



REPUBLIC OF KENYA



**Ngure v Republic (Revision Case E598 of 2022)
[2023] KEHC 17470 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17470 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
REVISION CASE E598 OF 2022**

**HM NYAGA, J
MAY 18, 2023**

BETWEEN

DAVID KABUCHO NGURE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant David Kabucho Ngure was charged with defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*.
2. The particulars were that on the diverse dates between March, 2015 and September, 2015 in [particulars withheld] in Rongai District within Nakuru County he intentionally and unlawfully committed an act which caused his genital organ namely penis to penetrate into the genital organ namely Vagina of DL, a child aged 15 years.
3. On December 22, 2015 the charge was read to the Applicant. He pleaded not guilty and the matter went into full trial.
4. On August 15, 2018 he was found guilty and convicted accordingly.
5. The prosecutor told court that he was a first time offender.
6. In mitigation, the Applicant told the court: -

' I seek for leniency. I seek for non-custodial sentence. There is a child born out of my action and I will take all responsibility to maintain and provide for the child. I have taken up insurance for health and education of the child. I will also take care of the child's mother. I regret my actions'



7. The court called for victim impact statement but the same was not availed and on September 27, 2018 the Applicant was sentenced to serve 20 years' imprisonment.
8. Subsequently, the Applicant appealed against both the conviction and sentence. The court considered the Applicant's Appeal and on May 28, 2020 delivered its judgement on the following terms: -
 1. Appeal on conviction is hereby dismissed.
 2. Appeal on sentence is allowed.
 3. Sentence reduced to 7 years' imprisonment.
 4. Sentence to run from the time of sentence in the lower court.
9. The Applicant thereafter filed Criminal Miscellaneous Application No E 027 of 2020 on November 17, 2020 seeking for substitution of the remainder of his sentence with a probationary sentence or a sentence under the Community Service Act No 10 of 1998 in the interest of justice pursuant to Article 165(3)(9) of the Constitution 2010. For unknown reasons, the applicant also filed this application seeking similar prayers.
10. The Application is predicated on grounds that the Applicant is not willing to pursue his Appeal in the Court of Appeal since by the time the same is heard and determined he would have served his sentence; that the Applicant has been in custody for over 3 years a period which he has reformed; that the Applicant is utterly remorseful and fully regrets the unprecedented circumstances under which the fateful offence happened; that the Applicant's family is very poor and continues to suffer irreparably as a result of the prolonged sentence which has subjected him to severe sufferings: and that the Applicant's health is under stake and on a downward trend and require proper and urgent attention in form of specialized treatment.
11. The Application is supported by an Affidavit of the Applicant sworn on undated date.
12. On March 31, 2022 the court called for probation report and report by Prison Authorities.
13. On March 9, 2023 the resentencing report was duly filed.
14. I have perused the Application herein and there is no evidence that the Applicant has filed an Appeal before the Court of Appeal as deponed.
15. The order before this court is for Revision. The High court is granted powers of revision under Article 165 (7) of the Constitution and section 362 of the Criminal Procedure Code.

' The High court has supervisory jurisdiction over the subordinate court and over any person, being on authority exercising a judicial or quasi- judicial function, but not over a superior court'

Article 165 (7) of the Constitution the High court,

' For purposes of clause (6), may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6) and may make an order or give any direction it considers appropriate to ensure the fair administration of justice'.

Section 362 of the Criminal Procedure Code, provides as follows: -

' The High court may call and examine the record of any criminal proceedings before any subordinate court for the purposes of satisfying itself as to the correctness, legality or



propriety of any finding, sentence, or order recorded or passed and as to the regularity of any proceedings of any subordinate court'.

16. The court is not being asked to review the sentence of the lower court which has already been handled on appeal. What the applicant is actually seeking is a review of the sentence imposed on him on appeal.
17. My view is that this court cannot review that sentence. The appellate court did make its decision after taking into consideration all the factors that the applicant is now raising. The court went as far as considering the well known case of *Francis Karioko Muruatetu and others v Republic [2017] eKLR* and meted out a lesser sentence of 7 years imprisonment.
18. The applicant is now trying to have a second bite at the cherry, through the present application. This court became functus officio after it rendered its decision. The only recourse for the applicant is to pursue an appeal in the Court of Appeal.
19. The applicant should continue to serve his sentence as imposed on appeal.
20. The above orders shall also apply to High Court Misc.Application No E027 of 2020. Both files are now closed.

DATED, SIGNED & DELIVERED AT NAKURU THIS 18TH MAY, 2023.

H.M. NYAGA

JUDGE

In the presence of:

C/A Jeniffer

Ms Murunga for state

Applicant present (At Nyahururu)

