SCN v Republic (Criminal Appeal 55 of 2015)
[2018] KEHC 2746 (KLR) (18 October 2018) (Judgment)

S C N v Republic [2018] eKLR

Neutral citation: [2018] KEHC 2746 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL 55 OF 2015

RM MWONGO, J

OCTOBER 18, 2018

BETWEEN

SCN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Original Conviction and Sentence in Criminal Case No 265 of 2012 in the Chief Magistrate's Court, Naivasha, (E. Kimilu – Ag PM))

The proper way of sentencing an offender, who at the time of commission of a serious offence was a minor above the age of sixteen years, but at the time of sentencing is an adult

An offender who at the time of commission of a serious offence was a minor above the age of sixteen years, but at the time of sentencing was an adult was a child at the time of committing the offence would be treated as a child in sentencing. Courts should prescribe any other lawful sentence pursuant to section 191(1)(g) and (l) of the Children Act.

Reported by Kakai Toili

Criminal Law*-charges-defective charges-circumstances in which a charge could be defective-variation with evidence adduced in support of the charge-effect of-rejection of evidence-whether a charge could be defective if it was in variance with the evidence adduced in its support-what were the circumstances in which contradiction would lead to rejection of evidence due to contradiction with charges preferred against an accused; Criminal Procedure Code, section 382*

Criminal Procedure*-sentencing-sentencing for defilement-where the offender was a child above the age of sixteen years at the time of committing the offence but an adult at the time of sentencing-where the Children Act provided for ways of dealing with child offenders-what was the proper way to sentence an offender who at the time of commission of a serious offence was a minor above the age of sixteen years but at the time of sentencing was*

an adult -what was the purpose of the sentences provided for under the Children Act-Children Act, section 191; Sexual Offences Act, section 8

Brief facts

The appellant was convicted for the offence of defilement and sentenced to life imprisonment. At the time of commission of the offence the appellant was a child above sixteen years. In the Trial Court while giving his evidence, the complainant, a nine year old pupil, said that the accused removed his trouser then removed his own trouser and then did bad manners to him. When asked what bad manners was, the complainant insisted that what was done to him was bad manners. The Trial Court recorded that the appellant inserted a pen in the complainant's buttocks and that the complainant did not see the pen. The evidence before the Trial Court showed that the appellant pressed the complainant's head onto the ground so he could not scream. Aggrieved by his conviction and sentencing, the Appellant filed the instant appeal.

Issues

i. Whether a charge could be defective if it was in variance with the evidence adduced in its support.
ii. What were the circumstances in which contradiction would lead to rejection of evidence due to contradiction with charges preferred against an accused?
iii. What was the proper way of sentencing an offender who at the time of commission of a serious offence was a minor above the age of sixteen but at the time of sentencing was an adult.
iv. What was the purpose of the sentences provided for under the Children Act?

Relevant provisions of the Law

Criminal Procedure Code

Section 382

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

Sexual Offences Act

Section 8

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life

Children Act

Section 191

(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.

