



REPUBLIC OF KENYA



KENYA LAW
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**Tanui v Republic (Criminal Revision 214 of 2022)
[2023] KEHC 2735 (KLR) (30 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2735 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION 214 OF 2022
RN NYAKUNDI, J
MARCH 30, 2023**

BETWEEN

DOMINIC KIMARU TANUI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged with the offence of defilement contrary to Section 8(1) as read together with Section 8(2) of the *Sexual Offences Act* No 3 of 2006 along with an alternative charge of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
2. The appellant pleaded not guilty and the matter proceeded to full hearing. The trial court, upon considering the evidence tendered in court and the testimonies of the parties, found the applicant guilty of the main charge and sentenced him to life imprisonment.
3. Being dissatisfied with the conviction and sentence he preferred an appeal. The appeal against conviction and sentence failed and was dismissed in its entirety. The applicant then filed the present application being an amended Notice of Motion dated August 27, 2023 seeking the following orders;
 1. Spent.
 2. That the sentence of life imprisonment that was imposed be hereby set aside.
 3. That the court considers the Applicant's mitigation and grant a sentence it deems fit.
 4. That the court considers the years that the Applicant has so far served in prison during resentencing and consider it sufficient in the circumstances.
4. The application is premised on the grounds set out therein and the contents of the affidavit annexed thereto.



5. The applicant's case is that the mandatory life sentence infringes on his right to a free trial as is envisaged in Article 50 of the Constitution. He urged that the mandatory nature of sentence undermines the courts discretion by forcing it to impose sentences which are pre-determined by the legislature contrary to the doctrine of separation of powers. He relied on the case of Petition No 97 of 2021 constitutional and Judicial Review Division in support of this submission. He stated that that trial court failed to exercise its discretionary powers to analyse the mitigating factors such as that the Applicant was a first-time offender with siblings who depended on him.
6. He stated that he had been incarcerated from the date when the trial court delivered its judgment on September 29, 2011 and that he has since then taken steps to reform. He urged that the court consider the time spent and the circumstances of the case and resentence him.

Whether the applicant's sentence should be reviewed

7. Sentencing and offender upon conviction rests in realm. Precisely as known in law judicial discretion is the power given to a Judge, magistrate or Chairman of a tribunal involved in the balancing Act of adjudication to choose between two or more alternatives when each of the alternatives is lawful. Judicial discretion the is:

'A legal condition in which the judge has the freedom to choose among a number of options. Where judicial discretion exists, it is as though the law were saying. 'I have determined the contents of the legal norm up to this point. From here on, it is for you, the judge, to determine the contents of the legal norm, for I, the legal system, am not unable to tell you which solution to choose.' It is as though the path of the law came to a junction, and the judge must decide with no clear path and precise standard to guide him-which road to take. When the judge is required to identify the values of society, he looks for those values that are shared by the members of the society, even if they are not his own. He avoids imposing on the society his subjective values, to the extent tht they are inconsistent with the articles of faith of the society in which he lives. When the judge must balance various values according to their weight, he should strive to do so according to what seems to him to be the s society's fundamental conception.' (See Aharon Barak, Judicial Discretion (Yadin Kaufmann trans, 1989) US Supreme Court Justice Benjamin Cardozo's Storrs Lectures at Yale Law School the Nature of the Judicial Process.

8. It is this discretion power vested in the courts and tribunals which the petitioners motion contents that the decision to impose life imprisonment for the offence he was found guilty be reviewed downwards. That takes me to the basic question as to the principles which govern the sentencing process before a court of law. I have in mind the persuasive dicta in *Republic vs ferix Madalitso Keke Confirmation Appeal NO 404 of 2010* where the court held as follows:

'Considerations of the public interest when sentencing offenders must go beyond considerations of deterrence; there is always the consideration that the public whose interest the sentence wants to serve includes the prisoner before the court at first instance. It is in the public interest that sentences are passed which are not cruel, degrading and inhuman. Harsh or lenient sentences may not necessarily serve the public interest; they are likely to have an opposite effect. While sentences must fit the crime, the offender and the victim, they must also fit and cohere with overall sentencing goals, justice, reformation, restoration and rehabilitation. Our sentences may not be in the public interest if they only succeed in instilling crime and fail in bringing the prisoner a better person in society's continuum.'



9. Perhaps more problematically, is the discourse on mandatory minimum sentences navigated by the Court of Appeal in the case of [*Joshua Gichuki Mwangi -vs- Republic Criminal Appeal No 84 of 2015 \(2022 eKLR\)*](#). The courts analysis focuses on the proud awareness placed upon the judges on application of discretion more significantly when imposing various statutory sentences in the context of a convicted offender. The explicit undertaking by the learned justices raised various fundamental questions within the province of sentencing and the power of discretion. Revisiting the decision in [*Daniel Kipkosgei Letting vs Republic \(2021\) eKLR*](#) the court emphasised the need to ensure consistency and the proportionality giving each case an individual approach notwithstanding the general similarity of the offence. In the Daniel case, (supra) it was observed as follows:

'That the purpose and objectives of sentencing as stated in the Judiciary sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principle of proportionality, deterrence and rehabilitation are adhered to. In this regard we think that the complaint that the sentence imposed was harsh and excessive is valid though it was the only sentence available then. We are therefore inclined to interfere with it. We therefore set aside the sentence of life imprisonment imposed on the appellant. Having considered the mitigation proffered by the appellant on record the sentence that commends to us is 25 years imprisonment.'

10. For the court it is very clear that mandatory minimum sentences are lawful and trial courts should conceptualise the guiding principles before passing the final verdict against the convict. As he suggested in the case of [*Athbanus Lijodi -vs- Republic \(2021\) eKLR*](#) mandatory minimum sentences remain to be part of our Criminal Legal System as the following extract signifies:

'On the issue of sentence, we reiterate that the life sentence imposed by the trial magistrate and affirmed by the High Court is not unconstitutional and can still be meted out in deserving cases Muruatetu's case (supra) notwithstanding. This court has on many occasions invoked the Muruatetu decision to reduce sentence that were hitherto deemed as minimum sentences. (See for instance *Evans Wanjala Wanyonyi v Republic (2019) eKLR*). Having said that however, we must hasten to add that this court will uphold a sentence prescribed by the [*Sexual Offences Act*](#) if upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence is deserved or merited.'

11. The contention resonates strongly with the statement by P Hanks *Constitutional Law in Australia (2nd ed 1996* at page 468) thus:

'As a result legislation that is properly characterised as an interference with or infringement of judicial power, as well as legislation that purports to usurp judicial power, contravenes the [*Constitution*](#)'s mandate of a separation of judicial from legislative and executive power.'

In addition the court in [*Leeth vs commonwealth \(1992\) \(174\) \(CLR 455\)*](#) Gaudron J explained the defining features of the judicial power as follows:-

'That it is essential feature of the judicial power that it should be exercised in accordance with the judicial process. A legislative direction which would require a power vested in a court to be exercised other than in accordance with that process is necessarily invalid its effect would be to take the power outside the concept of 'judicial power.'



12. Surveys of both National and comparative jurisprudence yield a harvest of general principles recognised in substance to guide the sentencer to the relevant facts to the case at hand. To this end, although mandatory minimum sentences strictly applied but with the advent of the supreme court decision in Francis Muruatetu it bolster the position that judicial discretion is at the heart of the fundamental concepts in the sentencing process for anything less it is simply an invitation to doing violence to the Constitution in Article 50 on the right to a fair hearing. The essential requirements of the court process is an obligation for those who have taken oath of office to act judicially. The doctrine on mandatory sentences as articulated and in accordance to the jurisprudential principles has not ousted the judicial discretion in compatibility with the judicial process and the rules of natural justice.

13. When the law demands Judges to do justice in sentencing it is starkly having in mind the principles in the persuasive decision of Malawi in *Republic vs Chikakuda and others (1997 (2) MLR at 292 – 293* the court pronounced itself as follows:

'Sentencing in a particular case could draw as much from the wisdom of others or the past. A sentencer could draw a lot from looking at sentences passed by himself in previous cases. There is much to gain from sentences passed in the same vicinity on akin circumstances. Then there is a trend set by superior courts. A sentencer is not necessarily bound to such decisions. Such decisions are helpful in assisting a sentencer arrive at an appropriate sentence in a particular case. All this is not intended to achieve uniform sentences. This is impossible given the variables. If justice, however, is supposed to be even-handed, offenders should be treated equally for infractions in similar circumstances.'

