



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 155 OF 2017

E K K.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the original conviction and sentence in Eldama Ravine Principal Magistrate's Court Criminal Case No. 347 of 2015 delivered on the 2nd day of July, 2015 by Hon. R. Yator, SRM]

JUDGMENT

Introduction

1. The appellant was sentenced to imprisonment for 20 years of the offence of incest by a male person contrary to section 20(1) of the Sexual Offences Act. The appellant appealed principally challenging the conviction on the basis of insufficiency of evidence.

Submissions

2. The DPP did not support the conviction urging that the sentence was unlawful as “*if the age of the complainant was proved to have been 14 years and evidence of incest were proved, the sentence was unlawful*” as it should have been life imprisonment. It was also urged that the age of the appellant was not proved as a basis for the order of imprisonment as section 190 of the Children’s Act prohibits sentencing children to imprisonment and there was evidence that the appellant had given his age as 17 years when he took the plea. It was pointed out that upon the issue being raised by the Prosecution, the court had ordered an age assessment to be done on the appellant but the same was never done. At the time of his defence on 1/10/14, the appellant had said that he was 18 years. The court ought to have obtained an age assessment report before sentencing the appellant to imprisonment.

3. DPP submitted that if the appellant was 17 years at the time of plea, the trial court had erred in assuming that the appellant was an adult. It was urged that as the appellant had been in custody since 2014, the court should “*reduce the sentence to the time already served considering that it was illegal*”.

Determination

4. If the appellant was a minor at the time of the trial, his fair trial guarantees under the Children’s Act required that he be represented by Counsel and if not able to hire one to be provided for on at State expense. See section 186 of the children Act on guarantees to a child accused of an offence.

5. His conviction in breach of his fair trial guarantee to representation by counsel and his subsequent punishment caused injustice on the appellant. He has already served imprisonment for 3 years since 2/7/15. The court order for age assessment of the appellant was not effected. Clearly, as urged by the DPP, the appellant was not sure of his age as he had said that he was 17 years at the time of plea taking on **10/4/12** and 18 years on **1/10/2014** two years later when he testified.

6. In these circumstances, the court should not have sentenced before ascertaining the age of the appellant let alone the breach of the fair trial guarantee of legal representation for the if he was a minor at the time of his trial. The appellant’s Counsel was, however, partly to blame for failure to attend court.

Appellant prejudiced

7. I find that the appellant was prejudiced in his trial possibly as a minor, without legal representation, leading to a conviction and sentence to imprisonment for 20 years, of which he has already served 3 years of the illegal order since conviction and sentence on **2/7/15**. Retrial is not in the interest of justice has already served time upon conviction which was not safe.

Orders

8. Accordingly, for the reasons set out above, I quash the conviction for incest contrary to section 20 (1) of the sexual offences Act on the ground that the conviction may have been the result of a defective trial of a minor without legal representation.

9. I also set aside the imprisonment for 20 years which was based on the said conviction.

10. There shall, therefore, be an order for his immediate release from custody unless he is otherwise lawfully held.

DATED AND DELIVERED ON THIS 18TH DAY OF JULY, 2018

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in Person.

Ms Macharia Ass. DPP for the Respondent