



**Shitawa v Republic (Criminal Petition 47 of 2019)  
[2024] KEHC 14945 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14945 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL PETITION 47 OF 2019  
E OMINDE, J  
NOVEMBER 28, 2024**

**BETWEEN**

**PATRICK SHITAWA ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Petitioner, Patrick Shitawa, was charged and convicted of the offence of defilement contrary to section 8(1) as read with Section 8(3) of the Sexual Offences Act, 2006. The particulars of the charge were that on diverse dates between 17<sup>th</sup> day of April, 2016 to 26<sup>th</sup> day of May, 2016 at Munyaka area in Eldoret East Sub-County within Uasin Gishu County, unlawfully and intentionally caused his genital organ (penis) to penetrate the genital organ (vagina) of S.K. a child aged 14 years.
2. He was also charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 OF 2006.
3. He entered a plea of not guilty and after trial he was convicted to serve 20 years imprisonment for the offence of defilement.
4. Aggrieved by the trial Court's finding, the Petitioner preferred an appeal in the High Court at Eldoret being Criminal Appeal No. 109 of 2017 which the Appeal was dismissed. The Petitioner is now before this Court seeking that he be allowed to serve a non-custodial sentence as under the provisions of Section 39 (2) and (3) of the Sexual Offences Act No. 2006.
5. The Application is premised inter alia on the grounds that the DNA results have proved at 99.995 that the child that was born out of the Appellant's defilement of the victim is 99.99% his and that the non-custodial sentence will give him a chance to take care of his baby and its mother and would grant him the opportunity to give parental care, protection and equal responsibility of a father with the assistance of his mother to his child as provided under Article 53(1) d) of the Constitution of Kenya 2010.



6. Further, the Applicant states that at the time of the commission of the offense, out of self-foolishness and induced reasoning at prison, he tried to run away from the responsibility of taking care of his child for fear of conviction and for his own protection but he is now remorseful, repentant and reformed and given that the family is the natural and fundamental unit of society and a necessary tool of social order, it ought to enjoy state recognition and protection hence his application.
7. In his submissions, the Appellant relied on the following authorities that I have considered;
  - i. [\*Francis Karioko Muruatetu and Another v Republic\*](#) SC Petition No. 15/2015
  - ii. [\*Nickson Kandegor Chesire v Republic\*](#) HCCR App. No. 144/2017
8. The Application is opposed by the State vide the submissions filed by Prosecution Counsel, S.G. Thuo on 23/10/2024. He submitted that the Petitioner herein was charged and rightly convicted to 20 years imprisonment for the charge of defilement. He maintained that the said sentence was lawful as the law dictates the minimum sentence for the same to be imprisonment to a jail term of not less than 20 years. Counsel relied on the Supreme Case being Petition No. E018 of 2023, [\*Republic V Joshua Gichuki Mwangi & Others\*](#); and further submitted that the sentence meted on the Petitioner is lawful and he urged the Court to maintain the same as provided for by the law.

### **Analysis and Determination**

9. I have given due consideration to the application for revision of sentence as well as the submissions by the parties. In the premises, the issue for determination is  
Whether the Petitioner has recourse to non-custodial sentence under Section 39(1) and (2) of the [\*Sexual Offences Act\*](#), on the basis of the period so far served.
10. That provision of the [\*Sexual Offences Act\*](#) as reproduced hereunder is to the following effect:
  - (1) A court may declare a person who has been convicted of a sexual offence a dangerous sexual offender if such a person has--
    - (a) more than one conviction for a sexual offence;
    - (b) been convicted of a sexual offence which was accompanied by violence or threats of violence; or
    - (c) been convicted of a sexual offence against a child
  - (2) Whenever a dangerous sexual offender has been convicted of a sexual offence and sentenced by a court to imprisonment without an option of a fine, the court shall order, as part of the sentence, that when such offender is released after serving part of a term of imprisonment imposed by a court, the prisons department shall ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence."
11. From the foregoing provisions it is evident that whereas the Appellant qualified for declaration as a dangerous sexual offender for purposes of Section 39 of the [\*Sexual Offences Act\*](#), granted the fact that he was convicted of a sexual offence against a child, it is noteworthy that he was not so declared by the Court that convicted and sentenced him. Section 39(2) of the [\*Act\*](#) is explicit that:

“...the court shall order, as part of the sentence, that when such offender is released after serving part of a term of imprisonment imposed by a court, the prisons department shall



ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence..."

12. Hence, "the Court" for the purposes of the aforementioned provision is the trial Court. Therefore, in the absence of an order of the trial Court, made as part of the Petitioner's sentence pursuant to Section 39(2) of the Sexual Offences Act, it was misconceived for the Petitioner to seek succour under the aforementioned provision. Moreover, the object of that provision is to provide a mechanism for the supervision of dangerous offenders and not to secure their release. I am of the view that the orders sought by the Petitioner are untenable under Section 39(2) of the Sexual Offences Act.
13. It is further worth noting that Petitioner herein was convicted for the offence of defilement contrary to Section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 and was sentenced to serve 20 years' imprisonment. It is also not in doubt that under Section 8(3) of the Sexual Offences Act, a person found guilty of defiling a child aged 14 to fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
14. Further to the above, the Supreme Court in the above decision in Petition No. E018 of 2023, Republic V Joshua Gichuki Mwangi & Others cited by Counsel for the State was emphatic the sentences prescribed under the Sexual Offences Act remain legal lawful and valid until such a time when the said Act will be repealed In its own words, the Court held as hereunder;

".....the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the Sexual Offences Act remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence"
15. In this case, the proceedings show that the trial Court in exercising the discretion that it had then before the Supreme Court pronounced itself as above took into account the gravity of the offence, the circumstances under which it was committed, its implication on the victim, the Petitioner's mitigation and handed him a sentence of 20 years' imprisonment which was upheld by the High Court.
16. The victim in this case was a child aged 14 years. Section 8(3) of the Sexual Offences Act under which the Appellant was charged provides as follows;

8

  - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
  - (2) .....
  - (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
17. In light of the decision of the Supreme Court cited above, given the age of the victim, I am satisfied that this sentence legal and lawful and the Court shall therefore not interfere with it. It follows therefore that the Appellant's Application is misconceived and lacks merit and the same is accordingly dismissed. The Appellant's right of appeal is explained.

**READ DATED AND SIGNED AT ELDORET ON 28<sup>TH</sup> NOVEMBER 2024**

**E. OMINDE**



**JUDGE**

