



REPUBLIC OF KENYA



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

**Republic v BC (Criminal Case E061 of 2022)**  
**[2022] KEHC 17153 (KLR) (28 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 17153 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAKURU**  
**CRIMINAL CASE E061 OF 2022**  
**TM MATHEKA, J**  
**DECEMBER 28, 2022**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**BC ..... SUBJECT**

**Methods of dealing with children in conflict with the law**

Reported by John Ribia

**Criminal Law – arrests – arrest of a child – procedure to be followed - what was the procedure to be followed by authorities in the criminal justice system in the arrest and presentation of a charge to a child - Children Act, (cap 141), sections 144 and 218.**

**Criminal Law – police – investigative role of the police – where a child was charged with the murder of her child - whether the police erred in arresting a child charged with the murder of her child without following up to charge the father of the murdered child for defilement.**

**Criminal Procedure – sentencing – sentencing of a child - children in conflict with the law - methods of dealing with children in conflict with the law - what should courts take into consideration in determining the best way to deal with a child in conflict with the law - Children Act, (cap 141), sections 144 and 239.**

**Brief facts**

The matter was brought up as a point of concern by a Children Officer in the Nakuru Children Court Users Committee WhatsApp Group. The officer was concerned that the subject (a child carrying a pregnancy) was five months pregnant, and the court was not aware. The greatest concern was that a remand home was not conducive for the holding of a pregnant child, and in the event that she gave birth, it would not be conducive for a child mother and her baby.

The subject was charged with murder of her first born child. In her defence it was contended that the subject was a survivor of an exceptionally difficult upbringing, having been raised by her grandparents due to her parent’s neglect, and having been married off as a child. The subject was carrying her second pregnancy, all at the tender age of 17 years. Her ‘husband’ sent her away when her child was 1 year 2 months. She went to her



grandmother's, only for the grandmother to find out she was by then 3 months pregnant. The grandmother was not ready to take care of three extra mouths and told her to go back to her 'husband' who had taken in a new wife. She decided to kill her child and then kill herself instead of going back.

The prosecution had tabled a plea agreement proposal in which if accepted would convict the accused to the lesser charge of manslaughter. The court was also tasked with deciding on the best way to proceed with the case.

### **Issues**

- i. What was the procedure to be followed by the authorities in the criminal justice system in the arrest of, and the presentation of a charge to a child?
- ii. Whether the authorities in the criminal justice system erred in arresting and charging a child parent with the murder of her child without following up to charge the father of the murdered child for defilement.
- iii. What should courts take into consideration in dealing with a child in conflict with the law?

### **Held**

1. The court was to always act in the best interests of the child and detention of a child ought to be the last resort. There was a mistake on the court's part. From a consideration of section 144 of the Children Act on the categories of children in need of care and protection, section 144(r) on a child who was pregnant and section 144(bb) on a child who was in conflict with the law, the child in the instant case was not only in conflict with the law, but was also in need of care and protection.
2. The mental assessment report indicated that the subject was 17 years old and was the first born of 8 siblings. She had been married of as a child and was separated from her husband with whom they had one child (the deceased) and was pregnant with the second child. There was a history of early childhood trauma as she had been married from the age of 15 years old. The psychiatrist formed the opinion that she was mentally fit to stand trial, but, in addition, she was psychologically traumatized and a victim of gender based violence. The psychiatrist recommended that she required more psycho-social support and rescue from the situation she was in.
3. There was urgent need for the creation of awareness amongst the child justice agencies of the new requirements of the law put there to enhance child protection for those who entered the criminal justice system. Section 218 of the Children Act required that a police officer who arrested a child ought to not only inform the parent/guardian, but also the Secretary Children Services or an authorized officer within 24 hours. Upon receipt of that information the children officer was to carry out an assessment and submit that report to the police officer. The report should contain information on the socio-economic and personal circumstances and the needs of the child with a view to safeguarding the welfare of the child. That had not been done in the instant case.
4. The police ought to have opened a protection and care file even as the matter was pending investigations. There was a gap in time, which was not explained, from the date the child died to the date the subject was presented in court. The protection and care file would have enabled the director of children services to begin other investigations. The director of criminal investigations ought to have been involved because of the child marriage issue, which was combined with defilement.
5. Despite being aware that the subject was a victim of early marriage and defilement the police did nothing to follow up on that. The Office of the Director of Public Prosecutions did not flag the two issues for follow up, everyone was more concerned about the killing of her own child without following up on the why, yet she was pregnant with another child.
6. When the subject entered into a plea agreement, the Director of Children Services was initially of the view that that was purely a matter for protection and care file as it involved a child in conflict with the law. In view of section 239 of the Children Act, that was no longer the position. Kenya's children law recognized the reality that more often than not, the child offender was first a child in need of care and protection whose welfare ought to be taken into consideration even as the criminal charges were proceeding against that child.



