DLK v State (Criminal Petition 3 of 2015) [2018] KEHC 6153 (KLR) (14 June 2018) (Judgment)

Daniel Langat Kiprotich v State [2018] eKLR

Neutral citation: [2018] KEHC 6153 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL PETITION 3 OF 2015

JM NGUGI, J

JUNE 14, 2018

BETWEEN

DLK ..... PETITIONER

AND

STATE ..... RESPONDENT

There is a lacuna in the Children Act, 2001 with regard to sentencing of children who committed serious offences but were slightly below eighteen years old.

The court discussed the dilemmas faced by criminal trial courts when sentencing minors who were slightly below 18 years of age or who turned 18 years during trial. The court concluded that there was a lacuna in the Children Act, 2001 with regard to sentencing of children slightly below eighteen years old but who committed serious offences. However, pending law reform, the courts were to deal with the offender in question in any other lawful manner as was provided in section 191(1)(l) of the Children Act

Reported by Moses Rotich

Criminal Law *- sentencing - sentencing of juveniles who were slightly below the age of 18 years - whether there was a lacuna in the Children Act, 2001 with regard to sentencing of children slightly below eighteen years old but who committed serious offences - what was the appropriate sentence for a juvenile who committed a serious offence but was only slightly below the age of eighteen years - Children Act, No 8 of 2001, section 191*

Brief facts

The petitioner, DLK, was charged jointly with five others with two counts of robbery with violence. While his co-accused were acquitted, the petitioner was convicted and sentenced to death in accordance with section 296(2) of the The petitioner was dissatisfied with the conviction and sentence and duly appealed to the High Court in Nakuru High Court Criminal Appeal No. 497 of 2003. That appeal was dismissed on February 20, 2006.

Having reached the end of the tether, and apprehensive that he could not find any jurisdictional hook to approach the Supreme Court, the petitioner approached the instant court seeking a new trial under article 50(6) and 20(2) of the . He stated that he was a minor at the time of his trial and conviction. As such both his

trial and sentence were irregular. Further, he argued that evidence about his age was not available at the time of his trial – and, in any event, he did not have the benefit of counsel to get that evidence and raise it during the trial.

The state conceded the petition only to the extent that the sentence was unlawful to the extent that the petitioner was a minor at the time he committed the offence. It further conceded that the petitioner was a minor during the commission of the offence following the age assessment report filed in the instant court.

Issues

i. Whether there was a *lacuna* in the Children Act, 2001 with regard to sentencing of children slightly below eighteen years old but who committed serious offences.

ii. What was the appropriate sentence for a juvenile who committed a serious offence but was only slightly below the age of eighteen years?

Held

1. Previous precedents from the Court of Appeal had relied on section 191(1)(l) of the Children Act to fashion an appropriate sentence for the child offender in both cases, drawing attention to the *lacuna* in the law regarding juvenile justice. Kenya's statutory scheme envisaged only two types of offenders:
    a. child offenders – those who were under eighteen years old; and,
    b. adult offenders – those who had attained eighteen years of age.
2. The statutory scheme did not, in any nuanced manner, distinguish the different developmental stages of children – especially those in teenage years who were, typically, both in need of care and protection but could be dangerous to the society due to their deviant behaviour. The statutory scheme stipulated that a child above sixteen years old could only be held in a borstal institution for a period not exceeding three years.
3. That often created a dilemma for trial courts which could be faced with a juvenile who was only slightly below eighteen years old but who committed a serious offence such as (depraved heart) murder or rape or particularly vicious armed robbery. Since the statutory scheme provided that such a child could not be sent to prison and since the law further provided that such a child could only be sent to a boarstal institution for no more than three years, the options were limited to trial courts even where on analysis and evidence such a court could be persuaded that the almost-adult it was dealing with was a danger to society; and had failed to acknowledge or come to terms with his or her errors.
4. A similar dilemma was created when the offender had already turned eighteen at the time of conviction or at the time of appeal as was the case in the instant matter. Where the offence committed was a particularly vicious or serious one, the option of releasing such an offender back to the society was not an attractive one. It could even be downright dangerous for the society. Further, it could deny the individual offender a true opportunity to reflect on his actions in a custodial setting and take the rehabilitative turn.
5. While those dilemmas called for a reform to Kenya's juvenile justice system to provide a more nuanced statutory scheme, when faced with the situation such as the one the instant case, the solution was in section 191(1)(l) of the Children Act, that was, to deal with the offender in question in any other lawful manner.

