IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE MAKHANDIA, KIAGE & ODEK, JJ.A)

CRIMINAL APPEAL NO. 149 OF 2015

BETWEEN

NAHASHON ONGWAE NYANGAU..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya

at Kisii ***(Lagat-Korir, J.)*** *dated* ***27th September, 2012***

in

HCCR NO. 102 OF 2015)

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JUDGMENT OF THE COURT

The appellant **Nahashon Ongwae Nyangau** was charged, tried and convicted by the Senior Resident Magistrate's Court on a charge of defilement contrary to **section 8(1)(2)** of the **Sexual Offences Act** in that on the 1st day of October, 2010 at [Particulars withheld] Village, Borabu District within the former Nyanza Province, he intentionally and unlawfully caused his penis to penetrate the vagina of **DB**, a child aged 10 years.

He was sentenced to serve life in prison on 17th May, 2011. His first appeal to the High Court at Kisii against both conviction and sentence was dismissed by Lagat Korir J on 27th September, 2012.

That dismissal provoked this appeal raising some four grounds in a memorandum of appeal filed on his behalf by the law firm of **Muchere & Company Advocates**. We think that ultimately the fate of this appeal will hinge on grounds 2 and 3 thereof namely;

> ***" 2. That the learned superior court erred in law and fact by upholding the judgment of the trial court which was arrived at based on a discriminatory age assessment report procured by the prosecution contrary to the orders of the trial court;***
>
> ***3. That the learned superior court erred in law and fact by upholding the conviction and sentence of the trial court when the age of the appellant was in question violating Article 27, 53 Id,f(i)(ii) and 2 of the Constitution of Kenya and the Children's Act 2001."***

Urging the appeal before us, **Mr. Muchere,** the appellant's learned counsel took issue with the fact that whereas the trial court had on 4th October, 2010 ordered that the appellant be age-assessed at the Masaba Hospital, that order was not complied with and instead a purported report on his age came from some other hospital. He maintained that the appellant was a child as at the time his trial occurred and he should therefore have been afforded all the protection a child is entitled to.

In opposing the appeal **Mr. Sirtuy,** the learned Principal Prosecution Counsel simply stated that the issues raised by the appellant are factual and therefore not within our jurisdiction. He urged us to dismiss the appeal.

This being a second appeal our jurisdiction is indeed limited to a consideration of matters of law only by dint of **section 361(a)** of the **Criminal Procedure Code**. It is of course a matter of law whether a factual finding such as the question of the appellant's age herein, is based on any evidence.

Only rarely do we interfere with concurrent findings of fact. In ***SAMUEL WARUI KARIMI -vs- REPUBLIC [2016] eKLR,*** it was stated;

> ***"This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong -vs- R, [1984] KLR 611."***

The non-interference with the concurrent findings is predicated on the expectation that both courts below have faithfully discharged their duties and that in particular the first appellate court has done a thorough and exhaustive re-evaluation of the evidence and arrived at an independent conclusion, not merely accepted without interrogation, the findings of the trial court. This is what this Court had in mind in delivering itself thus in ***JOSEPH NJUGUNA MWAURA & 2 OTHERS -vs- REPUBLIC [2013] eKLR;***

> ***"It is commonplace that the first appellate court is mandated to reconsider and re-evaluate the evidence on record, bearing in mind that it did not see or hear the witnesses, before making a determination of its own. See Okeno vs Republic [1972] EA. 32, Mohamed Rama Alfani & 2 Others vs Republic, Criminal Appeal No. 223 of 2002. Failure to properly re-evaluate the evidence on record would be a serious omission on the part of the first appellate court, and may warrant interference by this Court."***

So, was the appellant a child within the meaning of the **Children Act, 2001** when the trial commenced? This is a question of great legal consequence for the plain reason that once it is established that a person brought before the court is under the age of 18 years, that he is a child in conflict with the law and, beyond the fair trial guarantees in **Article 50(2)** of the **Constitution** that are common to all, he is by law entitled to further protections. If those protections are not activated and deployed in his favour, his trial fails to meet the non-negotiable threshold of a fair trial and it is accordingly vitiated. We said as much quite recently in ***EVANS WANJALA SIIBI -vs- REPUBLIC, Eldoret Criminal Appeal No. 314 of 2018,*** and it bears repeating, in *extenso*;

