



**Republic v NAS (Criminal Case E007 of 2024) [2024] KEHC 6752 (KLR) (4 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6752 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL CASE E007 OF 2024**

**RE ABURILI, J**

**JUNE 4, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**NAS ..... SUBJECT**

**RULING**

1. The subject in this case is N.A.S, a minor aged 10 years as per his birth certificate entry number 021406900 dated 18/1/2024 availed to court on 08/04/2024 showing that he was born on 25/4/2014. He is charged with the offence of murder contrary to section 203 as read with section 2024 of the [Penal Code](#).
2. Particulars of the Information dated 25<sup>th</sup> March, 2024, which was before the minor attained 10 years meaning he was still aged 9 years are that on the 2<sup>th</sup> day of November, 2023 at Andigo Olasi Village, Andigo Opanga Location in Nyakach Sub County within Kisumu County, he murdered T. D. O. The alleged deceased is said to have been a minor aged 8 years.
3. When the subject was arraigned on 8/4/2024, this court inquired on the age of criminal responsibility and the Senior Principal Prosecution Counsel, Mr. Okango requested for time to make an appropriate decision.
4. On 21<sup>st</sup> May, 2024, a mental assessment was done on the minor and he was found to be mentally fit. The court also ordered for a social inquiry report on the subject minor and the report was filed on 24<sup>th</sup> May, 2024.
5. The defence counsel, Ms Omollo did request that the prosecution considers diversion for the minor and the court gave directions accordingly, pending plea.
6. On 28<sup>th</sup> May 2024, Ms Omollo Counsel for the subject raised the issue of age of the subject and sought the court's directions in view of sections 4, 221 of the [Children's Act](#) and Article 53 of the



Constitution. According to Counsel, the child was under the age of twelve years and therefore was not criminally responsible and could not be charged with a criminal offence. She submitted that section 4 of the Children's Act, 2022 overrides section 14 of the Penal Code on presumption of children being criminally responsible if it can be shown that they knew what they were doing was wrong. She prayed that the subject be taken to the Charitable Children's Home.

7. The Prosecution counsel disagreed with this position and submitted that the provisions of section 221 of the Children's Act, 2022, only created a presumption which is rebuttal and not absolute. It was submitted that the case was properly before this Court and that the greater benefit is when the child goes through a full trial because section 221 of the Children's Act can easily be abused. Further, that the issue of criminal responsibility can only be raised after the court has heard the evidence by the prosecution witnesses to establish whether the child was capable of understanding the difference between right and wrong and not to terminate the case at this stage as the prosecution has evidence to show that it was the subject who unlawfully killed another minor.
8. In a rejoinder, Ms Omollo maintained that section 221 of the Children's Act was enacted recently, taking into account the trends and the UN Charter on Children's Rights. Further, she reiterated that section 4(1) of the Children's Act provides that in the event of inconsistency between the children's Act and any other written law, the Children's Act prevails hence the issue of criminal responsibility cannot be raised after the trial. She also relied on the counseling and probation report as well as the mental assessment report which all showed that the subject fell under section 221 of the Children's Act, 2022. Counsel submitted that from the witness statements, all the witnesses except the mother of the deceased claim that the deceased committed suicide and that as the child subject is under the age of 12 years, he cannot be held criminally responsible for any act or omission.
9. I reserved the matter for ruling to enable me peruse the relevant law as cited and to explore the rationale behind the provisions of section 4(1) and 221 of the Children's Act, 2022 as read together with section 14 of the Penal Code.

### **Analysis and determination**

10. Rules of criminal responsibility refer to circumstances under which criminal responsibility can be limited under the law. For example: age and mental capacity.
11. The age of criminal responsibility is the age below which a child is deemed incapable of having committed a criminal offence. In legal terms, it is referred to as a defence/defense of infancy, which is a form of defense known as an excuse so that defendants falling within the definition of an "infant" are excluded from criminal liability for their actions, if at the material time, they had not reached an age of criminal responsibility. After reaching the initial age, there may be levels of responsibility dictated by age and the type of offense committed.
12. Under the English common law, the defense of infancy was expressed as a set of presumption in a doctrine known as *doli incapax*. A child under the age of seven was presumed incapable of committing a crime. The presumption was conclusive, prohibiting the prosecution from offering evidence that the child had the capacity to appreciate the nature and wrongfulness of what they had done. Children aged 7–13 were presumed incapable of committing a crime but the presumption was rebuttable. Thus, the prosecution could overcome the presumption by proving that the child understood what they were doing and that it was wrong. In fact, capacity was a necessary element of the state's case (thus, the rule of sevens doctrine arose). Under this rule, Children under the age of seven cannot be held to have capacity, while there is a rebuttable presumption that a minor aged 7 to 14 lacks capacity, while for those aged 14 to 21 there is a rebuttable presumption of capacity.



