



**EE v Republic (Criminal Miscellaneous Application E041 of 2019)  
[2024] KEHC 746 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 746 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CRIMINAL MISCELLANEOUS APPLICATION E041 OF 2019  
RN NYAKUNDI, J  
FEBRUARY 2, 2024**

**BETWEEN**

**EE ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being a review of sentence in criminal case no. 9 of 2015)*

**RULING**

Coram: Before Justice R Nyakundi

Mr Yusuf for the State

1. The applicant was charged with the offence of incest contrary to section 20(1) of the *Sexual Offences Act* No. of 2006. The particulars of the offence were that on the 26<sup>th</sup> day of November, 2011 at [Particulars Withheld] village in Loima district within Turkana County being a male person caused his penis to penetrate the vagina of AY a female aged 12 years who was to his knowledge his niece. The applicant was thereafter tried, convicted and sentenced to life at the lower court. On appeal, the sentence was substituted with Twenty years imprisonment.
2. On 19<sup>th</sup> October, 2019, he filed an application for non-custodial consideration. In supporting the application, he stated that he had served a third of his sentence and that he was a reformed and rehabilitated citizen. He prayed that he may be considered for a non-custodial sentence.
3. In the sentencing the applicant, this court stated as follows:

“I notice that the accused was a first offender, thought the offence is admittedly serious. I reduce the sentence of life imprisonment and order the accused to serve twenty (20) years’ imprisonment from the date of conviction and sentence by trial court on 3.3.2015”



4. Pursuant to Section (1) of the *Sexual Offences Act*, any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years. Given the sentence imposed at this court, the learned judge took into consideration the mitigation and the aggravating factors.
5. In determining whether to impose a custodial or non-custodial sentence, the court is required to take into account the following factors: -
  - a) Gravity of the offence:- sentence of imprisonment should be avoided for misdemeanour.
  - b) Criminal history of the offender. Taking into account the seriousness of the offences, first offenders should be considered for non-custodial sentence.
  - c) Character of the offender:- non-custodial sentence are best suited for offenders who are already remorseful and receptive to rehabilitative measures.
  - d) Protection of the community:- where the offender is likely to pose a threat to the community.
  - e) Offender's responsibility to third parties:- where there are people depending on the offender.
  - f) Children in conflict with the law:- non-custodial orders should be imposed as a matter of course in cases of children in conflict with law, except in circumstances where, in light of the seriousness of the offence coupled with other factors, the court is satisfied that a custodial order is the most appropriate.
6. In the case of *Francis Karioko Muruatetu & Another v Republic*, Criminal Petition No. 15 of 2015, the Supreme Court held that mitigation was an important facet of fair trial. The learned Judges said;

“It is for this Court to ensure that all persons enjoy the rights to dignity.

Failing to allow a Judge discretion to take into consideration the convict's mitigating circumstances, the diverse character of the convicts and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence, thereby treating them as an undifferentiated mass, violates their right to dignity.”
7. With respect to non-custodial sentences, the powers given to this Court to substitute custodial sentences with community service under section 3(1) of the *Community Services Orders Act* (Chapter 93 of the Laws of Kenya), can only be exercised where a person is convicted with an offence punishable with imprisonment for a term not exceeding three years, or where the sentence not served does not exceed 3 years imprisonment.
8. In the present case, the Appellant was convicted and sentenced to twenty years imprisonment on appeal on 11<sup>th</sup> November, 2015 and has therefore served 9 years of his sentence, with a remainder of 11 years. He therefore does not qualify for consideration of a non-custodial sentence under the *Community Service Orders Act*.

**DATED AND SIGNED AT LODWAR THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2024.**

In the presence of;

Mr. Yusuf for the state

Applicant in person

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**R. NYAKUNDI**  
**JUDGE**

