



AKL v Republic (Miscellaneous Criminal Application E004 of 2024) [2024] KEHC 6723 (KLR) (6 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6723 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDAMA RAVINE
MISCELLANEOUS CRIMINAL APPLICATION E004 OF 2024**

RB NGETICH, J

JUNE 6, 2024

BETWEEN

AKL APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant was charged with the offence of attempted Incest by a male person contrary to section 20(2) of the *Sexual offences Act* No. 3 of 2006. The particulars of the offence were that the accused on the 27th day of June,2019 at around 1600hrs at [Particulars Withheld] village in Koibatek Sub-county within Baringo County, intentionally and unlawfully attempted to cause his penis to penetrate the vagina of G.J a child aged 3 years old whom he knew to be his niece.
2. The Applicant faced 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. The particulars of the charge were that the accused on the 27th day of June,2019 at around 1600hrs at [Particulars Withheld] village in Koibatek Sub- County within Baringon County committed an act which caused his penis to come into contact with the vagina of G.J a girl aged 3 years.
3. When called upon to plead the charges, the accused denied the same and the case was set down for hearing. The prosecution called 4 witnesses in an attempt to discharge its burden of proof against the accused. Upon the close of the prosecution’s case, the accused was placed on his defence where he chose to give an unsworn statement.
4. By judgment delivered on 13th day of April,2022 the applicant was found guilty and convicted of the main charge. On 26th April,2022 the applicant was sentenced to serve ten (10) years imprisonment being the minimum sentence.



5. The applicant has moved this court through a notice of motion application brought under the provisions of Articles 22,23,50(1), 50(2) (p), 159, 165(3)(9) and 259 of *the Constitution* of Kenya 2010, Section 363 and 364 of the *Criminal Procedure Code*, the *Probation offenders Act* Cap 64 Laws of Kenya seeking to have sentence of imprisonment revised to probation sentence. He submits that he is remorseful and repentant of what happened and if given another chance, he will not repeat such an act again
6. When the matter came up for hearing, the Applicant stated that he has been in prison for 5 years and he is remaining with 1 year and 8 months. That he has learnt carpentry and has obtained diploma in Biblical teachings and recommendation letter from the prison officer in-charge. He further stated that he has been sick since 2019 with Hepatitis B which he contracted while in remand and that he did not file an appeal in the High Court.
7. Th prosecution counsel Ms. Ratemo urged the court to direct the Applicant to avail the recommendation letter and the certificates and a social inquiry report to be filed by the probation officer.

Social Inquiry Report

8. From the report, the applicant is 46 years old and he sat for his KCPE in 1997 but did not continue with his education due to illness. He started doing house chores until he was of age when he started engaging in casual jobs in the construction industry until time he was arrested. He is not married, has no children; the family had a meeting in which the applicant was forgiven and the matter resolved. The two elder brothers who were interviewed confirmed that they had forgiven the applicant and wished that he may be released so as to continue with his life. They committed to assist him start life again and the community is ready to receive him back.
9. The victim's father who is the inmate's elder brother confirmed that they met as a family and agreed to forgive the applicant on ground that he has learnt his lesson. He said the victim is doing well and victim is doing well and is currently in grade 4 at Lombogishu primary school.
10. The administrator's sentiments are that the applicant related well with both the family and the community members and believes that he can reform; that he has good record in the area and people in the community are ready to welcome him back should he be released. He confirmed that the applicant had no other records of criminality in the area.
11. From the report, the applicant has health challenges (Hepatitis, Bronchitis, UTI) which has been there for a long time and still under medication. He attachment document to confirm that. He regrets having committed the offence.

Determination

12. This court is empowered by Article 165(6) of *the constitution* to review/revise sentence imposed by the trial court. The Applicant herein was charged with the offence of attempted incest by a male contrary to section 20(2) of the *Sexual offences Act* No. 3 of 2006; the complainant here being the child of the applicant's brother who was aged 3 years old at the time of the offence.
13. Upon conviction, the applicant was sentenced to serve 10 years imprisonment. He now says he is remorseful and regrets his act. From the report, the applicant is suffering from Hepatitis B, bronchitis and recurrent urinary tract infection as confirmed by the medical reports dated 1st August,2023 from Nakuru County Referral Hospital where he has been receiving treatment while in prison.



14. The objectives of sentencing are outlined in the 2023 Judiciary of Kenya *Sentencing Policy Guidelines* at page 15, paragraph 4.1 as follows:

Retribution: To punish the offender for his/her criminal conduct in a just manner.

Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.

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 demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

Community protection: To protect the community by incapacitating the offender.

Denunciation: To communicate the community's condemnation of the criminal conduct.”

15. The family of accused said they have forgiven, him. The area administrator says the community are willing to receive him back. However, I take note of the fact that the complainant is a child who was aged 3 years at the time of the offence. From the report, she may be about 8 years old now. The child being 3 years old at the time of the offence may not have understand the harm the applicant attempted to commit on her. The applicant being the complainant 's uncle owed her a duty to protect her but on the contrary attempted to defile her with his intended act being stopped by appearance of the complainant's mother who found accused having unzipped his trouser and was in process of defiling the child if not interrupted by the mother's appearance.
16. The applicant's act in my view was an improper act to be frowned by the community. I am of the view that the sentence of 10 years imposed was too lenient. However, in view of the fact that notice to enhance sentence was not issued, I will not interfere with the sentence. This should serve as a lesson to would be offenders who may think of going against society's norms to abuse such young children. The sentence should serve as a form of community's denunciation of accused's behavior.

Final Orders:-

1. Application or review is hereby dismissed.
2. Period served in Remand to be computed in sentence imposed by trail court.

RULING DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 6TH DAY OF JUNE 2024.

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RACHEL NGETICH

JUDGE

In the presence of:

CA Elvis.

Ms. Ratemo for state

Applicant present