Held

1. A charge could be defective if it was in variance with the evidence adduced in its support. The Trial Court heard and saw the witness and his demeanour; his outward behavior and bearing including movement, shame, eyes and posture. The Trial Court appreciated that the complainant had been penetrated in the buttocks in terms of section 8(1) of the Sexual Offences Act. The idea that a writing instrument, a pen, was used to penetrate the complainant was not consistent with the overall evidence and comprehension of the child. It was a mere afterthought on the part of the appellant.
2. It was not every contradiction that warranted rejection of evidence. The law was that grave contradictions unless satisfactorily explained would usually but not necessarily lead to the evidence of a witness being rejected. Courts would ignore minor contradictions unless they thought that they pointed to deliberate untruthfulness or if they did not affect the main substance of the prosecution's case. The instant Court did not have an opportunity to observe the witness' demeanour and was therefore unable to find that there was no evidence connecting the appellant to the offence.
3. Oral evidence of a single witness was sufficient to warrant a conviction. In the instant case, medical evidence was availed by PW 3 who produced a P3 medical report and post rape care report as exhibits. The reports showed that the complainant was sexually abused and described in detail injuries to anus. There was therefore proof of penetration beyond reasonable doubt.
4. With regard to what courts were to do in respect of minors who commit offences but attain the age of majority before sentencing, the statutory scheme stipulated that a child above sixteen years could only be held in a borstal institution for a maximum period not exceeding three years. However, section 191(1)(l) Children Act provided for an offender to be dealt with in any other lawful manner. The dilemma created by the instant case in which the Sexual Offences Act provided for a specific sentence, but was silent about the age of the offender, could be dealt with by reference to section 191 of the Children Act.
5. The purposes of the sentences provided for under the Children Act were meant to correct and rehabilitate a young offender, any person below the age of eighteen years while taking into account the overarching objective was the preservation of the life of the child and his best interest. A death sentence or a life imprisonment were not provided for but when dealing with an offender who had attained the age of sixteen years, courts could sentence him in any other lawful manner.
6. There was nothing to suggest that the trial court was in error in convicting the appellant on the evidence available. The appellant was a child at the time of committing the offence. Accordingly, the trial court ought to have prescribed any other lawful sentence pursuant to section 191(1)(g) and (l) of the Children Act.

Appeal partly allowed; the appellant's sentence reduced to a custodial sentence of ten (10) years.

Citations

Cases

Kenya

1. *JKK v Republic* (Criminal Appeal 118 of 2011) [2013] KECA 241 (KLR) - (Explained)
2. *Kassim Ali v Republic* Criminal Appeal 84 of 2005; [2006] KECA 156 (KLR) - (Explained)
3. *Kioji, George v Republic* Criminal Appeal No 270 of 2012 - (Explained)

4. *Langat ,Daniel Kiprotich v Republic* Criminal Appeal 26 of 2017; [2019] KEHC 7307 (KLR) - (Explained)
5. *Leitu ,Peter Sabemv Republic* Criminal Appeal 482 of 2007; [2013] KECA 270 (KLR) - (Mentioned)
6. *Musembi,Jackson Mwanzia v Republic* Criminal Appeal 42 of 2016; [2017] KECA 748 (KLR) - (Explained)
7. *Mwangi ,Peter Ngure v Republic* Criminal Appeal 44 of 2010; [2014] KECA 405 (KLR) - (Explained)
8. *Omambia,Isaac v Republic* Criminal Appeal 47 of 1995; [1995] KECA 156 (KLR) - (Explained)
9. *Republic v Hillary Cheruiyot Kirui* Criminal Case 38 of 2012; [2014] KEHC 1972 (KLR) - (Explained)

Uganda

Twehangane Alfred v Uganda [2003] UGCA 6 - (Explained)

Texts

Richardson, PJ., (Ed) (2009), *Archbold: Criminal Pleading, Evidence and Practice 2010* London: Sweet & Maxwell, 40th Edn p 52 para 53

Statutes

Kenya

1. Children Act (cap 141) section 191(1)(g) - (Interpreted)
2. Constitution of Kenya article 53 (1)(f)(i) - (Interpreted)
3. Criminal Procedure Code (cap 75) sections 134, 214, 382 - (Interpreted)
4. Evidence Act (cap 80) section 124 - (Interpreted)
5. Penal Code Act (cap 63) section 35(1) - (Interpreted)
6. Probation of Offenders Act (cap 64) In general - (Cited)
7. Sexual Offences Act (63A) sections 8(1)(2); 11(1) - (Interpreted)

Texts

Richardson, PJ., (Ed) (2009), *Archbold: Criminal Pleading, Evidence and Practice 2010* London: Sweet & Maxwell, 40 th Edn p 52 para 53

Advocates

Mr Koima for the respondent

JUDGMENT

Background

1. The appellant was convicted with defilement contrary to section 8(1) read together with section (8) (2) of the *Sexual Offences Act, 2006*. There was also an alternative charge of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The appellant was sentenced to life imprisonment.

2. Briefly, the evidence was that the complainant was a nine year old standard one pupil at [particulars withheld] Primary School. Whilst he was playing with a friend in a field near [Particu;ars witheld] shopping centre on an unknown date in January, 2012, the appellant came and took him to a place where there was saw dust and defiled him. The appellant was apparently 17 years old at the time of the alleged commission of the offence.

3. There were no eye-witnesses to the commission of the offence. Indeed, the incident came to light a few days after it had occurred when the complainant's mother (PW2) was washing the complainant and he complained of pain in the anus. When she asked him what had happened, he told her that C whose upper teeth were missing, had defiled him. She then took him to a hospital where the defilement

was confirmed. At the hospital, they happened upon C who was at the hospital and the complainant pointed him out to PW2. Thereafter, they reported the matter to the police.

4. The appeal is premised on the following grounds:

    1. That the charge was defective within the meaning of section 214 of the *Criminal Procedure Code*

    2. That there was no proof of penetration

    3. That the learned magistrate relied on evidence of a single witness that was insufficient and inconclusive

    4. That the learned magistrateconvicted the appellant notwithstanding the fact that he was a child at the time he committed the offence, thus the conviction and sentence were in contravention of article 53 of the *Constitution* and other provisions of the law;

    5. That learned magistrate erred in failing to take into account the defence of the appellant

Defective Charge Sheet.

5. The appellant's complaint here is that the charge sheet was defective in that: there was a difference between the charge stated in the charge sheet and the evidence given in court by the complainant; and that there was no date of commission of the alleged offence in the charge sheet. He alleges that he was charged with defilement but the complainant said the penetration to his anus was by a pen. The appellant maintains that the evidence given does not amount to defilement according to the definition of penetration in the *Sexual Offences Act*.

6. The appellant relies on the case of Isaac *Omambia v Republic*, [1995] eKLR where the court considered the ingredients necessary in a charge sheet and stated as follows:

> " In this regard, it is pertinent to draw attention to the following provisions of s. 134 of the *Criminal Procedure Code* which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."

7. The Court of Appeal in *Peter Ngure Mwangi v Republic* [2014] eKLR, quoted the *Isaac Omambia* case with approval and further stated that:

> " A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, *Criminal Pleading, Evidence and Practice* (40th Edn), page 52 paragraph 53, this court stated in Yongo v R, [198] eKLR that:
>
> "In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:
>
> (i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,
>
> (ii) when for such reason it does not accord with the evidence given at the trial."

8. The Court of Appeal in the Peter Ngure case was further guided by the case of *Peter Sabem Leitu v R, Cr App No 482 of 2007* (UR) where the court held thus:

> "The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant."

9. In the present case, the complainant said the accused removed the complainant's trouser then removed his own trouser. He then did bad manners to him. When asked what 'bad manners' was, the complainant insisted that what was done to him was bad manners. The trial court heard and saw the witness and saw his demeanour – that is his outward behavior and bearing including movement, shame, eyes and posture and so on formed a view. The trial court appreciated the evidence. That view was expressed in the learned Magistrates judgment to mean that he appreciated that the complainant had been penetrated in the buttocks in terms of section 8(1) of the *Sexual Offences Act*.

10. It is true that the word recorded by the trial magistrate was that the appellant inserted "a pen" in the complainant's buttocks and that the complainant "did not see the pen". The evidence also showed that this activity was done in conjunction with and after the appellant had also removed both the complainant's and his own trouser. He had also pressed the complainant's head onto the ground so he could not scream. When cross examining the complainant, the appellant did not question the nature of penetration. Taking all this evidence together, I am satisfied that the idea that a writing instrument – a pen – was used to penetrate the complainant is not consistent with the overall evidence and comprehension of the child. It appears to me as a mere afterthought on the part of the appellant.

