



**Emuria v Republic (Criminal Miscellaneous Application  
E005 of 2023) [2024] KEHC 10363 (KLR) (23 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10363 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CRIMINAL MISCELLANEOUS APPLICATION E005 OF 2023  
RN NYAKUNDI, J  
AUGUST 23, 2024**

**BETWEEN**

**SHAM EMURIA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant was charged and convicted with the offence of gang rape contrary to section 10 of the [Sexual Offences Act](#) No 3 of 2007. The particulars were that on 23<sup>rd</sup> February, 2023 Kanam Kemer in Turkana Central Sub-County within Turkana County, the Applicant together with others in turns, intentionally and unlawfully caused their Penis to penetrate the Vagina of Deborah Lolii by use of force.
2. On the second count, the applicant was charged with the offence of robbery with violence contrary to section 295 as read with section 296(1) of the [Penal Code](#). The particulars were that on the 23<sup>rd</sup> day of February 2023 at Kanam Kemer in Turkana Central Sub County within Turkana County the applicant jointly with others robbed Deborah Lolii of her ITEL Smartphone valued at Kshs 15,000/= . The applicant was thereafter tried, convicted and sentenced to serve 15 years on the first count and 20 years imprisonment on the second count.
3. On 7<sup>th</sup> July, 2023, he filed an application for review of the sentence only. In supporting the application, he stated that his age was assessed and found to be 16 years and that he should be given his right back under Article 53(f)(i)(ii). He equally cited the provisions of Section 333(2) of the [CPC](#).



## ANALYSIS AND DETERMINATION

4. The applicant was charged with the offence gang rape contrary to section 10 of the [Sexual Offences Act](#) which provides as follows:

“Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who with common intention is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less the fifteen years but which may be enhanced to imprisonment to life.”

The provisions of section 10 of the [Sexual Offences Act](#) have capture the elements of gang rape as follows:

- i. Commission of rape; Penetration as defined by section 2 of the [Sexual offences act](#) without consent thereof;
  - ii. In association with another or others, or any other with common intention, is in the company of another or others who commit the offence of rape.
  - iii. Positive identification of the perpetrator.
5. The key element then is rape or defilement that is committed in the association of others with a common intention notwithstanding the fact that the accused may not have defiled the victim. Therefore, it matters not whether the offence was rape or defilement as long as the conditions under section 10 are found to exist.

6. On the second count, the applicant was charged with the offence of robbery with violence.

The offence of robbery with violence is contained in Sections 295 and 296(2) of the [Penal Code](#) as follows:

“295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

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- (2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

7. On the question of the applicant’s age, medical evidence was availed confirming that he was an adult. The trial court also handled him as an adult throughout the trial process and as such, I find him to be an adult.

8. The most significant question I ask myself is whether or not the Applicant has made out a case to warrant the review of the sentence. I have considered The Sentencing Policy Guidelines, 2023 and its application which is intended to promote transparency, consistency and fairness in sentencing. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments.



9. In *Dismas Wafula Kilwake v Republic* [2018] eKLR, the Court of Appeal set out the factors to be considered in sentencing under the Act. It observed as follows:

[W]e hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

10. In sentencing, the gravity of the offence and the consequences of the offence on the victim are relevant factors. I have considered the application and all the information available. In such circumstances the court will ordinarily check the legality or propriety or appropriateness of the sentence.

11. I have laid out the punishment prescribed by the law for the offences of robbery with violence and gang rape. However, with the advent of the “*Muruatetu* case” mandatory sentences have been outlawed.

In the “*Muruatetu* Case”, the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to re-sentencing;

- a. age of the offender;
- b. being a first offender;
- c. whether the offender pleaded guilty;
- d. character and record of the offender;
- e. commission of the offence in response to gender-based violence;
- f. remorsefulness of the offender;
- g. the possibility of reform and social re-adaptation of the offender;
- h. any other factor that the Court considers relevant.”

12. I take the minimum sentence to be indicative of the seriousness of the offence. However, in my view and the trend in our current legal system, the nature of prescriptive minimum sentences does not create mandatory sentences, but preserves the discretion of judicial officers to sentence above and below the ‘standard’ by taking into account a non-exhaustive “check list of aggravating and mitigating factors” which are already largely taken into account by sentencing courts.

13. When I take all these factors into consideration, it is my considered view that interfering with the imposed sentences would take in totality all the aforementioned considerations in sentencing. Therefore, on the first count, the 15 years sentence is substituted with a sentence of 10 years whereas the 20 years sentence in the second count is substituted with 15 years’ imprisonment. In both orders on sentence, section 333(2) of the *Criminal Procedure Code* shall apply to give credit to the applicant that the period spent in pre trial detention pending the hearing and determination of his trial

14. The sentences shall run concurrently. Orders accordingly.



**DELIVERED, DATED AND SIGNED AT LODWAR THIS 23<sup>RD</sup> DAY OF AUGUST 2024**

In the presence of

Mr. Kakoi for the State

Accused

**R. NYAKUNDI**

**JUDGE**

