



REPUBLIC OF KENYA



**Khalibwa v Republic (Criminal Petition 43 of 2020)
[2022] KEHC 399 (KLR) (27 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 399 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL PETITION 43 OF 2020
FA OCHIENG, J
APRIL 27, 2022**

BETWEEN

RONALD ANAKAYE KHALIBWA APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

The Petitioner, Ronald Anakaye Khalibwa, was sentenced to 20 Years imprisonment, after being convicted for the offence of Attempted Defilement.

1. He has asked this Court to have him re-sentenced.
2. He expressed the view that the criminal justice system was now moving away from retributive justice to restorative justice and also reconcillatory justice.
3. The Petitioner told this Court that he was willing and ready to tender an apology to the victim.
4. He described himself as a changed man, saying that he had learnt lessons. He therefore promised not to engage in crime again, if he was given a chance to be re-intergrated back into the society.
5. The Petitioner requested the Court to order that he should serve the balance of the sentence on a non-custodial term.
6. He also invoked the provisions of Sections 19 and 20 of the Power of Mercy Act.
7. Finally, the Petitioner asked the Court to give effect to his rights under Section 333 (2) of the *Criminal Procedure Code*.
8. In a nutshell, the Petitioner sought the reduction of the sentence.

PARA 9.



In determining this Petition, I note that the Court has no jurisdiction to give orders pursuant to the Power of Mercy Act. If the Petitioner was desirous of having the Power of Mercy Board give consideration to his plea for mercy, he should approach the said Board directly.

10. I have given due consideration to the circumstances of this case.
11. The Petitioner was the husband of the Complainant's mother. In a manner of speaking, the Petitioner was a father to the Complainant, although he was not her biological father.
12. He left his matrimonial bed, where his wife was sleeping, and went to the place where the children were sleeping, which was within the same room.
13. The Applicant undressed and also undressed the Complainant. When the Complainant screamed, the Applicant threatened both her and her mother, with a knife.
14. When the Complainant was taken to hospital, it was ascertained that she had lost her virginity. She also had been infected with gonorrhoea, according to the testimony of her mother.
15. However, the Medical Doctor who testified as PW4, said that the Complainant had bruises on the inside of her vagina. The doctor told the Court that the HIV test was positive.
16. In the Judgment the learned trial magistrate noted as follows;

“I note that a charge of defilement was proved. However, the law does not, under S. 179 of the Criminal Procedure Code, allow the Court to convict on the more grave charge offence. My hands are tied.”
17. In the light of the fact that the Complainant was 10 years old at the material time, the Petitioner would have been liable to imprisonment for Life, if he had been convicted for the offence of Defilement, under the *Sexual Offences Act*.
18. As all the ingredients of the offence of defilement had been proved, I believe that that is why the trial court was expressing frustration about being unable to convict the Petitioner for the said offence of defilement.
19. To my mind there was no justification for the prosecution preferring a charge of attempted defilement, when there was conclusive evidence of penetration of the child's sexual organ.
20. I note that although he had lodged an appeal at the High Court, the Petitioner later withdrew the said appeal.
21. I am not sure about the reasons for the withdrawal of the appeal, but it could well be because the state may have intimated to him, that they would lodge a cross-appeal or would file a Notice of their intention to seek more severe penalties against the Petitioner.
22. It matters not why the Petitioner withdrew the appeal: the fact is that he made a conscious decision not to challenge the decisions made by the trial court.
23. The Complainant was a daughter of the Petitioner. If he was honestly remorseful, and desired to tender an apology to the Complainant, the Petitioner could already have done so.
24. Given the gravity of the offence, I find that there would be a subversion of justice if the court were to substitute the balance of the custodial sentence into a non-custodial sentence.



25. During mitigation, the Petitioner told the trial court that he had 2 wives and 3 children. It is therefore most baffling that, in those circumstances, the Petitioner took advantage of his 10 years' old daughter.
26. There is no material which has been provided to this Court, that could persuade me that there was a good reason to warrant the reduction of the custodial sentence.
27. I therefore decline to order that the balance of the sentence be served outside the prison walls.
28. However, pursuant to Section 333 (2) of the Criminal Procedure Code, I do direct the Prison authorities, that when they are computing the actual duration of the period which the Petitioner is to serve the sentence, they should take into account the period of THREE (3) Months and FOURTEEN (14) Days which he spent in custody, whilst he was still on trial.

DATED, SIGNED AND DELIVERED At **KISUMU** THIS 27TH DAY OF **APRIL** 2022

FRED A. OCHIENG

JUDGE

