



REPUBLIC OF KENYA



**Ngige v Republic (Criminal Revision E274 of 2021)
[2023] KEHC 281 (KLR) (27 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 281 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL REVISION E274 OF 2021
LN MUGAMBI, J
JANUARY 27, 2023**

BETWEEN

KENNEDY MWANGI NGIGE APPLICANT

AND

REPUBLIC RESPONDENT

((C.A Revision from original conviction and sentence of the Senior Principal Magistrate’s Court at Ruiru K. Kisiangani, SRM) dated 24th June, 2020 in Criminal Case (S.O) No. 17 of 2017)

RULING

1. The applicant Kennedy Mwangi Ngige was convicted and sentenced in the Senior Principal Magistrate’s Court at Ruiru in Sexual Offences (S.O.) No. 17 of 2019. He was sentenced to serve five years imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*.
2. In the present application, he prays for revision of the sentence. Under section 362 of the *Criminal Procedure Code*, the High Court is granted supervisory powers over the lower court. In exercising the said powers:-

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”
3. Section 364(1) provides for orders that the High Court may pass in its exercise of revisionary powers. Those orders include the powers conferred to the High Court as a court of appeal by sections 354, 357, and 358 where there is a conviction, in particular, the High Court may reduce or enhance a sentence meted on a convict.



4. The above statutory provisions are anchored on article 165(6) and 165(7) of the Constitution.
5. There are principles to guide alteration of a sentence which were laid down in the respected decision of *Ogolla v R* (1954) EACA 270 where it was held: -

“The court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors. To us, we would add, third criterion namely; the sentence is manifestly excessive in view of the circumstances of the case (*R v Shermosky* (1912) 28TLR 263.”

6. In the instant case, the applicant was convicted for a defilement contrary to section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006.
7. The particulars of the offence were that on 19th day of September, 2019, at [Particulars Withheld] area in [Particulars Withheld] within Kiambu County, intentionally and unlawfully caused his penis to penetrate the vagina of (BC) a child of 15 years.
8. The punishment provided for under section 8(3) of the Sexual Offences Act upon conviction of this offence is as follows: -

“(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.”

9. In this case, the trial court imposed a term of five years imprisonment. This was a quarter (1/4) of the prescribed minimum sentence for that offence.
10. I am aware of the evolving jurisprudence where even the Court of Appeal in Criminal Appeal No 84 of 2015 – *Joshua Gichuhi Mwangi v Republic* has restored the discretion of the court in sentencing on the basis that the imposition of mandatory sentences by legislature conflicts with principle of separation of powers. It also observed that mandatory deprive the court the power to determine the appropriate sentence depending on circumstances of each case.
11. In that case, the Court of Appeal, despite setting aside the minimum sentence of 20 years punishment for defilement under section 8(1) as read with section 8(3), it substituted appellant’s to fifteen (15) years imprisonment.
12. What the Court of Appeal has asserted is that sentencing is, has, and will always be an exercise in judicial discretion. However, judicial discretion must meet one cardinal test, whether in sentencing or in any matter that the court is called to apply, it must be used judiciously. Applied in sentencing, it means that even when it is expressed that the court may impose a maximum sentence or any other option, it must be always be clear in its reasons why it has preferred a shorter, a longer sentence or any other mode of punishment. The court must show what it has considered to give a lesser or longer term. In a serious crime such as defilement of a minor, the bar is even be higher considering the principle of proportionality in sentencing and the effect of the such offences on their victims. The Court must be thorough and must come out convincingly especially in a case like this where it imposed ¼ of the prescribed minimum sentence; restoration of sentencing discretion in sexual offences cases notwithstanding.
13. The Judiciary sentencing policy has explained a number of principles which the court must bear in mind while sentencing. The principles include proportionality – where the sentence meted out must be proportionate to the offences committed, uniformity – where same sentences must be applied to



offenders if committed in similar circumstances and, accountability – where reasons for consideration leading to the sentence must be clearly spelt out among others.

14. Looking at the record of the trial court at the time of sentencing the accused/applicant to five years imprisonment defilement, the sentencing process went on as follows:

Mitigation: My mother is sickly and my father passed away. I have nothing else to state.

Sentence:

“I have considered the mitigation, the fact that the accused is a 1st offender, the nature of the offence which is rampant and there is a need for deterrent sentence.

I have also considered the mitigation and noted that the accused has been in remand since 30/9/2019. For these reasons, I hereby sentence the accused for five (5) years imprisonment.”

The date of sentence was on 26/6/2020.

15. From the above, it clear there was no reference made by the court as to circumstances under which this offence was committed. I have dug through evidence that led to the conviction of the accused/applicant in order to appreciate the circumstances under which the accused defiled the complainant, a young girl of 15 years who was in form 1 at the time.
16. The complainant had been sent away for school fees. She went to look for her mother and step-father at place they previously lived but found that they had moved out. She had only Kshs.160/= which could not take her to the new place, [Particulars Withheld]. She approached a boda boda man called Peter and explained her predicament. This man promised to take her to her parents. However, in what appears to have been a well-choreographed scheme, the girl was duped. She was instead dilly-dallied and eventually carried on the same boda boda that carried her and the accused/applicant apparently to be assisted to change from the school uniform she was wearing. She found herself at [Particulars Withheld] Apartment where she was left in a house alone. Afterwards, the said Peter came and started caressing her but she resisted and he stopped. That night, she slept on a sofa. The following day the accused/applicant came. He opened her jumper and started touching while mockingly asking her if she ever had slept with a man. The complainant stood and walked away but the accused/applicant picked a bottle and threatened to smash it on her. The accused/applicant ultimately forced her to have sex with him.
17. These are the circumstances under which the defilement happened as narrated by the complainant before the Lower Court upon which the accused was convicted.
18. At sentencing stage, the trial court did not ask for the victim impact assessment report.
19. The court also did not comment on the circumstances under which the defilement occurred.
20. Under article 165(7) of the Constitution, the High Court in exercise of its revisionary powers may make:-
- “any order or give any directions to ensure the fair administration of justice.”
21. In the supporting affidavit, the accused/applicant he asked the court to consider he was a first offender, he was 23 years when he committed the offence and was in the process of starting a family. That he had spent one year and five months in prison at the time of making this review application and that the period he had spent in remand should also be taken into account.



22. I have alluded to the circumstances under which this offence was committed. The lower court did not mention that it had taken that into account. As part of information necessary to guide the court in this sentence review, I will be seeking for a victim impact report for consideration in this revision. Once the report is received, the accused/applicant will be heard on appropriateness of the sentence. Thereafter, the court will proceed and finalise this revision. The Probation Department is given fourteen (14) days to file the victim impact report.
23. Those are the directions of the court. Mention before the Presiding Judge on 14/2/2023 for further orders.

RULING DATED AND DELIVERED AT KIAMBU THIS 27TH DAY OF JANUARY, 2023.

L.N. MUGAMBI

JUDGE

In the presence of :-

Coram:

Court Assistant: Kinyua

Applicant: Present

Respondent: Mr. Gacharia for DPP

COURT

Ruling delivered virtually.

L.N. MUGAMBI

JUDGE