13. If the state failed to offer sufficient evidence of capacity, the infant was entitled to have the charges dismissed at the close of the state's evidence. *doli incapax* was abolished in England and Wales in 1998 for children over the age of 10, but persists in some other common law jurisdictions.
14. The United Nations has ruled that the minimum age of criminal responsibility should not be lower than 12 years on the grounds that children under the age of 12 years have not yet reached the necessary developmental stages in “emotional, mental and intellectual maturity” to be held responsible for criminal behaviour (United Nations 2007 and [United Nations](#) 1985). As the [Beijing Rules](#) explain, the psychological and moral components of criminal responsibility must be considered.
15. The reasons for this is simply that under criminal law, it is taken that a child of tender years is not deemed capable of conceiving the thought of committing a criminal offence and acting upon it in the same way as an adult would.
16. However, the reality is that children have and do commit heinous acts that shock many people world over, as innocent law breakers.
17. In South Africa, for example, the Criminal law justice states that a child below the age of 10 years is not to be considered to have the capacity to plan and execute a crime. Therefore, a child below that age may not be arrested or prosecuted for a criminal act. Instead, if the child commits an act that is heinous, the reference will be made to the Department of Social Development for Correction and Guidance by means other than trial.
18. Under the UN, Children under the age of 12 years are not considered to be capable of distinguishing right from wrong. The rationale is that children of that age cannot be deemed to have the same capacity in their minds to plan and execute crimes in a manner that would lead to wrong doing being attributed to them as crimes. This appears to be what Kenya, as a member of the [UN Convention on the Rights of Children](#), CRC, has adopted and domesticated via sections 4 (1) and 221 of the [Children's Act](#), as read with section 2 the interpretation section which defines what a child in conflict with the law is. Further consideration can be found in section 14(3) of the [Penal Code](#) which stipulates that a male child under the age of 12 years is incapable of carnal knowledge and may not be tried for rape or defilement.
19. The approach, and rightly so, is that even as wrong doers, children need more care and protection rather than punishment. However, the reality is that sometimes, as was in the case of James Bulger,<sup>1</sup> children's actions do defy this thinking by committing acts that leave even adults troubled.
20. In the James Bulger Case, a 2-year-old child was abducted by two boys each aged 10 1/2 years. They tortured the baby and murdered him in what the Judge described as “an unparalleled evil and barbarity manner.

<sup>1</sup> *Regina*

*v.*

*Secretary of state for the home department (original appellant and cross-respondent),*

*Ex parte v. (original respondent and cross-appellant*

*Regina*

*v.*

*Secretary of state for the home department (original appellant and cross-respondent), ex parte t. (original respondent and cross-appellant (conjoined appeals)*

**On 12 June 1997**



21. The two boys are said to have kicked and stamped on the toddler, threw bricks and stones at him and placed batteries in his mouth. Finally, they dropped a 22lb iron bar onto the toddler's head, causing 10 skull fractures. (this part of this ruling should not be published) They were detained until they would no longer would be a danger to others. This is what the Lord Goff of Chieveley stated:

“Robert Thompson and Jon Venables, the killing of James Bulger was an act of unparalleled evil and barbarity.

“This child of 2 was taken from his mother on a journey of over two miles and then, on the railway line, was battered to death without mercy and then his body was placed across the railway line so that his body would be run over by a train in an attempt to conceal his murder. In my judgment, your conduct was both cunning and very wicked.

