



**MKB v Republic (Criminal Application 263 of 2018)
[2023] KECA 343 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KECA 343 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPLICATION 263 OF 2018
F SICHALE, LA ACHODE & WK KORIR, JJA
MARCH 24, 2023**

BETWEEN

MKB APPELLANT

AND

REPUBLIC RESPONDENT

RULING

(Pursuant to Articles 19, 20, 21, 22(1), 23(1), 25(a)(c), 26(3), 29(f) & 50(6)(b) of the Constitution, Sections 186(b)(f), 189, 190(1)(2) & 191 of the Children's Act, section 2 of the sentencing policy, sections 29(1)(2)(3)(4), 65(1)(2) & 66(1)(2)(3) of the Court of Appeal Rules 2010 and all enabling provisions of the Law & precedent)

Ruling of The Court.

1. The motion before us is dated 19th July 2022, brought pursuant to the provisions of Articles 19, 20, 21, 22 (1), 23 (1), 25 (a) (c), 26 (3), 29 (f), & 50 (6) (b) of the Constitution, Sections 186 (b) (f), 189, 190 (1) (2) & 191 of the Children's Act, Section 20. 2 of the Sentencing Policy, Sections 29 (1) (2) (3) (4), 65 (1) (2) & 66 (1) (2) (3) of the Court of Appeal Rules 2010 and all other enabling provisions of the Law, in which MKB (the applicant herein) seeks the following orders:
2. Having been unrepresented at the lower court and the later part of his appeal at the High Court, the appellant/ applicant failed to adduce supporting & complimentary evidence in support of his claim that he was a minor at the time of commission of the offence and conviction. Considering that his certificate of birth had not yet been proceeded (sic) by the time of his conviction and that he be allowed to adduce the same plus complimentary evidence in the form of correspondence to this court or trial court.



3. Having perused the grounds of appeal and submissions filed by the appellant/applicant in person, I do wish to file a supplementary memorandum and grounds of appeal and to file further complimentary submissions to the appeal.
4. A finding/ declaration upon hearing of the appeal that the lower court case amounted to a mistrial and the same was extended to the High Court on appeal for failing to critically consider the age of the appellant vis-a-vis passing the appropriate sentence.
5. There should be no order as to costs.'

The motion is supported by the grounds on the face of the motion and an affidavit sworn by the applicant who deposed that he was re-arrested and first arraigned in court in the case in question at the Chief Magistrate's Court at Eldoret on the January 25, 2010, vide criminal case No 654 of 2010 for the offence of attempted robbery with violence contrary to Section 297 (2) of the Penal Code and that he was collected from the Eldoret Children's Remand Home, where he had been remanded by the court on November 5, 2009, courtesy of an age assessment report in criminal case No 3630 of 2009.

6. He further deposed that despite the charge sheet in the lower court indicating that he was an adult, at the time of his arraignment in court, the same was never brought to his attention and that at the time he had not yet procured a certificate of birth and there was no way he could tender the same to demonstrate that he was a minor.
7. That, he eventually procured a certificate of birth through his parents on June 26, 2012, which was long after conviction and being sentenced to suffer death by the lower court; that the birth certificate confirms his date of birth as January 26, 1994, hence, he was a minor at the time he was charged, the time of trial as well as when he was convicted and sentenced.
8. The respondent while conceding to prayers 1 and 2 of the motion vide a replying affidavit sworn on December 1, 2022, by Jamlick Muriithi Mwenda, learned prosecution counsel, deposed that they had since written to the Officer Commanding Station Eldoret police station, to investigate whether the birth certificate produced by the applicant was authentic or not and that further, that they would not be prejudiced in any way since they would have the chance of cross examining the applicant.
9. The applicant while reiterating the grounds on the face of the motion in support of the motion submitted that it was over 12 years since he was arraigned at the Chief Magistrate's court in Eldoret and over 8 years since the High Court dismissed his appeal and 4 years since the appeal was registered at the Court of Appeal and that his continued stay in custody as a convict was illegal, unjustifiable and an affront to his constitutional rights to be treated justly under the law and further, that he was sentenced to suffer death while the evidence confirms that he was a minor all through.
10. We have carefully considered the motion, the grounds thereof, the supporting affidavit, the respondent's replying affidavit, the applicant's submissions, the cited authorities and the law.
11. The applicant is essentially seeking to be granted leave to adduce new evidence and to file supplementary grounds of appeal. The thrust of his application is that at the time he was first arraigned at the Eldoret Chief Magistrate's Court on January 25, 2010, for the offence of attempted robbery with violence, he was a minor and had not yet procured a birth certificate and there was no way he could have tendered the same to demonstrate that he was a minor. He further contended that he eventually procured a birth certificate on June 26, 2012, long after his sentencing to death in the lower court which confirmed that he was born on January 26, 1994 hence, a minor at the time of his trial and eventual sentencing.



12. In the case of *Tom Martins Kibisu v Republic [2014] eKLR*, the Supreme Court of Kenya stated as follows as regards Article 50 (6) of the *Constitution*:

' We are in agreement with the Court of Appeal that under Article 50(6), 'new evidence' means 'evidence which was not available at the time of trial and which, despite exercise of due diligence, could not have been availed at the trial'; and 'compelling evidence' implies 'evidence that would have been admissible at the trial, of high probative value and capable of belief, and which, if adduced at the trial would probably have led to a different verdict.' A Court considering whether evidence is new and compelling for a given case, must ascertain that it is, prima facie, material to, or capable of affecting or varying the subject charges, the criminal trial process, the conviction entered, or the sentence passed against an accused person.'

13. We have perused a copy of the birth certificate annexed to the motion which even though a bit faint, shows that the applicant was born on January 26, 1994. This would mean that by the time the applicant was convicted and sentenced for the offence of attempted robbery with violence on December 8, 2010, he was about 16 years old. The respondent on the other hand contends that they need to confirm the authenticity of the birth certificate produced by the applicant.

14. From the circumstances of this case we are satisfied that the applicant's motion meets the threshold set out by the Supreme Court in the Tom Martins Kibusu case (supra), for adduction of new evidence pursuant to Article 50 (6) of the *Constitution*.

15. Accordingly, we find merit in the applicant's motion dated July 19, 2022 and allow the same in terms of prayer 1 and 2 thereof. Regarding prayer number 3 of the motion where we have been asked to declare the proceedings against the applicant a mistrial, the same cannot be subject of our determination in an application of this nature. All we can do at the moment is to direct the registry to list the applicant's appeal for hearing on a priority basis.

Orders accordingly.

DATED AND DELIVERED AT NAKURU ON THIS 24TH DAY OF MARCH, 2023.

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

