



**Ekai v Republic (Criminal Miscellaneous Application  
E050 of 2023) [2024] KEHC 669 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 669 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CRIMINAL MISCELLANEOUS APPLICATION E050 OF 2023**

**RN NYAKUNDI, J  
FEBRUARY 2, 2024**

**BETWEEN**

**DAVID EKAI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an application on review of sentence in criminal case No. E035 of 2022 presided over by Hon. Orimba SPM in a judgment delivered on 15th September, 2022)*

**RULING**

1. The applicant was charged and convicted with the offence of defilement contrary to section 8(1) as read with Section 8(4) of the *sexual offences Act* No. 3 of 2006. The particulars of which were that on 10<sup>th</sup> June, 2022, at (particulars withheld) village in (particulars withheld) Division in Turkana Central Sub-County within Turkana County, intentionally caused his penis to penetrate the Vagina of M.A. a child aged 17 years. The applicant was thereafter tried, convicted and sentenced to seven (7) years imprisonment

**Decision**

2. On 24<sup>th</sup> May, 2023, he filed an application for non-custodial consideration. In supporting the application, he stated that he was not bailed out during trial and that he is a first offender with no previous criminal record. He prayed that he may be considered for a non-custodial sentence.

In the sentencing the applicant, the trial court stated as follows:

“The Accused is a first offender. I have considered the mitigation and the nature of the offence. He is sentenced to serve seven years imprisonment”



3. Pursuant to Section 8 (4) of the *Sexual Offences Act*, a person who commits the offence of defilement with a child between the age of 16 and 18 years, is liable to imprisonment for a term of not less than 15 years. Given such a minimum sentence, it is evident that the trial court indeed considered the applicant's mitigation and a term of 7 years is appropriate.
4. However, I take note of the elements that need to be satisfied for one to be guilty of an offence of defilement. The specific elements of the offence of defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:
  - 1) Age of the complainant;
  - 2) Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and
  - 3) Positive identification of the assailant.

In the case of *Charles Wamukoya Karani Vs. Republic*, Criminal Appeal No. 72 of 2013 it was stated that:

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”

My attention is particularly drawn to the element of age.

5. PW1 – Susan testified that she is a medical practitioner at Kalokol. She testified that the victim was 17 years old. She produced a P3 form and stated that indeed there was penetration and there was no discharge seen and that both the Labia and Majora were normal. The victim on the contrary testified that she was 17 years. PW3 equally testified that the victim is 17 years but he did not know when the child was born.
6. The sentencing objectives in Kenya have been captured in the Judiciary *Sentencing Policy Guidelines* at page 15 to be the following: -
  - 1) Retribution: to punish the offender for his/her criminal conduct in a just manner.
  - 2) Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
  - 3) Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law abiding person.
  - 4) Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
  - 5) Community protection: to protect the community by incapacitating the offender.
  - 6) Denunciation: to communicate the community's condemnation of the criminal conduct.
7. 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 misdemeanor.
  - 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.
8. In the case of *Francis Karioko Muruatetu & Another Vs 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.”
9. 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-adaption of the offender;
  - (h) any other factor that the Court considers relevant.”
10. In sum, the Applicant does not wish to complete the sentence imposed on him. He wishes to be freed and would prefer it if the Court considered for a non-custodial sentence. In order to decide whether any of those are appropriate, the Court has to consider the seriousness of the offence. In this case, it was defilement contrary to section 8(1) as read with Section 8(4) of the *sexual offences Act* No. 3 of 2006.
11. The court of Appeal in *Thomas Mwambu Wenyi v Republic* [2017]eKLR cited the decision of the Supreme Court of India in *Alistar Annthony Pereira v State of Maharashtra* at paragraph 70 – 71 where the court held the following on sentencing;
- “Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive



for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence”

12. The primary role of any court hearing an appeal against sentence will be apparent from the observations above. Its essential function is to determine whether error has been established in one or other of the senses. I have described and, if so, either to exercise the sentencing discretion afresh, or remit the matter to the court below in order that the discretion may be re-exercised by a member of that court. So, the primary role of a court hearing an appeal against sentence is to determine whether an injustice has occurred, and if so, to correct it.
13. Given this background I find no error of fact or in law to review the sentence imposed by the trial court and have it substituted with a non-custodial sentence. There is no evidence of substantial and compelling reasons to grant that remedy to the Applicant. The matter is dismissed in its entirety

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

.....

**R. NYAKUNDI**

**JUDGE**

In the presence of

Mr. Kakoi for the State

