



**JEE v Republic (Criminal Appeal 189 of 2004)
[2005] KECA 288 (KLR) (23 September 2005) (Judgment)**

John Ereng Echbukule v Republic [2005] eKLR

Neutral citation: [2005] KECA 288 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL 189 OF 2004
RSC OMOLO, EM GITHINJI & PN WAKI, JJA
SEPTEMBER 23, 2005**

BETWEEN

JEE APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from a sentence of the High Court of Kenya at Kitale
(Karanja, J) dated 28 th July, 2004 in H.C.CR.C. NO. 9 of 2001)*

In order to deter crime, minors who committed heinous crimes were liable to imprisonment

Sections 16 and 17 of the repealed Children and Young Persons Act, cap 141, empowered a court to order a sentence of imprisonment of a person under the age of eighteen years for purposes of sending deterrent message to would-be offenders.

Reported by Moses Rotich

Sentencing – children or minors – sentence of imprisonment – circumstances in which a child or minor may be sentenced to imprisonment – defilement to death of a one year-old child by a seventeen year-old – whether a sentence of fifteen years imprisonment for manslaughter was a proper sentence – law applicable in sentencing a young person for an offence committed in 1998 - whether it was proper for the trial court to include a punishment for defilement when the offence was not charged - Penal Code (Cap. 63) sections 25(2), 202 and 205; Children and Young Persons Act (Cap 141) (Repealed) sections 16(1), 16(3)(a) and 17.

Brief facts

The appellants were convicted on their own plea of guilty to a charge of manslaughter contrary to section 202 as read together with section 205 of the Penal Code and sentenced to imprisonment for 15 years. The sentence arose from the defilement to death of a one year-old infant in 1998 when the appellants were aged 17 years. In sentencing the appellants to imprisonment, the trial court noted that they had committed a



heinous offence for which he was to be punished and observed further that both defilement and manslaughter carried life imprisonment. The appellant pleaded for leniency and for the reduction of his sentence.

Issues

Whether a person under the age of eighteen years could be sentenced to a term of imprisonment.

Held

1. Under the Children and Young Persons Act, before its repeal by the Children Act 2001, the appellant was a “young person” when he committed the offence in 1998.
2. As there was no provision in the Penal Code, under which the offence was charged, to guide the court on the manner of sentencing, the court reverted to the repealed Children and Young Persons Act for guidance as it was the law applicable at the time the offence was committed.
3. There was no mitigating circumstance for the appellant’s act and a deterrent message had to be sent out to aspiring pedophiles. There was no other way permitted by law for suitably dealing with the appellant as contemplated under section 16(3)(a) of the Children and Young Persons Act and the sentence of 15 years imprisonment was neither harsh nor excessive.
4. The inclusion by the High Court of the sentence for the offence of defilement which was not part of the offence charged was erroneous. The act of defilement was the cause of death and it was subsumed in the substantive charge for manslaughter.

Appeal dismissed.

Citations

Statutes

Kenya

1. Children and Young Persons Act (Repealed) (cap 141) sections 16(1)(3)(a); 17 - (Interpreted)
2. Penal Code (cap 63)sections 25(2); 202; 205 - (Interpreted)

Advocates

None mentioned

JUDGMENT

1. The appellant herein, JEE, was initially charged with the offence of murder and some four witnesses testified in relation to that charge. The state however withdrew that charge and substituted a lesser charge of manslaughter contrary to section 202 as read with section 205 of the *Penal Code*, cap 63, Laws of Kenya. The charge and facts were read over and explained to the appellant and he accepted those facts. He was convicted accordingly and was sentenced to serve 15 years imprisonment.
2. The events that led to the charge occurred in Neminyeu Manyatta in Turkana District of Rift Valley Province. On the July 6, 1998, the appellant was in the house of one MNE together with one PA the mother of a one-year old female child. The mother of the child placed her on a bed and left the house to attend to a quarrel that was taking place in the neighbourhood. M also left the house for a short call, leaving the appellant alone with the sleeping child. Shortly afterwards the terrible cries of a child were heard and M dashed back into the house only to find the child lying on the floor, her sexual organs torn and bleeding. She had been defiled and the appellant was nowhere to be found. The baby was rushed to hospital but she died while undergoing treatment. The appellant was subsequently arrested and charged with the offence as stated above.
3. At the time of commission of the offence in 1998, the appellant was aged 17 years. He does not challenge the conviction in his appeal before us but he pleads that he is a young unmarried man; has



young brothers and sisters depending on him; and had stayed in custody for a lengthy period before his trial. It is a plea for leniency and reduction of his sentence.

4. It is indeed true that the appellant was a young person when he committed the offence in 1998. By definition under the *Children and Young Persons Act* cap 141, before its repeal by Act No 8/01, a young person means “a person who is of the age of sixteen years or more and is under the age of eighteen years.” It is common ground that the appellant was 17 when the offence was committed. The only issue is whether he should have been sentenced to a term of imprisonment for the offence.
5. There is no provision in the Penal Code under which the offence was charged to guide the court on the manner of sentencing. The only provision relating to young persons under the age of 18 years is section 25(2), which prohibits the pronouncement of the death sentence against such a person. That is not the case here.
6. We must therefore revert to the repealed *Children and Young Persons Act*, cap 141 for guidance as it was the law applicable at the time the offence was committed. Section 17 of the act as far as is relevant states:-

“17. Notwithstanding the provisions of any other law and subject to the provisions of this Act, where a person under eighteen years of age is tried for an offence, and the court is satisfied of his guilt, the court may deal with the case in one or more of the following ways

(j) Where the offender is a juvenile or young person, by ordering him to be imprisoned.”

7. There is however a restriction on such punishment in section 16 of the Act which as far as is relevant provides:-

“16

(1) No child shall be ordered to imprisonment nor to detention in a detention camp.

(3)

(a) No juvenile or young person shall be ordered to imprisonment unless the court is of the opinion that he cannot be suitably dealt with in any other way permitted by law, and the court shall duly record such opinion and the reason therefor”

8. The superior court, Wanjiru Karanja, J imposed a sentence of imprisonment on the appellant and explained herself:-

“The crime the accused committed was heinous. He defiled a 1- year old infant and caused her death. That is definitely an act that should not receive the mercy of this court. Accused should be punished for the offence, both the defilement and manslaughter carry life imprisonment.”

9. While the revulsion expressed by that court is clearly understandable, with respect, the inclusion of the sentence for the offence of defilement which was not part of the offence charged was clearly



erroneous. The act of defilement was the cause of death and is subsumed in the substantive charge for manslaughter. Having said that, we find no mitigating circumstance for a sane and healthy 17-year old as the appellant was, to defile a 1-year old infant to death. A clear deterrent message must be sent out to any aspiring paedophile anywhere that infants have their human rights too. It does not appear to us that any other way permitted by law would suitably deal with the appellant in this case. The maximum sentence for the offence is life imprisonment. In all the circumstances of the case, a sentence of 15 years imprisonment is neither harsh nor excessive. Accordingly, the appeal has no merit and is dismissed.

DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF SEPTEMBER, 2005.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

