



**Kiiru v Republic (Criminal Petition E086 of 2023)  
[2024] KEHC 14934 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14934 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL PETITION E086 OF 2023**

**E OMINDE, J  
NOVEMBER 28, 2024**

**BETWEEN**

**JOHN KIIRU ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Petitioner herein was charged with the offence of defilement contrary to Section 8 (1) (3) of the of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between the month of March 2020 and 12/11/2020 at [Particulars Withheld] within Uasin Gishu County, the Petitioner intentionally and unlawfully caused his penis to penetrate the vagina of AC, a child aged 12 years and 8 months.
2. The Petitioner was also charged with the alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the same date and same place as above, he intentionally caused his penis to come to contact with the vagina of the same AC, a child.
3. After analysing the evidence, on 4/03/2022 the Trial Court found the Petitioner guilty and convicted him for offence of defilement and on 7/03/2022 the trial Court sentenced the Petitioner to serve 20 years imprisonment.
4. Aggrieved by the judgment of the trial Court, the Petitioner preferred an appeal before this court being Criminal Appeal No. E055 of 2017 wherein Hon. Justice Wananda upheld the conviction by the trial Court but he set aside the sentence of 20 years imprisonment imposed by the trial Court and substituted it with a sentence of 14 years imprisonment.
5. The Petitioner has now approached this Court vide an undated Notice of Motion wherein he seeks sentence review in accordance with Article 50(2) (p) & (q) of *the Constitution*. The Petitioner seeks a



non-custodial sentence pursuant the proviso of Section 39(2) of the *Sexual Offences Act*, 2006. The Petitioner wants the remainder of his sentence to be substituted with a non-custodial sentence owing to fact that he is now reformed and rehabilitated and now begs for leniency.

6. The Petition is opposed by the State vide the submissions filed by Prosecution Counsel, S.G. Thuo on 23/10/2024. He submitted that the Petitioner herein was charged and convicted initially to 20 years imprisonment that was subsequently commuted to 14 years imprisonment for the charge of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*, 2006.
7. He further submitted that the commutation was not only unlawful but also manifestly lenient as the law dictates the minimum sentence for the same to be imprisonment to a prison term of not less than 20 years. Counsel relied on the Supreme Court decision in Petition No. E018 of 2023, Republic V Joshua Gichuki Mwangi & Others; and further submitted that the sentence meted on the Petitioner is unlawful and he urged the Court to enhance the same to term of not less than 20 years as provided by the law.

### **Analysis and Determination**

8. I have given due consideration to the application for revision of sentence as well as the submissions by the parties. In the premises, the issue for determination is Whether the Petitioner has recourse to non-custodial sentence under Section 39(1) and (2) of the *Sexual Offences Act*, on the basis of the period so far served.
9. That provision states thus:
  - (1) 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) Whenever a dangerous sexual offender has been convicted of a sexual offence and sentenced by a court to imprisonment without an option of a fine, the court shall order, as part of the sentence, that when such offender is released after serving part of a term of imprisonment imposed by a court, the prisons department shall ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence."
10. From the foregoing provisions it is evident that whereas the Petitioner qualified for declaration as a dangerous sexual offender for purposes of Section 39 of the *Sexual Offences Act*, given the fact that he was convicted of a sexual offence against a child, it is noteworthy that he was not so declared by the Court that convicted and sentenced him. Section 39(2) of the Act is explicit that:

“...the court shall order, as part of the sentence, that when such offender is released after serving part of a term of imprisonment imposed by a court, the prisons department shall ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence...”
11. Hence, “the Court” for the purposes of the aforementioned provision is the Trial Court. Therefore, in the absence of an order of the trial Court made as part of the Petitioner’s sentence pursuant to Section 39(2) of the *Sexual Offences Act*, it was misconceived for the Petitioner to seek succour under



the aforementioned provision. Moreover, the object of that provision is to provide a mechanism for the supervision of dangerous offenders and not to secure their release. This being the case, it is my very well considered opinion that the orders sought by the Petitioner are untenable under Section 39(2) of the *Sexual Offences Act*.

12. It is further worth noting that Petitioner herein was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006 and was sentenced to serve 20 years' imprisonment. It is also not in doubt that under Section 8(3) of the *Sexual Offences Act*, a person found guilty of defiling a child aged 12 to fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years. He however on appeal got a lenient sentence of 14 years.
13. According to the Sentencing Policy Guidelines, non-custodial sentence, except fines, is best suited for minor offences and for a prescribed limited length of sentences. The offence of defilement, and particularly of a child aged 12 years is quite grave and serious. I take the view that the Petitioner herein already benefitted from this Court's leniency in handing him a 14 years' sentence, for an offence whose prescribed minimum sentence is 20 years imprisonment. He therefore does not deserve a non-custodial sentence.
14. The Petitioner, however, has gone ahead to invoke Article 50(2)(p) & (q) of *the Constitution*. It is important to reproduce the cited Article in order to appropriately answer to this aspect of the application. It states:

“ 50.

- (2) every accused person has the right to a fair trial, which includes the right- a).....
  - 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 that the offence was committed and the time of sentencing; and
  - q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”

15. A reading of the cited provisions will show that they will not come to the rescue of the Petitioner. Article 50(2)(p) can only be invoked where a less severe sentence is legislated in the course of the trial. In the Petitioner's case he has not shown that a less severe sentence had been passed by the time the court was passing sentence on him.
16. As for Article 50(2) (q), it is clear that an appeal or review can only lie to a higher court. This Court having dealt with the applicant's appeal, the only higher court he ought to have moved to was the Court of Appeal. The provision does not grant this court the jurisdiction to sit on appeal against its decisions or to review them. The Petitioner cannot therefore benefit from that provision.
17. I therefore find that his Application is misconceived and lacks merit. The same is accordingly dismissed. The Appellant's Right of Appeal within 14 days is explained

**READ DATED AND SIGNED IN OPEN COURT ON 28<sup>TH</sup> NOVEMBER 2024**

**E. OMINDE**

**JUDGE**

