



**Mwereza v Republic (Criminal Miscellaneous Application E041 of 2023)
[2024] KEHC 14404 (KLR) (15 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14404 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL MISCELLANEOUS APPLICATION E041 OF 2023**

**DK KEMEL, J
NOVEMBER 15, 2024**

BETWEEN

MUTURI SAMSON MWEREZA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant herein Muturi Samson Mwereza vide an application filed on 30/3/2023 has sought for an order of sentence review and that this court do find it proper that he be ordered to serve the remainder of his sentence under probation or community service order. The Applicant's gravamen is that he was convicted and sentenced vide Bondo SPM's Court Cr. No. 817 of 2016 on 11/8/2017 whereby he was ordered to serve twenty (20) years imprisonment. That he has no pending appeal and does not intend to lodge any. That this court has discretion under Article 165 (3) (6) of the Constitution to make the appropriate orders. That he has since been rehabilitated in prison and underwent various coursed and that he is now ready to rejoin the community.
2. The application was canvassed by way of written submissions. Both parties duly complied.
3. I have considered the Applicant's application as well as the submissions filed herein. It is not in dispute that the Applicant had been charged vide Bondo Principal Magistrate's Court, Criminal Case Number 817 of 2016 with an offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006. He also faced an alternative count 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 main charge are that on the 8th day of July 2016 at about 2200 hours at [Particulars withheld] village in Rarieda Sub-County within Siaya County unlawfully and intentionally caused his penis to penetrate the vagina of J.A a girl aged 13 years.



The particulars of the alternative count are that on the 8th day of July 2016, at about 2200 hours in Lumba village in Rarieda Sub-County within Siaya County unlawfully and intentionally touched the vagina of J.A a child aged 13 years.

4. After a full trial, the Applicant was found guilty and convicted on the main count of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual offences Act](#) and was subsequently ordered to serve a sentence of twenty (20) years' imprisonment.
5. The Applicant has opted not to lodge an appeal to this court to challenge both conviction and sentence and has further not lodged any appeal elsewhere. He has approached this court for a sentence review as captured in his averments in the application as well as the submissions. The issue for determination is whether the Applicant's application has merit.
6. As the Applicant has opted to approach this court for sentence review, I will proceed to find whether the sentence imposed by the trial court was within the law and whether the same can be interfered with. It is trite law that sentencing is a discretion of the trial court which has heard the matter and is able to decide the kind of sentence to be imposed upon an offender who has been found guilty and convicted. In that regard, the appellate court should be slow to intervene with a sentence imposed by a trial court unless the same is not lawful or harsh/excessive as to lead to a miscarriage of justice or that the trial court acted upon a wrong principle or that it exercised its discretion capriciously. In the case of *Ambani vs. R* [1990] eKLR, it was held that the sentence imposed must be commensurate with the moral blameworthiness of the offender and that the court must look at the facts and circumstances of the case in their entirety.
7. The Applicant as noted above, was sentenced to 20 years' imprisonment. Section 8(3) of the [Sexual Offences Act](#) No. 3 of 2006 provides as follows:

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

From the baptismal certificate produced by the Respondent before the trial court, the same indicated the date of birth of the complainant – minor as 20/11/2002 and hence the age of the complainant at the time of commission of the offence (8/7/2016) was 13 years four months and twelve days. I find the said age to have been between the age bracket of 12 – 15 years as provided for in the Act and hence the sentence imposed was within the law and the possible minimum.

8. From the evidence of the complainant, the Applicant herein not only physically assaulted her on the night in question but defiled her the whole night. It transpired from the evidence that the Applicant is a nephew of the complainant's father and hence the complainant was the Applicant's cousin.

The act of defilement caused the complainant psychological scars which will remain with her for the rest of her life. The Applicant had been left by the complainant's parents to take care of the complainant and the other children but instead preyed on the hapless complainant. The Applicant should have been the protector of the complainant and her siblings.

9. The certificate for birth availed to the trial court indicates that the Applicant was born on 26/11/1996 and hence at the time of commission of the offence he was aged nineteen years four months and eighteen days old. I find that the Applicant was above the age of 18 years and thus an adult. Further, I find that the circumstances of the offences do not fall under the category of Romeo and Juliet for purposes of consideration as the applicant and complainant were actually relatives. I am unable to interfere with the sentence imposed by the trial court as the same was neither harsh nor excessive. The



same is the minimum possible in law. I am guided by the Supreme Court’s decision in Petition No. E018 of 2023, *R Vs Joshua Gichuki Mwangi* [2024] eKLR, vide its decision dated 12th July 2024 when it held as follows:

“The reasoning behind the Court of Appeal’s decision is called into question by this omission as sentencing is a matter of fact unless an Appellate Court is dealing with a blatantly illegal sentence which was not the case in the present matter.”

The Supreme Court in setting aside the Court of Appeal decision in *Joshua Gichuki Mwangi* (*supra*) went on to find and hold that the sentence imposed by the trial court against the Respondent and affirmed by the first Appellate Court was lawful as long as Section 8 of the *Sexual Offences Act* remains valid.

Being guided by the said authority, I am unable to interfere with the sentence by the trial court. I uphold the same.

10. Finally, it is noted that the Applicant remained in custody throughout the trial and hence the period spent in custody must be taken into account in accordance with the mandatory provision of section 333(2) of the *Criminal Procedure Code*. The Applicant was arrested on 9/7/2016 and that he did not manage to post bail and hence the sentence should commence from the same date.
11. In view of the foregoing observations, the Applicant’s application only succeeds to the extent that the sentence of twenty (20) years’ imprisonment shall commence from the date of arrest namely 9/7/2016.

DATED AND DELIVERED AT SIAYA THIS 15TH DAY OF NOVEMBER, 2024.

D. KEMEI

JUDGE

In the presence of:

Muturi Samson Mwereza.....Applicant

M/s Kerubo.....for Respondent

Ogendo.....Court Assistant

SIAYA HC CRIMINAL MISC. APPLICATION NO. E041 OF 2023 RULING 2 | Page

