



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL NO. 135 OF 2014
Consolidated with
CRIMINAL APPEAL NO. 136 OF 2014

BETWEEN

REPUBLIC APPELLANT

AND

J O 1ST RESPONDENT

O O 2ND RESPONDENT

(Being an appeal from the order in Criminal Case No. 1123 of 2014 at the Chief Magistrates Court at Homa Bay, Hon. P. Mayova, Ag. SRM dated 13th November 2014)

JUDGMENT

1. The respondents are children. They were charged with the offence of gang defilement contrary to **section 10** of the ***Sexual Offences Act, 2006*** with an alternative count of committing an indecent act with a child contrary to **section 11(1)** of the ***Act***. After considering the charges against the children, the learned magistrate rejected the charges under **section 89(5)** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***. It is the order rejecting the charges that has precipitated this appeal.
2. For purposes of this judgment, it is necessary to set out the relevant part of the decision leading to this appeal and it is as follows;

I have seen the age assessment reports from the medical supritendant, Homa Bay dated 7th November 2014.

The age of J O is approximately 12 years. That of O O has been stated to be between 9 and 12 years. The two minors are charged with gang defilement contrary to section 10 of the Sexual Offences Act, No 3 of 2006 with an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. Section 14(3) of the Penal Code provides as follows;

(3) A male person under the age of twelve years is presumed to be incapable of having carnal knowledge.

In view of this provision and the age assessment report, I am of the considered opinion that the charges herein cannot stand as they offend the express statutory provision. Admitting this charge, in my considered opinion, will be illegal. I therefore reject these charges under section 89(5) of the CPC.

3. The State appeals against the order on the following grounds set out in the petition of appeal dated 27th November 2014;
 - i. *The learned trial magistrate erred in law in misinterpreting the provisions of s. 14(3) of the Penal Code.*
 - ii. *The learned trial Magistrate erred in law in not appreciating that unlike section 14(1) of the Penal Code which is absolute and mandatory, sections 14(2) and (3) are subject to rebuttal.*
4. The appellant's case revolves around the interpretation of **section 14** of the **Penal Code (Chapter 63 of the Law of Kenya)** which provides as follows;

14. (1) A person under the age of eight years is not criminally responsible for any act or omission.

(2) A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.

(3) A male person under the age of twelve years is presumed to be incapable of having carnal knowledge. (emphasis mine)

5. Both parties in their written submissions agree that the provisions of **section 14** of the **Penal Code**, dealing with criminal liability of children, raise both rebuttable and irrebutable presumptions. **Section 14(1)** of the **Penal Code**, which shields a child below the age of eight years, contains an absolute and irrebutable presumption that a child under that age is incapable of committing a criminal offence. The use of the word "*presumed*" in **section 14(3)** of the **Penal Code** contains a rebuttable presumption (see **Archbold Criminal Pleading, Evidence and Practice, Vol 37**). Thus where the child is between the age of eight and twelve years the presumption that he is incapable of having carnal knowledge may be rebutted by calling evidence to the contrary. I also accept the contention by Mr Oluoch, the learned Assistant Director of Public Prosecutions, that the intent of the legislature was clear by inclusion of the word "*presumed*" from **section 14(3)** of the **Penal Code**. Conversely removal of the phrase, "*presumed to be*" from the section would have made it clear that the presumption was irrebutable.
6. The point of departure according to Mr Okoth, learned counsel for the respondents, is that in this case, the children were not criminally liable as they had no capacity to know that what they did was wrong. He submitted that the respondents were covered by **section 14(2)** of the **Penal Code**. The basis of this submission was that when the children were brought before the court to plead to the charge, they both answered, "*I do not know why I am in court.*" Counsel contended since both children were under the age of twelve, they lacked the capacity to know what they did was wrong and that there was adequate evidence available for the court to make that determination and in the circumstances, the learned magistrate properly rejected the charges. Furthermore, counsel contended the children were incapable of, "*having carnal knowledge.*"
7. The provisions of **section 14(2)** of the **Penal Code** capture the common law rebuttable presumption (*doli capax*) which operated to deem a child between the prescribed age group incapable of committing a criminal act. The accused child can only be held liable of the offence if the prosecution can rebut the presumption by showing that was at the relevant time the child had the requisite mental capacity. In **Republic v EM Embu HCCC Crim. Rev. No. 14 of 2015[2015]eKLR**, the court held that;

The provisions of section 14(2) amounts to a rebuttable presumption generally in criminal cases. All children of 12 years and below are considered of immature age. Under this provision the court is under the obligation to assess the capacity and knowledge of the subject and make a finding to that effect.

8. In order to surmount this presumption, the prosecution is entitled to present evidence of criminal capacity which may include mental or psychiatric assessment and evidence of surrounding circumstances to enable the court reach a conclusion whether or not the child is criminally liable.
9. I therefore disagree with the respondents' position that the learned magistrate carried out an inquiry as to the criminal responsibility of the children. The learned magistrate only dealt with the issue of age. The issue of criminal responsibility is a question of fact which the State is entitled to rebut by marshalling appropriate evidence. At no time did the State present this evidence as such an opportunity was not afforded to it. The manner in which respondents answered when the charge was read to them is but one of the facts that the court may take into account in considering whether the State has proved that the children are criminally responsible.
10. I find and hold that the learned magistrate erred in rejecting the charges on account of the age of the children. As J O was approximately 12 years and O O was between 9 and 12 years, the provisions of **section 14(2)** and **14(3)** of the **Penal Code** were clearly applicable and the State was entitled to call evidence to rebut the presumptions erected under those provisions.
11. Since the charge was rejected at the preliminary stage, I have exercised great circumspection in addressing the issue whether carnal knowledge under the **Penal Code** and penetration under the **Sexual Offences Act** are the same or different acts. What is clear is that the respondents were charged with an offence under the provisions of the **Sexual Offences Act**. The full circumstances of the alleged offence were not before the court and the issue was not addressed by the subordinate court. In view of the position I have taken, it is not necessary to address it.
12. I allow the appeal and set aside the order rejecting the charges against the respondents. I direct that the children appear before another magistrate other than Hon. P. Mayova, SRM for hearing of their case.

DATED and DELIVERED at HOMA BAY this 19th day of October 2015.

D.S. MAJANJA

JUDGE

Mr Okoth instructed by G. S. Okoth and Company Advocates for the appellant.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.