MMM v Republic (Criminal Appeal 377 of 2012)
[2014] KECA 253 (KLR) (17 October 2014) (Judgment)

Mwata Mwachinga Mwazige v Republic [2014] eKLR

Neutral citation: [2014] KECA 253 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 377 OF 2012

HM OKWENGU, MSA MAKHANDIA & F SICHALE, JJA

OCTOBER 17, 2014

BETWEEN

MMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Ibrahim & Odero, JJ.) dated 7th September, 2012 in H.C.Cr.A. No. 46 of 2010)

Magistrate Courts lack jurisdiction to determine offences by child offenders

The court was asked to determine whether the Magistrate Court as opposed to the Children Court had jurisdiction to try a child offender. While holding that Magistrate Courts lacked jurisdiction to determine offences by child offenders, the instant court frowned upon the imposition of a death sentence to a child offender since such a sentence was proscribed by section 190 (2) of the Children Act, 2001.

Reported by Moses Rotich

Criminal Law *– retrial – irregularity of trial process – where appellant was a minor during commission of offence and trial – where appellant was not tried in the Children Court – where at the time of appeal the appellant was above 18 years - whether it was fair and just to order the retrial of a child offender on account of irregularity of a trial process, who at commission of offence was a minor, but on appeal was above 18 years – Children Act, No 8 of 2001, section 191.*

Jurisdiction *- Senior Resident Magistrate Court vis-a-vis Children Court jurisdiction - trial of a child offender-where the appellant, being a minor, was charged with the offence of robbery with violence before the Senior Resident Magistrate's Court-whether the Senior Resident Magistrate's Court had the jurisdiction to try the appellant for the offence of robbery with violence- Children Act, No 8 of 2001, section 184 (1).*

Criminal Law *- sentencing - sentencing of a child offender-where the appellant (a minor) was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code-where the appellant was sentenced*

to death for the offence of robbery with violence-whether the death sentence imposed on the appellant by the trial court was illegal for failing to comply with the provisions of section 190 (1) of the Children Act-Penal Code, Cap 63 Laws of Kenya section 296 (2); Children Act, No 8 of 2001 section 190 (1).

Brief facts

The appellant (a minor) was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code, Cap 63, Laws of Kenya (Penal Code). After a full trial, the trial court found the appellant guilty and sentenced him to death. Dissatisfied with the conviction and sentence, the appellant lodged an appeal to the High Court against both conviction and sentence. The High Court dismissed the appellant's appeal prompting the appellant to file the instant second appeal at the Court of Appeal challenging the conviction and death sentence imposed on him by the trial court. I

The appellant contended that the High Court committed the same error which the trial court committed in failing to note that there was no provision under section 191 of the Children Act, 2001 (Children Act) for detention of a child at the president's pleasure or death sentence. The appellant further argued that the High Court erred in failing to note that the evidence of identification, which the trial court relied on in convicting him, was doubtful. He further faulted the two courts below for failing to consider his defence thereby leading to a miscarriage of justice.

Issues

i. Whether the Senior Resident Magistrate Court, as opposed to the Children Court, had the jurisdiction to try the appellant who was a minor at the time of commission of the alleged offence of robbery with violence.
ii. Whether it was fair and just to order the retrial of a child offender on account of irregularity of a trial process, who at commission of offence was a minor, but on appeal was above 18 years.
iii. Whether the death sentence imposed on the appellant by the trial court was illegal for failing to comply with the provisions of section 191 of the Children Act.

Relevant provisions of the Law

Children Act, No 8 of 2001

Section 184(1)

Notwithstanding the provisions of Parts II and VII of the Criminal Procedure Code (Cap. 75), a Children's Court may try a child for any offence except for –

a) The offence of murder; or

b) An offence with which the child is charged together with a person or persons of or above the age of eighteen years

Held

1. Section 184(1) of the Children Act excluded only the offence of murder and an offence for which the minor was charged together with an adult from being tried by the Children Court. Given that the appellant was below the age of 18 years at the time of commission of the offence, he ought to have been tried in a Children Court and not the Senior Resident Magistrate's Court. To that extent the appellant's trial was vitiated by that apparent irregularity.
2. The appellant was a child at the time of commission of the offence and ought to have been sentenced under section 191(1) of the Children Act which provided for various ways in which the court could sentence a child offender. The trial court erred in sentencing the appellant to death as that sentence was contrary to the provisions of section 190(1) of the Children Act.
3. The appellant had been in custody for a period of slightly more than six years. He was obviously no longer a minor and if he was to be retried and convicted, he would be prejudiced as some of the options under section 191 of the Children Act would not be available to him. Consequently, an order for retrial would neither be fair nor just.