“The sentence that I pass upon you both . . . is that you shall be detained during Her Majesty's pleasure in such a place and under such conditions as the Secretary of State may direct and that means that you will be securely detained for very, very many years until the Home Secretary is satisfied that you have matured and are fully rehabilitated and are no longer a danger to others.”
22. After sentencing them, the judge continued, in their absence:

“How it came about that two mentally normal boys aged 10 of average intelligence committed this terrible crime is very hard to comprehend . . .”
23. In Kenya, to be held criminally responsible one has to have attained the age of criminal responsibility at the time of committing the act (or making the omissions).
24. Although not defined in the *Penal Code*, criminal responsibility is the mental capacity of a child to commit crimes, for which they may be prosecuted and found guilty. Further, the age of criminal responsibility is the age from which a person is considered to have the capacity to distinguish right from wrong; and therefore bear the responsibility for their criminal acts or omissions.
25. In assessing the criminal responsibility of a child, courts have considered factors such as; level of education of the child, cognitive ability, domestic and environmental circumstances, age and maturity of the child, nature and seriousness of the alleged offence, the impact of the offence on any victim and the interests of the community.
26. In order to understand the concept of the age of criminal responsibility, we look into two aspects; the first is *doli incapax*- the age at which a child is deemed as having no mental capacity to commit a crime and thus not criminally responsible, while the second is *doli capax*- the age at which it is appropriate to consider a child liable to prosecution and sanctions for criminal acts or omissions.
27. It is apparent that in determining criminal responsibility, of great consideration is the shift in mental capacity. During the tender years, a child is considered incapable of knowing what a crime is, so as to commit one, and as they grow, they transition into an age in which they are considered capable of having the knowledge; and capable of handling the consequences of committing crime.
28. The age of criminal responsibility in Kenya is interpreted in 3 categories under Section 14 of the *Penal Code*. Under Section 14(1), persons under 8 years old are not criminally responsible for any act or omission. The threshold for those older than 8 years but not 12 years old is different, such that the aspect of proof of capacity is introduced as under Section 14(2). Under this category, to be held



- criminally liable, there is need to prove that the child was aware that he ought not to commit the act or make the omission.
29. The final category under Section 14(3) is with regard to carnal knowledge. A male child below 12 years is presumed incapable of having carnal knowledge. This provision shields male children under the age of 12 years from criminal responsibility of carnal nature.
  30. The High Court discussed the distinction between Section 14(2) and Section 14(3) of the *Penal Code* in the case of *Republic v EM* [2015e KLR Revision. In its analysis, the Court held that from the wording of the *Penal Code*, Section 14(2) raises a rebuttable presumption and as such, the court has a duty to assess and determine whether the child in question had the capacity to know right from wrong. On the contrary, Section 14(3) is an irrebuttable presumption as the provision does not leave room for proof of capacity of knowledge or otherwise.
  31. A child under the age of criminal responsibility lacks the capacity to commit a crime. This means they are immune from criminal prosecution – they cannot be formally charged by authorities with an offence nor be subjected to any criminal law procedures or measures. The significance of the minimum age of criminal responsibility is that it recognizes that a child has attained the emotional, mental and intellectual maturity to be held responsible for their actions. The minimum age of criminal responsibility set by different countries ranges hugely from as low as six up to 18 years of age. The median age of criminal responsibility worldwide is 12.1
  32. Having the requisite capacity to be held responsible for offending behaviour does not mean that children over the age of criminal responsibility should be subject to adult-oriented, formal criminal prosecution. However, in nearly all countries, children above the age of criminal responsibility can be arrested, detained and imprisoned. This means that children are drawn at an early age into criminal justice systems that can stigmatize them and damage their long-term prospects and opportunities.
  33. I have examined the brief by Penal Reform International which looked at what the international standards say about the minimum age of criminal responsibility and then looks at how minimum ages work in practice. It concludes that States should set as high a minimum age of criminal responsibility as possible bearing in mind the emotional, mental and intellectual maturity of children.
  34. That a low age of criminal responsibility sends out a damaging message to society that children are criminals first and foremost and children second. However, irrespective of where the minimum age is set, States have obligations under the *UN Convention on the Rights of the Child* (CRC) towards all children under the age of 18 and, as a matter of priority, governments should develop separate justice systems for children that do not focus on punishment or retribution but on their rehabilitation and reintegration into society and on promoting respect for the child’s sense of dignity and worth.
  35. Under Article 40(3) of the *CRC*, States parties are encouraged to establish a minimum age below which children are presumed not to have the capacity to infringe the criminal law. There is much controversy about what should be the most appropriate age of criminal responsibility and there are no categorical international standards in this regard. In General Comment No. 10, the Committee on the Rights of the Child (*UN Committee on the Rights of the Child* (CRC), CRC General Comment No. 10 (2007): *Children’s Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10 Paragraph 32 concludes that:  
‘a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable’.<sup>2</sup>
  36. At the same time, it stresses that States parties should not lower the age of criminal responsibility to 12 where it has already been set higher and strongly encourages States to introduce a higher minimum age of criminal responsibility, for instance 14 or 16 years of age.



