



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 176 OF 2008

F M K APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. E. Nderitu Resident Magistrate delivered on 31/8/2008 in Machakos Chief Magistrate P & D Case No. 39 of 2004)

(Before Hon. B. Thurania Jaden J)

J U D G M E N T

1. Vide a document headed “**Children’s Department Machakos Charge Sheet**” the Appellant, **F M** was charged as follows:-

“Neglecting his children contrary to **section 6 (1) and 7 (1) of Cap 586 of Laws of Kenya.**”

The particulars of the offence were that between January 2001 and July 2004, he willfully neglected his children when he had parental responsibilities thus causing them to suffer.

2. When the Appellant was arraigned before the trial court, he pleaded not guilty. After a full trial, the Appellant was convicted and the trial court proceeded to make orders compelling the Appellant to maintain his children by paying of school fees and payment of Kshs.4,000/= monthly maintenance.
3. The Appellant was dissatisfied with both the conviction and the consequential orders and appealed to this court on the following grounds:
 - v. **The learned Resident Magistrate erred in both law and fact in hearing the complaint when a similar matter was pending in court and contravened the provisions of section 92 of the Children’s Act as no leave was applied for nor granted by the court hence the learned Resident Magistrate lacked any jurisdiction to entertain the complaint.**
 - v. **The learned Resident Magistrate erred both in law and fact and contravened the law of evidence in admitting the evidence of Mr. Kisembi, a children’s officer who had previously prosecuted the case and as such his evidence was inadmissible as he was not a competent witness.**
 - v. **The learned Resident Magistrate erred in law in extending parental responsibility against the**

Appellant beyond the children's eighteen birthdays in the absence of any application and or any special circumstances to justify the extension.

v. **The learned Resident Magistrate erred in both law and fact in issuing a maintenance order having found as a fact that the Appellant neither had income nor property and the said order was both unjustified, unreasonable and harsh.**

4. The appeal was opposed by the State. During the hearing of the appeal, both parties relied on written submissions which I have considered.
5. The case herein was purported to be a criminal proceeding under **section 6 (1)** and **7 (1)** of the **Children's Act** (hereinafter **Act**). The aforesaid two provisions provide for the right to parental care and the right to education but do not create any offence. However, **section 20** of the **Act** provides that:-

"...where any person willfully or as a consequence of culpable negligence infringes any of the rights of a child as specified in sections 5 to 19 such person shall be liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine."

6. **Further section 127 of the Act** creates the offence for cruelty and neglect of children which offences are punishable by a fine not exceeding Kshs.200,000/= or imprisonment for a term of 5 years or both. The proviso to **section 127** of the **Act** goes further to provide for trials under the **Penal Code** when the acts complained of are serious and aggravated in nature.
7. Although the **Children's Act** creates offences and provides for penalties for abdicating parental responsibilities, the **Act** does not give any powers of prosecution to the Director of Children's Services. **Section 124** of the **Act** states as follows:-

"The Attorney General may authorize the Director at any stage in the proceedings under this Part, whether before, during or after the making of any application to take over and assume the conduct of any application or proceedings in respect of a child."

8. **Section 38** of the **Act** provides for the functions of the Director of Children's Services. Those functions do not include the power to institute criminal proceedings. It is therefore no wonder that a conflict of interest arose when the children's officer who previously prosecuted the case ended up testifying in the same case.
9. The offence herein was stated in the charge sheet to have been committed in the year 2004. Under **Article 26 (3)** of the **Old Constitution**:-

"The Attorney-General shall have power in any case in which he considers it desirable so to do-

a. **To institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person."**

10. Similarly, under **Article 157 (6)** of the **Constitution**, the state powers of prosecution are vested on the Director of Public Prosecutions. The Director of Public Prosecutions may exercise these powers in person or through subordinate officers acting in accordance with general or special instructions.

11. Consequently, the proceedings before the trial magistrate were irregular and were contrary to the provisions of the law. The extension of parental responsibility beyond the child's 18th birthday is a civil process as provided for under **section 91 (b) (i)** which provides as follows:-

b. **"a person who has attained the age of eighteen years may, with the leave of the court, apply to the court for a maintenance order to be made in his favour in the following circumstances-**

i. **the person is or will be involved in education and training which will extend beyond the person's eighteenth birthday."**

12. The proceedings for maintenance of children are also a civil process as provided under **Part VII** of the **Children's Act**.

13. On the issue of maintenance during the matrimonial proceedings, the proviso to **section 92** of the **Children's Act** provides as follows:-

"Provided always that once proceedings for the maintenance of a child have been commenced under this Act or any other Act, no subsequent or other proceedings with respect to the maintenance of that child may be commenced under any other Act without the leave of the court."

14. However, as stated above, the proceedings herein were criminal proceedings and not maintenance proceedings.

15. The appeal is meritorious. Consequently, I quash the conviction and set aside the orders made by the trial magistrate.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 15th day of May 2014.

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JUDGE