 and PW2 reported that on a certain day in July 2017 she had been defiled by the accused person. It was reported to him that the accused person had joined PW2 at their home. After small talk he convinced her to join him in a hut in that compound. PW4 testified that while there the accused person undressed PW2 and proceeded to defile her.
56. PW4 told the court that PW2 did not report the matter to her mother (PW1). According to PW4, after 7 months the mother noticed some changes in PW2's body and behaviour and asked her about it. It is at that point that PW2 told the mother what had transpired. The mother took the daughter to Wajir County Referral Hospital. PW4 testified that he arrested the accused person on 26th June 2018. PW4 testified that he received PW2's birth certificate and found that she was born on January 1, 2006.



Defence Case:

57. The court found the accused person with a case to answer and placed him on his defence. He elected to give a sworn statement. The accused person denied that he committed the offence. He testified that no one heard PW2 scream when he is alleged to have defiled her. According to the accused person, if at all he defiled the complainant the matter ought to have been reported the same day he committed the offence.
58. The accused person told the court that he was being framed. It was then accused person's defence that when it was found that the complainant was pregnant she mentioned 3 other people. Finally, the accused person testified that she was framed because his family and that of PW2 had differences.
59. AMS (DW2) testified that he was the father to the accused person. He told the court that he learnt that the accused person had defiled a girl. According to DW2, elders intervened and found that the girl had not been defiled. DW2 told the court that he did not think PW2 was defiled. According to DW2, there is no way PW2 could give birth because she was 12 years old. Lastly, DW2 testified that the accused person was being framed.
60. Mohamed Mohamed (DW3) told the court that he was a neighbour to the accused person. According to DW3, no sexual offence was committed in their neighbourhood. He testified that PW2 lied to the court. It was his evidence that there was no way a 12 year old child could give birth.

Issues, Analysis and Determination:

61. After going through the trial court record and the parties submissions I find the issues that;
 - a) whether the irregularities and errors of law committed by the trial court vitiates the proceedings before the trial court? If above in affirmative, what is the appropriate orders to make?
 - B) If a) in negative, was the prosecution case proved beyond reasonable doubt?
 - C) Was sentence excessive and / or illegal?
62. The appellant contends that, under section 198 of the *Criminal Procedure Code*, the language of this court is either English or Kiswahili. Whenever evidence is recorded and proceedings taken, they shall be so taken in the language of the court.
63. That on the June 28, 2018, when plea was taken the plea court did rightly record the language that the plea was taken on being Kisomali language. Much as the record is not clear who the interpreter was and how (language) the appellant respondent thereto.
64. On the September 19, 2018 when PW1 took the witness stand the record appearing at page 5 of the typed proceedings indicate thus, "PW1 is sworn and states as follows."
65. The same manner of recording replicates itself in proceedings that followed when PW2 testified which appears at page 6 line 26 of the typed proceedings when the court had to record thus:

" Court – The complainant understands nature of an oath. She is sworn and states that....."
66. PW3 evidence at page 8 line 20 also testified in the manner and style the 2 previous witnesses had testified so was PW4 at page 7 line 27.
67. The pertinent question therefore will be the language that all the four witnesses used to tender their respective testimonies which he did submit that, it is unknown.



68. It is now a settled legal principle and holding by the superior courts that whenever evidence is tendered, the language that the witness engages in to communicate his testimony to the court should be at the very least be recorded by the trial court. In the instant case, the language of the testimony is but missing.
69. In the case of *Swahibu Simbuani Simiyu & Another vs Republic* [2006] eKLR and that of *Albanus Mwasia Mutua vs Republic* [2006] eKLR the superior court found and held that there was a gross violation of the appellant's right to fair trial on account of the court not recording the language that the proceedings were taken.
70. Once that holding was reached at on the violations, it is appellant submission that there was a blatant violation on the appellant's right as to the non-keeping of the record of the court. He urges the court to reach a similar findings of fact on the non-compliance of the statute as relates the record keeping by the court.
71. The prosecution response is that it is apparent that the proceedings were done in Kiswahili but interpreted to Kisomali for the benefit of the accused person. He participated in the trial through cross examining witnesses. He understood what the trial was all about. But was he effectively participating in the proceedings?
72. It is also an issue that, the proceedings at page 14 regarding the sentence meted out on the appellant clearly acknowledged the appellant to have been born on the February 2, 2000 vide birth certificate No 0908447 (which was not tendered in evidence). The offence is alleged to have been committed in July, 2017.
73. Taking the February 2, 2000 as the birth date of the appellant as acknowledged by the court through the birth certificates, for all purposes and intent, the appellant had not attained majority age as at the date of the alleged offence. He was a subject of being governed by the *Children Act, 2001*. Under article 53 *Constitution of Kenya* and section 4 of the *Children Act* the best interest of the child ought to have been observed in the proceedings in the trial court.
74. The fifth schedule of the *Children Act* regarding the children offender's rules provides guidelines in regard to duration of cases under rule 12 which provides for expeditious disposal of the cases and provides that if a case in which a child is involved is not resolved within 3 months from the time of plea, the case shall be dismissed and the child shall not be liable to any further proceedings for the same offence.
75. Having that specific section/rule in mind, the case against the appellant pending at the trial subordinate court should have concluded on or before the September 28, 2018 being the legally provided for period. Anything done over and above the said date presented on illegality.
76. On other flaw against the *Children Act* provisions is the finding that the appellant was an adult whilst the alleged offence was committed. Section 190 of the *Children Act, 2001* ought to have come into play since imprisonment is banned as a punishment for child offenders. Therefore, the sentencing for a lifetime in prison was not only illegal and unlawful but against the set provisions of the law as no child should be subjected to the cruel sentence as meted out.
77. Article 50(2)(h) of the *Constitution* provides thus regarding fair trial rights:
 - “(h) To have an advocate assigned to the accused person by the State at State expense, of substantial injustice would otherwise result and to be informed of his right promptly.”



