



REPUBLIC OF KENYA



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

**EWS v Republic (Criminal Appeal 105 of 2019)  
[2023] KECA 492 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KECA 492 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CRIMINAL APPEAL 105 OF 2019  
F SICHALE, FA OCHIENG & LA ACHODE, JJA  
MAY 12, 2023**

**BETWEEN**

**EWS ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An Appeal from the judgment of the High Court of Kenya at Kitale,  
(Chemitei, J), dated 21st September 2017 IN HC. CRA NO. 78 OF 2016)*

**JUDGMENT**

1. EWS (the appellant herein), has preferred this second appeal against the judgment of Chemitei, J dated September 21, 2017, in which he had initially been charged at the Chief Magistrate's Court in Kitale with two counts of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* No 3 of 2006.
2. The particulars of the offence were that on March 6, 2015, at [particulars withheld], he intentionally caused his penis to penetrate the vagina of RN, a child aged 13 years and CB, a child aged 12 years.
3. In the alternative, the appellant faced charges of committing indecent acts with the said minors contrary to the provisions of Section 11(1) of the same Act. The particulars of the offence were that at the same time and place, he intentionally and unlawfully caused his penis to come into contact with the vaginas of RN and CB, minors aged 13 and 12 years respectively.
4. The appellant denied the charge after which a trial ensued. In a judgment delivered on July 12, 2016, Hon CN Mugo (the then Resident Magistrate, Kitale) convicted him of the 1<sup>st</sup> count of defilement and sentenced him to 20 years' imprisonment.



5. Being aggrieved with both the conviction and sentence, the appellant moved to the High Court on appeal and vide a judgment delivered on September 21, 2017, Chemitei, J found the appeal to be lacking in merit and dismissed the same in its entirety, upheld the conviction and affirmed the sentence.
6. Unrelenting, the appellant has now filed this appeal and probably the last appeal vide a Memorandum of Appeal dated February 8, 2018, raising 5 grounds of appeal. Subsequently thereafter, the appellant filed 10 grounds of appeal on April 12, 2021, which we shall revert to in the course of this judgment.
7. When the matter came up before us for plenary hearing on February 13, 2023, the appellant appeared in person and briefly orally highlighted his written submissions and submitted that he was under age at the time of commission of the offence; that he was 17 years in the year 2016 and that he is now 24 years. He further submitted that he was not taken for age assessment.
8. Miss Kiptoo, learned counsel appearing for the State on the other hand, while opposing the appeal submitted that there was no evidence that the appellant was underage and that the issue of age was an afterthought.
9. During the course of hearing the appeal, it transpired that vide the impugned judgment delivered by Chemitei, J on September 21, 2017, he had directed that the appellant be taken for age assessment, which order was apparently not effected. This Court subsequently directed that age assessment be undertaken on the appellant within 7 days of service of the order upon the Officer in Charge, Eldoret Main Prison.
10. In pursuance of the aforesaid order and according to an age assessment report dated February 15, 2023, from Moi Teaching and Referral Hospital prepared by Dr Kiyeng, the appellant is over 18 years but under 25 years of age. This supports the appellant's contention that he is now 24 years and that in August 2016, he was 17 years. This therefore means that in the year 2015 when the offence was committed, the appellant was 16 years. Indeed, the age assessment report prepared by Dr Kiyeng indicates appellant's year of birth to be 1999.
11. The proceedings in the trial therefore proceeded as if the appellant was an adult and the entire proceedings against him resulted in a mistrial and are a nullity. Our view in this regard is fortified by the provisions of Article 53 (1) (f) of the Constitution which provides:

'Every child has the right not to be detained, except as a measure of last resort, and when detained, to be held-

  - i. For the shortest appropriate period of time; and
  - ii. Separate from adults and in conditions that take account of the child's sex and age'
12. Further Section 190 (1) of the Children's Act which was then in force when the appellant was charged and convicted provided:

'No child shall be ordered to imprisonment or to be placed in a detention camp.'
13. The said provisions are replicated in Section 238 (1) of the Current Children's Act No 29 of 2022 which provides:

'No court shall order the imprisonment of a child'.



14. In view of the foregoing, it is evident that the sentence of 20 years' imprisonment meted out on the appellant was unlawful and illegal. From the circumstances of this appeal, it is apparent that the same largely dwells on the issue of age of the appellant as at the time of the commission of the offence, which we have found that he was a minor and the entire proceedings against him occasioned a mistrial and are a nullity in law.
15. As a result, we find it unnecessary to evaluate the evidence that was proffered at the trial in these circumstances or the other grounds of appeal advanced by the appellant since in our considered opinion, a fresh examination of the evidence would be nothing more than an academic exercise for the simple reason that it will not be of any consequence; whether our findings on facts are consistent or inconsistent with those of the learned magistrate or the High Court as the end result would remain the same; that the appellant's trial was a mistrial.
16. Taking into consideration all the circumstances in this case and given that the alleged offence was committed over 5 years ago and the fact that a re-trial will subject the complainants to further trauma, we do not deem it fit to order a retrial.
17. Consequently, we allow the appellant's appeal, quash the conviction and set aside the sentence and order that he be set at liberty forthwith unless otherwise lawfully held.

**DATED AND DELIVERED AT ELDORET THIS 12<sup>TH</sup> DAY OF MAY, 2023.**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

**F. OCHIENG**

.....

**JUDGE OF APPEAL**

**L. ACHODE**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

