



REPUBLIC OF KENYA



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

**EMC v Director of Public Prosecutions (Criminal Appeal 74 of 2019)
[2022] KEHC 16911 (KLR) (23 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16911 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL 74 OF 2019
WM MUSYOKA, J
DECEMBER 23, 2022**

BETWEEN

EMC APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

(From original conviction and sentence in Mumias Senior Principal Magistrate's Court Sexual Offences Case No. 22 of 2018 by Hon. T.A Odera SPM on 17th June 2019)

RULING

1. On May 21, 2020, I delivered a ruling herein, wherein I dismissed the appeal on conviction, and upheld or affirmed the conviction. I suspended determination of the appeal on sentence to allow or await the assessment of the age of the appellant. I directed the Medical Superintendent of Health, responsible for the Kakamega County Referral Hospital, to assess the age of the appellant, as at June 16, 2018.
2. The appellant was presented at the Kakamega County Referral Hospital, in compliance with the order of May 21, 2020. He was seen by a dentist known as Dr Sembere J, who then prepared a report dated June 11, 2020, in which he assessed the age of the appellant to be above 18, without indicating whether that was the apparent age as at July 16, 2018 as per the order or as at the date of assessment on June 11, 2020.
3. When the report of June 11, 2020 was placed before me, on February 11, 2021, I indicated that the same was not helpful, to the extent that it did not indicate whether or not the appellant was a child as at July 16, 2018. I then directed a fresh age assessment to be done at Jaramogi Oginga Odinga Referral Hospital, and specifically ordered that the doctor shall approximate the age of the appellant as at the date of commission of the offence. My order of February 11, 2021 was not complied with, and I have been forced to deal with the sentence aspect of the appeal without the benefit of a coherent age assessment of the appellant as at July 16, 2018.



4. I directed age assessment to be done on the appellant, as the charge sheet, carrying the charges against him, identified him as a juvenile, whose apparent age was 10 years. The first column of the charge sheet is as follows:

CHARGE SHEET

OB NO 15/24/7/2018

Christian Names in full or Name EM	Surname or Father's Name C	Identity Certificate No. JUVENILE	Sex MALE	Nationality or Tribe KIKIYU	Apparent 10 years	ADDRESS KITALE ARBA JUNCTION
--	-------------------------------------	--	----------	-----------------------------------	----------------------	---------------------------------------

5. The charge sheet in criminal trials is the pleading upon which criminal proceedings are conducted. According to the charge sheet, the appellant was a minor, of about 10 years in 2018. That would mean that he was entitled to the protection accorded to minor offenders, during the course of the trial, and at sentencing.
6. I have scrupulously looked at the proceedings of the trial court, and noted that the issue of the age of the appellant was never dealt with. The proceedings focused more on the age of the victim but not on the age of the appellant, who was identified in the charge as a juvenile of about 10 years. It would mean that the offence was allegedly committed by one minor on another. It would appear that the appellant was not handled as a minor, and did not benefit from the safeguards under the *Children Act*, No 29 of 2022, laws of Kenya. The charge sheet was not amended to reflect the appellant as an adult. Parties are bound by their pleadings. The courts have a responsibility to ensure that children are protected, be they the victims of the offence charged, or the offender. This is more crucial in cases where the apparent age of the accused is said to be about when criminal liability does not attach.
7. I took the precaution of having the age of the appellant assessed, to clear any doubts as to his age, and also so as to comply with the requirements of the *Children Act*, and other laws dealing with children. The dentist did not assist the court in that respect, and it would appear that there is no appetite on the part of the Prisons Service, who have custody of the appellant, and the office of the Director of Public Prosecutions, who are responsible for having brought the charge against the appellant and in fact prosecuted him, to have his age assessed, despite the anomaly that I have indicated in the foregoing paragraphs.
8. Is there other material that I can rely on with regard to assessing the age of the appellant? Attached to the charge sheet, which indicates the appellant to be a juvenile of 10, is a police form C 8 title "Description Form", which says his date of birth is 1991. However, this is not the primary document, as the charge sheet is the principal pleading. The inconsistency between these two documents ought to have been resolved at trial, or on appeal upon my directions of February 11, 2021. The inconsistency persists as the respondent has taken no steps to address the same.
9. Any inconsistency or anomaly in criminal proceedings is resolved in favour of the appellant. As the principal pleadings indicate that he was a juvenile when the offence was committed, I shall treat him as such in addressing the sentence to be imposed. He is estimated to have been 10 years or so at the time, almost a child of tender years. He was still in the age where criminal liability does not attach. Consequently, I shall give him the benefit of the doubt. I shall order that his punishment shall be the



time served. He, accordingly shall, be released from prison custody forthwith, unless he is otherwise lawfully held. It is so ordered.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS
.....23rd DAY OF ...December..... 2022**

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

EMC, appellant, in person.

Mr. Mwangi, instructed by the Director of Public Prosecutions, for the respondent.

