



**DK v Republic (Criminal Petition E024 of 2023)  
[2024] KEHC 4263 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4263 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL PETITION E024 OF 2023  
RN NYAKUNDI, J  
APRIL 11, 2024**

**BETWEEN**

**DK ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant, DK, was charged and convicted of the offence of incest contrary to Section 20 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 15<sup>th</sup> day of August 2015, at (particulars withheld) in (particulars withheld) within Uasin Gishu County, being a male person, he caused his genital organ (penis) to penetrate the genital organ (vagina) of (EC) a female who was to his knowledge his daughter.
2. He was also charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 OF 2006.
3. The Applicant was sentenced to 20 years’ imprisonment. He then Appealed to the High Court he Eldoret in Criminal Appeal No. 123 of 2019 on both the conviction and sentence wherein the Court dismissed appeal in its entirety.
4. The Applicant is now before this Court seeking review of sentence pursuant Article 50 (2) (p) (q) of the *Constitution* of Kenya, 2010. The Applicant maintains that he is remorseful and has since been reformed and rehabilitated. Further, the Applicant contends that the sentence meted upon him was too harsh considering the mitigating factors and the circumstances of the case.

**Determination**

5. Article 50 (2) (p) of the *Constitution* of Kenya, provides that every accused person has the right – to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment



for the offence has been changed between the time that the offence was committed and the time of sentencing.

6. Article 50 (2) (q) of the Constitution of Kenya, provides that every accused person has the right – if convicted, to appeal to, or apply for review by a higher court as prescribed by law.
7. In sentencing an offender, the sentence meted out on an accused person must commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence. (See Ambani v R). The Court of Appeal Thomas Mwambu Wenyi v Republic (2017) eKLR cited the decision of the Supreme Court of India in Alister Anthony 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.”

8. The Courts now can exercise discretion when considering and passing sentence. The said discretion however should only be exercised in the deserving cases. (See Republic v Ruth Wanjiku Kamande [2018] eKLR).
9. In exercising discretion in sentencing, the Court must further have in mind the objectives of sentencing as laid down in the Sentencing Policy Guidelines, 2023 published by the Kenya Judiciary and which includes: -
  - i. Retribution: To punish the offender for his/her criminal conduct in a just manner.
  - ii. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
  - iii. Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.
  - iv. Restorative Justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims, communities’ and offenders’ needs and justice demand that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.



- v. Community protection: To protect the community by incapacitating the offender.
- vi. Denunciation: To communicate the community's condemnation of the criminal conduct.
- vii. Reconciliation: To mend the relationship between the offender, the victim and the community.
- viii. Reintegration: To facilitate the re-entry of the offender into the society.

10. Section 20(1) of the [Sexual Offences Act](#) that creates the offence provides thus:

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“(1) 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:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.”

- 11. In his judgment, the trial Magistrate observed that the medical evidence confirms that there was penetration. He went further to note that the girl is a daughter to the accused, she had no reason to falsely implicate the accused by confessing to neighbour who then set in motion the process that led to the arrest of the accused. The trial Magistrate further noted that the child was telling the truth and that she was staying with her father after her mother left and the accused had the opportunity to defile her.
- 12. Apparently, this is the 2<sup>nd</sup> bite at the cherry by the Appellant while fully aware that on 15.2.2023 his appeal on conviction and sentence was dismissed by Mong'are J. The power to exercise discretion to this latest application must satisfy the constitutional criteria in Art. 50 (6) (a) & (b). To the best of my knowledge and from the record there is no discovery of new and compelling evidence which was not within the knowledge when the decision was made before the trial court and thereafter and Appeal for any such jurisdiction to be assumed as invited by the Appellant. In so far as I am concerned any other cause of action is res-judicata. Flowing from analysis there is no cause of action capable of being litigated before this court save that the sentence so imposed shall be computed within the letter and spirit of Section 333(2) of the CPC for the committal warrants to take cognizance for the period spent in pre-trial detention. In my considered view this was a vexatious litigation for the Appellant to re-litigate on matters resolved in earlier proceedings in the same concurrent forum of convenience.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 11<sup>TH</sup> DAY OF 2024**

In the Presence of:

Appellant

Mr. Mugun for the State

.....

**R. NYAKUNDI**



**JUDGE**