37. Certainly there is nothing to prevent States from having 18 as their minimum age of criminal responsibility and a number of countries have chosen to do so including Brazil (Article 228 of the *Brazilian Constitution* states that:
- ‘Minors under eighteen years of age may not be held criminally liable and shall be subject to the rules of the special legislation.’
38. Guidance is also found in Rule 4 of the (*UN Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”)*), adopted by General Assembly resolution 40/33 of 29 November 1985, Rule 4 which recommends that any minimum age of criminal responsibility ‘shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity’.
39. According to Penal Reform International, on the minimum age of criminal responsibility, a child under the age of criminal responsibility lacks the capacity to commit a crime. This means that such children are immune from criminal prosecution – they cannot be formally charged by authorities with an offence nor be subjected to any criminal law procedures or measures.
40. Onto the sections of the law in Kenya on criminal responsibility, Section 2 of the *Children’s Act, 2022* defines “child in conflict with the law” to mean
- “a person who is above the age of twelve years, but below the age of eighteen years, who has been dealt with or punished in accordance with Part XV of this Act or any other written law for contravention of the law.”[emphasis added]
41. From the above interpretation section, it is apparently clear that even before reading section 221 of the *Children’s Act*, there is an absolute bar to trying children under the age of 12 years as they are excluded from the definition of child offenders or children in conflict with the law. This definition read together with section 221 of the *Children’s Act* provides an unquestionable presumption that children under the age of 12 years are not criminally responsible for committing or omitting to do anything in law. Section 221 of *the Act* provides as follows: in the marginal notes and in the body of the section:
- “Criminal Liability of a child
- 221.
- (1) A person under the age of twelve years shall not be criminally responsible for any act or omission.”
42. The operative words are “shall” and this resonates with section 2 above, providing for absolute immunity to criminal prosecution of children under the age of 12 years for any criminal offence or omission, since they are incapable of being in conflict with the law.
43. Furthermore, Section 4 of the *Children’s Act, 2022* provides that:
- 4 (1) This Act shall prevail in the case of any inconsistency between this Act and any other legislation on children matters.
- (2) Despite subsection (1), a provision in another legislation on children matters may prevail if it offers a greater benefit in law to a child.
- (3) A judicial or administrative institution or any person making an interpretation as to conflict of any provision or laws shall have regard to the best interests of a child.



44. No doubt, the above sections 221 (1) and section 2 of the *Children's Act* are the latest in terms of legislative enactment. they are in addition, in conflict with section 14 of the Penal Code which provides for a rebuttable presumption of criminal responsibility of children under the age of 12. Accordingly, the provisions of the *Children's Act* prevail as they are not only the latter legislation but that they are also considered to have regard to the best interest of the child as discussed above on the rationale for raising the age of criminal responsibility which also accords with the *UNCRC*.
45. Accordingly, I am persuaded beyond doubt that the child herein N.A.S is a person who was under the age of 12 years at the material time of alleged murder of the deceased T.D.O. on 25<sup>th</sup> November, 2023 and therefore he is not a person in conflict with the law and cannot be charged or be prosecuted for any act or omission under the criminal law of this country.
46. In the end, I find and hold that N.A.S is not criminally responsible for any act or omission. The Information for murder dated 25<sup>th</sup> March, 2024 against the child N.A.S. is hereby rejected and quashed and the subject child is hereby set at liberty.
47. However, as the Child, N.A.S., from the probation Officer's report dated 24<sup>th</sup> May, 2024, lives in a dysfunctional family where he had clearly been abandoned and neglected by his own parents, I direct that the minor shall be taken before the Children's Court at Kisumu by the County Children's Officer, Kisumu for proceedings under the *Children's Act* to be commenced in the best interest of the child herein N.A.S. as one in need of care and protection. During the pendency of the said proceedings, the minor shall be placed in a Children's Rescue Centre to be identified by the County Children's Officer.
48. This order is to be served upon the County Children's Officer, Kisumu, for necessary action, to ensure that the child N.A.S. is taken custody of from the Kisumu Children's Remand Home immediately for proceedings to be commenced before the Children's Court at Kisumu.
49. I so Order.
50. This file is closed.

Dated, Signed and Delivered at Kisumu this 4<sup>th</sup> Day of June, 2024

**R. E. ABURILI**

**JUDGE**

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