



**JMK1 & another v Republic (Criminal Appeal 552 of 2010)
[2011] KECA 22 (KLR) (1 December 2011) (Judgment)**

J. M.K & another v REPUBLIC [2011] eKLR

Neutral citation: [2011] KECA 22 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 552 OF 2010
PN WAKI, DKS.AGANYANYA & ARM VISRAM, JJA
DECEMBER 1, 2011**

BETWEEN

JMK1 1ST APPELLANT

JMK2 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nyeri (Kasango & Makhandia, JJ) dated 30th January, 2009 in H. C. CR. A. No. 152 of 2006 & 249 of 2008)

The Children Act does not override section 25(2) of the Penal Code which provides for the detaining of a minor at the President’s pleasure in lieu of a death sentence

The appellants were charged and convicted on two counts of robbery with violence. At the time of presenting their defence at the trial court, they indicated that they were minors and the trial court ordered that they be detained in prison at the President’s pleasure under section 25 (2) of the Penal Code. The instant court held that even where a case was erroneously commenced before a trial court and it transpired at some stage that it was indeed before the wrong court, there was a discretion on the trial court to proceed with the trial. The court further held that section 25(2) of the Penal Code was still a lawful provision of the law and was in existence before the enactment of the Children Act. No provision on the Children Act overrode that section.

Reported by Kakai Toili

Statutes – interpretation of statutes – interpretation of the Children Act vis a vis the Penal Code regarding the sentencing of minors - whether provisions of the Children Act could override section 25(2) of the which provided for the sentencing of a minor to be detained at the President’s pleasure in lieu of a death sentence - , Cap 141, section 191; , Cap 63, section 25(2).

Jurisdiction – jurisdiction of the Magistrates Court – jurisdiction as a trial court in a criminal case involving a minor – where the trial court had not been gazetted as a children’s court - whether the trial court could proceed



with the trial of minors in a criminal case where the minors' age was not stated at the time of trial - , Cap 141, section 191.

Statutes – application of statutes – application of the Children Act - retrospective application - whether the Children Act was applicable to an offence committed by a minor before its enactment where an appeal was instituted after the Act had come into force - , Cap 2, section 23.

Brief facts

The appellants were charged before trial court on two counts of robbery with violence. The charge sheet stated that the apparent age for each of them was “adult”. After hearing four prosecution witnesses and the two appellants, the trial court found as proved beyond doubt, that the two of them on the June 22, 2005 at Kahuti, in Murang'a, jointly with others not before court, robbed three different people of their property after breaking into their houses and caused actual bodily harm on them. At the time of presenting their defences, and in their mitigation after conviction, the appellants disclosed that they were aged 16 and 17 years respectively. The trial court did not doubt the stated age and ordered that they be detained in prison at the President's pleasure under section 25 (2) of the .

The appellants appealed to the High Court against both conviction and sentence. The High Court dismissed their appeal against conviction but said nothing about the sentence. The appellants had therefore been held in custody at the President's pleasure since July 18, 2006. In the instant appeal, they had sought to challenge both the conviction and sentence but their counsel informed the court that they had abandoned the appeal against conviction. The appellants argued that the High Court erred in failing to appreciate that as both accused were minors, their case ought to have heard by a children's court. They further argued that the High Court erred in failing to come to the conclusion that section 25(2) and (3) of the was inconsistent with section 191 of the and thereby apply the .

Issues

- i. Whether provisions of the Children Act could override section 25(2) of the which provided for the sentencing of a minor to be detained at the President's pleasure in lieu of a death sentence.
- ii. Whether a trial court, which was not a gazetted children's court, could proceed with the trial of minors in a criminal case where the minors' age was not stated at the time of trial.
- iii. Whether the Children Act was applicable to an offence committed by a minor before its enactment where an appeal was instituted after the Act had come into force.

Relevant provisions of the Law

, Cap 63

Section 25 - Sentence of death

*(2) * Sentence of death shall not be pronounced on or recorded against any person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of eighteen years, but in lieu thereof the court shall sentence such person to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct, and whilst so detained shall be deemed to be in legal custody.*

**Power delegated to the Minister and to the Permanent Secretary of the Ministry for the time being responsible for Prisons (L.N. 579/1963).*

(3) When a person has been sentenced to be detained during the President's pleasure under subsection (2), the presiding judge shall forward to the President a copy of the notes of evidence taken on the trial, with a report in writing signed by him containing any recommendation or observations on the case he may think fit to make.

Held

1. There was no impropriety in the application of section 25(2) of the , save for the omission to apply section 25(3) thereof. The appellants were children as defined under section 2 of the Children Act



which was operational when the offence was committed. Their apparent ages in the charge sheet were stated as “adult” and there was no disclosure of their real ages until they presented their defences and in mitigation before sentence. On the face of it therefore the trial court had jurisdiction under section 7 of the as read with the First Schedule thereunder. There was no evidence that the Chief Justice had in accordance with section 73 gazetted the trial court as a children's court and the appellants were right in not challenging his jurisdiction.

2. Even where a case was erroneously commenced before a trial court and it transpired at some stage that it was indeed before the wrong court, there was a discretion on the trial court to proceed with the trial. That construction was strengthened by the provisions of section 185 of the Children Act which donated the power to remit cases to children's courts. The proviso to the section applied in the instant matter where all the prosecution witnesses had been heard and the case was closed before the ages of the appellants were disclosed. There was no impropriety by the trial court in proceeding with the trial and determining the case.
3. Section 191 of the provided several methods of dealing with child offenders. The options listed under the section were eleven [(a) to (k)], but there was a final provision (l) which was all embracing. Section 25(2) of the was still a lawful provision of the law and was in existence before the enactment of the Children Act. No provision on the Children Act overrode that section.
4. The High Court in *Koech & Another v Republic* [2004] 2 KLR 322 found that the offence was committed before the enactment of the Children Act and that the trial, conviction and sentence of the appellants also preceded the Act. The court, however, reasoned that since the first appeal came before the court after commencement of the Children Act, then the Act should apply to determine the sentence of the appellants. The court doubted the correctness of that finding in view of section 23 of the, Cap 2, Laws of Kenya. The court also applied one of the options provided under section 191 of the but said nothing about provision (l). The court doubted that the reasoning of the High Court was sound in law. At all events the authority cited was not binding on the instant court and it did not follow it.
5. There was nothing unlawful about placing the appellants under the legal custody of the President. It was an order which the High Court ought to have re-examined as it was expressly placed before it as a “ground of appeal” but it said nothing about it. The court fell in error in failing to do so. If it had done so it would have noted that the trial court did not comply with section 25(3) of the .

Appeal dismissed.

Orders

- i. *The conviction and sentence meted out by the trial court and upheld by the High Court was upheld.*
- ii. *The record was to be remitted back to the High Court for full compliance with section 25(3) of the without further delay.*
- iii. *The file was to be placed before the High Court within 14 days of the judgment for directions.*

Citations

Citations

Cases

Koech & another v Republic [2004] 2 KLR — Explained

Statutes

1. Children Act (cap 141) sections 2, 73(b); 185; 187; 190; 191(1) — Interpreted
2. Criminal Procedure Code (cap 75) sections 7, 361(1)(b) — Interpreted
3. Interpretation And General Provisions (cap 2) section 23 — Interpreted
4. Penal Code (cap 63) sections 25(2)(3); 296(2) — Interpreted

Advocates None mentioned



JUDGMENT

1. The two appellants are brothers. On August 12, 2005 they were charged before Murang'a Principal Magistrate's Court on two counts of robbery with violence contrary to section 296(2) of the [Penal Code](#). The charge sheet stated that the apparent age for each of them was "Adult". After hearing four prosecution witnesses and the two appellants, the trial Magistrate (TW Murigi, SRM) found as proved beyond doubt, that the two of them on the June 22, 2005 at Kahuti, in Murang'a, jointly with others not before court, robbed three different people of their property after breaking into their houses and caused actual bodily harm on them. At the time of presenting their defences, and in their mitigation after conviction, the appellants disclosed that they were aged 16 and 17 years respectively. They stated:

"1st accused

I am young i do not even have an Identity card. I help my parents. I am only 17 years.

2nd accused

I am young we are only grown children. I am only 16 years old. I have not even made my life."

2. The prosecution said nothing in respect of those submissions and the trial Magistrate did not doubt the stated age. He stated thus:

"I have considered the accused persons mitigation. I have also considered the offence that the accused persons are charged with (sic) carries a mandatory death sentence. However, the accused persons who were minors at the time when the offence was committed and are still minors are protected by law and hence the death sentence cannot be pronounced on them.

Both accused persons shall be detained in prison and shall so be detained at the President's pleasure under section 25(2) of the [Penal Code](#)."

3. The appellants appealed to the High Court against both conviction and sentence and among the grounds listed in their memorandum of appeal was No 7 stating:

"Your Lordship, the sentence of presidential pressure (sic) is exercise (sic) and harsh, therefore kindly request this honourable high (sic) court to consider my few grounds quash the sentence and set it aside."

4. The High Court (Kasango and Makhandia, JJ) dismissed their appeal against conviction but said nothing about the sentence. The appellants have therefore been held in custody at the President's pleasure under section 25(2) of the [Penal Code](#) since July 18, 2006.

5. In this second, and probably final appeal, they had sought to challenge both the conviction and sentence but learned counsel for them, Mr SK Njuguna, informed us that the appeal against conviction was abandoned. He sought to urge the following grounds listed in a supplementary memorandum of appeal:

1. That the learned judges of the superior court erred in failing to appreciate that as both accused were minors, their case ought to have heard by a Children's Court as per sections 2 and 73 of the [Children Act](#), which was not done in this case.



2. That the learned Judges of the superior court erred in law in failing to make a finding on Ground No 7 of the 2nd appellant's petition of appeal which ground would have been resolved in favour of both appellants had it been considered.
3. That the superior court erred in failing to come to the conclusion that section 25(2) and (3) of the Penal Code is inconsistent with section 191 of the Children Act and thereby apply the Children Act.
4. That the learned Judges of the superior court (and likewise the court of first instance) erred in law in not enforcing the provisions of section 187, 190 and 191 of the Children Act.
6. Wherefore the appellants propose to ask the court for an order that:-
 - (a) The sentence meted out to them be set aside and they be set at liberty.
 - (b) In the alternative and without prejudice to (a) above and taking into consideration the period the appellants have been in custody/detain, (sic) they be dealt with under section 191(1) of the Children Act.
 - (c) The honourable court do make any further and appropriate orders as the same may deem fit.”
7. Those are basically issues of law relating to the legality of sentence which this court is at liberty to consider under section 361(1)(b) of the Criminal Procedure Code. The basic argument advanced by learned counsel for the appellants' Mr Njuguna is that both the trial court and the High Court were oblivious that they were dealing with minors although they were under a duty to enquire about their ages early in the proceedings. The Children Act, No 8 of 2001 (“the Act”) became operative on March 1, 2002 while the offence was committed on June 22, 2005 . In his submission, therefore, the trial should have been held by a Children's Court under section 73(b) of the Act and the sentence should have complied with section 191 of the Act. Mr Njuguna did not seek to challenge the competency of the trial Magistrate to hear the matter but contended that the sentence ought to have accorded with section 191 and facilitated the discharge of the minors. He cited the High Court decision in *Koebh & another v Republic* [2004] 2 KLR 322 where, as in this case, two minors aged 16 and 17 were convicted for the offence of robbery with violence and ordered to be detained at the President's pleasure, but were on appeal to the High Court discharged under section 191 of the Act.
8. In responding to the legal issue, Mr Kaigai, learned state counsel, submitted that the trial and sentence imposed on the appellants were lawful and correct. Section 191 of the Act, in his view, was permissive and there was provision thereunder authorizing legal custody of minors under the President's pleasure. At all events, Mr. Kaigai submitted, the provisions of the Act did not override other Statutes, and where there was no gazetted Children's Court in the country, any Magistrate upon whom jurisdiction is conferred under the Criminal Procedure Code may try the case. The only omission by the trial court which the High Court failed to rectify, he submitted, was the full application of section 25(3) of the Penal Code and therefore this court may remit the record back to High Court for compliance.
9. We have anxiously considered the issues of law raised in this matter but in the end, we find no impropriety in the application of section 25(2) of the Penal Code, save for the omission to apply section 25(3) thereof.
10. It is common ground that the appellants were children as defined under section 2 of the Children Act which was operational when the offence was committed. As stated earlier, their apparent ages in the charge sheet were stated as “Adult” and there was no disclosure of their real ages until they presented their defences and in mitigation before sentence. On the face of it therefore the Senior Resident



Magistrate who presided over the trial had jurisdiction under section 7 of the Criminal Procedure Code as read with First Schedule thereunder. There is no evidence that the Chief Justice had in accordance with section 73 gazetted the trial Magistrate as a Children's Court and the appellants were right in not challenging his jurisdiction.

11. Section 73 under part VI of the Children Act provides in relevant part as follows:

“73. There shall be courts to be known as Children's Courts constituted in accordance with the provisions of this section for the purpose of –

.....