11. I would in addition point out section 382 of the *Criminal Procedure Code* which provides:

> "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

12. Further in *Jackson Mwanzia Musembi v Republic* [2017] eKLR the court relied on the case of Uganda Court of Appeal in *Twehangane Alfred v Uganda*- Criminal Appeal No 139 of 2001, [2003] UGCA, 6, where the court noted that it is not every contradiction that warrants rejection of evidence. There the court stated:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor

contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

Proof of Penetration and Evidence of Single Witness

13. The appellant argues that there was no proof of penetration and that the conviction was secured on the evidence of only one witness.

14. In this case PW1, the complainant, gave detailed evidence of how the incident occurred, and subsequent medical evidence corroborated the event. PW1 testified that:

> " ...I don't know that one (court orderly). I know him (accused person pointed at). Accused removed my trouser, removed his and did 'bad manner' to me. (Witness insists that he did bad manners to him when asked what bad manners is).
>
> He did bad manners at my behinds. He did it inside my buttocks. He inserted a pen (sic) in my buttocks. I did not see the pen. I saw the accused remove his trouser, I was lying on my stomach, when he was doing that to me.... When accused was done, he escaped; I dressed up and went home. I was feeling pain inside my buttocks."

15. When cross examined, PW1 was unshaken and said:

> " It was during the day when you defiled me. I cannot recall how you were dressed. I could not scream for help because you were pressing my head on the ground....I couldn't tell what time it was but I had already come from school at 1.00pm... I know you because you were a mechanic there at the road. I could hear you being called C. We live near the field in a plot. It is you who defiled me not drunkards"

16. It must be remembered, as stated earlier, that the trial court had the opportunity to observe the demeanour of all the witnesses and found them to be truthful. This court has not had that opportunity, and I am unable to find that there was no evidence connecting the appellant to the offence.

17. Conviction on the evidence of a single witness has been subject of appeals for a long time. It is now well established that the oral evidence of a single witness is indeed sufficient to warrant a conviction. In *Kassim Ali v Republic* [2006] eKLR it was held:

> " ... [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

18. This was reaffirmed in the case of *George Kioji v R* Nyeri Criminal Appeal No 270 of 2012 (unreported) that-

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

19. In the present case, medical evidence was availed by PW 3, Dr Oluoch who produced a P3 medical report and Post Rape Care Report as Exhibits 2(a) and 2(b). The reports show that the complainant was sexually abused and describes in detail injuries to anus as follows:

> "No visible injuries to anus. According to medical report anal lacerations found with incontinence of stool"

20. Contrary to the assertions of the appellant, therefore, there was proof of penetration beyond reasonable doubt and this ground of the appeal cannot stand.

Sentence meted on appellant as a child at the time of commission of the offence

21. It is not disputed, as the record shows, that the appellant was aged 17 at the time he committed the offence. He impugns the decision of the trial court in imposing a life sentence on him despite the fact that he was a child at the time the offence was committed. He argues that such sentence was in contravention with article 53 of the *Constitution* in that: the best interests of a child were not considered as paramount; and that his incarceration ought to have been for the shortest appropriate period of time in line with article 53(1)(f)(i).

22. Section 8(2) of the *Sexual Offences Act*, under which the trial court had passed the sentence provides as follows:

> (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life" (Emphasis supplied)

I note, however, that the trial magistrate did not wrestle with the question of the age of the appellant at the time of commission of the offence, in determining the sentence.

23. The dilemma created by this scenario in which the *Sexual Offences Act* provides for a specific sentence, but is silent about the age of the offender, can be dealt with by reference to section 191 of the *Children Act*. That provision reads 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. [emphasis supplied].

24. Still, there is the question as to what the trial court is to do in respect of minors who commit offences but attain the age of majority before sentencing. The statutory scheme stipulates that a child above sixteen years old can only be held in a borstal institution for a maximum period not exceeding three years. However, section 191(1)(l) *Children Act* provides for an offender to be dealt with in any other lawful manner.