78. The appellant is/was a minor when the proceedings were happening. The court failed to safeguard his rights as to fair and it ought to have guided him over his rights including choosing for him an advocate to offer legal representation. It is therefore a fault on the part of the trial magistrate not to call for extra representation for the minor when the initial legal team failed to turn up.
79. On that the court sentenced the appellant to an illegal sentence at law and which sentence was outside the legally mandated period of determination in terms of the court's jurisdiction, this ground almost relates and resonates with ground 3 of the petition.
80. It was not available for the court to send the appellant to serve life in prison when in fact he was a minor during the commission of the offence. Section 190 of the *Children Act* doesn't envisage a situation of life imprisonment but rather gives a myriad of remedies available at law to deal with child offenders. This therefore means that the sentence that the appellant is serving is illegal.
81. In sum the court finds that the errors and irregularities disclosed on record cumulatively vitiates the entire proceedings by the trial court. The trial court at no time did he acknowledge that appellant was a minor at the time of commission of the offence and during the part of the proceedings. The appellant seemed to have been treated as an adult from the date of arrest to date of sentencing.
82. Having nullified proceedings by the trial court, the next question is whether a retrial should be ordered?
83. I have anxiously considered whether or not to order a retrial. The relevant principles to consider when faced with such a matter have been stated severally by the courts. In the case of *Muiruri vs Republic* the court held inter alia as follows:-
- “Generally whether a retrial should be ordered or not must depend on the circumstances of the case....It will only be made where the interests of justice requires it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having lapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.”
84. In *Laban Kimondo Karanja vs Republic* discussing grounds for ordering a retrial, reviewed several court of appeal decisions on the subject and concluded as follows:-
- “At the end,the principles an appellate court should apply in determining whether to order a retrial are as follows:-
- i. A retrial may be ordered only when the original trial, was illegal or defective.
 - ii. Whether an order for retrial should be made depends on the particular facts and circumstances of each case but should only be made where the interest of justice require it and where it is not likely to cause an injustice to an accused person.
 - iii. A retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible evidence, or potentially admissible evidence a conviction might result.”
85. The Supreme Court of India in *Satyajit Banerjee & Ors. vs State of W.B. & Ors.* It has been opined that direction for retrial should not be made in all or every case where acquittal of accused is for want



of adequate or reliable evidence. It is only when an extraordinary situation with regard to first trial is found so as to treat it as a farce or a 'mock trial, direction for retrial would be justified.

86. To appreciate the above principles it is important to understand the meaning of the expression "where the interests of justice require it and where it is not likely to cause an injustice to an accused person." For a re-trial to be ordered the interests of justice must require it and secondly it must not cause an injustice to the accused person.
87. The phrase "in the interests of justice" potentially has a broad scope. It includes the right to fair trial, which is a fundamental right of the accused. In the context of the right to a fair trial, the time the case has lasted, the period the appellant was in prison, the weight of the evidence and the possibility of a conviction needs to be considered.
88. In the present context, it is also necessary to appreciate the basic concept behind a fair trial. I find useful guidance in the Supreme Court of India decision in *Manu Sharma vs. State* (NCT of Delhi), where the court stated that:-
- i. "In the Indian criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudence of some of the countries in the world. The criminal justice administration system in India places human rights and dignity for human life at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in articles 20 and 21 of the Constitution of India."
89. The above position is reflected in the Kenya Constitution which guarantees a fair trial to an accused person as one of the fundamental rights in the bill of Rights. In *Rattiram vs State of MP* a three-Judge Bench ruled thus:-
- "i. Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracise injustice, prejudice, dishonesty and favouritism."
90. In this regard, I find it necessary to emphasize that fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized.
91. There has to be a fair trial and no miscarriage of justice should be permitted and under no circumstances should prejudice be caused to the accused. I am not persuaded that a retrial can be conducted without causing injustice to the appellant in this case.
92. First, he was first arraigned in court in 2017, he stood trial, went through the entire process and he tendered his defence. At no time did trial court accord him the protection under the *Constitution* and *Children Act*. He was unrepresented and the trial On the sentencing violated the provisions of the children's act. He has been in prisons until he was released on bond.



93. I find that a retrial will not be without prejudice because the prosecution is already aware of his defence. Thus the court makes the following orders;
- i) The conviction is quashed, sentence is set aside and appellant is set at liberty unless otherwise lawfully held.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 21ST DAY OF NOVEMBER, 2019.

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C. KARIUKI

JUDGE

