



**Ong’ndo v Republic (Criminal Revision 240 (E190) of 2022)
[2023] KEHC 20343 (KLR) (11 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20343 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL REVISION 240 (E190) OF 2022
PN GICHOHI, J
JULY 11, 2023**

BETWEEN

HENRY ONDIEKI ONG’NDO APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application for review of sentence in Criminal Case SO. No. 5 of 2017 at Kisii Chief Magistrate’s Court by Hon. D. MacAndere Resident Magistrate on 17th February 2021)

RULING

1. Henry Ondieki Ong’ndo (Applicant) appeared before the trial court on January 15, 2021 where he was charged 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 are that on the 14th day of January 2021 in Marani Sub- County within Kisii County , he intentionally caused his penis to penetrate the vagina of FNA a child aged 2 ½ years.
2. He also faced an alternative count of Indecent Act contrary to section 11(1) of the [Sexual Offences Act](#). The particulars are that on the 14th day of January 2021 in Marani Sub- County within Kisii County , he intentionally and unlawfully did commit an indecent act by rubbing his penis against the vagina of FNA a child aged 2 ½ years.
3. He pleaded guilty to the main charge and went ahead to admit the facts read to him. He had no previous records. In his mitigation, he sought forgiveness. On the February 17, 2021, the trial magistrate sentenced him to serve Thirty (30) years imprisonment for the offence of defilement.
4. He has now moved this Court by way of an undated Chamber Summons filed on December 1, 2022 seeking that the sentence of 30 years imprisonment be reviewed and that there be an order that he serves the remaining sentence under Probation or Community Service Order. The grounds thereof are that



he has no pending appeal and has no intention of preferring one hence this application for revision and that this court has jurisdiction to hear and determine the application under article 165 (3) (b) of the Constitution.

5. In support of that application, he swore an affidavit which he filed on December 1, 2022. He states that he is a first offender and that he will never break the law again.
6. That sentence is the subject of this application filed on December 1, 2021 where he seeks revision of the sentence to the extent that he gets a non- custodial sentence to finish the remainder of the sentence while on probation to enable him care for his young child and his old mother. He states that he is remorseful and will not repeat such an offence again. He further states that he is aged Seventy- Six (76) and that due to his age , his life in prison has become hectic to him and that he has to rely on other inmates to wash him and wash his clothes.
7. Terming the application incompetent , the learned prosecution counsel Mr. Justus Ochengo for the respondent opposed the application on the grounds that the applicant defiled a 2 ½ year old child and therefore he cannot now come to claim in court that he seeks a non- custodial sentence because he is aged 76 years. He argued that the grandchildren would be safe if he remained in custody. Further, he argued that the applicant has not satisfied any condition to warrant any interference with this sentence when the section under which the applicant was charged attracts a life sentence. He therefore urges the court to dismiss the application.
8. When the applicant appeared before court virtually, he urged the court to allow his application and let him go home. The prosecution counsel maintained that he had opposed the application.

Determination

9. I have considered the application. No doubt , the applicant admitted that he defiled a 2 and half year-old female child. The child's grandmother was attracted by screams from the child. She found the Applicant holding the child with his trousers lowered to the knees and child had no underpants. Blood was oozing from the child's private parts. The child was crying helplessly.
10. The child's grandmother rescued the child as the applicant fled. The applicant was rescued by elders as members of the public bayed for his blood. He was taken to police station. The doctor confirmed the child had been defiled. After investigations, the applicant was charged. Exhibits were produced being the child's P3 Form, treatment notes and PRC form as well as the applicant's treatment notes.
11. The lower court record shows that in sentencing the applicant, the trial magistrate considered that he was a first offender, that the offence under which the applicant was charged attracted a life imprisonment but went on and held:

“In as much as the sentence to be imposed in this section is life imprisonment.... The accused herein has pleaded guilty to defiling a child aged 2 years. This is a heinous act to do such a child of tender years. He is a first offender though and, in my observations, he is a middle-aged man and considering his mitigation I will sentence him to 30 years imprisonment.”

12. That sentence was discretionally. This is not an appeal but revision. The applicant is emphasising on his age, but he does not seem to recall the age of the child he defiled. That was not only heinous as described by the magistrate but savage and beastly. The pain suffered by the child must have been immense and it may not be imagined how far the applicant would have gone with that child had the grandmother not rescued her from the applicant. The applicant is not a person who can be trusted with children and specifically female children. At his age, he should be a protector of children but he turned out



to be a predator. He cannot blow the trumpet in regard to his advanced age when he had no qualms whatsoever about the very tender age of this female child.

13. The offence called for a deterrent custodial sentence which would be even life imprisonment. However, if the trial magistrate found that life imprisonment was not appropriate, then considering the age of the applicant, the 30 years imprisonment though lawful would translate to life imprisonment yet that was not her intention. That is a reason to warrant interference by this court.
14. According to the charge sheet , the applicant was arrested on January 14, 2021 and placed in custody and remained in custody up to February 17, 2021. There is no indication from the lower court record that the trialcourt referred to section 333 (2) of the *Criminal Procedure Code* during sentencing yet the section is in mandatory terms for it provides that :

“Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

15. In the circumstance, the revision succeeds to the extent that sentence of Thirty (30) years imprisonment is substituted with Fifteen (15) years imprisonment. Further, this court now directs that the applicant’s sentence of imprisonment runs from January 14, 2021.

Dated, signed and delivered virtually at Kisii this 11th day of July, 2023

PATRICIA GICHOHI

JUDGE

In the presence of:

Appellant

Mr. Ochengo for Respondent

Kevin Isindu, Court Assistant

