



**Republic v Kilele (Miscellaneous Criminal Application
E044 of 2022) [2023] KEHC 18075 (KLR) (24 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18075 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
MISCELLANEOUS CRIMINAL APPLICATION E044 OF 2022**

RL KORIR, J

MAY 24, 2023

BETWEEN

REPUBLIC APPLICANT

AND

ROBERT KILELE RESPONDENT

RULING

1. This Revision came to me through a Notice of Motion dated 9th November, 2022 filed by the Prosecution seeking orders that: -
 - i. That the application be certified urgent and heard on priority basis.
 - ii. That the Honourable court be pleased to call for the record in Bomet Magistrate Criminal Case No. SO E022/2022 and revise the sentence imposed by the trial court on the Respondent.
2. The Application was brought on the following grounds:-
 - i. That the Applicant has no right of appeal.
 - ii. That the Respondent was convicted on the charge of Committing an Indecent Act with a Child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006 on 27th October, 2022.
 - iii. That the trial court subsequently called for a pre-sentence report and proceeded to sentence the Respondent to serve 1 year imprisonment on 3rd November, 2022.
 - iv. That under the said section of the law, the court is mandated to impose a mandatory minimum sentence of 10 years imprisonment.
 - v. That the sentence imposed by the trial court is illegal, improper and unjust.



- vi. That the Supreme Court of Kenya clarified the issue of mandatory minimum sentences in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) Directions)
 - vii. That in the said clarification, the Supreme Court of Kenya clearly indicated that the mandatory death penalty was unconstitutional and so the decision only applied in murder cases.
 - viii. That the victim is a child of tender years aged 8 years old.
 - ix. That the said sentence sends a wrong message to society regarding the protection of children from sexual predators.
 - x. That the victim and her family are totally dissatisfied with the sentence imposed by the trial court.
 - xi. That this Honorable Court has the jurisdiction to revise the sentence imposed by the trial court.
3. Solomon Njeru the learned Prosecution Counsel filed a supporting affidavit sworn on 9th November, 2022. The averments in the supporting affidavit replicate the grounds listed above. He deponed further that the trial court misapprehended the law.
 4. The Accused, Robert Kilele was charged with the offence of attempted defilement contrary to Section 9 (1) (2) of the *Sexual Offences Act*. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*.
 5. In the Judgment dated 27th October 2022, the trial court found the prosecution had failed to prove the 1st charge. The trial court then convicted the Accused of the alternative charge and sentenced him to serve one year in prison. It is this sentence that the prosecution urges was illegal, improper and unjust.
 6. It was the Prosecution's case that the Supreme Court of Kenya clarified the issue of mandatory minimum sentences in *Muruatetu & another vs Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) (2021) KESC 31 (KLR) (6th July 2021) (Directions) where the court clearly indicated that the mandatory death penalty was unconstitutional and that the decision only applied to murder.
 7. The Prosecution urged that the trial court misapprehended the law when it issued a one-year sentence it opined that the victim was 8 years old and the Sentence sent a wrong message to the society regarding the protection of children from sexual predators. That the victim's family were totally dissatisfied with the Sentence imposed by the trial court.
 8. In his oral submissions before court, the Prosecution Counsel, Mr. Njeru submitted that the Sentence of 1 year was too lenient considering the fact that the victim was 8 years old. He further submitted that the Sentence should be proportional to the offence committed.
 9. The Respondent submitted that the court should let him finish his Sentence and pleaded that he did not want it increased. He further submitted that he had many dependants including his aged parents and children.
 10. This court's revisionary jurisdiction is exercised under the provisions of Section 362 of the *Criminal Procedure Code* which states: -

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.

11. For this revision, the powers of this court are provided for under Section 364 (1) (a) of the Criminal Procedure Code which provides: -

In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence.

12. I am persuaded by the case of *Joseph Nduvi Mbuvi vs Republic* (2019) eKLR, where Odunga J. (as he then was) held that: -

“In my view, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words, parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person. As was stated by the High Court of Malaysia in *Public Prosecutor vs. Muhari Bin Mohd Jani and another* [1996] 4 LRC 728 at 734, 735: -

“The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion... This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”.