14. It is precisely of the nature of these principles that they belong to no particular system of law but they are common to them all. The central theme of the revision by the Applicant is that mandatory sentence of life imprisonment for the alleged offence so proved beyond reasonable doubt should be reviewed by this court placing reliance on mitigation, the personal circumstances, the period he has undergone transformation for the last 11 years serving part of the life sentence, strong positivism rehabilitation characteristics from the skills imparted in the prison environment. So what is the position of such and application? First and foremost, punishment of the offenders and particular their imprisonment is legitimately undertaken in pursued of a variety of goals including deterrence and rehabilitation. Yet it is not coherent for the courts to attempt to give meaning to the legitimate social goals of punishment without attending to the individual offender's life circumstances. This is the terrain I cling into to determine the merits or demerits of the application

15. The sentence prescribed for defilement under section 8(1) as read together with Section 8(2) of the Sexual Offences Act No 3 of 2006 is life imprisonment. However, the recent jurisprudence is that mandatory sentences are illegal as they deny the court the discretion to sentence an accused persons based on the circumstances of the case. In Mombasa High Court Constitutional Petition No 97 of 2021 – Edwin Wachira and 9 others vs Republic Hon Mativo J, when declaring that courts should have unfettered discretion in sentencing held as follows;

'For avoidance of doubt, a mandatory minimum sentence is not per se unconstitutional. The legislature in the exercise of its legislative powers is perfectly entitled to indicate the type of the sentence which would fit the offence it creates. It has never been suggested that the sphere of judicial power is invaded when Parliament provides for a maximum or minimum penalty for offences which are duly proved in courts of law. What is decried is absence of judicial discretion to determine an appropriate sentence taking into account the individual



circumstances of an accused person, depriving an accused person the right to be heard in mitigation and or depriving the court the discretion to determine an appropriate sentence.'

16. In *Maingi & 5 others v Director of Public Prosecutions & another Petition E017 of 2021* [2022] KEHC 13118 (KLR) (17 May 2022) where GV Odunga J (as he then was) stated as follows;

'To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of the *Constitution*. However, the Court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences.'

17. I have considered the submissions of the applicant and taken into account the offence he committed and the circumstances therein. I am alive to article 50(2)(p) of the *Constitution* which provides as follows;

- (2) Every accused person has the right to a fair trial, which includes the right— 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;

18. I have argued that this court strong message to sentencing is that mandatory prima facie mandatory minimum sentences are to be fashioned within the fulcrum of judicial discretion. Accordingly, one challenge is whether if truly the trial court took into account the deeper reflection on the trending jurisprudence from the stand point of Muruatetu and the succeeding precedents from other superior courts would he have still focused his legal lens to impose the impugned life imprisonment. A judge or a magistrate occupies a broader community of nations commonly referred to as society.

19. How is a judge properly to exercise discretion? The permissible perspective is to be found on what Barak calls the test of objectivity in the following excerpt

'When the judge is required to identify the values of society, he looks for those values that are shared by the members of the society, even if they are not his own. He avoids imposing on the society his subjective values, to the extent that they are inconsistent with the articles of faith of the society in which he lives. When the judge must balance various values according to their weight, he should strive to do so according to what seems to him to be the society's fundamental conception'. (See Aharon Barak, *Judicial Discretion* (Yadin Kaufmann trans, 1989)

20. The heart of the answer to the question is whether this court has the discretion to interfere with the sentence in question. I find so less in the outlined principles in the case of *Shadrack Kipchoge Kogo – vs- Republic in Criminal Appeal No 253 of 2003* at Eldoret in which the court stated as follows:

'That sentence is essentially and exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or that the sentence was so harsh and excessive that an error in principle must be inferred'

21. The instant case concerns a life sentence which in the motion of the applicant denotes that he would serve the whole of his life in prison. However, be that as it may be under Kenya law the president of the Republic is entitled to order the release of the person imprisoned for life in terms of Article 133 of the *Constitution*. There is therefore a presumption that upon exhaustion of the Right of Appeal within our



legal system the convicts under life imprisonment save for Article 133 of the Constitution is a sentence without commutation. May this time for the whole life sentence to measure up with Article 25 (A) of the Constitution for the convict to know at the outset of his or her sentence what he/she must do to be considered for release and under what conditions, including when the review of his/her sentence will take place within the scope of Article 133 of the Constitution. It is not in the public domain as to how long a prisoner must wait before he or she could expect to be considered for clemency. It is not lost with the court that issues surrounding long term loss of liberty present obvious psych-traumatic emotions and it is perceived to be inhuman and degrading sentence. Clearly, the courts should consider weighing carefully every critical aspect of the case to ensure life imprisonment is justified due to the existence of substantial and compelling circumstances.

- 22 The inference one draws from this analogy to the facts on record of the case at bar factoring in the gravity of the offence, weighted aggravating determiners, the accused age, no previous conviction and personal enticements I take the liberty to exercise discretion of reviewing the life imprisonment for the offence against the Applicant and have it substituted to a period of 40 years imprisonment with effect from the date of arrest. To that extent the committal warrant be amended to reflect the new order of this court. It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 30TH DAY OF MARCH 2023

.....

R. NYAKUNDI

JUDGE

In the Presence of:

Mr. Mugun for the state

The applicant in person.

