



CM ADVOCATES LLP



FROM BLANKET PROSECUTION TO PROPORTIONALITY:

Analyzing Kenya's Evolving Adolescent Rights Jurisprudence (Petition E490 of 2025)

INTRODUCTION

On 20th May 2026, the High Court (Justice Bahati Mwamuye) delivered a landmark constitutional decision in **HCCHRPET No. E490 of 2025** that is set to significantly reshape the enforcement of Kenya's sexual offences framework regarding adolescents. The judgment directly addresses the long-standing tension between statutory child protection obligations and constitutional rights, specifically where adolescents engage in consensual, non-coercive, and non-exploitative relationships with peers of close age proximity.

While reaffirming the State's constitutional duty to shield minors from abuse, exploitation, and predatory conduct, the Court held that the blanket criminalisation of consensual, non-coercive adolescent relationships between peers of close age proximity is inconsistent with the Constitution of Kenya, 2010.

In doing so, the Court established that constitutional adjudication must balance protection from harm with a recognition of an adolescent:

- **Inherent human dignity**
- **Evolving capacities and developmental realities**
- **Right to privacy, personal autonomy, and healthcare access**

This decision marks a fundamental transition away from a rigid, purely punitive framework toward a proportional, child-sensitive, and rights-based model.

BRIEF BACKGROUND OF THE CASE

The Petition arose from criminal proceedings against adolescent Petitioners (1st and 2nd Petitioners) who were arrested, detained, and charged under the Sexual Offences Act following

consensual relationships with fellow adolescents. The charges were later withdrawn upon confirmation of their minor status at the time of the alleged offences. For the 2nd Petitioner, he had cohabited with the 3rd Petitioner prior to his arrest.

The Petitioners challenged the constitutionality of **Sections 8, 9, 11, and 43(4)(f) of the Sexual Offences Act**, arguing that these provisions unconstitutionally criminalised consensual peer conduct. They asserted that automatic criminalisation exposes adolescents to severe social stigma, psychological trauma, educational disruption, and barriers to accessing critical sexual and reproductive healthcare.

The Court was called upon to determine whether these statutory provisions violated **Articles 27, 28, 31, 43, and 53** of the Constitution.

Key Procedural Ruling on Res Judicata:

The Respondents argued that the constitutionality of Sections 8 and 11 had already been settled in *CKW v Attorney General & Another [2014] eKLR*. Rejecting this argument, Justice Mwamuye affirmed (relying on *John Florence Maritime Services Ltd v CS Transport [2021] KESC 39*) that res judicata must be applied cautiously in constitutional litigation when novel social, factual, and developmental dimensions arise.

THE PARADIGM SHIFT: FROM MANDATORY CRIMINALIZATION TO PROPORTIONALITY

Historically, enforcement of the Sexual Offences Act operated under a strict liability approach: any sexual conduct involving minors automatically triggered criminal proceedings, regardless of mutuality, age proximity, or lack of exploitation.

The High Court recognized that while the Act remains a vital instrument against predatory exploitation, its practical application has frequently failed to distinguish between **exploitative adult behavior** and **consensual adolescent relationships involving individuals of similar age and developmental capacity**.

THE COURT'S CORE FINDINGS

- 1. Targeted Constitutional Validity:** The Court did not strike down the Sexual Offences Act in its entirety. Sections 8, 9, 11, and 43(4)(f) remain fully valid and enforceable against abusive, coercive, predatory, and exploitative conduct.
- 2. The Article 24 Proportionality Test:** Protecting children is a legitimate state interest. However, blanket criminalisation fails the proportionality test because it represents an overbroad mechanism that is not the least restrictive means available.
- 3. Comparative Best Practice ("Romeo & Juliet" Frameworks):** The Court noted that less restrictive, welfare-oriented alternatives exist globally and locally, including diversion programs, restorative justice mechanisms, comprehensive sexuality education, and close-in-age exemption frameworks.
- 4. Prosecutorial Discretion & Rule of Law:** The Court criticized the lack of clear, published enforcement policies. Arbitrary or unwritten internal prosecutorial guidelines undermine procedural fairness under Articles 27 and 47. The Office of the Director of Public Prosecutions (ODPP) and the National Police Service (NPS) must now formalise and gazette clear, publicly accessible guidelines for adolescent cases.

STRATEGIC IMPLICATIONS FOR INSTITUTIONS & ORGANIZATIONS

This judgment introduces an immediate operational recalibration for entities interacting with adolescents:

- **Educational Institutions & Boarding Schools:** Must move away from automatic law enforcement reporting in peer-to-peer consensual incidents, shifting focus toward institutional guidance, counseling, and child-centered disciplinary policies.
- **Healthcare Providers:** Adolescent access to reproductive healthcare can no longer be gated by fear of mandatory statutory reporting when no exploitation is present.

- **Faith-Based & Youth Organizations:** Safeguarding and child protection policies require structural audits to align with evolving constitutional standards of dignity and privacy.

HOW CM ADVOCATES LLP CAN ASSIST YOUR ORGANIZATION

As Kenya's legal landscape transitions toward child-sensitive compliance, institutions, health-care facilities, faith-based bodies, and family enterprises must proactively update their risk and governance frameworks.

Our **Family Law & Private Client Practice Unit** offers specialized legal and strategic advisory, including:

- **Institutional Policy Audits:** Reviewing and updating school safeguarding policies, student handbooks, and codes of conduct to mirror Article 24 constitutional standards.
- **Healthcare & Youth Service Compliance:** Drafting clear internal

protocols for confidential, adolescent-friendly healthcare delivery in compliance with statutory and constitutional mandates.

- **Restorative Dispute Resolution & Governance:** Sensitizing boards, management, and administrative teams on resolving sensitive minor-related disputes through restorative framework design rather than immediate criminalization.
- **Executive & Institutional Training:** Delivering targeted legal sensitisation seminars on emerging legal risks, child rights, and regulatory developments arising from this landmark decision.

Is your organization's safeguarding framework aligned with current constitutional standards?

Contact our **Family Law & Private Client Practice Unit** at familylaw@cmadvocates.com or leave a comment below to schedule an institutional compliance review.

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