Cheruiyot v Republic (Criminal Appeal 133 of 2019)
[2020] KEHC 487 (KLR) (30 December 2020) (Judgment)

Amos Kipchirchir Cheruiyot v Republic [2020] eKLR

Neutral citation: [2020] KEHC 487 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL 133 OF 2019

TM MATHEKA, J

DECEMBER 30, 2020

BETWEEN

AMOS KIPCHIRCHIR CHERUIYOT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Conviction and Sentence in Iten SPM's Court Criminal Case Number 21 of 2018 delivered by Hon.Caroline R.T Ateya SRM on 10 th July 2019)

There is need to limit the life of children's cases in the courts in the same manner as the election petitions.

The case dealt with the need for the prosecution and a trial court to conduct investigation through an age assessment so as to establish the actual age of an accused person before trial. Additionally, it espoused on the duty of a trial court to inform an accused person of his rights before undergoing trial. Further, the court found that there are systemic failures in the criminal justice system which prolonged the life of children's cases in the courts. Thus, the court held that there is an urgent need to set up appropriate structures and infrastructure necessary to limit the life of children's cases in the courts in the same manner as the election petitions.

Reported by Moses Rotich

Constitutional Law *- Bill of Rights - rights of a child - the right to a fair trial - where the appellant (a minor) was at the time of his arrest, coerced to make a confession - where the appellant was not informed by the trial court of his right to be represented by an advocate of his choice - where the trial court failed to assign an advocate at the state's expense to represent the appellant - where the court proceedings during trial were not interpreted to Marakwet language which was the language that the appellant understood - whether the appellant's right to a fair trial was violated - Constitution of Kenya, 2010 articles 49 (1) and 50 (g) and (h)*

Criminal Law *- trials - sentencing of a child offender - where the appellant was charged with two counts of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act - whether section 14 of*

the Penal Code on immature age was applicable in the instant case - whether the trial court misdirected itself in imposing the mandatory life sentence on the appellant who was a minor at the time of commission of the offence - whether the appellant had an alibi which was not considered - Sexual Offences Act, No 3 of 200,6 sections (8 (1), (8 (2); Children Act, No 8 of 2001, section 191.

***Children Law** - juvenile justice - time within which cases concerning children were to be concluded - whether there was need to fast-track children's cases in the courts - Children Act, No 8 of 2001, sections 4 and 187*

Brief facts

The appellant was charged with 2 counts of the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act, No 3 of 2006 (Sexual Offences Act) in the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act on each count.

After a full trial, the trial court found the appellant guilty of the two main counts and sentenced him to life imprisonment.

Aggrieved by the decision of the trial court, the appellant lodged an appeal against both conviction and sentence. It was the appellant's contention that the trial court erred in law and fact, in failing to observe that the appellant was forced to make a confession contrary to the provisions of article 49 (1) of the Constitution of Kenya, 2010 (Constitution).

Further, the appellant argued that the trial court misdirected itself in failing to observe section 14 of the Penal Code on immature age leading to a miscarriage of justice. The appellant claimed that the trial court misguided itself in sentencing him to mandatory life sentence contrary to the Supreme Court's holding in *Muruatetu* case.

Issues

i. Whether the trial court considered the appellant's confession which was obtained through coercion in its determination.
ii. Whether section 14 of the Penal Code on immature age was applicable in the instant case.
iii. Whether the trial court misdirected itself in imposing the mandatory life sentence on the appellant who was a minor at the time of commission of the offence.
iv. Whether the appellant had an *alibi* which was not considered.
v. Whether there was need to fast track children's cases to limit the cases' lifespan in the courts.

Held

1. There was no evidence that the trial court used the evidence of the appellant's confession in its judgment. There was no mention of the appellant's confession or that it was considered and fed into the finding of guilt. It was evidence that was not admissible as there was a legal process for taking confessions.
2. It was not in doubt that the appellant was a minor at the time the offence was committed. The Constitution of Kenya 2010 (Constitution), the Children Act, 2001 (Children Act), and the Sexual Offences Act, No 3 of 2006 (Sexual Offences Act) defined a child as any person below the age of eighteen (18) years old. According to the pre-sentence report, the appellant was born in 2000 and dropped out of school in class five (5) in 2014. The age factor was something that the prosecution and the trial court ought to have investigated through an age assessment so as to be certain that the person who was going through the trial was an adult and not a child. By the time he was arrested he could have turned 18 years taking into consideration that the date and month of birth were unknown. However, what was inevitable was that the appellant ought to have benefited from the lower age factor.
3. It was evident from the testimony of the victims and other witnesses that at the material time, the appellant was not going to school. The pre-sentence report reviewed as much. What was evident was that he was 17 years old at the time the offence was committed and he was 19 years at the time of his conviction and sentence. He was a child offender who faced 2 counts of a serious charge. He was alleged to have committed the offence of defilement while he was a minor. The appellant faced life

imprisonment at the age of 19 years. He also required interpretation of the court proceedings to a language that he understood. According to the pre-sentence report, the appellant could not afford to pay his own counsel. The trial court ought to have informed the appellant of his rights and having failed to do so, the trial court violated the appellant's right to a fair trial.

4. There was a *lacuna* in the Children Act on how to deal with child offenders who, like the appellant herein got arrested and charged with offences committed while they were children. There was a need to find the means to deal with the tricky situations the moment a child turned 18 while still in the criminal justice system, or committed a serious. They were being pushed onto the adult criminal justice system yet at the time of commission of the offence they were children as per the Children Act.

5. Children who committed serious offences such as murder, defilement, robbery with violence, required a different treatment regimen than those who were delinquent or committed minor offences. The serious offenders required to be held in separate facilities from the delinquents or petty offenders again for obvious reasons. When they turned into adults while still being tried for offences they committed as children, the Act did not have clear legal provisions on what to do with them without jeopardizing the fact that they committed the offence while below the age of eighteen (18) years. That was evident in that there was no infrastructure in place to deal with the said offenders.

6. From the provisions of section 190 of the Children Act, the only custodial punishment available for any child offender was either the Rehabilitation school or the Borstal institution, depending on the age of the child. Further, regardless of the offence committed by the child, any form of imprisonment of a child offender was prohibited by law. Nevertheless the Court of Appeal having interpreted the law to state that a child the age of sixteen (16) years and above could be dealt with in any other lawful manner, tied the instant court's hands.

7. Being aware of the binding force of the holding of the superior court's decision, it was necessary to state that that the act of sending child offenders into the 'adult' criminal justice system was not helping in the growth and development of the juvenile/ child justice system in our country as a separate, visible, accessible, attainable justice system for children and youth who came into conflict with the law. It was never intended that that a child's case would take so long within the justice system that the child would turn into an adult while awaiting trial. It was intended, given the frailty of childhood and adolescence, and the urgency that existed in the growing up and development of the child in all ways, that the child's case would be given every priority, whether as a victim or as an offender, because it was about the survival and development of the child. That was evident from the clears words of section 4 as read with section 187 of the Children Act.

8. If the life of an election petition could, by statutory fiat, be limited in the courts, and they strictly abided by it, the same could be done for children cases. The Child Offender Rules laid the limitation of the three (3) months for other cases and twelve (12) months for 'capital' offences were on point, long before those other laws came into force. By giving the child offender cases the priority they deserved, courts would secure the guidance and correction necessary for the welfare of the child and in the public interest. The other institutions would play their roles and to put in place the requisite structures to ensure that that goal was achieved. As it was children who were being punished in the manner prohibited by the Children Act because of systemic failures in the criminal justice system.

9. That was not to say that children who committed horrendous crimes should be treated with kid gloves. The Criminal Justice System stakeholders, the adults in the room, ought to see that there was something wrong that needed to be specifically righted by responding to the specific issues instead of reacting to them, when children committed serious crimes. The National Council on Administration of Justice (NCAJ) Special Task Force on Children Matters set the pace, by not only identifying those challenges and coming up with recommendations, but on setting in place structures, e.g., the Children Service Weeks, the Children CUCs. That was not enough. The Children Act was crying to enter the age of adolescence and proceed to young adulthood. There was need to conduct the initiation rites by

doing the right thing; putting in place the appropriate structures and infrastructure to enable that and deal with the problem.

10. In the instant matter, the trial court ought to have been alive to the case of (Criminal Appeal 129 of 2014) [2019] KECA 5 (KLR) where the Court of Appeal found that the mandatory nature of the minimum sentences in the Sexual Offences Act unconstitutional. The appellant was sentenced to two consecutive terms of life imprisonment on July 27, 2019. He had been in custody for one year and five months. He was remanded on December 7, 2018 and therefore had been in prison for 2 years. The pre-sentence report showed that the appellant was remorseful and his relatives were willing to take him back if given a second chance. Having been in prison custody must have accelerated the appellant's understanding that he could not just do whatever he wanted. There were rules which ought to be obeyed.
11. The two victims suffered trauma and were infected with a disease. The appellant too had also contracted the disease, which the clinical officer stated could only have been sexually transmitted. Unfortunately, nobody sought to find out how he had contracted the same yet he too was a child at the material time. While the appellant ought to be punished for what he did, it was apparent that things also happened to him, leading to him contracting syphilis. Having been a minor at the material time, it was only fair that the appellant should get the appropriate sentence.
12. The offence of defilement was proved against the appellant beyond a reasonable doubt. The appellant was however not informed of his right to an advocate and neither did the trial court consider granting him one at the state expense.
13. The fact that he was a minor when the offence was committed ought to have been taken into consideration by the trial court at the time of trial and during sentencing. The trial court was not bound to mete out the minimum sentence.

Appeal partly allowed.

Orders

i. *The appeal against the sentence to serve life imprisonment was allowed.*
ii. *Taking into consideration the seriousness of the offence and the two years already spent in custody, the pre-sentence report on record, the sentence imposed by the trial court was substituted with an order for Probation Supervision for Three Years.*
iii. *The Probation Officer was to draw a treatment plan and present the same to the Deputy Registrar within 14 days of the judgment.*
iv. *Right of appeal 14 days.*

Citations

Cases

Kenya

1. *DKL v Republic* Criminal Appeal 272 of 2015; [2019] KEHC 10702 (KLR) - (Mentioned)
2. *JKK v Republic* (2013) eKLR - (Explained)
3. *Kilwake, Dismas Wafula v Republic* Criminal Appeal 129 of 2014; [2019] KECA 5 (KLR) - (Explained)
4. *Kiprotich, Daniel Langat v State* Criminal Petition 3 of 2015; [2018] KEHC 6153 (KLR) - (Explained)
5. *Ndegwa, Thomas Alugha v Republic* Criminal Appeal 2 of 2014; [2016] KECA 21 (KLR) - (Explained)
6. *Okeno v Republic* [1972] EA 372 - (Explained)
7. *R v Dennis Kirui Cheruiyot* [2014] eKLR - (Explained)
8. *Republic v Karisa Chengo & 2 others* Petition 5 of 2015; [2017] eKLR - (Explained)
9. *S C N v Republic* Criminal Appeal 55 of 2015; [2018] KEHC 2746 (KLR) - (Explained)
10. *Simiyu, Fred Juma v Republic* Criminal Appeal 33 of 2017; [2018] KEHC 7732 (KLR) - (Mentioned)

United Kingdom

Pett v Greyhound Racing Association [1968] All ER 545 - (Explained)

Statutes

Kenya

1. Children Act (cap 141) sections 4, 187, 189, 190, 191(l)- (Interpreted)
2. Constitution of Kenya articles 49(1); 50(2)(g)(h)- (Interpreted)
3. Legal Aid Act (cap 16A) section 43(1) - (Interpreted)
4. Penal Code (cap 63) section 14 - (Interpreted)
5. Sexual Offences Act (cap 63A) section 8(1)(2)- (Interpreted)

Advocates

Ms. Limo for the respondent

JUDGMENT

1. Amos Kipchirchir Cheruiyot was charged with two counts the offence of Defilement c/s 8(1) as read with 8(2) of the *Sexual Offences Act* No 3 of 2006. He also face an alternative charge of Indecent Act with a child c/s 11 of the same Act, on each count. It was alleged that on an unknown date in December 2017 at an unknown time in Kapyego Location [particulars withheld] village within Elgeyo Marakwet County he intentionally committed an act which caused penetration with his genital organ namely penis, of the genital organ namely vagina of (1) SJK, a girl aged 9 years and (2) MJ a girl aged 10 years. In the alternative, it was alleged that he had touched each of the victim's vagina.

2. In a judgment delivered on the July 10, 2019 the learned trial magistrate found the appellant guilty of the two main counts. There was a pre-sentence report, which the trial court considered. The court was of the view that the appellant who was born in 2000 deserved the life imprisonment for the reason that he had not only defiled the two children but had also infected them with syphilis.

3. This disheartening story was told by the two victims and their brothers, all of them minors aged between 9 and 12 years. It was during the December holidays in 2017. The four children had been sent to collect firewood in the forest when they were confronted by the appellant and another. The appellant chased the two boys away and he and his accomplice dragged the two girls back into the forest. While the other one watched, the appellant defiled the two girls in turns. Each of them described how the appellant, whom they said was a neighbour, and whose siblings attended the same school as themselves, removed his thing that he uses to urinate, and put it in each of their private parts.

4. When schools opened, each of the two girls was exhibiting some sickness in relation to their private parts. According to their fathers who testified in court, when each was taken to hospital, the doctor was of the view that they must have been defiled and infected with syphilis. That is when each mentioned that it was the appellant who had done it. When the appellant was arrested and subjected to a medical examination, he too was found to be syphilis positive.

5. The appellant was aggrieved by the conviction and sentence. He challenged the same on the following grounds:

   That the learned trial magistrate;

   1. Misguided herself in sentencing him to the mandatory life sentence contrary to the Supreme Court holding in the Muruatetu case.

2. Failed to observe that the appellant was forced to make a confession in contravention of article 49(1) of the *Constitution*.

3. Misdirected herself in failing to observe section 14 of the *Penal Code* on Immature age leading to a miscarriage of justice

4. Failed to note that the ingredients of defilement were not proved: age, penetration as incident was reported after 5 months, no nexus established with the appellant.

5. Failed to analyse the appellant's *alibi*.

6. The issues then are: whether the PW7's testimony on the appellant's alleged confession was considered; whether section 14 of the *Penal Code* was applicable in this case; whether the trial court misdirected itself in meting the mandatory life sentence; whether the ingredients of defilement were proved; whether appellant had an alibi that was not considered.

7. This being a first appeal I am guided by the case of *Okeno v Republic* [1972] EA 372 where it was stated

> "The first appellate court must itself weigh conflicting evidence and draw its own conclusion (*Shantitlal M Ruwala v R*, [1957] EA 57). It is not the function of a first appellate court merely to scrutinise the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusion only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witness."

8. The appeal was opposed by the state through Mr Masisa prosecuting counsel on the ground that the state proved its case beyond a reasonable doubt, and that the sentence meted was lawful.

9. In arguing his appeal, he drew the court's attention to the evidence of PW7 who said that on interrogation the appellant admitted to having committed the offence. The appellant argues that this was as a result of coercion and violated his right to remain silent and not to be coerced to confession.

10. I have perused the judgment. There is no mention of this evidence by the learned trial magistrate that it was considered, and fed into the finding of guilt. It is evidence that is not admissible as there is a legal process for taking confessions. This ground fails.

11. Regarding the application of section 14 of the *Penal Code*, the appellant submitted that it was the evidence of the children that he was in the same class as themselves, between the age of 9 and 12 years, therefore he could not be the nineteen (19) years that was alleged. Section 14 states:

> S.14. Immature age
>
> (1) A person under the age of eight years is not criminally responsible for any act or omission.
>
> (2) A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.
>
> (3) A male person under the age of twelve years is presumed to be incapable of having carnal knowledge."

12. The appellant argued that he was not nineteen (19) years old and the court ought to have applied section 14 of the *Penal Code* to his case. He cited the case of *Fred Wanjala Simiyu v Republic* [2018] eKLR.

13. I have perused the record. The complainants and their brothers clearly testified that the appellant was no longer going to school. His siblings were going to school. He was older than they were.

14. At the time of filling the P3 he was found to be nineteen (19) years old. In his defence, he testified that he was a farmer, that in May, he had gone to Chesoi and when he came back in September, he was arrested. He said he was still in school and sought pardon to go back to school.

15. It is evident from the testimony of the victims and the other witnesses that at the material time the appellant was not going to school. The Pre-sentence report revealed as much. What is evident is that he was seventeen (17) years at the time the offence was committed as according to the report he was nineteen (19) years at the time of conviction and sentence.

16. Regarding sexual offences section 14 of the *Penal Code* applies only to persons of the age below 12 years. He was way past that age. This ground falls as well.

17. On whether the charge was proved, he submitted that the age of the victims was not proved because no certificate of birth was produced. However, age assessments was conducted for each of the victims and their ages ascertained as per the charge sheet.

18. He submitted that the charge was defective because the specific date the offence was committed was not known. The record however explains why. The children due to their age, could not remember except that it was during the December school holidays. That alone does not render the charge to be defective, because there is a specific period of time, and it adds up as the impact of the defilement was felt when the children fell sick during the school term.

19. With regard to penetration, it was his argument that the report having been made five (5) months after the alleged offence clearly demonstrated that the case for the prosecution was full of conjecture, exaggeration and no nexus was established between him and the offence.

20. The children told the court that the appellant had threatened them with beatings et al if they reported the incident, and had it not been for the disease they would not have spoken. What was the coincidence that the two victims would be found positive for syphilis, and the appellant whom they mentioned as the perpetrator would also be having the same STD? I found that the testimonies of the children given on oath, were cogent as to what happened. There appeared no reason at all for them to lie about their neighbour, former schoolmate and one whose siblings were school mates as well. Had it not been for the sickness they would probably never have told. Having considered the evidence on record I am persuaded that the children told the truth as to what happened.

21. The appellant did raise issue with the fact that in the testimony of PW6 he stated that when the defilement of the girls was found out, it was suggested that the boys be examined as well. This was not because the boys were suspects, but to see whether they too may have been defiled as well. This was because they were in the company of the girls when it happened. The appellant's suggestion springs from a misapprehension of the evidence.

22. The appellant submitted that failure to call the investigation officer was fatal to the case. PW8 No 111191 PC Rogers Lemayan was the investigating officer. He testified that he received the reports of the defilement, arranged for all the medical examination after issuing the P3s for the complainant's and the appellant. It is after they all came back with the common thread that the three had contracted syphilis that he charged the appellant. It was not necessary to summon the members of public who arrested

him because the arresting officer PW7 No 2001008792 Sgt Richard Cheboi Rutto testified as having received the appellant at Kapyego AP Post on May 5, 2018. That ground fails. Penetration was proved.

23. The three issues that remain out for determination are:

    1. The age of the appellant at the time of the committal of the offence.

    2. The failure to provide him with legal counsel.

    3. The sentence.

24. It is not in doubt that at the time the offence was committed the appellant was a minor. Our *Constitution*, the *Children Act* and indeed the *Sexual Offences Act* define a child as any person below the age of eighteen (18) years. The appellant was born in 2000 according to the Pre-sentence Report, and dropped out of school in class five (5) in 2014. The age factor is something that the prosecution and the court ought to have investigated through an age assessment so as to be certain that the person who was going through the trial was an adult and not a child. By the time he was arrested he may have turned eighteen (18) taking into consideration that the date and month of birth are unknown. What is inevitable is that he ought to have benefitted from lower age factor.

25. The appellant citing the celebrated case of *Pett v Greyhound Racing Association* (1968) All ER 545 where Lord Denning stated;

> "It is not every man who has ability to defend himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man; 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task?"

26. He submitted that he was not informed of his right to legal representation, and the right to get an advocate of his choice or that the state could grant him an advocate if his right to fair trial would be violated by that lack of representation. He was of the position that he was a stranger to the language of the court and ought to have been informed of his right.

27. Article 50 of the *Constitution* provided that the right to fair hearing includes the rights at (2)(g) and (h) thus:

    (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

    (h) to have an advocate assigned to the accused person by the state and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;"

28. In *Thomas Alugha Ndegwa v Republic* [2016] eKLR the Court of Appeal stated:

> "In Kenya, section 43(1) of the *Legal Aid Act* sets out the duties of the court before which an unrepresented accused person is presented. Such court is required to promptly inform the accused person of his right to legal representation; promptly inform him of his right to have an advocate assigned to him if substantial injustice is likely to result; and to inform the National Legal Aid Service to provide legal aid to the accused person... it is clear the framework for full implementation of article 50(h) is now in place as required by the Constitution. Section 40 of the Act requires that a person who wishes to receive legal aid may apply to the Service in writing so long as such an application is made before the final determination of the matter by a court, tribunal or any other forum to which the application

relates. In light of the constitutional and statutory provisions aforementioned, the provision of legal aid is a constitutional, legal and human right."

29. Further in *Republic v Karisa Chengo & 2 others* [2017] eKLR the Supreme Court stated:

> "Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which include:
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> (i) the seriousness of the offence;
>
> (ii) the severity of the sentence;
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> (iii) the ability of the accused person to pay for his own legal representation;
>
> (iv) whether the accused is a minor;
>
> (v) the literacy of the accused;
>
> (vi) the complexity of the charge against the accused;"

30. In this case we had a young offender who faced two counts of a very serious charge, who was alleged to have committed the offence as a minor, who faced life imprisonment at nineteen (19) years of age, and who required Marakwet interpretation of the proceedings, and whom, from the look of things in the pre-sentence report, would not, have afforded to pay for his own counsel. The learned trial magistrate ought to have informed him of his rights and having failed to do so violated his right to fair trial.

31. The appellant was sentenced to life imprisonment on count one and count two 'to run consecutively'.

32. The learned trial magistrate was within her discretion to mete out the appropriate sentence. However, the question here is whether all the circumstances of the offence were taken into consideration.

33. Having sought for and obtained a pre-sentence report, it bore information on the date of year of birth of the appellant. The indication was that the offence was committed at a time when the offender was a minor. If in doubt, the court could still have sought an age assessment report so as to mete out the appropriate sentence.

34. Of great concern however is the lacuna in our *Children Act* on how to deal with child offenders who, like the appellant herein get arrested and charged with offences committed while they were children.

35. Look at these provisions:

> 189. Words "conviction" and "sentence" not to be used of child
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> The words "conviction" and "sentence" shall not be used in relation to a child dealt with by the Children's Court, and any reference in any written law to a person convicted, a conviction or a sentence shall, in the case of a child, be construed as including a reference to a person found guilty of an offence, a finding of guilt or an order upon such a finding, as the case may be.
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> 190. Restriction on punishment
>
> (1) No child shall be ordered to imprisonment or to be placed in a detention camp.
>
> (2) No child shall be sentenced to death."

36. It is an anxious moment finding the means to deal with these tricky situations the moment a child offender turns eighteen (18) years while still in the criminal justice system, or commits a serious offence. We simply push them onto the adult criminal justice system yet at the time of commission of the offence they were children as per the *Children Act*. We have children who commit serious offences, murder, defilement, robbery with violence. Obviously, they require a different treatment regimen than those who are delinquent or commit minor offences. The serious offenders require to be held in separate facilities from the delinquents or petty offenders again for obvious reasons. When they turn into adults while still being tried for offences they committed as children, it is my understanding that the Act does not have clear legal provisions on what to do with them without jeopardizing the fact that they committed the offence while below the age of eighteen (18) years. This is so evident in that there is no infrastructure in place to deal with the said offenders.

37. This issue has been dealt with by other Judges.

For instance in the judgment of the learned Judge in *SCN v Republic* [2018] eKLR who dealt with a similar case where the appellant was seventeen (17) when he committed the offence and was sentenced to imprisonment for life. In that case just as this the trial court did not address the age of the appellant. The learned Judge made an analysis of this court's and the court of appeal's approach to these situations. He reduced the appellant's sentence to ten (10) years' imprisonment.

38. In *Daniel Langat Kiprotich v State* [2018] eKLR where the Judge noted the lacuna in the law and the need for reform. The learned Judge interpreted the provisions of section 191(l) as giving the court the discretion to deal with a child in any other lawful manner other than the manner provided at (a) to (k). This, he was of the view meant that a court could convict and sentence a child offender to a term of imprisonment, in an adult facility now that the child had committed a serious offence and could not be held in a children facility. He stated:

> "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 borstal 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.
>
> 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.
>
> 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."

39. The Court of Appeal had in *JKK v Republic* (2013) eKLR in which it followed in *R v Dennis Kirui Cheruiyot* [2014] eKLR, determined:

> "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."

40. In *R v Dennis Kirui Cheruiyot* above the court stated:

> "In view of the above cited cases and the above mentioned provision of the *Children Act*, the appellant could not be sentenced to life imprisonment. We however face the same dilemma as this court did in *JKK v R* (*supra*) because the appellant was aged 15 years in February 2009. Although he was not subjected to an age assessment, considering the Judge was satisfied and the prosecution did not object we have no reason to doubt the appellant was aged 15 years. The appellant has already served 5 years since conviction which means he is now aged about 20 years. The best interest of the appellant as a minor offender ought to have been of paramount consideration when passing the sentence. The life of a minor should be preserved, he must also be rehabilitated which in our view includes being brought to bear the consequences of his omission, errors of judgment and disregard of the rule of law. Due to his omissions, an innocent life of a Kenyan was lost. Although the appellant was a minor, he must be brought to bear the consequences of his omission and lack of proper judgment. The appellant has served 5 years serving a life sentence; we do not however know whether that sentence was done as per the provisions of the *Children Act* or the *Penal Code* under which he was sentenced."

41. Section 191 of the *Children Act* provides for the methods of dealing with offenders in the following terms:

> (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. (all emphasis mine)"

42. The same law at section 190 places a restriction on punishment by saying:

(1) No child shall be ordered to imprisonment or to be placed in a detention camp.

(2) No child shall be sentenced to death."

43. It appears to me that the only custodial punishment available for any child offender is either the Rehabilitation school or the Borstal institution, depending on the age of the child. It also appears to me that regardless of the offence committed by the child, any form of imprisonment of a child offender is prohibited by the same law. Never the less the Court Appeal having interpreted the law to state that a child the age of sixteen (16) years and above may be dealt with in any other lawful manner, ties my hands.

44. Even then, with respect, and aware of the binding force of the holding of the superior court's decision, I find it necessary to add my voice to this issue. Firstly, because of my view of the matter, secondly, my fear that the act of sending child offenders into the 'adult' criminal justice system is not helping in the growth and development of the juvenile/ child justice system in our country as a separate, visible, accessible, attainable justice system for our children and youth who come into conflict with the law. My humble view is that it was never intended that that a child's case would take so long within the justice system that the child would turn into an adult while awaiting trial. I believe that it was intended, given the frailty of childhood and adolescence, and the urgency that exists in the growing up and development of the child in all ways, that the child's case would be given every priority, whether as a victim or as an offender, because it is about the survival and development of the child . This is seen in the clear words of section 4 of the *Act* which states:

S.4. Survival and best interests of the child

(1) Every child shall have an inherent right to life and it shall be the responsibility of the government and the family to ensure the survival and development of the child.

(2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act

shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child;

(c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest."

45. This provision is to be read together with section 187 which provides for the Consideration of the welfare of the child offender:

(1) Every court in dealing with a child who is brought before it shall have regard to the best interests of the child and shall, in a proper case, take steps for removing him from undesirable surroundings and for securing that proper provision be made for his maintenance, education and training."

46. If we can by statutory fiat, limit the life of an election petition in the courts, and strictly abide by it, that we stop everything else to do this, why won't we do the same for children cases? The Child Offender rules laying the limitation of the three (3) months for other cases and twelve (12) months for 'capital' offences were on point, long before these other laws came into force. I believe that giving the child offender cases the priority they deserve, courts would secure the guidance and correction necessary for the welfare of the child and in the public interest. The other institutions would play their roles and to put in place the requisite structures to ensure that this goal was achieved. As it is children are being punished in the manner prohibited by the *Children Act* because of systemic failures in the Criminal Justice System. I am not saying that children who commit horrendous crimes should be treated with kid gloves. No I am just saying that as the Criminal Justice System stakeholders, the adults in the room, we ought to see that there is something wrong that needs to be specifically righted by responding to the specific issues instead of reacting to them, when children commit serious crimes. The NCAJ Special Task Force on Children Matters set the pace, by not only identifying these challenges and coming up with recommendations, but on setting in place structures e.g. the Children Service Weeks, the Children CUCs. That is not enough. Our *Children Act* is crying to enter the age of adolescence and proceed to young adulthood. We need to conduct the initiation rites by doing the right thing. Put in place the appropriate structures and infrastructure to enable this and deal with the problem.

47. Having said so, it is important to point out here that firstly the learned trial magistrate ought to have been alive to the case of *Dismas Wafula Kilwake v Republic* [2018] eKLR where the Court of Appeal applying Muruatetu, found that the mandatory nature of the minimum sentences in the *Sexual Offences Act* to be unconstitutional. The court Stated:

> "In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the *Sexual Offences Act*, which do exactly the same thing. Being so persuaded, we hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand,

the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it."

48. The appellant herein was sentenced to two consecutive terms of life imprisonment on the July 27, 2019. He has been in prison for 1 year and 5 months. He was remanded on December 7, 2018, and therefore been in custody for two (2) years.

49. There is a pre-sentence report on record, which shows that the appellant was remorseful, and his relatives were willing to take him back if given a second chance. Being in prison custody must have accelerated the appellants understanding that he cannot just do whatever he wants. There are rules that must be obeyed.

50. The two victims suffered trauma and were infected with a disease. He too had contracted the disease, which the clinical officer stated could only have been sexually transmitted. Unfortunately, nobody sought to find out how he had contracted the same yet he too was a child at the material time. The sad story of the boy child. While he ought to be punished for what he did, it is apparent that things also happened to him, leading to his contracting syphilis.

51. Having been a minor at the material time, it is my view that it is only fair that he should get the appropriate sentence.

52. In conclusion:

    1. I find that the offence of defilement was proved against the appellant beyond a reasonable doubt.

    2. That he was not informed of his right to an advocate, neither did the court consider granting him one at state expense.

    3. He was a minor when the offence was committed and that ought to have been taken into consideration at the time of trial, and sentencing. The trial court was not bound to mete out the minimum sentence.

    4. The appeal succeeds on sentence.

    5. Taking into consideration the seriousness of the offence and the two years already spent in custody, the pre-sentence report on record, the sentence imposed by the subordinate court is substituted with an order for Probation Supervision for Three Years. (See *DKL v Republic* [2019] eKLR).

    6. The Probation Officer to draw a treatment plan and present the same to the Deputy Registrar within 14 days hereof.

    7. Right of appeal 14 days.

DATED AND DELIVERED VIRTUALLY THIS 30TH DAY OF DECEMBER, 2020.

MUMBUA T. MATHEKA

JUDGE

In the Presence of:

Court Assistant Martin

Appellant present

Respondent: Ms. Limo Prosecuting Counsel

Ms. Wanyonyi Probation Officer