



**Republic v Wabwile alias Cherop (Sexual Offence E007 of 2024)  
[2024] KEMC 83 (KLR) (15 April 2024) (Sentence)**

Neutral citation: [2024] KEMC 83 (KLR)

**REPUBLIC OF KENYA  
IN THE NAIROBI CHILDREN'S COURT  
SEXUAL OFFENCE E007 OF 2024**

**JC KIBOSIA, PM  
APRIL 15, 2024**

**BETWEEN**

**REPUBLIC ..... STATE**

**AND**

**SHARON NANJALA WABWILE ALIAS ROSHABAVACANEMA  
CHEROP ..... ACCUSED**

**Sentencing should aim not only to punish but to repair harm and prevent recurrence.**

*The matter concerned sentencing for the offence of child pornography under section 24(1) of the Computer Misuse and Cybercrimes Act, following a guilty plea by the accused. The accused was subsequently sentenced in light of both mitigating and aggravating factors, including her status as a first-time offender and her breach of trust as a caregiver. The court held that, despite the accused's remorse, the severity of the offence and the psychological harm inflicted on the child required a sentence that achieved both deterrence and restorative justice. Accordingly, the court imposed substantial fines or imprisonment, alongside restitution and victim protection orders, affirming the judiciary's duty to prioritize the best interests of the child in cases of online exploitation.*

Reported by Moses Rotich

**Criminal Law** - offences relating to child pornography - sentencing - accused pleading guilty - whether a guilty plea by a first offender was sufficient to justify a non-custodial sentence for an offence involving child pornography - whether such an offence could be aggravated by proof of breach of trust - whether restitution and protective measures could accompany a penal sanction - Computer Misuse and Cybercrimes Act, cap 79C, section 24 (1).

**Brief facts**

The accused was charged with the offence of child pornography, contrary to section 24(1) of the Computer Misuse and Cybercrimes Act, cap 79C. The offences involved a child under her care. The accused subsequently pleaded guilty having been cautioned by the court as to the seriousness of the offences. The matter, thus, proceeded to sentencing.

A pre-sentence report described the accused as an orphan who had migrated to Nairobi seeking work, had no previous convictions, and was remorseful. The probation officer recommended a non-custodial sentence.



However, the prosecution submitted that the offence involved a grave breach of trust and had inflicted emotional harm on the minor, whose parents, though forgiving, remained deeply affected.

The court received a victim impact statement, as well as direct expression from the child based on the Lowenfeld projection method. The child conveyed distress and emotional trauma. The court recognised that the accused, a caregiver, had exploited her position and violated a child's inherent trust, underscoring the broader context of rising online sexual exploitation of minors.

### **Issues**

- i. Whether a guilty plea by a first offender was sufficient to justify a non-custodial sentence for an offence involving child pornography.
- ii. Whether the abuse of a position of trust by the accused constituted an aggravating factor requiring enhanced penal measures.
- iii. Whether restitution and protective orders could be imposed alongside or in place of a custodial or financial sentence.
- iv. What were the principles governing sentencing in child pornography offences?

### **Relevant provisions of the Law**

#### **Computer Misuse and Cybercrimes Act, cap 79C**

#### **Section 24 - Child pornography**

*(1) A person who intentionally—*

*(a) publishes child pornography through a computer system;*

*(b) produces child pornography for the purpose of its publication through a computer system;*

*(c) downloads, distributes, transmits, disseminates, circulates, delivers, exhibits, lends for gain, exchanges, barter, sells or offers for sale, lets on hire or offers to let on hire, offers in another way, or make available in any way from a telecommunications apparatus pornography; or*

*(d) possesses child pornography in a computer system or on a computer data storage medium,*

*commits an offence and is liable, on conviction, to a fine not exceeding twenty million or to imprisonment for a term not exceeding twenty five years, or both.*

### **Held**

1. While a guilty plea and first-offender status were mitigating factors, they did not automatically justify a non-custodial sentence in serious offences involving exploitation of children. The harm caused to the child, and the public interest in deterrence, were paramount considerations.
2. In the instant matter, the accused's role as a caregiver constituted a significant aggravating factor. Thus, that breach of trust substantially increased culpability.
3. Restitution and protective orders were appropriate and necessary complements to penal sentencing in child protection matters. Such orders were permitted under section 26 of the Victim Protection Act, cap 79A, and were in line with restorative justice objectives.
4. Pursuant to article 53 (2) of the Constitution, sentencing ought to reflect the constitutional imperative to safeguard the best interests of the child. Sentencing should serve the objectives of deterrence, denunciation, and community protection, especially in the context of rising digital crimes against children.