13. Similarly, in *Reuben Mwangi Nguri vs Republic* (2021) eKLR, Kariuki J. held that: -

“It is plain from the above passage that the High Court is vested into wide revisionary powers to look into the orders, decisions, proceedings, sentences where any of the following circumstances manifest themselves.

- (a) Where the decision is grossly erroneous
- (b) Where there is no compliance with the provisions of the law.
- (c) Where the finding of fact affecting the decision as not based on the evidence or it is result of mis-reading or non-reading of evidence on record
- (d) Where the material evidence on the parties is not considered.
- (e) where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence...”



14. Regarding Sentencing, the Court of Appeal in *Bernard Kimani Gacheru vs Republic* (2002) eKLR, stated that: -

“It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist”.

15. The Respondent was convicted of an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* which provides: -

Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

16. The above Section is couched in mandatory terms meaning the least Sentence are can receive after being convicted of the charge of indecent act with a child was 10 years.

17. I am aware of the current robust debate and jurisprudence regarding the constitutionality or unconstitutionality of mandatory sentences. Indeed, the Supreme Court expressed itself on the issue of the mandatory minimum sentences. in the Muruatetu case (supra) where it stated that: -

“We therefore reiterate that, this Court’s decision in Muruatetu did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute”.

18. It was therefore bold of the trial magistrate to, as it were invalidate the minimum sentence in this case. The Sentence had no foundation in law thereby making it illegal.

19. The Criminal Procedure Bench Book at page 116 provides that: -

The sentences imposed should be geared towards achieving the following objectives set out in the sentencing policy guidelines (paragraph 4.1):

- i. Retribution.
- ii. Deterrence.
- iii. Rehabilitation.
- iv. Restorative justice.
- v. Incapacitating the offender.
- vi. Denouncing the offence, on behalf of the community.

20. The circumstances of the case were that the Respondent was convicted of an indecent act with a child. The child in question was 8 years old at the time the offence was committed. I have read and considered his mitigation in the trial court. He stated that he had a young family which depended on him.



21. I have read the Sentence Ruling by the trial court to understand why the learned trial magistrate would deviate and move so far away from the mandatory sentence. In the sentence issued on 3rd November, 2022, the court made reference to the current robust discourse on the propriety of minimum sentences. It cited the case of *Yawa Nyale vs Republic* (2018) eKLR, where the court expressed itself as follows: -

“It is now clear that certain provision of the *Sexual Offences Act* are a cause of concern in the country. The effect of the harsh minimum sentences imposed under the said Act of young people in this Country is a serious cause of concern. Our jails are overflowing with young people convicted courtesy of the provision of the said Act. While I appreciate the Sexual Offences do demean the victims of such crimes and ought not to be taken lightly, the general society in which we operate ought to be taken into account in order to achieve the objective of punishment. Penal provisions ought to take into account in objectives intended to be achieved and should not just be an end in themselves otherwise they may end up being unjust especially where the penalties imposed do not deter the commission of crimes where both the victim and the offender do not appreciate the wrong doing in question.” (Underline mine)

22. With respect the above case is clearly distinguishable. It concerned young people who collaborated in the offence. This was not the case here where the victim was an innocent 8-year-old.

23. The court also dwell at length on the Pre-Sentence report which was very positive and described the accused as a straight person and an assistant pastor of a church. That he had 8 minor children who were all school going and was also a recovering epileptic. It is the sum total of these circumstances which the court indicated warranted a deviation from the minimum sentence.

24. I have considered the circumstances as stated in the pre-sentence report and as considered by the trial court. It is my considered view that they warranted consideration. Consideration however does not mean complete deviation from the minimum sentence. I also find that the sentence lacks consideration of the victim who at barely 8 years old was subjected to an indecent act. The trial court was in error to downplay such a heinous violation of the minor. I agree with the prosecution that the one-year sentence would send a wrong message to the community. I take judicial notice that the defilement of children in this region is on the increase. The sentence must therefore be deterrent.

25. Having taken into consideration the above, I set aside the sentence of 1 year imprisonment and substitute therefor an enhanced sentence of 5 years imprisonment. The accused shall serve 5 years' imprisonment from the date of sentence by the trial court being 3rd November, 2022.

Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 24TH DAY OF MAY, 2023

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R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of the Respondent, Mr. Waweru holding brief Mr. Njeru for the State and Siele (Court Assistant)

