



**Dogo v Republic (Criminal Miscellaneous Application
E018 of 2023) [2024] KEHC 4254 (KLR) (17 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4254 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL MISCELLANEOUS APPLICATION E018 OF 2023**

RN NYAKUNDI, J

APRIL 17, 2024

BETWEEN

LODIO LOLILAE ALIAS DOGO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged and convicted with the offence of defilement contrary to section 8(1) as read with Section 8(2) of the *sexual offences Act* No. 3 of 2006. The particulars of the offence were that on 4th January, 2021 at (particulars withheld) intentionally caused his penis to penetrate the Vagina of ME a child aged 10 years
2. The applicant appealed against sentence and conviction in Lodwar High Court Appeal No. E015 of 2021 and the same was dismissed.
3. On 18th July, 2023, he filed an application for review of the sentence. In supporting the application, he stated that he has children who are approaching secondary school and they depend on him. He further stated that his guardians are old, blind and suffering. That the court should consider reducing his sentence by the period spent in remand.

Analysis and determination

4. The Applicant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* which provides:

8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement



8(2) “A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

5. I am of the considered view that he who breaches the trust bestowed upon him, also imposes upon himself a huge task of rebuilding such trust. When an offence is committed against a vulnerable member of the society, such as minors, the offender must appreciate that that calls for much greater effort on his part, to regain the trust of the society.
6. I take note that the applicant has so far served a total of 3 years remand period inclusive. The most significant question I ask myself is whether or not the Applicant has made out a case to warrant the review of the sentence.
7. I have considered The [Sentencing Policy Guidelines](#), 2023 and its application which is intended to promote transparency, consistency and fairness in sentencing. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments.
8. In [Dismas Wafula Kilwake v Republic](#) [2018] eKLR, the Court of Appeal set out the factors to be considered in sentencing under the Act. It observed as follows:

[W]e hold that the provisions of section 8 of the [Sexual Offences Act](#) must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

9. In sentencing, the gravity of the offence and the consequences of the offence on the victim are relevant factors. I have considered the application and all the information available. In such circumstances the court will ordinarily check the legality or propriety or appropriateness of the sentence.
10. The punishment prescribed by the law for the offence of defilement of a child below 11 years is life imprisonment. However, with the advent of the “[Muruatetu](#) case” mandatory sentences have been outlawed.
11. 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.”

- 12. I take the minimum sentence to be indicative of the seriousness of the offence. However, in my view and the trend in our current legal system, the nature of prescriptive minimum sentences does not create mandatory sentences, but preserves the discretion of judicial officers to sentence above and below the ‘standard’ by taking into account a non-exhaustive “check list of aggravating and mitigating factors” which are already largely taken into account by sentencing courts.
- 13. When I take all these factors into consideration, it is my considered view that when the trial court sentenced the applicant to 25 years, all these factors were considered and I shall therefore not interfere with the sentence.
- 14. In the upshot, the application is hereby dismissed. The applicant ought to serve the sentence to completion. He can only benefit from the provisions of section 333(2) and as such the sentence shall start running from the date of arrest i.e. 04/01/2021.
- 15. Orders accordingly.

DATED AND SIGNED AT LODWAR THIS 17TH DAY OF APRIL, 2024

.....

R. NYAKUNDI

JUDGE

<i>CRIMINAL MISC APPLICATION NO E108 OF 2023</i>	0
---	---