*Accused was sentenced.*



## **Orders**

- i. *Accused was sentenced in:*
  - a. *Count 1; to a fine of Kenya shillings five million(5,000,000/-), in default to serve 5 years imprisonment*
  - b. *Count 2: to a fine of Kenya shillings five million (5,000,000/-), in default to serve 5years imprisonment*
  - c. *Count 3: to a fine of Kenya Shillings five million (5,000,000/-), in default to serve 5 years imprisonment.*  
*Sentence to run concurrently*
- ii. *A Protection and Care file be opened for the child to enable her proceed for trauma assessment/counselling. The court was to issue further orders after the file was opened.*
- iii. *Victim Restitution Orders under section 26 of the Victim Protection Act:*
  - a. *In addition, to the fine, the accused person to pay a restitution amount of 2,000,000/-*
  - b. *Restitution to take precedence over the fine.*
  - c. *If the accused person was unable to raise the said amount, then the victim was at liberty to claim the same under the Victim Protection Trust Fund.*
- iv. *All images in relation to this matter, be expunged from all social, print and visual media platforms.*
- v. *Directorate of Criminal Investigation’s Child Protection Unit to ensure compliance with order (iv) above, through the relevant authorities.*
- vi. *The exhibit (phone) to be forfeited to the Communications Authority 14 days from the date of the instant ruling.*

## **Citations**

### **Cases**

#### **Kenya**

1. *MWK & another v Attorney General & 4 others; Independent Medical Legal Unit (IMLU) (Interested Party); The Redress Trust (Amicus Curiae) Constitutional Petition 347 of 2015; [2017] KEHC 1496 (KLR) - (Explained)*
2. *Ochieng, Benson & another v Republic Miscellaneous Criminal Case 45 of 2018; [2018] KEHC 3749 (KLR) - (Explained)*

### **Texts**

National Council on Administration of Justice (2023), *Sentencing Guidelines* Nairobi: National Council on the Administration of Justice

### **Statutes**

#### **Kenya**

1. Computer Misuse and Cybercrimes Act (cap 79C) section 24(1) - (Interpreted)
2. Constitution of Kenya article 21(3)- (Interpreted)
3. Victim Protection Act (cap 79A) section 26 - (Interpreted)

### **Advocates**

*Mr Owuor* for the State



## SENTENCE

### Background

1. The accused person herein was charged with the offence of child pornography, contrary to section 24(1) of the [Computer Misuse and Cybercrimes Act](#):

“A person who, intentionally —

- (a) publishes child pornography through a computer system;
  - (b) produces child pornography for the purpose of its publication through a computer system;
  - (c) downloads, distributes, transmits, disseminates, circulates, delivers, exhibits, lends for gain, exchanges, barter, sells or offers for sale, lets on hire or offers to let on hire, offers in another way, or make available in any way from a telecommunications apparatus pornography; or
  - (d) possesses child pornography in a computer system or on a computer data storage medium, commits an offence and is liable, on conviction, to a fine not exceeding twenty million or to imprisonment for a term not exceeding twenty five years, or both.”
2. On February 19, 2024, she pleaded guilty, after the court had warned her of the seriousness of the offence. It is now upon this court to mete out an appropriate sentence.

### Pre-sentence Report

3. The presentence report dated March 4, 2024 indicates that the accused person is an orphan who came to Nairobi in search of greener pastures. That she is remorseful and has no previous record. The probation report indicates that she is suitable for a non-custodial sentence.

### Victim Impact Statement

4. The learned prosecuting counsel stated in his submissions that the subject’s parents had forgiven the accused person. He was of a different view. That the child had trusted the accused person and had a liking for her and she betrayed that trust.

### Mitigation

5. In mitigation the accused person informed the court that she was remorseful and asked for forgiveness.

### Sentencing Guidelines

6. The National Council on Administration of Justice [Sentencing Guidelines \(2023\)](#) state as follows:

“Sentences are imposed to meet the following objectives. There will be instances in which the objectives may conflict with each other – insofar as possible, sentences imposed should be geared towards meeting the objectives in totality.



- i. Retribution: To punish the offender for 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 to discourage the public from committing offences.
- iii. Rehabilitation: To enable the offender to reform from his/her criminal disposition and become a law-abiding person.
- iv. Restorative justice: To address the needs arising from the criminal conduct such as loss 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 by removing the offender from the community thus avoiding the further perpetuation of the offender's criminal acts.
- vi. Denunciation: To clearly communicate the community's condemnation of the criminal conduct.
- vii. Reconciliation: To mend the relationship between the offender, the victim and the community.
- viii. Reintegration: To facilitate the re-entry of the offender into the society"

7. Ngugi, J (as he then was) in *Benson Ochieng & another v Republic* [2018] eKLR stated as followings on considerations before sentencing:

“Re-phrasing the Sentencing Guidelines, there are four sets of factors a court looks at in determining the appropriate custodial sentence after determining the correct entry point (which, as stated above, I have determined to be fifteen years imprisonment). These are the following:

“..... Circumstances Surrounding the Offender: The factors here include the following:

- i. The criminal history of the offender: being a first offender is a mitigating factor;
- ii. The remorse of the applicant as expressed at the time of conviction;
- iii. The remorse of the applicant presently;
- iv. Demonstrable evidence that the applicant has reformed while in prison;
- v. Demonstrable capacity for rehabilitation;
- vi. Potential for re-integration with the community;
- vii. The personal situation of the Offender including the Applicant's family situation; health; disability; or mental illness or impaired function of the mind.