7. The child offender was a child in need of care and protection, who, should the circumstances dictate, would return to the hands of the Secretary Children Services who had a role in dealing with the child who was in conflict with the law, in view of section 239 (1)(d), (e), (h), (i), (l) and (m) of the Children Act. The provision provided that where a child was tried for an offence, and the court was satisfied as to their guilt, the court could commit the offender to the care of a fit person; if the child was 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; place the child under the care of a qualified counsellor or psychologist; order that the child be placed in an educational institution or vocational training programme; make a restorative justice order; or make a supervision order.
8. The Directorate of Children Services had a major role in the rescue, rehabilitation and reintegration of the child in conflict with the law. Nevertheless, they had filed the children officer's report, where they had recommended that she be committed to KRC (a rescue center) pending the hearing of the case. An institution that would have both rehabilitative and reintegration programs, while at the same time taking care of her pregnancy and new born when the time arose would be ideal. The Probation Officer's Report recommended that the subject be placed on probation for three years at SGP Hostel. The Hostel was the appropriate institution. Section 239 of the Children Act (cap 141) provided that the court could make one or a combination of the methods set out there with respect to the child found guilty of an offence.

*Matter allowed.*

### **Orders**

- i. *The following reports were to be made and filed in court:*
  - a. *a children officer's report on the welfare of the children.*
  - b. *A pre-bail report by Probation and After Care Services with a view to securing a surety/fit person for her and her baby pending the hearing and determination of her case.*
- ii. *The child to be escorted to hospital for ante-natal clinic/care.*
- iii. *In view of the psychiatrist's assessment on gender based violence, the accused to be taken for counselling at the Gender-Based Violence Recovery Centre at the PGN Hospital.*
- iv. *A probation order was issued against the offender under the provisions of the Probation of Offenders Act.*
- v. *The subject was to be placed;*
  - a. *under the care of a qualified counsellor or psychologist;*
  - b. *in an educational institution or vocational training programme.*
  - c. *in a probation hostel under the provisions of the Probation of Offenders Act. A follow-up by the court upon her delivering her baby was also necessary.*
- vi. *The accused to be placed on probation supervision for three years to be served while committed to SGP Hostel. During her stay there and upon exit if necessary, she was to be accorded appropriate counselling and psychological support. She was to be accorded educational and /or vocational training support necessary for her reintegration and self-support.*
- vii. *Probation and aftercare services were at liberty to seek an extension of the order if necessary.*
- viii. *A protection and care file to be opened by the Deputy Registrar for purposes of progress report. The file was to contain certified copies of the charge sheet, the two reports (Child Officer's Report and Probation Officer's Report) and the instant judgment.*
- ix. *Mention of the protection and care file was to be on April 5, 2023, before the Deputy Registrar's report.*



- x. *The orders were to be served on the probation and aftercare services for compliance were:*
- a. *The accused was placed on probation supervision for three years.*
  - b. *The accused was committed to SGP Hostel for the period of the order.*
  - c. *The Probation and After Services were at liberty to seek an extension of the order.*
  - d. *The accused was to be accorded education and or vocational training necessary for her self-sufficiency.*
  - e. *The accused was to be accorded counselling and psychological support in view of the circumstances of her case.*
  - f. *Due to her pregnancy, the subject be accorded all the necessary medical support for her and her baby.*
  - g. *A protection and care file was to be opened for the baby for the appropriate orders.*

