



REPUBLIC OF KENYA



**Ekeno v Republic (Criminal Miscellaneous Application  
E107 of 2023) [2024] KEHC 747 (KLR) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 747 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CRIMINAL MISCELLANEOUS APPLICATION E107 OF 2023**

**RN NYAKUNDI, J  
FEBRUARY 1, 2024**

**BETWEEN**

**CHRISTOPHER EKENO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being a review on sentence in criminal case No. 211 of 2009)*

**RULING**

1. The applicant jointly with another were charged with the offence of gang rape contrary to section 10 of the *Sexual Offences Act*. The particulars of the offence were that on the 17<sup>th</sup> day of February, 2009 at [Particulars Withheld] in Turkana North District within the Rift Valley province, jointly in association unlawfully and intentionally caused penetration of genital organs of RN a woman aged 30 years. The applicant was thereafter tried, convicted and sentenced to Twenty-Five (25) years imprisonment
2. On 19<sup>th</sup> October, 2023, 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.

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

“I have considered the accused persons mitigation. The accused persons in the course of gang rape also assaulted and maimed the complainant. I note the brutal acts of the accused persona and the pain, suffering and mental anguish caused to the complainant who is a married woman. The complainant was also infected with a venereal disease. Given the circumstance of this case. I find that the accused persons deserve a deterrent sentence. I sentence each of them to serve 25 years imprisonment.”



3. Pursuant to Section 10 of the *Sexual Offences Act*, any person who commits the offence of rape or Defilement under this Act 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 or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life. Given the sentence imposed at the trial court, the learned magistrate took into consideration the mitigation and the aggravating factors.
4. 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.
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 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.
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. 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.”
8. In this matter as observed by the trial court, the convict while committing the act maimed the complainant. In sentencing, such is an aggravating factor that warrants enhancement of sentence. Having taken into account the circumstances leading to the commission of the offence herein, I am of the considered opinion that a sentence combining both custodial and non-custodial sentence will achieve the objective of both deterrence and rehabilitation.
9. Fairness in sentencing requires a procedure that does not prevent any factor that is relevant to the sentencing process, and which could have a mitigation effect on the imposition of punishment from being considered by the sentencing court. The sentencing stage is part of a criminal trial, which means that every right to a fair trial applicable at the evidential phase of the trial is also relevant at the sentencing stage. The determination of whether an accused’s fair trial right at the sentencing stage has been breach requires a careful factual examination of the relevant circumstances of each case.
10. Having taken further into account the doctrine of proportionality in sentencing and the fact that the applicant has a balance of 14 years, I have come to the logical conclusion that a sentence of twenty-five (25) years meets the justice of this case, the only rider is for the sentence pursuant to Section 333(2) of the [Criminal Procedure Code](#) to be effected from the 23.3.2009

Orders Accordingly

**DATED AND SIGNED AT LODWAR THIS 1<sup>ST</sup> DAY OF FEBRUARY, 2024**

In the presence of

Yusuf for the state

Appellant present

.....

**R. NYAKUNDI**

**JUDGE**