> ***"Where, as here, the person accused of a criminal offence is a minor, the law is cognizant of the attendant vulnerability of his position and puts in place measures to ameliorate the same and thus avoid injustice. This is in keeping with the Constitution's own peremptory requirement at Article 53(2) that in every matter concerning a child, the best interest of the child shall be of paramount importance.***
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> ***Indeed, by reason of Section 186 of the Children Act, a child who is accused of having infringed any law has various other safeguards additional to the rights available to other suspects or accused persons. Those safeguards are quite elaborate but for purposes of this case we shall quote but a few, which are that he shall;***
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> > ***(a) be informed promptly and directly of the charges against him***
> >
> > ***(b) if he is unable to obtain legal assistance, be provided by the Government with assistance in the preparation and presentation of his defence;***
> >
> > ***(c) have the matter determined without delay***
> >
> > ***…***
> >
> > ***(g) have his privacy fully respected at all the proceedings.***
> >
> > ***The Constitution itself also provides in Article 53(1) that every child has the right -***
> >
> > ***….***
> >
> > ***(f) not to be detained, except as a measure of last resort, and when detained, to be held-***
> >
> > > ***(i) for the shortest appropriate period of time; and***
> > >
> > > ***(ii) separate from adults and in conditions that take account of the child's sex and age."***
>
> ***….***
>
> ***"More concerning is the fact that the appellant was not provided with legal assistance at Government expense. There is no indication even that he was asked whether he could afford a lawyer. He had to defend himself against a charge carrying a lengthy jail term in case of conviction. We think, with respect, that this was such a fundamental omission it went to the very core of the fairness of the appellant's trial, and vitiated it. The ensuing conviction and sentence were thus null and void for violation of the appellant's right to a fair trial which, by virtue of Article 25(c) of the Constitution, is non-derogable and not subject to limitation.***

It bears repeating that trial courts must be more vigilant to ensure that young persons in conflict with the law are accorded the full protection afforded by various constitutional and statutory guarantees and safeguards that exist in our laws. It is time we were more deliberately solicitous of the best interest of children. We do so, not so much out of some mushy-mushy sentimentality, but out of an acute recognition of the special space that children occupy and as a constitutional and statutory command. It is a command to observe the best interest of all children be they male or female."

In the present case, the trial court must have had reason to doubt that the appellant was an adult. The record shows that when the appellant was first presented to court on 4th October, 2010, he did not take the plea. Instead, the court made this order s*uo motu*;

"Court: accused to undergo an age assessment at Masaba Hospital. Mention on 06/10/2010 for plea."

When he came to court on 6th October, 2010, the Prosecutor, one Inspector Oyango simply informed the court as follows;

"Oyango: accused examined and found to be 21 years old."

It is not clear from the record whether the leaned trial magistrate sought to satisfy herself as to that fact. What is indisputable is that there was no report tendered from Masaba Hospital. Counsel for the appellant brought to our attention a sheet of paper bearing the stamp of Medical Superintendent Kijauri Sub-District Hospital on which was scribbled that the appellant was aged 21 years old. It was not signed and there was no indication as to the basis upon which the unknown author arrived at the conclusion that the appellant was of that age.

Against that unauthenticated and doubtful sheet of paper, aforesaid, we have perused the police P3 form that was produced by the prosecution as exhibit 2. Under Part I, indicated as required "*to be completed by police officers requesting examination",* the Investigating Officer requested an examination of the appellant. Under *"age (if known)"* the said police officer indicated that the appellant was 17 years old. Part 'C' of the P3 Form required to be completed by the medical examiner after examining the person also has a part to be filled regarding the estimated age of the person examined. In it the medical officer indicated the appellant's age to be 17 years.

The learned judge when dealing with these contrasting, indeed, conflicting documents, delivered herself as follows;

"The P3 report in respect of the appellant referred to above estimated the age at 17 years. Subsequently during the trial, the court ordered an age assessment to be carried out on the appellant. A report bearing the rubber stamp of the medical superintendent Kijauri sub-district hospital was tendered by the prosecution and marked as exhibit C-2. It placed the age of the appellant at 21 years. It is also instructive that the appellant has not raised an issue regarding his age either on the grounds of appeal or in his submissions before court. I therefore find on the basis of the age assessment report presented before the trial court that the appellant was an adult at the time of commission of the offence."

With respect to the learned Judge, the document purporting to be from Kijauri sub-district hospital cannot possibly be described as a medical report. As we have stated, the name and qualifications of the author are not indicated. Nor is there any indication of the methodology by which the opinion was reached that the appellant was 21 years old. It was a bare statement unsupported by anything and without any background as to how the appellant was brought to Kijauri sub-district hospital, if he was, when the court order had directed Masaba Hospital. That order was not varied at any point.

At any rate, in the face of those conflicting age indications, and the trial court having of its own motion clearly doubted that the appellant was an adult, the proper approach would have been for the courts to give the appellant the benefit of doubt and to adopt the age more favourable to him.

We are satisfied that had the learned Judge approached this issue with the proper circumspection, she would have come to the conclusion that the appellant was a child in law at the time of his trial. That being so, and on the basis of the Constitution, the Children Act and the authorities we have cited, his trial without the necessary and mandatory guarantees, was wrongful and therefore a nullity.

Noting that the appellant has been in custody since 1st October, 2010 which is a considerable period nearing a decade, and considering further that any retrial could be without the very guarantees he was entitled to as a child, which he now is not, it would not be in the interests of justice to order a retrial. Indeed, to order a retrial in the circumstances would be a cynical subjection of the appellant to a prejudicial process.

The result of our consideration of this appeal is that it succeeds. The conviction of the appellant is quashed and the sentence is set aside. He shall be set at liberty forthwith unless otherwise lawfully held.

DATED and delivered at Kisumu this 31st day of October, 2019

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. OTIENO ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR