



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OMOLO, GITHINJI, J.J.A. & ONYANGO OTIENO, AG.  
J.A.)

CRIMINAL APPEAL NO. 257 OF 2003

BETWEEN

O.O.N (a minor)..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from conviction and sentence of the High Court of

Kenya at Kisii (Mr. Justice Kaburu Bauni) dated 25th  
November, 2003

in

H.C.CR.C. NO. 114 OF 2003)

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JUDGMENT OF THE COURT

The appellant O.O.N. was charged with the offence of murder. The particulars were that on 28th day of September, 2003, at Bosoti sub-location in Gucha District within the Nyanza Province, he murdered Auka James. On the date the plea was taken in the superior court, he offered a plea to the lesser charge of manslaughter. That offer was accepted and the learned Judge of the superior court reduced the charge to that of manslaughter. On the charge of manslaughter contrary to **Section 202** being read to him, the record shows that he said:

***“Charge is true”.***

Facts were then read to the appellant and he stated that the facts were all correct. He was then convicted of the offence of manslaughter contrary to **Section 202** as read with **Section 205** of the Penal Code. On mitigation, the appellant’s age was given as 16 and the court was told that the appellant was provoked by the deceased; he was remorseful and regretted what happened. His counsel pleaded for him to be placed on probation. The learned Judge however, noting that the appellant was under 18 years sentenced him to be detained at the President’s pleasure.

He has appealed against conviction and sentence. On conviction he contends that the plea was not unequivocal; that the plea was not taken in compliance with the laid down procedure and that there were such contradictions on the various and several dates as regards the incident which contradictions were

irreconcilable. On sentence, the appellant maintains that the superior court failed to appreciate and or comply with the provisions and requirements of **Section 184(1)** and **185(1)** of the Children Act; that the learned Judge should have complied with the provisions of **Section 190(1)** of the Children Act, that as the offence of murder had been reduced to that of manslaughter and as the evidence revealed that his age was below 18 years, the High Court lacked jurisdiction to be the trial court according to the Children Act, and that the superior court erroneously construed the provisions of **Section 25(2)** of the Penal Code and consequently handed down a wrong sentence.

We have considered the appeal. We do agree that the way the plea was taken was not the best as first the words “charge is true” attributed to the appellant may not in our view have reflected what the appellant said in his plea. That was not made better when the facts were read and explained to the appellant as the facts as read and as recorded showed that the date on which the offence is alleged to have taken place was 28th December, 2003 which was not correct. We are particularly not impressed by the manner in which the appellant’s plea was recorded by the learned Judge of the superior court and would reiterate that the proper procedure of taking plea should be as was set out in the case of **ADAN V. REPUBLIC** (1973) EA 445, and there should be no departure from the same.

However, we note that in this case, the appellant was represented by counsel, and having perused fully the proceedings, we are satisfied that the appellant did understand the charge and unequivocally pleaded to it. We are also certain in our mind that he had no defence to the charge. In those circumstances, we are of the view, that the danger of conviction on an equivocal plea was eliminated. We are satisfied the irregularities which were pointed out to us by the appellant’s counsel are in form rather than substance and were curable under **Section 382** of the Criminal Procedure Act. The appeal on conviction cannot stand. It is dismissed.

The superior court, having convicted the appellant of the offence of manslaughter contrary to **Section 202** as read with **Section 205** of the Penal Code proceeded to sentence the appellant to be detained at the President’s pleasure. In doing so, the learned Judge seems to have proceeded under **Section 25(2)** of the Penal Code which states that a sentence of death shall not be pronounced or recorded against any person convicted of an offence if it appears to the Court that at the time when the offence was committed that person was under the age of eighteen years, but in lieu thereof, the court shall sentence such person to be detained during the Presidents pleasure. In our view, the learned Judge was plainly wrong in thinking that he was bound to impose that sentence. The provisions of **Section 25(2)** of the Penal Code could only have been invoked if the appellant was liable to be sentenced to death and that could only have been so if the appellant had been convicted of the offence of murder. The charge of murder having been abandoned and reduced to manslaughter, and the appellant having pleaded guilty to the offence of manslaughter which does not carry the death sentence, the appellant could no longer be dealt with under the provisions of **Section 25(2)**. We agree with Mr. Onsongo, the learned counsel for the appellant, that the sentence awarded by the learned Judge of the superior court was not lawful.

We were urged by the appellant to accept that as the offence of murder was reduced to that of manslaughter, and as the appellant was below the age of 18 years, the High Court lacked jurisdiction to be the trial court. **Section 18 5(1)** of the Children Act – Act No. 8 of 2001 was cited in support of that contention and Mr. Onsongo submitted that the superior court should not have dealt with the matter after the charge was reduced to manslaughter. With respect to Mr. Onsongo, this argument is misplaced. **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 and had the superior court appreciated the position as we have stated hereinabove and sentenced the appellant for the offence of manslaughter and not murder which carried death sentence, we could not have interfered with that decision. Different considerations would apply if the plea was being taken in a subordinate court.

We now proceed to consider what would be an appropriate sentence in this case. The appellant was below the age of 18 years when the offence took place. He was then a child under the Children Act and the court should have proceeded to sentence him under the Children Act **Section 191(1)** of the Children Act provides ways in which the court may deal with a child offender. The appellant as we have stated above, was provoked by the deceased. He was remorseful and regretted what happened. We also note that he hit the deceased on the head once with a stone. Having considered all these circumstances, we order that a probation report be availed to us on 23rd April, 2004 in Nairobi. The Provincial Probation Officer, to be served with this order and to ensure that the probation report on the appellant is availed. The appellant is also to be produced before us on the same date. The appeal is to be mentioned on 23rd April, 2004 at Nairobi, at 9.00 a.m. and probation officer from Nyanza Province must be available in Nairobi on that day.

**Dated and delivered at Kisumu 26th day of March, 2004.**

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

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**AG. JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**