



**HOM v Attorney General & another (Miscellaneous Criminal Application E008 of 2021) [2023] KEHC 974 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 974 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
MISCELLANEOUS CRIMINAL APPLICATION E008 OF 2021  
F GIKONYO, J  
FEBRUARY 16, 2023**

**BETWEEN**

**HOM ..... APPLICANT**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION ..... 2<sup>ND</sup> RESPONDENT**

*((Revision from Original Conviction and Sentence in Narok CMCR No. 31 of 2016, Narok HCCRA No. 35 of 2016, and Nakuru Criminal Petition No. 4 of 2020))*

**JUDGMENT**

1. In an undated application received in court on March 29, 2021 the applicant is seeking revision of his sentence on the ground that he was a child at the time of the commission of the offence and conviction.
2. The application is expressed to be brought pursuant to articles 19(3)(9),20(1)(2)(3), 22(1) (3), 23(1) (3), 25(d),27(1) (2), 28, 29, 47, 48, 49, 50 (1),(2)(4), 51(2), 53(1) (f) (i) (ii) (2) of the Constitution, 159, 165(3), 258(1), 259 and 260 of the Constitution, sections 3, 4(2) (3) (5), 18(1)(2)(3)(4), 77(1) (2), 143(1)(2), 184, 185, 186, 187(1), 190(1), 191, 194 and fifth schedule of the Children’s Act No 8 of 2001, section 8(1) of the Sexual Offences Act and Probation of the Offenders Act and section 35 (1) (2) of the Penal Code.
3. The applicant stated that he was born on August 26, 2002. And, that the offence in question was committed on January 15, 2016. He argues, that at the time of the commission of the offence, he was 13 years and 5 months old and therefore a child.
4. On September 8, 2016, he was sentenced to life imprisonment. At the time of sentencing, he was 14 years old.



### **Directions of the court.**

5. The application was canvassed by way of written submissions. both parties have filed.

### **Applicant's Submission**

6. The applicant reiterated the grounds of his application and augmented them in his submissions. He emphasized that, at the commission of and conviction for the offence herein, he was a child within the meaning of section 2 of the Children's Act. But, the trial court imposed upon him a life sentence in violation of his right to be sentenced as a child. According to the applicant, this is a potent ground for which the sentence should be reviewed and set aside.
7. In conclusion, it was submitted that this court has jurisdiction to remedy the miscarriage of justice which has been inflicted upon the applicant.
8. The applicant has relied on the case of *WMN v Republic [2016] eKLR*.

### **2<sup>nd</sup> Respondent's submission**

9. The 2<sup>nd</sup> respondent is opposed to the application herein and terms it an abuse of the court process.
10. The 2<sup>nd</sup> respondent submitted that this particular application is meant to have this honourable court sit as an appeal on the findings of two judges who have similar jurisdiction which is contrary to article 165(6) of the [Constitution](#).
11. The 2<sup>nd</sup> respondent submitted that the applicant did not apply pursuant to section 358 of the [CPC](#) to adduce new evidence in the appeal. The matter being raised now ought to have been raised in the appeal.
12. The 2<sup>nd</sup> respondent submitted that the applicant did not challenge the age assessment conducted by a medical officer by presenting any documents to the court.
13. The 2<sup>nd</sup> respondent submitted that the certificate of birth was deliberately obtained to defeat justice and therefore, they suspect that the particulars given to the registrar of births have been fabricated. They supported this claim by stating that in the year 2016 appeal no 35 of 2016 was subsisting in the court but the applicant did not present the alleged certificate of birth registered the same year.
14. In the end, the 2<sup>nd</sup> respondent urged this court to dismiss this petition and the applicant should pursue his appeal at the petition and the applicant should pursue his appeal at the court of appeal.

### **Analysis and determination**

15. The applicant has invoked the court's constitutional jurisdiction to determine whether the sentence that was imposed on him in Narok criminal case no 31 Of 2016 was in violation of rights of a child to be sentenced in accordance with the [Constitution](#) and the [Children Act](#).
16. The applicant was tried and convicted as an adult. He has now sought orders for revision of his sentence.
17. The petitioner was tried and convicted in Narok Chief Magistrate's Criminal Case No 31 of 2016 of the offence of defilement contrary to section 8(1) as read together with section 8(2) of the [Sexual Offences Act](#). The trial court sentenced the petitioner to life imprisonment.



18. The petitioner was dissatisfied with the conviction and sentence. He appealed to the High Court. His appeal was heard and determined by Bwonwonga J at Narok High Court. Among the issues specifically taken up on appeal by the applicant was the issue of his age. The applicant argued before the High Court that the trial court had committed an error because it did not ascertain that he (the applicant) was a minor at the time of the commission of the alleged offence and trial.
19. The learned judge addressed his mind to this ground of appeal and rendered himself thus:
  22. In ground 4, the appellant has faulted the trial court in failing to find his age before this judgment was delivered. In this regard, I find the appellant, according to his own evidence, was aged 18 years. He is therefore an adult. In the circumstances, I find no merit in this ground of appeal and [it] is hereby dismissed.
20. After the determination of the appeal, the applicant approached the same Court (Bwonwonga J) seeking a declaration that he had been discriminated against because he was treated differently than the female complainant.
21. Bwonwonga J, who had heard the applicant's appeal at Narok High Court recused himself from hearing the petition and sent it to Nakuru High Court for hearing and determination. The said petition is Nakuru Criminal Petition No 4 of 2020.
22. Ngugi J (as he then was) summarily dismissed the petition because the substratum of the petitioner's claim was that he was a minor during the alleged commission of the offence and during the trial- the very same ground that was raised and determined in the appeal,
23. Specifically, Ngugi J (as he then was) in his judgment stated as follows;
  6. Unfortunately for the petitioner, the application is one for summary dismissal. This is because, the substratum of the petitioner's claim is that he was a minor during the alleged commission of the offence and during the trial. However, the issue of the petitioner's age was a subject of appeal at the High Court and the learned judge specifically made a finding that the petitioner was an adult during both the commission of the offence and during the trial. As such, the petitioner cannot, again, approach the self-same court hoping for a different factual determination on the question of his age. the only option available to the petitioner, if he is dissatisfied with the findings of the trial court and the High Court on the question of his age, is to appeal to the Court of Appeal as a matter of law. This court lacks jurisdiction to review the factual findings of a fellow High Court judge.
  7. For this reason, this petition is dismissed.
24. This application raises the same issue of age which was determined by the trial court and the appellate court. His subsequent petition which was also pegged on the same issue was dismissed. Except he has now annexed a certificate of birth. One wonders why the certificate was not tendered in the appeal under section 358 of the CPC- and I do note here that the prosecution has raised serious doubts as to the authenticity of the certificate. Nevertheless, no doubt this is an afterthought- but which does not, in any way, change the fact that the age issue was duly determined by the trial as well as appellate court.
25. In the circumstances, I find this application to be yet another dint of abuse of the process of court.
26. Accordingly, the application is dismissed. If he is dissatisfied with this decision, he is at liberty to pursue an appeal in the Court of Appeal.
27. It is so ordered



**DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE  
APPLICATION THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2023**

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**F. GIKONYO M.**

**JUDGE**

**In the presence of:**

1. Machoka holding brief for Githui for Applicant
2. Ondimu for DPP
3. Mr. Kasaso - CA

