



**Odawa v Republic (Miscellaneous Criminal Application  
E023 of 2024) [2024] KEHC 6758 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6758 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS CRIMINAL APPLICATION E023 OF 2024**

**RE ABURILI, J**

**JUNE 6, 2024**

**BETWEEN**

**FANUEL OMAWA ODAWA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The applicant Fanuel Omawa Odawa was, according to his application subject of this judgment, charged and convicted with the offence of defilement contrary to section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006 and sentenced to serve ten (10) years imprisonment by a Nyando Court. The particulars of the offence are not within the knowledge of this court as the same have not been presented by way of court proceedings or judgment rendered before Nyando Law Courts.
2. On 18<sup>th</sup> March, 2024, the applicant filed an application for non-custodial consideration. In support of the application, he stated that he was moving court on account of his health status/challenges which are compounded due to his advanced age of 70.5 years and is difficult to nurse while in custody. The applicant avers that he is unable to walk even 200m away and that he is suffering backache and arthritis. He prayed that he may be considered for a non-custodial sentence.
3. The applicant submitted that the incarceration of elderly inmates does little to serve the principle purpose of punishment, retribution, incapacitation, deterrence and rehabilitation. He submitted that it was his mitigation that he is remorseful and humble and that he urged the court to review and reduce his sentence to its least severe form and order a non-custodial sentence so that he can spend his sunset days at home.
4. In response, Ms. Avoga Prosecution Counsel for the respondent submitted that the offence is serious one involving a minor and further that there was no record to inform the court in its determination.



Ms. Avoga submitted that the sentence meted out to the applicant is written in law and that if he wanted, he could appeal the sentence on merit and not seek review. Ms. Avoga further submitted that there was no evidence presented by the applicant of his sickness.

### Determination

5. 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.
6. 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 the 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.
7. 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 stated as follows:

“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.”



8. 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.”

9. In this case, the applicant does not want to serve out the remainder of the sentence that has been imposed upon him. He is in favour of being released from custody and would like the court to take this into consideration. The Court must take into account the gravity of the offence in order to determine which of those is appropriate, considering the fact that the applicant committed a serious offence and that he has not even served a third of that sentence. Additionally, the trial Court had the power to impose the mandatory minimum sentence of 20 years imprisonment but imposed ten years meaning he took into account the age of the convict and exercised discretion in his favour.

10. The offence of defilement contrary to section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006 attracts twenty years imprisonment upon conviction. The Court of Appeal in *Thomas Mwambu Wenyi v Republic* [2017] eKLR cited the decision of the Supreme Court of India in *Alistar Anthony Pereira v State of Mahareshra* at paragraph 70 – 71 where the Court held as follows 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.”

11. The principal function of any court tasked with reviewing sentence is made clear from the aforementioned observations. The Court’s fundamental duty is to ascertain the existence of any errors established in either aspect. As previously outlined, the court must then decide whether to reassess the sentencing discretion or refer the case back to the lower court for a fresh evaluation by one of its



members. Hence, the primary objective of a court handling an application like this which is not an appeal on sentencing is to identify any potential miscarriage of justice and rectify it accordingly.

12. Given this background I find no error of fact or in law to review the sentence imposed by the trial court and therefore find no justification to have it substituted with a non-custodial sentence. There is no evidence of substantial and compelling reasons to grant that remedy to the Applicant who was given very lenient sentence of half the mandatory minimum provided for in law
13. Accordingly, the application for sentence review by the convict herein is found to be devoid of any merit. It is dismissed.
14. This file is closed.
15. Signal to issue.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 6<sup>TH</sup> DAY OF JUNE, 2024**

**R. E. ABURILI**

**JUDGE**