- c. Circumstances Surrounding the Victim: The factors to be considered here include:
- i. The impact of the offence on the victims (if known or knowable);
  - ii. Whether the victim got injured, and if so the extent of the injury;
  - iii. Whether there were serious psychological effects on the victim;
  - iv. The views of the victim(s) regarding the appropriate sentence;
  - v. Whether the victim was a member of a vulnerable group such as children; women; Persons with disabilities; or the elderly;
  - vi. Whether the victim was targeted because of the special public service they offer or their position in the public service; and
  - vii. Whether there been commitment on the part of the offender (applicant) to repair the harm as evidenced through reconciliation, restitution or genuine attempts to reach out to the victims of the crime.”

## Child Online Protection

### Why protect children from online intrusion?

8. Article 21(3) of the Constitution declares them vulnerable:

“All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, Constitution of Kenya, 2010 21 youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities”

In the case of MWK & another v Attorney General & 4 others; Independent Medical Legal Unit (IMLU) (Interested Party); The Redress Trust (amicus curiae) (Constitutional Petition 347 of 2015) [2017] KEHC 1496 (KLR) (Constitutional and Human Rights) (18 December 2017) (Judgment) the Court pronounced itself thus:

“Contrary to the position pre-2010, our constitutional dispensation has ushered in a new era – an era where the best interests of a child must be accorded paramount importance in all matters affecting the child – an era where we, as society, are committed to raising, developing and nurturing our children in an environment that conduces to their well-being. This resolve was captured admirably in the following passage:-

“Children are precious members of our society and any law that affects them must have due regard to their vulnerability and their need for guidance. We have a duty



to ensure that they receive the support and assistance that are necessary for their positive growth and development. Indeed, this court has recognised that children merit special protection through legislation that guards and enforces their rights and liberties. We must be careful, however, to ensure that, in attempting to guide and protect children, our interventions do not expose them to harsh circumstances which can only have adverse effects on their development.”

### **Child’s Views**

9. I had a chance to interview the child. I invoked the principle of child expression through art (Lowenfeld theory<sup>1</sup>) . She was sad and expressed displeasure over the photos that had allegedly been taken by the accused person . She broke down during the interview.
10. The accused person owed a duty of care to the victim. She trusted her as a primary caregiver given that working parents spend less time with their children. I also take judicial notice of the fact that online child exploitation has reached epidemic proportions globally. And many a child are suffering in silence.
11. I have further considered the age of the offender, the fact that she has saved precious judicial time by pleading guilty. She is also a first offender This will inform the sentence to be meted

### **Disposition**

12. A report by Innocent Lives Foundation, posits as follows on effects of child pornography a child’s psychological wellbeing:

“... Ultimately, this leaves the child with a lifetime of re-victimization through knowing their abuse will always be on the internet for anyone to see. As a result, they feel helpless, afraid, humiliated, and like they have no control over their images of abuse. This psychological damage encompasses disruptions in sexual development, self-image, and developing trusting relationships in the future. These children live with pain and suffering because pedophiles took advantage of them.”<sup>2</sup>

### **Sentence**

13. Sentence objective:DeterrenceRestitution  
Count 1: Kenya Shillings five million (5,000,000/-) in default to serve 5 years imprisonment  
Count 2: Kenya Shillings five million (5,000,000/-) in default to serve 5years imprisonment  
Count 3: Kenya Shillings five million (5,000,000/-) in default to serve 5 years imprisonment  
Sentence to run concurrently

### **Further Orders:**

- i. That a Protection and Care file be opened for the child to enable her proceed for trauma assessment/counselling. Court will issue further orders once the file is opened
- ii. Victim Restitution Order under section 26 of the *Victim Protection Act*In addition, to the fine, the accused person to pay a restitution amount of 2,000,000/-Restitution to

<sup>1</sup> <https://www.d.umn.edu/artedu/Lowenf.htm>

<sup>2</sup> <https://www.innocentlivesfoundation.org/the-lasting-effects-of-child-pornography/>



take precedence over the fine. In the event the accused person is not able to raise the said amount, then the victim is at liberty to claim the same under the Victim Protection Trust Fund

- iii. All images in relation to this matter, be expunged from all social, print and visual media platforms
- iv. Directorate of Criminal Investigation's Child Protection Unit to ensure compliance with order (iv) above, through the relevant authorities
- v. The exhibit (phone) to be forfeited to the Communications Authority 14 days from today's date
- vi. 14 days right of appeal (explained)

**DATED, SIGNED AND DELIVERED IN OPEN COURT ON THIS 15<sup>TH</sup> DAY OF APRIL, 2024**

**JACKIE KIBOSIA, PM**

In the presence of:-

Mr. Owuor for the State

The accused person

Mr. Mohamed, CA