Appeal allowed.

Orders

i. *The appellant's conviction was quashed.*

ii. *The death sentence imposed on the appellant was set aside and the appellant was to be set free unless otherwise lawfully held.*

Citations

Cases

Kenya

1. *Muindi, Geoffrey Gichana v Republic* Criminal Appeal 66 of 2004; [2004] KEHC 1776 (KLR) - (Mentioned)
2. *OON (a minor) v Republic* Criminal Appeal No 257 of 2003; [2003] eKLR - (Distinguished)

Regional Court

Fatehali Manji v Republic [1966] EA 343 - (Explained)

Statutes

Kenya

1. Children Act (cap 141) sections 19(1); 184(1) - (Interpreted)
2. Constitution of Kenya article 53(1)(f)(i)(ii) - (Interpreted)
3. Constitution of Kenya (Repealed) section 60(1)- (Interpreted)
4. Criminal Procedure Code Act (cap 75) parts II, VII- (Interpreted)
5. Evidence Act (cap 80) section 77(1)- (Interpreted)
6. Penal Code (cap 63) sections 35, 296(2)- (Interpreted)

Advocates

None mentioned

JUDGMENT

1. The appellant, MMM, was charged with the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars of the offence were that:

> On the 30th day of June, 2008 at [particulars withheld] Village- Voi Township in Taita-Taveta within Coast Province, jointly with others not before court robbed Moses Mulilo Mbega of his mobile phone make Nokia 2600 valued at Kshs 4,500 and cash Kshs 2,000 all valued at Kshs 6,500 and at or immediately before or immediately after the time of such robbery beat the said Moses Mulilo Mbega."

2. The trial proceeded before PN Ndwiga, the then Senior Resident Magistrate at Voi. In a judgment delivered on December 30, 2009 the learned trial magistrate found the appellant guilty and sentenced him to death as by law prescribed. The appellant was dissatisfied with the conviction and sentence and filed an appeal in the High Court. On September 7, 2012. Ibrahim, J. (as he then was) and Odero, J. dismissed the appellant's appeal, thus provoking this appeal. In his grounds of appeal filed in Court on April 7, 2014, the appellant raised the following grounds:

    1. The first court committed the self (sic) same error which the trial magistrate had committed in failing to note that there is no provision under section 191 of the *Children Act* for detention of the child at presidential pleasure or sentence of death leading to a wrong decision when given that:

i) I was below the age of 18 years at the time of conviction yet section 190 of the children Act, prohibits imprisonment or placing of the child in detention camp or sentencing the child to death or at presidents pleasure and also article 53(1)(f)(i)(ii) of the *Constitution*.

ii) I was never taken to medical practitioner for age assessment yet I told the trial court I was under age thus c/sec 77(I) of the *evidence Act* (cap 80).

2. The first superior court committed the self (sic) same error which the trial magistrate had committed in failing to note that the evidence of identification which is crucial was doubtful when given that:-

i) PW1 and PW4 never gave my names to PW2 a police officer or to PW5 his cousin or even write my names in their statements to police at the first opportunity immediately after the alleged attack, the lapse in time waters down the value and impact of that identification and it is tempting to call it an afterthought.

ii) PW1 and PW4 never came with police to my home immediately after the attack upon PW1 but after 6 days later yet they alleged to have known me before and where I live, leaving their claims suspect.3.

3. The first superior court committed the self (sic) same error which the trial magistrate had committed in failing to re-consider my defence before rejecting it leading to miscarriage of justice."

3. During the plenary hearing before us, Mr. Muchiri learned counsel for the appellant urged us to find that at the time of the commission of the offence that is June 30, 2008 the appellant was a minor and that at the time of judgment on December 30, 2009 he was 18 years old. He submitted that the appellant having been a minor, the trial court had no jurisdiction to try him as the trial ought to have proceeded in the Children's Court. Further that the appellant was entitled to all the rights that flow from the *Children Act*, to wit legal right to counsel; a sentence of not more than 6 months imprisonment and further that the sentence meted on the appellant was outside the purview of section 191 of the *Children Act*. The learned counsel invited us not to order a retrial as the appellant had been in custody for 6 years and 2 months and the property allegedly stolen by him was worth Kshs 6,500, but instead sentence the appellant under the provisions of section 35 of the *Penal Code*

4. He relied on the following authorities:

OON (a minor) v R Criminal Appeal No 257 of 2003 and

Geoffrey Gichana Muindi v R Criminal Appeal No 66 of 2004.

5. Mr Kiprop, the learned senior prosecution counsel opposed the appeal. He submitted that the appellant's counsel urged only ground I and not grounds 2 and 3. He refuted the contention that the sentence imposed on the appellant was unlawful.

6. As to the contention raised by the appellant that he ought to have been tried in the Children's Court the appellant relied on section 184 of the *Children Act* which provides as follows:

(1) Notwithstanding the provisions of parts II and VII of the *Criminal Procedure Code* (cap 75), a Children's Court may try a child for any offence except for –

a) The offence of murder; or

b) An offence with which the child is charged together with a person or persons of or above the age of eighteen years."

7. The issue as to whether all offences involving minors except murder should be conducted in the Children's Court arose for consideration in the case of *O.O.N. (a minor)*(*supra*) wherein a charge of murder against a minor arraigned before the High Court had been substituted to manslaughter. This court (differently constituted) rendered itself thus:

> Section 60(1) of the *Constitution* confers upon the superior court unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by the Constitution or any other law. That jurisdiction, having been conferred by the Constitution, which is the supreme law, cannot be ousted by an Act of Parliament and we need no authority in support of that trite legal position. Section 185(1) of the Children Act, therefore, cannot take away the High Court's jurisdiction to deal with the matter simply because the charge before it is no longer murder but manslaughter. We are satisfied the superior court was perfectly right in dealing with the matter after the charge of murder was reduced to manslaughter."

8. We find the case of *O.O.N. (a minor)* (*supra*) distinguishable as the minor therein was charged in the High Court which as observed has unlimited original jurisdiction. In the present case, the appellant was charged before the Senior Resident Magistrate. He was charged alone and although the charge was a serious charge of capital robbery attracting a death penalty, only the offence of murder is excluded under section 184(1) and an offence for which the minor is charged together with any other person. Therefore, if the appellant was below the age of eighteen years when the offence took place (as conceded by the State) he ought to have been tried in a Children Court and not the Senior Resident Magistrate's Court. To this extent, the appellant's trial was vitiated by this apparent irregularity. But perhaps what is of more concern to us, is the sentence of death imposed upon the appellant. If he was a child under the *Children Act*, the court should have proceeded to sentence him under section 191(1) of the *Children Act* which provides ways in which the court may deal with a child offender. It provides:

(1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways:

a) By discharging the offender under section 35(1) of the Penal Code (cap. 63).

b) By discharging the offender on his entering into a recognizance, with or without sureties;

c) By making a probation order against the offender under the provisions of the Probation of Offenders Act (cap.64);

d) By committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;

e) If the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;

f) By ordering the offender to pay a fine, compensation or costs, or any of all of them;

g) In the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for establishment and regulation of borstal institutions;

h) By placing the offender under the care of a qualified counsellor;

i) By ordering him to be placed in an educational institution or vocational training programme;

j) By ordering him to be placed in a probation hostel under provisions of the Probation of Offender Act (cap. 64);

k) By making a community service order; or

l) In any other lawful manner."

9. Given the circumstances surrounding the appellant's age, the appellant ought to have been tried in the Children's Court. Further, the trial court erred in sentencing the appellant to death as this was contrary to the provisions of section 191 of the *Children Act*.

10. The question is whether in view of the irregularity in the trial process, an order for retrial ought to be made for the appellant to be retried in the appropriate court. In *Fatehali Manji v the Republic* [1966] EA 343, the court considering the circumstances in which a retrial should be ordered stated as follows:

> In general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of the evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it."

11. In this case, the appellant has been in custody for a period of slightly more than six years. He is now obviously no longer a minor and if he was to be retried and convicted, he would obviously be prejudiced as some of the options under section 191 of the *Children Act* will not be available to him. In the circumstances, we find that an order for retrial will neither be fair nor just.

12. Accordingly, we quash the appellant's conviction, set aside the sentence imposed upon him and order that the appellant shall be set free unless otherwise lawfully held.

DATED AND DELIVERED AT MOMBASA THIS 17TH DAY OF OCTOBER 2014

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR