



**Republic v GL (Sexual Offence E005 of 2024)
[2024] KEMC 53 (KLR) (16 October 2024) (Sentence)**

Neutral citation: [2024] KEMC 53 (KLR)

**REPUBLIC OF KENYA
IN THE MARALAL LAW COURTS
SEXUAL OFFENCE E005 OF 2024
AT SITATI, SPM
OCTOBER 16, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

GL ACCUSED

SENTENCE

- 1 In the main count, the accused person denied the charge of defilement contrary to section 8(1)(3) of the [Sexual Offences Act](#). The particulars were that on diverse dates between 7th August and 29th August, 2024 at night at xxxxx area of xxxxxxxxxxx Sub-County of Samburu County he unlawfully caused his penis to penetrate the vagina of M.N. (initials) a child aged 12 years old.
- 2 In the alternative count, he was denied the offence of committing an indecent act to a minor contrary to section 11(1) of the [Sexual Offences Act](#). The particulars were that on diverse dates between 7th August and 29th August, 2024 at night at xxxxxxxx area of xxxxxxxx Sub-County of Samburu County he intentionally and unlawfully caused his penis to touch the vagina of M.N. (initials) a child aged 12 years old.
- 3 The accused person was unrepresented in this case while the DPP’s case was conducted by Prosecution Counsel Moses Ndira.
- 4 After hearing the DPP and the Defence the court found the accused person guilty of defilement and convicted him under section 215 of the [Criminal Procedure Code](#).

Antecedents of the Convict

- 5 DPP Ndira submitted that the convict was a first offender and he had no previous records.



Mitigation

6 In mitigation, the convict told the court that he did not commit the offence. He submitted that he had lived with the child as his own in spite of the mother getting the child out of wedlock.

8. Defilement

- (1). A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
- (3) 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.

Sentencing Principles

7 On the authorities, the court considered that of *Geoffrey Kilonzo Makau v Republic* (2020)eKLR (Odunga J. as he then was) where learned Judge made an exposition of the principles applicable in considering an appropriate sentence:

“ 11. This court would need to consider some cases which will assist it to reach a just decision in regard to the sentencing of the accused. In the case *R v Scott* (2005) NSWCCA 152 Howie J Grove and Barr JJ stated:

“There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...One of the purposes of punishment is to ensure that an offender is adequately punished...a further purpose of punishment is to denounce the conduct of the offender.”

12. In a New Zealand decision namely *R v AEM* (200) it was decided:

“... One of the main purposes of punishment...is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield them, they will meet this punishment.”

13. In *R vs. Harrison* (1997) 93 Crim R 314 it was stated:-

“Except in well- defined circumstances such as youth or mental incapacity of the offender...Public deterrence is generally regarded as the main purpose of punishment, and this objective considerations relating to particular prisoner (however persuasive) are necessarily subsidiary to the duty of the courts to see that the sentence which is imposed will operate as a powerful factor in preventing the commission of similar crimes by those may



who otherwise would be tempted by the prospect that only light punishment will be imposed.”

14. As regards the sentence, the Supreme Court in *Francis Karioko Muruatetu & Another vs. Republic*, Petition No. 15 of 2015, as a guide in sentencing held that:

“ [71] ...the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- (a) age of the offender;
- (b) being a first offender;
- (c) whether the offender pleaded guilty;
- (d) character and record of the offender;
- (e) commission of the offence in response to gender-based violence;
- (f) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaptation of the offender;
- (h) any other factor that the Court considers relevant.

15. In this case the manner in which the death of the deceased was executed reveals a cold scheming perpetrator who is slow in forgiving and one who has poor anger management and lack of self-control. He is a person who was prepared to take his own life after taking that of the deceased.

16. As appreciated by the Supreme Court in Muruatetu Case (*supra*):

“In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in *Dahir Hussein v. Republic* Criminal Appeal No. 1 of 2015; [2015] eKLR, where the High Court held that the objectives include: “deterrence, rehabilitation, accountability for one’s actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.” The 2016 *Judiciary of Kenya Sentencing Policy Guidelines* lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

“Sentences are imposed to meet the following objectives:

1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.



3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
5. Community protection: To protect the community by incapacitating the offender.
6. Denunciation: To communicate the community's condemnation of the criminal conduct."

The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict."

