



REPUBLIC OF KENYA



**Republic v Makotsi (Criminal Case 49 of 2016)  
[2023] KEHC 26781 (KLR) (19 December 2023) (Sentence)**

Neutral citation: [2023] KEHC 26781 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 49 OF 2016  
SC CHIRCHIR, J  
DECEMBER 19, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**EUGENE MAKOTSI ..... ACCUSED**

**SENTENCE**

1. The Accused herein was convicted of murder of Felix Muliro Masheti by Justice Musyoka. A presentencing report was ordered and parties were given a chance to make their submissions.
2. Mr. Otyeno pointed out to the court that the Accused was 15 years at the time of the commission of the crime. He was in class 6 and he is alleged to have killed his classmate. The counsel further pointed out that the trial itself, which has been going on since 2016 has violated his rights as a child. In the words of the counsel “the system has failed him”.
3. Counsel further submits that the accused was in remand upto the year 2022 and that he has been of good conduct while in. He did his Kenya primary certificate of Education (KCPE) Examinations , while in remand and scored 236 marks.
4. It is the Accused’s further submission that if the trial had been expedited, the accused would have benefited from the law relating to punishment of minor offenders.
5. It is further submitted that he is remorseful. That he has served a period of 6 years in custody. That he has just completed his primary Education , and has a whole future a head of him. He prays for a conditional non-custodial sentence.
6. On the part of the state, Ms. Osoro submits that the Judge who convicted the accused would have reduced the charge to manslaughter if things like age was indeed a mitigation factor, but the court did not consider it so.



7. The prosecution proposes that, in line with section 239 of the *children's Act*, the court may deal with the accused in the way it deems fit. The prosecution however further submitted that, the court ought to consider the impact of a non-custodial sentence on the family of the victim.
8. According to the probation officers' findings the accused has a history of alcohol, drugs and other substance abuse. That though he socialized well with his peers in school, he was known to be temperamental. was known to be temperamental.

### **Determination**

9. I have considered the parties' submissions and the presentencing report. The accused is said to be a first offender and is remorseful. These are a mitigating factor as per the judiciary sentencing policy guidelines. ( see paragraph 23.8 of the Guidelines)
10. It is not disputed that the accused was 15 years old when he committed the offence. He is now 20 years. The prosecution has argued that Age should not be considered as a mitigating factor. However Age is indeed a mitigating factor, but only if it affects the responsibility of the individual offender ( see paragraph 23.8.5 of the sentencing policy guidelines.). In this particular case however am of the view the accused was of an age in which he was capable of comprehending the seriousness of the harm he was inflicting on his classmate.
11. Section 239 (1) of the *Children's Act* No. 29 of 2022 sets out the guidelines for dealing with children who are in conflict with the law. One of the means of dealing with the children provided under section 239 (1) (o) is to "deal with the child in any other lawful manner as may be provided under any written law"
12. The Judiciary sentencing policy guidelines too has a number of guidelines:

Paragraph 20.10 provides as follows: The paramount objectives when dealing with children in conflict with the law should be reformation, social integration, rehabilitation and restorative justice. The order imposed should thus be the one best suited to realise this objective.

Paragraph 20.11 provides: Custodial orders should only be imposed as a matter of last resort when dealing with children.....".

Paragraph 20.13 states: The overarching consideration is the child's best interest and thus the individual circumstances of the child should be considered." In sentencing the Accused, the court will keep in focus the above guidelines.
13. The Accused committed the offence when he was a child, but has transitioned to adulthood in the course of trial. In the case of *JKK v Republic* (2013) eKLR , the court of Appeal had to deal with a scenario similar to the present one. The Accused who had committed the offence when he was a child had transitioned to Adulthood in the course of trial. The court reasoned thus: The purposes of the sentences provided for under the *Children Act* are meant to correct and rehabilitate a young offender, i.e. 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”

14. The social inquiry report on the accused herein indicates that while in the remand home, the accused was a Head Boy. He managed to finish his class Eight ( 8 ) successfully. The two are indicators of a person who is responding positively to rehabilitation and the focus of the intended punishment must remain that , rehabilitation.
15. Further this court takes into consideration the fact that in all matters concerning children their best interest is of paramount consideration.( see article 53 (2) of the Constitution and section 8 of the children’s Act No. 29 of 2022)
16. However to use the words of the court in in JKK case ( *supra*) the Accused “must be helped to understand the consequences of his mistakes before he can be released back to society and which can only happen by being made to serve a custodial sentence”.
17. Taking all the above into considerations, I hereby sentence the accused to 10 years in prison, less the 6 years that he has spent in remand. Effectively, the Accused will serve 4 years from the date of conviction.
18. Right of Appeal- 14 days.

**DATED SIGNED AND DELIVERED AT KAKAMEGA THIS 19<sup>TH</sup> DAY OF DECEMBER, 2023.**

**S. CHIRCHIR**

**JUDGE**

In the presence of:-

Ms. Osoro for DPP

Accused- present