Petition partly allowed.

Orders

i. *The petitioner should be sentenced to twelve years imprisonment for each of the two counts of robbery with violence*

ii. *. In addition, given the circumstances, each of the two sentences to run consecutively starting on the date when the petitioner was sentenced, namely, October 30, 2003.*

Citations

Cases

Kenya

1. *JKK v Republic* Criminal Appeal 118 of 2011; [2013] eKLR - (Applied)
2. *R v Dennis Kirui Cheruiyot* [2014] eKLR - (Mentioned)

Statutes

Kenya

1. Children Act, 2001 (Repealed) (Act No 8 of 2001) section 191- (Interpreted)
2. Constitution of Kenya articles 20(2); 50(6) - (Interpreted)
3. Penal Code Act (cap 63) sections 35(1); 296(2) - (Interpreted)
4. Probation of Offenders Act (cap 64) In general - (Cited)

Advocates

Mr Mairagia for the petitioner

JUDGMENT

1. The petitioner, DLK, was charged jointly with five others in Molo Resident Magistrate's Court Criminal Case No 1545 of 2003 with two counts of robbery with violence. While his co-accused were acquitted, the petitioner was convicted and sentenced to death in accordance with section 296(2) of the *Penal Code*, and the interpretation our jurisprudence gave to it at the time.

2. The petitioner was dissatisfied with the conviction and sentence and duly appealed to the High Court in Nakuru High Court Criminal Appeal No 497 of 2003. That appeal was dismissed on 20/02/2006.

3. The petitioner proceeded to the Court of Appeal where his appeal was equally dismissed on 07/08/2009.

4. Having reached the end of the tether, and apprehensive that he cannot find any jurisdictional hook to approach the Supreme Court, the petitioner has now approached this court seeking a new tril under article 50(6) and 20(2) of the *Constitution*. The petitioner's argument is quite straightforward: the petitioner was a minor at the time of his trial and conviction. As such both his trial and sentence were irregular. The petitioner has argued that evidence about his age was not available at the time of his trial – and, in any event, the petitioner did not have the benefit of counsel to get that evidence and raise it during the trial.

5. The state has conceded the petition only to the extent that the sentence was unlawful to the extent that the petitioner was a minor at the time he committed the offence. The State has conceded that the petitioner was a minor during the commission of the offence following the age assessment report filed in this court following court orders.

6. Both the state and the petitioner's counsel, Mr Mairagia, urged the court to adopt the reasoning of the court in *R v Dennis Kirui Cheruiyot* [2014] eKLR. In that case, the appellant was aged 20 years at the time of sentencing had been 15 years when the offence was committed. He was convicted of murder. The court sentenced him to life imprisonment. The Court of Appeal reduced the sentence to 10 years imprisonment after noting the dilemma a court faces in sentencing an offender who was a minor when they committed a serious offence but has turned into an adult at the time of sentencing or at the time of an appeal.

7. In reaching its decision in the *Dennis Kirui Cheruiyot case* (*supra*), the court relied on *JKK v Republic* [2013] eKLR. This is a decision of the Court of Appeal sitting in Nyeri. In that case, a minor charged with murder was convicted and sentenced to death. The Court of Appeal found that the appellant was

a under 18 years of age at the time of committing the offence although at the time of the sentence four years had elapsed making him about 21 years of age. The Court of Appeal reduced the sentenced from the death penalty to a custodial sentence of 12 years. The court reasoned as follows:

> The purposes of the sentences provided for under the *Children Act* are meant to correct and rehabilitate a young offender, ie. any person below the age of 18 years while taking into account the overarching objective is the preservation of the life of the child and his best interest. A death sentence or a life imprisonment are not provided for but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. The offence committed by the appellant is very serious, an innocent life was lost, the appellant though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear the weight and responsibility of his omission or lack of judgment, by serving a custodial sentence. We are of the view that the appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes, which can only happen after serving a custodial sentence.

8. In the *Dennis Cheruiyot* case (*supra*), the Court of Appeal expressed itself thus:

   i. Whatever the case, life imprisonment is not provided for under the *Children Act*, but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. We think that due to the gravity of the offence, and the current age of the appellant, he cannot be released to the society without being brought to terms with the consequences of his action or omissions by a custodial sentence. It is for this reason that we are inclined to allow the appeal against the life sentence imposed by the trial court and substitute it with imprisonment for a period of 10 years from the date of conviction. We therefore allow the appeal to the extent that the life sentence imposed on the appellant is substituted with ten years imprisonment.

9. In both the *Dennis Cheruiyot* case and the *JKK Case*, the Court of Appeal latched on to the omnibus proviso in section 191(1)(l) of the *Children Act* to fashion a sentence that it deemed appropriate for the context and circumstances of the case at hand. Section 191 of the *Children's Act* provides as follows:

   (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 recognisance, 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 or 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 the 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 a vocational training programme;

(j) by ordering him to be placed in a probation hostel under provisions of the *Probation of Offenders Act* (cap 64);

(k) by making a community service order; or

(l) in any other lawful manner.

10. By relying on section 191(1)(l) of the *Children's Act* to fashion an appropriate sentence for the child offender in both cases, the Court of Appeal is drawing attention to the lacuna in our law regarding juvenile justice. Our statutory scheme envisages only two types of offenders: child offenders – those who are under eighteen years old – and adult offenders – those who have attained eighteen years of age. The statutory scheme does not, in any nuanced manner, distinguish the different developmental stages of children – especially those in teenage years who are, typically, both in need of care and protection but can be dangerous to the society due to their deviant behaviour. The statutory scheme stipulates that a child above sixteen years old can only be held in a borstal institution for a period not exceeding three years.

11. This often creates a dilemma for trial courts which may be faced with a juvenile who is only slightly below eighteen years old but who committed a serious offence such as (depraved heart) murder or rape or particularly vicious armed robbery. Since the statutory scheme provides that such a child cannot be sent to prison and since the law further provides that such a child can only be sent to a boarstal institution for no more than three years, the options are limited to trial courts even where on analysis and evidence such a court might be persuaded that the almost-adult it is dealing with is a danger to society; and has failed to acknowledge or come to terms with his or her errors.

12. A similar dilemma is created when the offender has already turned eighteen at the time of conviction or at the time of appeal as is the case here. Where the offence committed was a particularly vicious or serious one, the option of releasing such an offender back to the society is not an attractive one. It may even be downright dangerous for the society. Further, it might deny the individual offender a true opportunity to reflect on his actions in a custodial setting and take the rehabilitative turn.

13. While these dilemmas call for a reform to our juvenile justice system to provide a more nuanced statutory scheme, I am persuaded, in following the Court of Appeal in the *Dennis Cheruiyot* case and the *JKK* case, that when faced with the situation such as the one we have in this case, the solution lies in section 191(1)(l) of the *Children's Act*: to deal with the offender in question in any other lawful manner. In this case, I have followed these two precedents regarding the right approach to sentencing is such cases. In addition, I have taken into consideration the following particular factors in the case at hand namely:

a. the fact that the petitioner was accompanied by five other people during the commission of the robbery;

b. the fact that the assailants were armed – one with a gun and the rest with pangas and clubs;

c. the fact that the petitioner committed two separate offences of armed robbery;

d. the fact that the offences took place on the highway which poses particular threat to road users; and

e. the fact that the only mitigating circumstances are the fact that the petitioner was a minor and that he was a first offender.

14. In the face of all these factors, I am persuaded that the petitioner should be sentenced to twelve years imprisonment for each of the two counts of robbery with violence. In addition, given the circumstances, each of the two sentences will run consecutively starting on the date when the petitioner was sentenced, namely, October 30, 2003.

15. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 14TH DAY OF JUNE, 2018.

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(PROF.) JOEL NGUGI

JUDGE