



REPUBLIC OF KENYA



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

**Newton v Republic (Criminal Petition E008 of 2021)  
[2022] KEHC 11149 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11149 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CRIMINAL PETITION E008 OF 2021  
CM KARIUKI, J  
MAY 31, 2022**

**BETWEEN**

**MOSES KIGERA NEWTON ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Petitioner through the Amended Petition dated 3<sup>rd</sup> November 2021 sought the following orders: -
  - i. A declaration order do issue that the Petitioner's constitutional rights and freedoms together with his rights under other applicable laws as petitioned herein have be contravened.
  - ii. A declaration order do issue that the Petitioner was and is entitled to enjoy his contravened constitutional fundamental rights and freedoms.
  - iii. A declaration order do issue that the Petitioner's custodial sentence was wrongful.
  - iv. An order do issue quashing and setting aside the custodial sentence.
  - v. Any such orders as this honorable court shall deem fit and just.
2. The petition was supported by the grounds on the face of the amended petition and the supporting affidavit dated 19<sup>th</sup> October 2021.
3. Briefly, the Petitioner was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*. The particulars being that he, on July 2015 at Thome Village in Laikipia County unlawfully and intentionally caused his genital organ namely penis to penetrate the vagina of J.M., a child aged four years.
4. The Petitioner was after the hearing of the case, found guilty for the offence of defilement and subsequently convicted on 21. 2. 2018 and condemned to a sentence of life imprisonment.



5. The Petitioner lodged an appeal in Nyahururu HC Criminal Case No. 61 of 2018 in which the issue of the Petitioner's age arose whereby the court directed that the Petitioner be taken for age assessment. The age assessment report concluded that the Petitioner was then, twenty years old meaning the Petitioner was charged at the age of 15 years thus a child offender.
6. The court then requested for a presentence report and proceeded to substitute the Petitioner's sentence of life imprisonment to 12 years and further declared the Petitioner a dangerous sexual offender whose name should be entered in the register of registered sexual offenders (if any exists).
7. The Petitioner's petition was centered on the issue of age and the violation of his rights as a child offender. It was asserted that the Petitioner was held beyond 24 hours and after taking plea, he continued being held in custody together with adults at Rumuruti Prisons.
8. Further, during trial, the prosecution case was over delayed for about 3 years contrary to the provisions of Rule 12 of the Child Offenders Rules on duration of child offender cases consequently which the Petitioner was condemned as an adult offender.
9. It was the Petitioner's submission that the result of being held in custody together with adults exposes the Petitioner to hardcore adult criminals who have lost hope in life, some of whom are immoral malicious and with no good lessons and/or virtues to impact on the Petitioner. That the Petitioner's chances of being reformed into a better and productive citizen were shattered having gone to prison as a minor and subjected to harsh prison environment.
10. The Petitioner asserted that his fundamental rights and freedoms were contravened particularly under Article 20, 21 (1), 25, 27 (4), 50 (2) (e), 51 (1), 53 (1) (f) and (2) of *the Constitution* of Kenya, Article 2 of the *Convention of the Rights of the Child, 1990*, Section 3, 4(2), 5, 18, 189, 190, 191, 194(1) of the *Children Act*, Rule 6 and 12 of the Child Offenders Rules and Article 24 (1) of the *International Covenant on Civil and Political Rights, 1976*.
11. Further reliance was placed on Nyahururu HC Criminal Appeal No. 1 of 2020, *David Njoroge Ngige vs Republic*.

### **Petitioner's Submissions**

12. The Petitioner's submissions reiterated the contents on the face of the amended petition. The Petitioner stated that being held in custody for over 24 hours after he was arrested was in contravention of his rights as an accused person and as a child.
13. It was submitted that the presentence report dated 2.10.2020 was prima facie biased and harsh as against the Petitioner although it suggested the Petitioner was 16 years. That the appellate court disregarded the paramount issue of the Petitioner's age and found him, not fit for a non-custodial sentence.
14. The petition contended that the major issue for determination is whether his constitution rights as a child offender were violated. In which they answered in the affirmative for the aforesaid reasons and on the basis that they were in contravention of the Petitioner's fundamental rights and freedoms which were contravened particularly under Article 20, 21 (1), 25, 27 (4), 50 (2) (e), 51 (1), 53 (1) (f) and (2) of *the Constitution* of Kenya, Article 2 of the *Convention of the Rights of the Child, 1990*, Section 3, 4(2), 5, 18, 189, 190, 191, 194(1) of the *Children Act*, Rule 6 and 12 of the Child Offenders Rules and Article 24 (1) of the *International Covenant on Civil and Political Rights, 1976*.
15. In conclusion, the Petitioner prayed that this court do allow his petition and issue and order quashing and setting aside his custodial sentence.



## Respondent's Submissions

16. The petition is opposed by the Respondent. It was stated that there was no documentary evidence to prove the Petitioner's age neither was there an age assessment called for at any stage of the trial. Nowhere in the record is the issue of age raised. Further, the court has a chance to observe the Petitioner and if he was indeed a subject the court would have taken note of that. They urged the court to dismiss the issue of age as to bring it up at this point would be introducing new evidence.
17. It was averred that as per the typed proceedings on the date the Petitioner was arraigned in court, the record does not mention that the Petitioner was remanded at Rumuruti Police Station.
18. The prosecution stated that the Petitioner was properly identified as the assailant of PW1 and the trial magistrate was correct to find so. PW1 identified the Petitioner by way of recognition. Although PW1 stated that "I know Moses Kigera. My mother told me his name. I had not seen him before." It only means or can be interpreted to mean that she knew the Petitioner but did not know his name thus her mother only told her the name of the Petitioner. There was therefore no need for an identification parade as the Petitioner was well known to the complainant.
19. It was asserted that the evidence of PW1 was well corroborated by the evidence of PW2 and PW3. The doctor who testified as PW10 further corroborated the evidence of PW1 confirming that she was indeed defiled on that day. Although photographs of the Petitioner's house and his cloths were not produced in court, it is not in question that he is the one who did the gruesome act as the evidence clearly points at him. The magistrate rejected the Petitioner's defence as it was just a narration of how he got arrested on 6<sup>th</sup> July 2015 and DW2's evidence was just mere denials.
20. Lastly, the Respondent urged the court to dismiss this petition in its entirety.

## Analysis and Determination

21. This court has carefully read and considered the Petitioner's petition, supporting affidavit and the respective submissions.
22. The Petitioner submitted that this application falls under Article 23 (1) and 50 (2) (q) of *the Constitution* of Kenya. The said provisions center on Bill of Rights and the right to fair hearing. The Petitioner asserted that his fundamental rights and freedoms were contravened particularly under Article 20, 21 (1), 25, 27 (4), 50 (2) (e), 51 (1), 53 (1) (f) and (2) of *the Constitution* of Kenya, Article 2 of the Convention of the Rights of the Child, 1990, Section 3, 4(2), 5, 18, 189, 190, 191, 194(1) of the *Children Act*, Rule 6 and 12 of the Child Offenders Rules and Article 24 (1) of the *International Covenant on Civil and Political Rights*, 1976.
23. At this stage, it is important that I point out that this petition is only concerned with the contravention of the Petitioner's fundamental rights and freedoms as guaranteed by *the Constitution* of Kenya and all other enabling Laws. This court will therefore restrict itself to the foresaid mandate. This petition is not one of appeal or revision neither is it concerned with the guilt or otherwise of the Petitioner and therefore the Petitioner cannot substitute this petition with an appeal or review. The Petitioner was already convicted and sentenced by the trial court and subsequently he appealed and the court discharged its mandate on the same.
24. Article 23 (1) of *the Constitution* provides that the High Court has jurisdiction in accordance with Article 165, to hear and determine applications for redress of denial, violation and infringement of, or threat to a right or fundamental freedom. Particularly, Article 165 (3) (d) of *the Constitution* provides that the High Court has jurisdiction to hear any question on the interpretation of *the Constitution*



including the issue of whether anything said to be done under the authority of *the Constitution* or any law is inconsistent with, or in contravention of *the Constitution*.

25. The Petitioner’s petition was centered on the issue of age and the violation of his rights as a child offender. It was asserted that the Petitioner was held beyond 24 hours and after taking plea, he continued being held in custody together with adults at Rumuruti Prisons. I have thoroughly perused the trial court proceedings and nothing on record indicated that the court ever recorded that the Petitioner be remanded at Rumuruti Prisons. There is no evidence to substantiate the aforesaid allegations by the Petitioner.
26. Section 143(1) of the *Children Act* states that:
- “Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that such person is under eighteen years of age, the court shall make due inquiry as to the age of that person and for that purpose shall take such evidence, including medical evidence, as it may require, but an order or judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court, and the age presumed or declared by the court to be the age of that person so brought before it shall, for the purposes of this Act and of all proceedings thereunder, be deemed to be the true age of the person”
27. It is my view that at no point in the trial court proceedings was the issue of the Petitioner’s age raised and therefore the trial court did not presume and/ or was not persuaded to think that the Petitioner was a minor at the time under the aforesaid section.
28. Further, I find that the Petitioner did not clearly particularize how his said rights were infringed during the trial, conviction and sentencing by the Trial Court. There is no evidence of the alleged torture and injustice that the Petitioner suffered. Most importantly, is whether any prejudice was occasioned upon the Petitioner? To answer this, the Petitioner must be so prejudiced in his right to fair trial under Article 50(2) of *the Constitution* by showing was infringed and it is my opinion that there is no evidence to indicate the same. No prejudice was occasioned to the Appellant. I find that there was no miscarriage of justice and/or substantial disadvantage that was occasioned against the Petitioner.
29. The appellate court examined the issue of the Petitioner’s age and although it was found that the issue of the Petitioner’s age did not come up during trial, the court proceeded to request for an age assessment report and consequently the Petitioner’s sentence of life imprisonment was set aside and substituted with a term of 12 years. Further, the Petitioner was found unfit for non-custodial sentence.
30. In the upshot, I find that the Petitioner has not sufficiently demonstrated the stifling of or threats of infringement of his rights, fundamental freedoms, *the Constitution* and/or the law. Further, he has not demonstrated that the trial court proceedings against him violated or threatened their constitutional rights. It is therefore my finding that the Petitioner has not satisfied this court for the grant of the orders sought. Therefore, the court makes the orders;
- (i) This Petition, is therefore, found unmeritorious and hereby dismissed.
- (ii) No orders as to costs

Dated and Signed at Nyahururu this 31<sup>st</sup> the day of May 2022.

.....

CHARLES KARIUKI



JUDGE