#### **Citations**

##### **Cases**

None referred to

##### **Statutes**

##### **Kenya**

1. Children Act (cap 141) sections 144 (bb)(r); 218(2)(3)(4); 239(1)(d)(e)(h)(i)(l)(m) - (Interpreted)
2. Criminal Procedure Code (cap 75) sections 137A - 137L, 137L - (Interpreted)
3. Penal Code (cap 63) sections 202 - 205 - (Interpreted)

##### **Advocates**

*Mr Kihara* for the state

*Ms Ng'anga* for the subject

## **JUDGMENT**

1. The Nakuru Children Court Users Committee has a WhatsApp Group where members share concerns over issues related the administration of and access to justice for children in the child justice system. It is here that that the representatives of the agencies raise issues of access to justice for children and those related to the administration of justice for children.
2. Being a specialized CCUC, the membership is drawn from the Child Justice System, the Judiciary, The Rift Valley Law Society, the Children Remand Home, Probation & After Care Services, Directorate of Children Services, Nakuru County Teaching & Referral Hospital, Office the Director of Public Prosecution, Kenya Police Service, Kenya Prisons Service, the County Government, Non-Governmental Organizations dealing with issues of children, et al.
3. On the December 16, 2022 the volunteer children officer at the Children Remand Home, [...], Mr Gitonga, brought to my attention, on the wall, that there was a child at the remand home facing a murder charge that her case had been scheduled for hearing on the March 15, 2023. The concern for the officer was that the child was five (5) months pregnant and it appeared to him that the court was not aware.
4. The greatest concern was that the Children Remand Home was not conducive for the holding of a pregnant child, and in the event that she gave birth, it would not be conducive for a child mother and her baby.
5. Noting that it was a High Court matter, and guided by the Constitutional Principle to always act in the best interests of the child, and that detention of a child ought to be the last resort, I was of the view



- that there must have been a mistake on our part. In any event, we were still in the service month for children matters.
6. I requested the Deputy Registrar to place the file before me for perusal. I immediately noted that the matter was last before the Presiding Judge and the record did not show that this concern had been brought to his attention. I brought that fact to his attention. He was out of station on duty at Kabarnet High Court. He immediately directed me to proceed and deal with the matter as appropriate which I did.
  7. Taking into account the provisions of the *Children Act, 2022*, section 144 on the categories of children in need of care and protection section 144(r), a child who is pregnant, 144(b) a child who is in conflict with the law, I was of the view that this child was not only in conflict with the law, but was also in need of care and protection.
  8. Upon perusal of the file I found the mental assessment report, which indicated that she was 17 years old, 1<sup>st</sup> born of 8 siblings, separated from her husband with whom they had one child (the deceased) and was now pregnant with the 2<sup>nd</sup> child. That there was history of early childhood trauma as she had been married from the age of 15 years old. The psychiatrist formed the opinion that she was mentally fit to stand trial, but, in addition, she was psychologically traumatized and a victim of Gender Based Violence. He recommended that she required more psycho-social support and rescue from the situation she was in.
  9. I noted the charge sheet dated November 14, 2022. She was charged with murder contrary to section 203 as read with 204 of the *Penal Code*, that on October 21, 2022 in[...] Sub County within [...] she murdered MC.
  10. It was clear that there had not been compliance with section 218 of the *Children Act*, which provides;
    - (1) A police officer who arrests, serves a summons or issues with a written notice to child shall notify the parent or guardian of the child and the Secretary or an authorised officer within twenty four hours.
    - (2) A Children’s Officer who receives a notification under subsection (1) shall assess and submit a report to the police officer on—
      - (a) a social inquiry on the child to ascertain the social, economic, personal circumstances, and the needs of the child;
      - (b) the child’s tendency to engage in activities which is in conflict with the law; and (c) the surrounding facts and circumstances leading to the child’s conduct in conflict with the law.
    - (3) A Children’s Officer shall assess a child under subsection (1) in an environment that is secure and is friendly to a child that may include a room in a police station, the children’s court or the offices of the Secretary.
    - (4) A Children’s Officer shall assess a child in a manner that is conducive to ease and comfort a child and shall have regard to the best interest of a child.
    - (5) The assessment of a child for purposes of this section shall be carried out in accordance with the Fifth Schedule.”
  11. It is evident that there is urgent need for the creation of awareness amongst the child justice agencies of the new requirements of the law put there to enhance child protection for those who enter the criminal



justice system. That besides, the law requires that a police officer who arrests a child ought to not only inform the parent/guardian, but also the Secretary Children Services or an authorized officer within 24 hours. Upon receipt of that information the children officer is to carry out an assessment and submit that report to the police officer. Of importance is what the report should contain; information on the socio-economic and personal circumstances and the needs of the child with a view to safeguarding the welfare of the child.

12. Clearly that had not been done. I therefore made the following orders;
  1. That a Children Officer's Report be filed on the welfare of the children (section 218(2),(3) and ( 4)
  2. A pre-bail report by Probation and After Care Services with a view to securing a surety/fit person for her and her baby pending the hearing and determination of her case.
  3. The child be escorted to hospital for ante-natal clinic/care.
  4. In view of the psychiatrist's assessment on Gender Based Violence, the child be taken for counselling at the Gender Based Violence Recovery Center at the PG Hospital [...].
  5. The orders be served appropriately.
13. The matter was mentioned on December 20, 2022. Mr Kihara appeared for the state, Ms Ng'ang'a appeared for the subject, the subject appeared virtually from the [...] Children Remand Home.
14. Counsel for the subject told the court that they had written to the DPP on November 15, 2022 seeking a plea agreement. Mr Kihara submitted in response that the office had received the letter, and had received the charge documents. He submitted that he had served Ms Ng'ang'a and supplied copies to the court.
15. Ms Ng'ang'a confirmed that their plea agreement proposal was accepted by the ODPP. The plea agreement was recorded in accordance with section 137A to 137I and 137L of the [Criminal Procedure Code](#), upon satisfying myself that the subject understood the nature of a plea agreement, and that she was competent to take the same.
16. She pleaded to the lesser charge of manslaughter contrary to section 202 as read with 205 of the [Penal Code](#). The fact as given by the prosecution were simply that on the material date, the subject was at her grandmother's place. Her child M was missing. When the child showed up he appeared sad, he said he had eaten Mandazi, but was not well. On further questioning by her mother the accused revealed that she had fed the child poison. The mother called neighbours for help. The child was rushed to Kamwaura Health Centre, but was declared dead on arrival. The accused was arrested. A bottle of diazonal, the poison was recovered. The body of the child was taken to Molo Sub County Hospital Mortuary, samples examined by government analyst revealed cause of death to be poisoning. The subject pleaded guilty to the facts. I made a finding of guilt on her own plea.
17. Mr Kihara submitted that she was a 1<sup>st</sup> offender.
18. In mitigation, Ms Ng'ang'a told the court that her client was below 18 years, at the time of committing the offence was living with her grandmother because her family had neglected her. She was married off as a minor and was currently pregnant with her second child. She had been chased away by the man who had married her. Ms Ng'ang'a sought a lenient disposition from the court.
19. The 2 reports I had sought for had not been filed by Director of Children Services or Probation and After Care Services, as they had been expected on December 21, 2022. I directed Probation and After



Care Services to now present a Probation Officer's Report, and the Director of Children Services to avail the Children Officer's Report.

20. The issue for determination is, out of the 15 methods of dealing with a child provided for under section 239 of the *Children Act* which is appropriate for such a case?
21. First, the police ought to have opened the Protection and Care File even as the matter was pending investigations. There is a gap in time, which is not explained, from the date the child died to the date the subject was presented in court.
22. That Protection and Care file would have enabled the Director of Children Services to begin other investigations. The Director of Criminal Investigations ought to have been involved because of the child marriage issue, which is obviously combined with defilement.
23. It is noteworthy that despite being aware that the child was a victim of early marriage and defilement the police did nothing to follow up on that, and ODPP did not flag the two issues for follow up, everyone was more concerned about the killing of her own child without following up on the why, yet she was pregnant with another child.
24. When she entered into a Plea Agreement the Director of Children Services was initially of the view that this was purely a matter for PACs as it involves a child in conflict with the law. In view of section 239 of the *Children Act* No 29 of 2022, this is no longer the position. Our children law recognizes our lived reality that more often than not the child offender is first a child in need of care and protection whose welfare ought to be taken into consideration even as the criminal charges are proceeding against that child. The child offender is a child in need of care and protection, who, should the circumstances dictate, would return to the hands of the Secretary Children Services who now has a role in dealing with the child who is in conflict with the law, in view of section 239(1)(d)(e)(h)(i), (l) and (m) which provides.

239. Methods of dealing with children in conflict with the law

- (1) Where a child is tried for an offence, and the court is satisfied as to their guilt, the court may deal with the case in one or more of the following ways—
  - (a) ;
  - (b) ;
  - (c) ;
  - (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) ;
  - (g) ;
  - (h) place the child under the care of a qualified counsellor or psychologist;
  - (i) order that the child be placed in an educational institution or vocational training programme;



- (j) ;
- (k) ;
- (l) make a restorative justice order;
- (m) make a supervision order

25. Evidently in this new dispensation the Directorate of Children Services has a major role in the rescue, rehabilitation and reintegration of the child in conflict with the law.
26. Nevertheless, they had filed the Children Officer's Report, where they found that the child was a victim of child marriage, and that her 'husband' sent her away when her child was 1 year 2 months. She went to her grandmother's in Tinnet, only for the grandmother to find out she was by then 3 months pregnant. The grandmother was not ready to take care of three extra mouths and told her to go back to her 'husband' who had by not taken in a new wife. She decided to kill her child and then kill herself instead of going back. DCS had recommended that she be committed to KRC (a rescue center) pending the hearing of the case.
27. Upon the plea agreement, I sought a pre placement report (Pre-sentence report) from Probation and After Care Services [...]. The confirmed the factual back ground of the case. It now became inevitable to find an institution that would have both rehabilitative and reintegration programs, while at the same taking care of her pregnancy and new born when the time arose. the Probation Officer's Report recommended that the subject be placed on probation for three years at SGP Hostel.
28. S 239 of the *Children Act 2022* provides that the court can make one or a combination of the methods set out there with respect to the child found guilty of an offence.
29. In this case it is my view that a combination of the following methods would be appropriate for BC.
  - (c) make a probation order against the offender under the provisions of the Probation of Offenders Act;
  - (h) place the child under the care of a qualified counsellor or psychologist;
  - (i) order that the child be placed in an educational institution or vocational training programme;
  - (j) order that the child be placed in a probation hostel under the provisions of the Probation of Offenders Act;
30. Taking into consideration the circumstances of the case, I was persuaded that the Probation Hostel would be the appropriate institution where all these would be implemented. It would also be necessary that there be a follow up by the court upon her delivering her baby
31. I order therefor that the subject be placed on probation supervision for three years to be served while committed to SGP Hostel. During her stay there and upon exist if necessary, she be accorded appropriate Counselling and Psychological support. She be accorded educational and /or vocational training support necessary for her reintegration and self-support.
32. Probation and after care services are at liberty to seek extension of the order if necessary.
33. A P & C file be opened, by the Deputy Registrar for purposes of progress report. The file to contain certified copies of the charge sheet, the two reports (COR and POR) and this judgment.
34. Mention of the P & C file on the April 5, 2023 before the DR for progress report.



35. The orders to be served on Probation and After Care Services [...] for compliance are.
- a. The subject is placed on probation supervision for three years.
  - b. The subject be and is hereby committed to SGP Hostel for the period of the order. The Probation and After Services be at liberty to seek extension of the order.
  - c. The subject be accorded education and or vocational training necessary for her self sufficiency
  - d. The subject be accorded the counselling and psychological support in view of the circumstances of her case.
  - e. Due to her pregnancy the subject be accorded all the necessary medical support for her and her baby when it comes.
  - f. A P&C file be opened for the baby for the appropriate orders
36. Orders accordingly.

**DATED, SIGNED AND DELIVERED THIS 28TH DAY OF DECEMBER, 2022.**

**MUMBUA T. MATHEKA,**

**JUDGE.**

C/A Jennifer

For state: Mr. Kihara

For Subject: Ms. Ng'ang'a

Subject: Present