25. The dilemma is well set out in, and help may be obtained from, the judgment in the recent case of *Daniel Langat Kiprotich v State* [2018] eKLR, where the court stated as follows:

> " Since the statutory scheme provides that such a child cannot be sent to prison and since the law further provides that such a child can only be sent to a boarstal institution for no more than three years, the options are limited to trial Courts even where on analysis and evidence such a court might be persuaded that the almost-adult it is dealing with is a danger to society; and has failed to acknowledge or come to terms with his or her errors.
>
> A similar dilemma is created when the offender has already turned eighteen at the time of conviction or at the time of appeal as is the case here. Where the offence committed was a particularly vicious or serious one, the option of releasing such an offender back to the society is not an attractive one. It may even be downright dangerous for the society. Further, it might deny the individual offender a true opportunity to reflect on his actions in a custodial setting and take the rehabilitative turn.
>
> While these dilemmas call for a reform to our juvenile justice system to provide a more nuanced statutory scheme, I am persuaded, in following the Court of Appeal in the *Dennis Cheruiyot* case and the *JKK* case, that when faced with the situation such as the one we have in this case, the solution lies in section 191(1)(l) of the *Children Act*: to deal with the offender in question in any other lawful manner. In this case, I have followed these two precedents regarding the right approach to sentencing is such cases. In addition, I have taken into consideration the following particular factors in the case at hand namely:
>
> a. the fact that the Petitioner was accompanied by five other people during the commission of the robbery;
>
> b. the fact that the assailants were armed – one with a gun and the rest with pangas and clubs;
>
> c. the fact that the Petitioner committed two separate offences of armed robbery;
>
> d. the fact that the offences took place on the highway which poses particular threat to road users; and

e. the fact that the only mitigating circumstances are the fact that the Petitioner was a minor and that he was a first offender."

26. In *R v Dennis Kirui Cheruiyot* [2014] eKLR, the appellant was aged 20 years at the time of sentencing, but was 15 years when the offence was committed. He was convicted of murder. The court sentenced him to life imprisonment. On appeal, the Court of Appeal reduced the sentence to 10 years imprisonment after noting the dilemma a court faces in sentencing an offender who was a minor turned into an adult at the time of sentencing or at the time of an appeal.

27. The Court of Appeal in *R v Dennis Kirui* (*supra*) relied on *JKK v Republic* [2013] eKLR, a decision of the Court of Appeal sitting in Nyeri. There, a minor charged with murder was convicted and sentenced to death. The court found that the Appellant was under 18 years of age at the time of committing the offence although at the time of the sentence four years had elapsed making him about 21 years of age. The court reduced the sentenced from the death penalty to a custodial sentence of 12 years. The court reasoned as follows:

> "The purposes of the sentences provided for under the *Children Act* are meant to correct and rehabilitate a young offender, i.e. any person below the age of 18 years while taking into account the overarching objective is the preservation of the life of the child and his best interest. A death sentence or a life imprisonment are not provided for but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. The offence committed by the appellant is very serious, an innocent life was lost, the appellant though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear the weight and responsibility of his omission or lack of judgment, by serving a custodial sentence. We are of the view that the appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes, which can only happen after serving a custodial sentence"

28. I have perused the appellant's mitigation in the proceedings. All he said was that he was innocent and sought a non-custodial sentence. The appellant was seventeen years in 2012, and is therefore presently twenty three years old. Applying the principles from these authorities, I would reduce the appellant's sentence to ten years.

Disposition

29. Having considered all the appellant's grounds of appeal, and also having carefully reviewed the evidence on record, I find nothing to suggest that the learned magistrate was in error in convicting the appellant on the evidence available.

30. 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 other lawful sentence pursuant to section 191(1)(g) and (l) of the *Children Act*, and the authorities herein cited. Accordingly, I hereby reduce the appellant's sentence to a custodial sentence of ten (10) years.

31. The other grounds of appeal are hereby dismissed.

32. Orders accordingly.

DATED AND DELIVERED AT NAIVASHA THIS 18TH DAY OF OCTOBER, 2018

RICHARD MWONGO

JUDGE

S C N the Appellant

Mr. Koima for the State

Court Clerk - Quinter Ogutu