



**Waswa v Republic (Miscellaneous Criminal Application E012 of 2024)  
[2024] KEHC 14429 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14429 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDAMA RAVINE  
MISCELLANEOUS CRIMINAL APPLICATION E012 OF 2024  
RB NGETICH, J  
NOVEMBER 14, 2024**

**BETWEEN**

**MICHAEL WASWA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant Michael Waswa was charged 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. The particulars of the charge were that on diverse dates between 29<sup>th</sup> January, 2021 and 6<sup>th</sup> February, 2021, at Mogotio Sub- County within Baringo County, the accused person intentionally and unlawfully caused his penis to penetrate the vagina of F.J a child aged 15 years.
2. The accused denied the charge. The case proceeded for hearing and after trial, he was found guilty as charged, convicted and sentenced to serve 15 years imprisonment.

**Application For Review Of Sentence**

3. The Applicant has now approached this court vide an un dated application seeking for sentence review under Article 165(3) (b),22,23 and 50(6), of *the Constitution* of Kenya,2010.
4. The application is founded on the grounds that under *the constitution* of Kenya Article 50(2)(p)(q) an applicant has a right to benefit from the least severe sentence and have his sentence reviewed. He avers that the sentence contravenes sections 216 and 389 of the criminal procedure Codes on mitigation and the values of sentencing as in the sentencing policy guidelines. That under the provisions of *the Constitution* of Kenya,2010 and practice and procedure Rules,2010 this court has power to hear and determine infringements of fundamental rights and award remedies.



5. When the matter came up for hearing on the 17<sup>th</sup> September, 2024, the applicant informed the court that his prayer is for sentence to be reduced and that he was jailed for 15 years and has served 4 years.

### **Response**

6. The prosecution counsel Ms. Omari argued that considering the age of the minor, the trial court was lenient and her submissions was that the sentence should not be interfered with. This court called for a social inquiry report which was filed on the 14<sup>th</sup> October, 2024.

### **Social Inquiry Report**

7. From the report, the Applicant is 28 years old with 2 biological children and was taking care of his late sister's 2 children. He dropped out of school while in class five due to lack of school fees. He started herding livestock at a tender in Miti Moja village. In 2011 he relocated together with his Maternal grandfather to Mogotio. He got employment as a casual in a hotel in Mogotio, Westland village. The grandfather started training him in building and in 2013 he started working in construction sites.
8. The children stay with their mother in Mogotio, Kapsigiroi village. The inmate's wife stays with her late sisters 2 children hence they were both raising four children prior to his arrest. His wife is a casual worker. The applicants' wife revealed that the inmate had another second wife who was pregnant at the time of his arrest and at the time the applicant defiled the victim, he had chased the second wife away.
9. Applicant's mother left them while they were young and they were raised by step mother. The father disclosed that there was criminality in the family as one of the inmate's uncle was in custody and died three days after his release. The family has not been able to visit the Applicant due to financial constraints.
10. The Applicant's first wife disclosed that she separated with the Applicant in the year 2017 and has been taking care of the two children plus two other children of her late sister but he was still supporting them. She further indicated that the Applicant had remarried at the time of his arrest. The Applicant's grandfather indicated that the Applicant lived a good life and did not have issues with people. He prayed for another chance to amend his ways.
11. The Applicant stated that the wife left home with the children and the victim who was a form 2 student and a friend to his wife's friend went to visit them. He admits defiling her as the wife had left and expresses deep regret for allowing his emotions to escalate into this merciless act. He is remorseful and recognizes the gravity of his actions, especially in inflicting injuries to an innocent person. The Applicant is committed to making amends and taking responsibility for his actions. His step mother has initiated talks aimed at reconciling the two parties. He welcomes the plea bargain initiated by the ODPP, viewing it as an opportunity to face the consequences of his actions while seeking a resolution that takes into account both justice and reconciliation.
12. The victim's family have no problem with the Applicant's release but are fearful of being attacked. The victim's mother confirmed that the Applicant and his stepmother called her to ask for forgiveness. The victim who is currently a form three student fears the inmate but said she has already forgiven him. From the report, she stated that she is performing well in her school work getting a mean grade of C unlike previously when she was in form one and two while she was traumatized. She however pointed out that she was able to overcome the issue and she is now moving on focusing on her study. The victim's mother confirmed that the inmate together with his step-mother called her to seek for forgiveness.



13. The local administrator indicated that the Applicant is well-known in the area as he used to work in construction sites and had good community ties in the area; that he was a trustworthy person and who had community ties in the area wishing that he may be given a chance to raise his children. The inmate's parents are sorry for what happened and pleads for mercy from the honorable court on behalf of the inmate and promise to assist him amend his ways should the plea-bargaining go through. The Applicant is remorseful and prays that the reconciliation process may go through. The two families started negotiation and are yet to be finalized.

### **Analysis and Determination**

14. I wish to consider whether the applicant herein merit revision of his sentence. The principles applicable in considering whether to interfere with the sentence of a trial court on appeal were enunciated in the case of *Mbogo & Another vs. Shah* (1968) 1 E.A. 93 thus: -

“...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

15. The other principle to be considered is whether the sentence is manifestly excessive in view of the circumstances of the case. In the case of *Shadrack Kipkoech Kogo - vs - Republic Eldoret Criminal Appeal No.253 of 2003* the Court of Appeal stated thus:-

“Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka - vs- R.* (1989 KLR 306).”

16. The Court of Appeal, on its part, in *Bernard Kimani Gacheru vs. Republic* [2002] eKLR restated that:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

17. Under *Sexual Offences Act*, sentence for defilement is prescribed based on the age of the victim of the sexual assault. Although the Act does not expressly state, the manner the penalty is prescribed show that, the younger the victim, the more severe the sentence. From the foregoing, age is an aggravating factor to be considered by court among other factors while sentencing.
18. The complainant herein was 15 years old at the time of the offence. Thus, the appropriate penalty clause is Section 8(3) of the Act. Sentencing is exercise of discretion by the trial court which should never be interfered with unless the trial court acted upon wrong principles or overlooked some material



factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See Shadrack Kipkoech Kogo - Vs - R., and Wilson Waitegei V Republic [2021] eKLR).

19. There is no doubt that the applicant took unfair advantage of the minor herein to secure and satisfy his sexual desires. The court while imposing sentence ought to take into consideration the need to protect young children against abuse by adults as envisioned by the legislature while enacting the [sexual offences Act](#)(SOA).It is worth noting that an act of defilement leaves the innocent victim traumatized for the rest of her life time.
20. Record show that the trial court considered the fact that the Applicant was a first offender, he also considered the circumstances of both the victim and the appellant and noted that the offence required a stiff punishment. In this regard, I am satisfied that due consideration was made in safeguarding the interests of the victim, the Appellant and the community at large. In view of the above, I hereby decline to revise sentence imposed by the trail court.
21. Final Orders: -  
I hereby decline to revise sentence.

**RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 14<sup>TH</sup> DAY OF NOVEMBER 2024.**

.....  
**RACHEL NGETICH**

**JUDGE**

In the presence of:

Elvis, Court Assistant.

Mr. Mwangi for the State.

Mr. Kiptoo for accused.

