



Republic v Mulu (Sexual Offence 2 of 2020) [2025] KEMC 12 (KLR) (6 February 2025) (Ruling)

Neutral citation: [2025] KEMC 12 (KLR)

**REPUBLIC OF KENYA
IN THE MUTOMO LAW COURTS
SEXUAL OFFENCE 2 OF 2020
LK MWENDWA, PM
FEBRUARY 6, 2025**

BETWEEN

REPUBLIC PROSECUTION

AND

DANIEL MUSYOKA MULU ACCUSED

RULING

1. The accused person herein was charged with the offence of defilement contrary to Section 8(1) as read with 8(2) of the [Sexual Offences Act](#) No. 3 of 2006 (Main count). The Particulars of the offence are that;-

Daniel Musyoka Mulu ; On diverse does between 22nd and 28th January, 2020 at [Particulars Withheld] within Kitui County, intentionally and unlawfully caused your penis to penetrate the vagina of JM a child aged 8 years.
2. The prosecution preferred an alternative count of indecent act with a child Contrary to Section 11(1) of [Sexual Offences Act](#) No. 3 of 2006. Particulars were;-

Daniel Musyoka Mulu ; On diverse does between 22nd and 28th January, 2020 at [Particulars Withheld] within Kitui County, intentionally and unlawfully you touched the vagina of JM a child aged 8 years with your penis.
3. My brother, Hon. P. Mayova heard this matter; by his judgment delivered on 6th July, 2023, he found the accused person guilty on the main count. Subsequently, he convicted him and sentenced him to serve life imprisonment.
4. The accused person was dissatisfied with the aforesaid on conviction and sentence. He challenged them through (PMM Vs Republic Criminal Appeal E031 of 2023) [2024] KEHC 11614 (KLR).
5. Hon. Mr. Justice Francis Olel, in his judgment dated and delivered on 30/9/2024 held as follows;



- a. The Appeal against conviction lacks merit and the same is dismissed.
 - b. The appeal against the sentence is upheld and the same is set aside.
 - c. The trial file be returned to Mutomo Principal Magistrate court for fresh sentencing.
 - d. I do direct that the probation officer in- charge of Mutomo Sub-county, file a new pre-sentence report in Principal Magistrate’s court (SOA) case No. 2 of 2020 within the next 30 days of delivery of this judgment and the Senior Principal Magistrate-Mutomo court to consider the same and resentence the appellant fresh.
6. In essence the High Court ordered for re-sentencing herein and to review the life imprisonment imposed on the accused person on account that it was discriminatory inhumane and violation of his right to dignity-As per the finding of the court of appeal in *Manyeso Vs. Republic* [2023] KECA 827(KLR)-in which a life imprisonment under Section 8(2) *Sexual Offences Act* for defilement of a minor of 4^{1/2} years was sustained with 40 years imprisonment.
7. This court was thus directed to conduct a fresh sentencing in a bid to protect and safeguard the rights of the accused person enshrined under Article 50(2) (P) of *the Constitution* of Kenya, 2010. The said Article provides that every accused person has a right to fair hearing, which includes the right.
- “(P) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing; and -
8. In light of direction above, a re-sentencing report dated 13/12/2024 prepared by Festus Kithome has been filed. I have perused the said report; and it comprises the following pertinent finding and recommendations:-
- a. That the accused person is a youthful man aged 30 years, with no previous criminal records.
 - b. That the victim is now a grade 6 pupil and resides with her mother in Nyahururu.
 - c. That the accused person is currently under medication for mental illness.
 - d. That based on his medical condition, the family is ready and willing to take care of his medical needs under a non-custodial sentencing and through regular supervision by the probation and after care department, at least once per month to assess his rehabilitation progress and support his reform.

What is the appropriate sentence herein?

9. In determining this question, I shall be guided by sentencing policy guidelines, 2023- which outlines the principles and objectives of sentencing. I also called upon to observe relevant Case Law in adherence to the doctrine of stare decisis set out under Article 162(7) of *the constitution* of Kenya 2010-that
- “ All courts, other that the Supreme Court are bound by the decisions of the Supreme Court”
10. In this regard, I take note of the recent procurements of the supreme court of Kenya in *Republic Vs. Murangi; Initiative for strategic Litigation in Africa(ISLA) & 3 Others (Amicus Curie)* (Petition E018 of 2023) (2024) KESC 34(KLR) (12 July 2024) (Judgment). In this matter the learned Justices



of the Apex Court considered inter alia the difference between mandatory and Minimum Sentence (as prescribed under the *Sexual Offences Act* (SOA). The court stated:-

“Mandatory sentences leave trial court with absolutely no discretion, the singular sentence is already prescribed by the law. Minimum sentences however set the floor rather than the ceiling when it comes to sentence. What is prescribed is the least severe sentence a court can issue, leaving it open for them to the discretion of the courts to impose a harsher sentence.....”

11. The accused person herein was convicted and sentenced under Section 8(1) as read with (8) 2 SOA. The penalty in Section 8(2) SOA is set out as follows;

“Any person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life”

12. The penalty under section 8(2) SOA is mandatory offence, the court has no discretion to render a sentence less than live imprisonment as per the finding in Mwangi case (Supra)

13. There is a different issue that emerged from the re-sentencing report herein. It speaks to mental status of the accused person-that he is mentally ill and is on and requires further treatment.

14. In terms of Section 167(1) a Criminal Procedure Code where a person is mentally ill but the court is satisfied that the evidence justifies a conviction, it shall order the accused person be detained during the presidents pleasure, subject to the confirmation by the High Court. The conviction herein was confirmed by High Court on 30th September, 2024.

15. I take note that the provisions of Section 167 Criminal Procedure Code have been severally declared unconstitutional by the High Court of Kenya- in that is an affront to various rights and fundamental rights enshrined under our Constitution 2010; thus

- a. Article 54 in regard to treatment with dignity and respect persons living with disability-Kimaru & 17 others Vs. Ag; Kenya Human rights & Equality Commission (2022) KEHC.
- b. Article 28 which provides that every person has inherent dignity and right to have their dignity protected- Kimaru case (Supra).
- c. Article 29(f) that guards against any person from being treated or punished in a cruel, inhuman or degrading manner-Hassan Yussuf Vs. Republic [2016] eKLR.
- d. Article 25(a) that decrees that the freedom from torture and cruel, inhuman or degrading treatment or punishment Republic Vs Kagua & Another (2024) KEHC 371 (KLR).

16. All the above case law speak to the unconstitutionality of the sentence prescribed under Section 167 Criminal Procedure Code. The said pronouncements have not been overturned and thus have full force of law and are binding upon me.

17. Kiarie Waweru Kiarie, J, in Yussuf Hassan (Supra) was succinct; thus

“A sick persons place is at the hospital and not in prison. I find Section 167 of the Penal Code discriminative to people with mental illness for describing detention to be in a prison. Instead of a health facility and for detention to the indeterminate. This offends Articles 25 and 29(f) of *the constitution*”



18. Yusuf Hassan (Supra) was cited with approval in Joseph Mekelino Katula Vs. Republic [2017] eKLR. Kamau J. stated:-

“The constitutionality of Section 167(1) of the Criminal Procedure Code vis –a- vis the Provisions of Article 25 of *the constitution* that Kiarie wa Kiarie J also arrived at in the cases of BKJ vs. Republic [2016]eKLR and Hassan Hussein Vs Republic(2016)eKLR. The common thread of his holdings is that keeping a sick person for indeterminate period in prison is cruel, inhuman and degrading treatment contrary to Article 25(a) and Article 29(f) of *the Constitution* of Kenya”

19. In Joseph Melikino case(Supra) the court set aside sentence of 20 years imprisonment for offence of defilement Contrary to Section 8(1) as read with Section 3 of SOA. The court having found that the appellant was mentally ill, went on to state as follows:-

“In view of the mental status of the appellant herein, there was no doubt that he had been deprived of freedom without a just cause by being sentenced to twenty (20) years imprisonment. Indeed , his mental capacity ought to have been evident during trial as this court observed right at the onset of this Appeal”

20. This court has taken note of the above case Law and Jurisprudence thereof. I am thus guided to take into account the mental incapacity of the accused person herein as I consider what sentence is appropriate. I have also factored the objectives of sentences set out Paragraph 1.3.1 (1) – (VII) of the Sentencing Policy Guidelines, 2023.

21. The objective of sentencing as set out in the above provision are:-

- i. Retribution: To punish the offender of their criminal conduct in a just manner.
- ii. Deterrence: To deter the offender from committing a similar or any other offence in future as well as discourage the public from committing offences.
- iii. Rehabilitation: To enable the offender to reform from his/her criminal disposition and become law abiding citizens.
- iv. Restorative Justice: To address the need arising from the criminal conduct such as cost and damages sustained by the victim or the community and to promote a sense of responsibility through the offender’s contribution towards meeting those needs.
- v. Community Protection: To protect the community from removing this offender from the community thus avoiding further perpetuation of the offender criminal acts.
- vi. Denunciation: To clearly communicate the society’s condemnation of the criminal conduct.
- vii. Reconciliation: To mend the relationship between the offender, the victim and the community.
- viii. Re- integration: To facilitate re-entry of the offender in the society.

22. . In regard to objectives of sentencing for mentally ill persons, the court in Jospeh Melikini (Supra), held:-

“Notably, imprisonment as a punishment must therefore achieve any of the aforesaid objectives. It is not intended to merely punish a person who has absolutely no idea why he



has been imprisoned. Imprisonment of a convicted person who is unlikely to be reformed or deterred from future crimes because he is not aware of the consequences of his actions due to mental incapacities is tantamount to subjecting such a person to torture and cruel, inhuman and degrading treatment or punishment. Contrary to Article 25 of *the Constitution* of Kenya”

23. . It is thus clear in my mind that rendering a custodial sentence herein will be an affront to Article 25(a) of *the constitution*. The offender, being a person with a disability as defined under Article 260 of *the Constitution*, is entitled to protection of his dignity under Article 54 of *the Constitution*.
24. Whereas Article 54(1) (a) constitution of Kenya provides that a person with disabilities should be treated with dignity and respect and not to be addressed in a manner that is demeaning, Sub –clause (b) thereof, provided that such a person is entitled:-

“to access educational institutions and facilities for persons with disabilities that are integrated in the society to the extent compatible with the interests of the person”

Disposition

25. Having considered the mental illness of the accused herein, further noting that he deserves treatment, as well as being guided by the finding in court of Appeal decision in *Wakesho Vs. Republic* (2021) KECA 223 (KLR), I order as follows;
- (a) That the accused person be escorted forthwith to a mental health facility for his medical treatment.
 - (b) That the accused person shall remain under treatment until such a time a qualified health personnel certified that he is not a danger to the society and/or himself.
 - (c) That upon certification in (b) above the facility shall hand over the accused person to his family and/or relatives.

DATED, SIGNED AND DELIVERED THIS 6TH DAY OF FEBRUARY 2025.

HON. L .K. MWENDWA

PRINCIPAL MAGISTRATE