Recent Authorities On Similar Offences Of Defilement

- 8 In the present case, the offence attracts life imprisonment since the child had not yet clocked 12 years of age. The question that arises is that amounts to "life imprisonment?" To answer this issue, the court considered the authority of *Muriithi v Republic* (Criminal Appeal E067 of 2023) [2024] KEHC 6536 (KLR) (3 June 2024) (Judgment) (Kizitro Magare J.) where it was held that life imprisonment shall be read to mean 30 years:

"In the case of *Barasa v Republic* (Criminal Appeal 219 of 2019) [2024] KECA 324 (KLR) (15 March 2024) (Judgment), the court of Appeal stated as follows: -"Given the circumstances in which the offence was committed, the complainant being a young girl whom the appellant as the stepfather ought to have protected but instead violated, the appellant deserved a deterrent sentence. The sentence of life imprisonment was an option which was available in the exercise of discretion in sentencing and would in our view have been appropriate.¹³In accordance with our decision in *Evans Nyamari Ayako v Republic* (supra), translating life imprisonment to a term sentence of 30 years' imprisonment, we allow the appellant's appeal; on sentence to the extent of substituting the sentence of life imprisonment that was imposed on the appellant with a term sentence of 30 years' imprisonment. The sentence of 30 years shall be calculated from the date the appellant was first arraigned in court in accordance with Section 333(2) of the *Criminal Procedure Code*."

- 9 In the case of *Thaithi v Republic* (Criminal Appeal E007 of 2020) [2024] KEHC 10639 (KLR) (11 September 2024) (Judgment) (Rhoda Rutto J.) the child was aged 11 years 9 months old and the appellant who was her mother's boyfriend defiled her in the middle of the night when the mother left the house to go and answer a call of nature in a toilet outside the house. He was sentenced to 45 years imprisonment in the following terms:

58. The appellant was sentenced to 45 years imprisonment. In passing sentence, the trial court considered all the mitigating factors and noted that: "Taking into account that the mandatory



sentence of life imprisonment was revised after the reasoning in Muruatetu case, looking into the case of David Esoku Samuel in which the court sentenced the accused to 25 years after 11 years in custody, the aggravating circumstances of this case and the fact that he never pleaded guilty. The court will sentence the accused to 45 years in jail....”.

59. The Appellant did not submit much on this save to mention that the sentence be set aside as the appeal has merit. I however note that trial court did not peg the sentence to the mandatory nature of sentence as provided for under the *Sexual Offences Act*. The court gave a deterrence sentence having considered the jurisprudence as at that time. This court finds no reason to disturb the sentence. The upshot is that the appeal on conviction fails for lack of merit. As regards sentence, the 45 years imprisonment sentence is also upheld save that in its computation, regard shall be borne to the period in remand custody during trial, from 31st December 2019.
- 10 A further guidance was from the Court of Appeal decision of *Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment) (P Nyamweya, JW Lessit & GV Odunga, JJ.A). in this appeal, the appellant had been sentenced to life imprisonment for defiling a child 4 ½ years. On appeal the Court of Appeal reviewed the life imprisonment to a determinate sentence of 40 years imprisonment in the following terms:
- “ 93. We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as for the protection of civilians who may be harmed by some prisoners. We find the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism”.
26. We are equally guided by this holding by the Supreme Court of Kenya, and in the instant appeal, we are of the view that having found the sentence of life imprisonment to be unconstitutional, we have the discretion to interfere with the said sentence.
27. The appellant also did not say anything in mitigation after conviction by the trial court, which he attributes to his young age at the time. We are also alive to the fact that he was convicted for defiling a child of 4 years and of the likely ramifications of his actions on the child’s future. We are therefore of the view that while the appellant should be given the opportunity for rehabilitation, he also merits a deterrent sentence. We, therefore in the circumstances, uphold the appellant’s conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction.
- 11 The offender herein expressed no remorse. While motive was not a relevant factor in the case, it appears that at the back of his mind he had considered the complainant an illegitimate child since in his mitigation he stated that his wife got her out of wedlock. The child was so traumatized that she started abusing drugs and substances so as to try without success to relieve the stress of being repeatedly defiled over a whole month by a person that she recognized as her own father. In the result, guided by the



Court of Appeal authorities of Manyeso And Ayako authorities on what constitutes a life sentences the court makes the following orders:

1. The convict is declared as a dangerous Sexual offender since the since was the victim of this traumatic experience. This declaration is made under section 39 of the *Sexual Offences Act* which states as follows:
 39. A court may declare a person who has been convicted of a sexual offence a dangerous sexual offender if such a person has -
 - (a) more than one conviction for a sexual offence;
 - (b) been convicted of a sexual offence which was accompanied by violence or threats of violence; or
 - (c) been convicted of a sexual offence against a child.
2. As a deterrent, punitive and a denunciation of the convict sentence, the court passes a sentence of 30 years imprisonment on the convict.

Right of appeal is 14 days.

DATED, READ AND SIGNED AT MARALAL LAW COURTS THIS 16TH DAY OF OCTOBER, 2024

HON.T.A SITAITI

SENIOR PRINCIPAL MAGISTRATE

MARALAL LAW COURTS

Present

DPP Ndira

Convicted Person

Leparsanti Court AssistanT

