



REPUBLIC OF KENYA



KENYA LAW
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**Omollo v Republic (Criminal Application E103 of 2024)
[2024] KEHC 10038 (KLR) (12 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10038 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPLICATION E103 OF 2024
RE ABURILI, J
AUGUST 12, 2024**

BETWEEN

MICHAEL ODHIAMBO OMOLLO APPLICANT

AND

REPUBLIC RESPONDENT

*(From the original conviction and sentence in Winam
SPM Criminal Case No. 377 of 2012 on 21/11/2017)*

RULING

1. The applicant in this matter is Michael Odhiambo Omollo. He was convicted and sentenced to serve life imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*.
2. He appealed to the High Court vide HCCRA 18 of 2017 which appeal was dismissed. He claims that he did not appeal to the Court of Appeal. He now seeks for review of the life imprisonment to a lesser severe sentence. He has also sought for consideration of the period spent in remand custody pending trial although he has not stated what period and neither has he annexed copies off the trial court record. That said, life imprisonment means just that and not being a term period, the period spent in remand custody if at all he was not released on bond is immaterial.
3. Having said that, the question is whether this court has jurisdiction at this moment in time to review the life imprisonment to a lesser term, noting that that is the mandatory sentence provided for under section 8(2) of the *Sexual Offences Act*.
4. in the case of *GK v Republic* (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), the Court of Appeal stated that the law was no longer rigid with regard to minimum mandatory sentences and would take into account the peculiar circumstances of each case.



5. On 15th May 2022 which was also after the directions of the Supreme Court, in the case of *Maingi & 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.
6. 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.
7. However, the aforementioned decision was overturned by the Supreme Court on the 12th July 2024, exactly one 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.”
8. 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.
9. In the circumstances, the applicant convict herein has not demonstrated before this court that the sentence rendered by the trial court was illegal or that it was arrived at by a wrong exercise of jurisdiction and in the circumstances, I find no reason to interfere with the same. Furthermore, the High Court already pronounced itself on the lawfulness of that sentence and dismissed the appeal No 18 of 2027, against conviction and life imprisonment.
10. Accordingly, the application dated 14th may, 2024 is found to be devoid of merit and is hereby dismissed.
11. Signal to issue.
12. File is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 12TH DAY OF AUGUST, 2024

R. E. ABURILI

JUDGE

