



1. Criminal Law

2. Revision

3. Subject of subordinate court case

a. Sexual Offences Act.

i. Defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006.

ii. **Particulars of offence**

On 23rd June, 2008 at C in Bomet District within Rift Valley Province, committed an act which caused penetration to a child namely D.C aged six years.

iii. Plea of not guilty 1.7.09

iv. 26.2.09- escaped from Juvenile Remand home on 15.10.08

v. Age assessment – above 18 years old.

vi. 12.3.09 Plea of guilty

vii. 13.3.09 conviction and sentence – life imprisonment

4. Letters to court on legality of sentence

a) Section 362 and 364(1) criminal procedure code.

b) The offender was a minor and still is a minor when sentence passed.

5. Held

a) Re – trial ordered before another magistrate

b) The offender is a minor aged 15 years six months

“Assessment by way of radiographic atlas of the skettal development of hand and wrist by professors W.W. Greich and S.I. Pyle”

c) Torture allegations.

6. Case Law – Nil

7. Advocates

Letters written by E.M. Orina & Co. advocate on behalf of offender.

Criminal Revision Case No. 5 of 2009 (From the original subordinate Case 424 of 2008 and the decision of T. Okello (Esq) Senior Resident Magistrate at Bomet delivered on 13th March, 2009)

PETER KURGAT APPLICANT

VERSUS

REPUBLICRESPONDENT

REVISION RULING

I: Procedure

1. Section 363 of the Criminal procedure Code empowers the High Court of Kenya to call and examine any criminal proceedings before the subordinate court for purpose of satisfying itself as to the “correctness” or “legality” or “propriety” of any finding sentence or order recorded or passed as to the regularity of any proceedings of the subordinate court case.
2. The procedure is just a letter addressed to the deputy registrar of the High Court to be placed before the Hon. Judge for consideration.
3. On 24th April, 2009 a letter was written and received to court on 27th April, 2009.
4. On 29th April, 2009 this court accordingly made orders to call up the file in question for perusal. No file was bought up as of 5th May, 2009 being the next mention date. No file was made available to this court until 29th July, 2009.
5. On perusal of the file, the issue was whether the offender who pleaded guilty to the offence and was convicted did so voluntarily and whether he was aged 18 years old at the time of sentencing to a term of life imprisonment?
6. The offender previous conviction was called for. By 16th September, 2009 no previous conviction was available to satisfactorily prove the offender’s age scientifically.
7. The offender was re submitted to the Provincial Hospital at Nakuru for age assessment. This was duly done to the conformity of “*Radiographic Atlas of skeletal development of the hand and wrist by professors W.W. Gerntich and S.I. Pyle*” The age of the offender was confirmed to be 15 years and six(6) months old.

II: Facts Background

8. (Peter Kurgat) was charged with the offence of

Defilement

Contrary to section 8(1) as read with section 8(2) of the penal code.

The particulars of offence being

On the 23rd day of June, 2008 at C in Bomet District within the Rift Valley Province you committed an at which causes penetration to a child namely (D. C) aged six years

9. He was arraigned before court on the 1st July, 2008 and pleaded not guilty unable to raise the cash bail of Kshs. 10,000/= given by the trial magistrate he was remanded at the Juvenile Remand Home at Kericho. The case was fixed for hearing on 11th September, 2008.

10. On the 9th September, 2008 the records showed that the hearing was to be for 11th September, 2008 but a Production Order to be issued on 15th September, 2008. This of course meant that the said minor was not able to appear for his hearing on 11th September, 2008. The case was never mentioned on either 11th September, 2008 nor 15th September, 2008. It next came up before the trial magistrate on 23rd September, 2008 and a new date of 10th November, 2008 was set.

11. The minor escaped from the remand home on 15th October, 2008. This information was made available to the trial magistrate on 26th February, 2009.

12. For unknown reasons the trial magistrate ordered that the minor be remanded to the police station at Bomet for purposes that his age be assessed.

13. The said minor returned to court on 27th February, 2009 and the court made comment on the file "*The accused age has been assessed to be above 18 years*". The trial magistrate stated because of the minors escape from custody at the Juvenile home he be remanded to the G.K Prisons at Kericho a new date of 30th April, 2009 was set.

14. On the day the case was called out for mention before hearing the case on 30th April, 2009 the minor pleaded not guilty. The minor was unrepresented.

15. The facts of the case was read out to the minor on 13th March, 2009 and he was committed on a plea of guilty.

16. He was sentenced to live imprisonment

III: Revision

17. The revision letter written by the advocate on behalf of the minor was that the minor was tortured and beaten up by the police. This was the reasons why he pleaded guilty to the offence.

18. The request asked that the minor be placed in a Borstal institution and not be subjected to a life imprisonment sentence. The substitute the said offence under **Section 73(d) (vi)** of the **Children's Act** and make a finding of not guilty (**Section 196**) with one under **Section 125(2)** of the **Children's Act**.

III: Opinion

19. The circumstances in which the trial magistrate had treated the offender as a minor and thereafter treated the offender as an adult is most certainly suspect.

20. This court on revision ordered that the offender's age assessment be redone again. After some delay at the Provincial Hospital at Nakuru the age assessment proved was that of 15 years and six months old.

21. It is the scientific method of "*radiographic atlas of the skeltal development of the hand and wrist by professors W.W. Grekich and S.I. Pyle*" that confirmed the said age.

22. This court would recommend that this method at all times and as far as possible he used to ascertain the age of the offender more so where there are minors. X-rays are therefore required to be used.

23. Having ascertained the age of the minor the sentence cannot therefore stand.
24. There is a point raised, being that the minor had been tortured to plead guilty to the charge. This allegation and the conduct/proceedings of the court in the subordinate court of changing the dates by not producing the offender to trial when required, by accepting an age assessment not true when the offender was still a minor. It was irregular to do so.
25. This court herein makes a finding that the plea of guilty be set aside.
26. [In law the word convicted is never used for minors.]
27. This court orders that this case be retried before another trial magistrate other than T. Okello (Esq) and the original file transferred.
28. That the trial be heard at the Children's Court at Kericho. The prosecution charge may require to be amended.

DATED this 8th day of October, 2009 at **KERICHO**

M.A. ANG'AWA

JUDGE

Advocates

Letters written by E.M. Orina & Co. advocate on behalf of offender.