



**Aloo v Republic (Miscellaneous Criminal Application E135 of 2024)  
[2024] KEHC 10149 (KLR) (14 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10149 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS CRIMINAL APPLICATION E135 OF 2024  
RE ABURILI, J  
AUGUST 14, 2024**

**BETWEEN**

**JAMES OMONDI ALOO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant is a convict in a defilement case at Nyando Law Courts. He was sentenced to serve ten years imprisonment for the offence of rape contrary to section 3 of the of the *Sexual Offences Act*. He deposes that he applied to the High Court vide HCCR MIsc E089 of 2022 and that the sentence was reduced although he does not state what portion thereof was reduced.
2. The applicant now applies for further reduction of the remainder of the said sentence because he is repentant and has reformed.
3. I have considered the application. Regrettably, the applicant is lucky to have had his sentence reduced in a sexual offence. It is now not business as usual in terms of discretion exercised by courts in sexual offences cases.
4. appealed to this Court vide HCRA 766 of 2019 which appeal was dismissed. He now applies for revision of sentence to a term sentence and that the period spent in custody pending trial be considered as stipulated in section 3333(2) of the the reasons are given below.
5. Prior to the directions of the Supreme Court in *Francis Karioko Muruatetu and Another v Republic* [2017] eKLR on 6<sup>th</sup> July 2021 that emphasized that the said case was only applicable to murder cases, courts re-sentenced petitioner/convicts for different offences, including sexual offences.
6. In the cases of defilement, the High Court and subordinate courts were bound by the Court of Appeal decision in the case of *Dismas Wafula Kilwake v Republic* [2018] eKLR where it held that Section



- 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing offences.
7. With the directions of the Supreme Court which clarified that the case of Francis Karioko Muruatetu and Another v Republic (Supra) was applicable to re-sentencing in murder cases only, courts have since stopped re-sentencing applicants in sexual offences.
  8. However, on 3<sup>rd</sup> December 2021 while the Supreme Court directions of 6<sup>th</sup> July 2021 were still in place, in the case of *GK v Republic* (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), the Court of Appeal reiterated that the law was no longer rigid with regard to minimum mandatory sentences and would take into account the peculiar circumstances of each case.
  9. On 15<sup>th</sup> May 2022 which was also after the directions of the Supreme Court, in the case of *Mainingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR), Odunga J (as he then was) held that to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of Article 28 of the Constitution of Kenya, 2010. He, however, clarified that it was not unconstitutional to mete out the mandatory sentence if the circumstances of the case warranted such a sentence.
  10. In the case of *Joshua Gichuki Mwangi v Republic* [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of *Dismas Wafula Kilwake v Republic* (Supra) and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.
  11. However, the aforementioned decision was overturned by the Supreme Court on the 12th July 2024, just a month ago, in Petition No. E018 of 2023 *Republic v Joshua Gichuki Mwangi* wherein the court faulted the Court of Appeal's decision to reduce the sentence meted out on the appellant from 20 years to 15 years on the grounds of unconstitutionality or otherwise of minimum sentences under the *Sexual Offences Act* and discretion to mete out sentences under the said Act. The Supreme Court noted that:

“The reasoning behind the court'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.”
  12. 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 and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid.
  13. For the above reasons, I find the application for sentence reduction an abuse of court process as the applicant already benefitted from sentence reduction before the above decisions was rendered by the Supreme Court. I find no reason to sit on appeal of this court's decision.
  14. The upshot of the above is that this application for review of sentence lacks merit and the same is hereby dismissed.
  15. This file is closed.
  16. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 14<sup>TH</sup> DAY OF AUGUST, 2024**

**R.E. ABURILI**



**JUDGE**