(b) hearing any charge against a child, other than a charge of murder or a charge in which the child is charged together with a person or persons of or above the age of eighteen years.”

.....

12. There is, however, a proviso to that section providing in relevant parts thus:

“(i) reference to subordinate courts of any class, in the first schedule to the Criminal Procedure Code, shall include a Children's Court;

(ii) the Chief Justice may, by notice in the Gazette, appoint a magistrate to preside over cases involving children in respect of any area of the country;

(iii) where in the course of any proceedings in a Children's Court it appears to the court that the person charged, or to whom the proceedings relate, is over eighteen years of age, or where in the course of any proceedings in any court other than a Children's Court it appears to the court that the person charged or to whom the proceedings relate, is under eighteen years of age, nothing in this section shall prevent the court, if it thinks fit, from proceeding with the hearing and determination of the case.” Emphasis is added.

13. So that, in our view, even where a case is erroneously commenced before a trial court and it transpires at some stage that it was indeed before the wrong court, there is a discretion on the trial court to proceed with the trial. That construction is strengthened by the provisions of section 185 of the Children Act which donates the power to remit cases to Children's Courts. It provides as follows:

“Subject to any rules or directions made or issued by the Chief Justice, where it appears to a court, other than a Children's Court, at any stage of the proceedings that a child is charged before it with an offence other than murder and is not charged together with a person or persons of or above the age of eighteen years, the court may, and where within the area of a subordinate court's jurisdiction there is established a Children's Court having jurisdiction, the subordinate court shall, remit the case to a Children's Court:

Provided that nothing in this subsection shall be construed as preventing a court, if it considers in the circumstances (including the stage reached in the proceedings) that it is proper so to do, from proceeding with the hearing and determination of the charge.” Emphasis is added.

14. The proviso to the section applies in this matter where all the prosecution witnesses had been heard and the case was closed before the ages of the appellants were disclosed. We find no impropriety by the trial magistrate in proceeding with the trial and determining the case. The only issue, therefore, is whether the sentence imposed on the appellants was lawful.



15. We think it was. In saying so, we allude to section 191 of the *Children Act* which provides several methods of dealing with child offenders. The options listed under the section are eleven [(a) to (k)], but there is a final provision (l) which is all embracing stating thus:

“..... or

(l) In any other lawful manner.”

16. Section 25(2) of the *Penal Code* is still a lawful provision of the law and was in existence before the enactment of the Children Act. No provision on the Children Act overrides that section. It provides as follows:

“(2) Sentence of death shall not be pronounced on or recorded against any person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of eighteen years, but in lieu thereof the court shall sentence such person to be detained during the President’s pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct, and whilst so detained shall be deemed to be in legal custody.”

17. The High Court in the *Koech* case (*supra*), which is relied on by the appellants, found that the offence was committed before the enactment of the Children Act and that the trial, conviction and sentence of the appellants also preceded the Act. The court, however, reasoned that since the first appeal came before the court after commencement of the Children Act, then the Act should apply to determine the sentence of the appellants. With respect, we doubt the correctness of that finding in view of section 23 of the *Interpretation and General Provisions Act*, cap 2, Laws of Kenya. The court also applied one of the options provided under section 191 of the *Children Act* but said nothing about provision (l) (*supra*). Once again, with respect, we doubt that the reasoning of the High Court was sound in law. At all events the authority cited is not binding on this court and we do not follow it.

18. As stated earlier, there was nothing unlawful about placing the appellants under the legal custody of the President. It is an order which the High Court ought to have re-examined as it was expressly placed before it as a “ground of appeal” but it said nothing about it. The court fell in error in failing to do so. If it had done so it would have noted that the trial court did not comply with section 25(3) of the *Penal Code* which provides as follows:

“(3) When a person has been sentenced to be detained during the President’s pleasure under subsection (2), the presiding judge shall forward to the President a copy of the notes of evidence taken on the trial, with a report in writing signed by him containing any recommendation on observations on the case he may think fit to make.”

19. For the reasons stated above, we reject the appeal by the appellants. We uphold the conviction and sentence meted out by the trial court and upheld by the High Court. We order that the record be remitted back to the High Court for full compliance with section 25(3) aforesaid without further delay. The file shall be placed before that court within 14 days of this judgment for directions. We so order.

DATED AND DELIVERED AT NYERI THIS 1ST DAY OF DECEMBER, 2011.

P. N. WAKI

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JUDGE OF APPEAL

D. K. S. AGANYANYA



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JUDGE OF APPEAL

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR

