



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**KM v Republic (Criminal Revision 154 of 2022)
[2023] KEHC 26795 (KLR) (22 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26795 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL REVISION 154 OF 2022
HI ONG'UDI, J
DECEMBER 22, 2023**

BETWEEN

KM APPLICANT

AND

REPUBLIC RESPONDENT

*(Revision against the sentence delivered by Hon. P.C. Biwott
SPM in Ogembo Cr. MCSO/E062 of 2022 on 28th July 2022)*

RULING

1. KM was charged and convicted upon pleading guilty to the offence of attempted defilement contrary to section 9(1) as read with section 9(2) of the *Sexual Offences Act* No. 3 of 2006. This was on 28th July 2022. He informed the Court he was 18 years old and was sentenced to five (5) years imprisonment.
2. He filed this application seeking review of his sentence claiming that at the time of conviction he was 16 years and 11 months old. He annexed a copy of his birth certificate showing he was born on August 3, 2005. He informed the court that at the time of the incident he was attending Matangano Primary School Standard 7.
3. Learned Counsel Mr. Ayodo for the ODPP confirmed seeing the applicant's birth certificate which showed that he was 17 years of age by July 26, 2022. He however opposed the application for review of sentence as the victim was aged 6 years at the time of the offence. He submitted that the applicant knew what he was doing and the law provides for a sentence of life imprisonment.
4. A probation report called for by the Court was filed by Mr. Gerald Atinda of probation. The report shows that the victim and the applicant are cousins. That the area administration, community and two families are ready to have the applicant back at home for purposes of rehabilitation. The report shows that the applicant was born to a single mother who has been working in Qatar as a househelp but is



now back at home. He also confirmed that at the time of commission of the offence, the applicant was in Standard 7 and has missed out now on the last Standard 8 class.

5. The facts presented to the Trial Court show that the applicant was preparing to commit the act before he was intercepted by a passerby by the name of Ruth. The laboratory request form (Exb.1), filter clinic attendance card (Exb.2), P3 Form (Exb. 3) all produced in Court confirm that the applicant's penis did not come into contact with the victim's vagina. He was even still standing as the child lay on the ground. In fact, what the applicant did was preparing to commit the act. Thank God for Ruth who appeared at the opportune moment.
6. The main reason for the review application is that the applicant was a minor at the time of the offence. This fact is not denied by the prosecution. Counsel however insists that the sentence of five (5) years must be left intact.
7. There is no dispute that as per the birth certificate produced here the applicant was aged 17 years at the time of commission of this offence. What then was his status? Under Part 1- Preliminary of the [Children Act](#) "a child" means any human being under the age of eighteen years. It means that the applicant was a child.
8. Section 239 of the [Children Act](#) provides for methods of dealing with child offenders as follows:
 - a. Discharge the child under section 35(1) of the [Penal Code](#);
 - b. Discharge the child on his or her entering into a recognisance, with or without sureties;
 - c. Make a probation order against the offender under the provisions of the [Probation of Offenders Act](#);
 - d. Commit the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake the care of the offender;
 - e. If the child is between twelve years and fifteen years of age, order that the child be sent to a rehabilitation institution suitable to the child's needs and circumstances;
 - f. Order the child to pay a fine, compensation or costs, or any or all of them, having regard to the means of the child's parents or guardian;
 - g. In the case of a child who has attained the age of sixteen years, deal with the child in accordance with the [Borstal Institutions Act](#);
 - h. Place the child under the care of a qualified counsellor or psychologist;
 - i. Order that the child be placed in an education institution of vocational training programme;
 - j. Order that the child be placed in a probation hostel under the provisions of the [Probation of Offenders Act](#);
 - k. Make a community service order;
 - l. Make a restorative justice order;
 - m. Make a supervision order;
 - n. Make any other orders of diversion provided for in this Part; or
 - o. Deal with the child in any other lawful manner as may be provided under any written law.



9. In the present case the above provision was not adhered to. I, however, do not wholly blame the Learned Magistrate since the applicant told the Court he was 18 years old. I have seen the applicant in Court and I would not have believed his word about his age from his physical appearance. Had I been the trial court then I would have subjected him to age assessment or provision of documents to confirm his age. That is, however, not needed now as a birth certificate has been availed.
10. In as much as I do not condone the applicant's conduct, I am of the view that his exposure to Prison life where he has been for almost 1¹/₂ years is not fair. That is all the reason why we have the *Children Act*.
11. From the record, it is clear there is a glaring error where a minor was sent to Prison to stay with adults. I, therefore, exercise the revisionary powers of the High Court under section 362 and 364 of the *Criminal Procedure Code* and review the sentence of five (5) years. I set it aside and substitute it with a probation sentence and order as follows:
 - i. The applicant to serve three (3) years on probation.
 - ii. Mr. Edward Atinda in charge of Probation Kisii to organize for counselling sessions for both the applicant and the victim.
 - iii. Mr. Atinda to organize for a meeting of the two families (of the applicant and victim) and the area administration for purposes of reconciliation.
 - iv. The applicant is warned against committing any offence during the probation period and even after.
 - v. Ruling to be served on Mr. Atinda for compliance.
12. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED AT KISII THIS 22ND DAY OF DECEMBER 2023.

H.I. ONG'UDI

JUDGE

In the presence of:

Applicant

Mr. Ochengo for the State

Otieno/Jerusha: Court Assistant

