



**Alex v Republic (Miscellaneous Criminal Application
E024 of 2022) [2023] KEHC 21456 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21456 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS CRIMINAL APPLICATION E024 OF 2022**

**FR OLEL, J
JULY 31, 2023**

BETWEEN

JULIUS KAMITU ALEX APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. What is before this court is a notice of motion application dated August 14, 2022 wherein the applicant is seeking for orders of re sentencing. He had been charged before Mavoko chief magistrate court with the offence of defilement a child aged 6 years contrary to provisions of section 8(1) and 8(2) of the *Sexual Offences Act* and in the alternative, he was charged with the offence of indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*. He was found guilty on the main count of defilement and was convicted and sentenced to serve a term of 21 years imprisonment on July 2, 2019. He appealed to the high court and his conviction was reduced from defilement to indecent assault and re - sentenced to serve eight (8) years imprisonment.
2. The applicant in his brief application sought re sentencing based on Article 28, 50(2)(p) and sections 216 & 329 of the *Criminal Procedure Code* and petition no *Philip Mueke & others Vs Odpp & Attorney General & Criminal Appeal 312 of 2018* Evans wanyonyi Vs Republic amongst .He also stated that the high court had jurisdiction in accordance to Article 165 of the *Constitution* to hear and determine this application and exercise its discretion and look at the sentence melted out.
3. The applicant further filed written submissions on March 9, 2023 where he reiterated the contents of his pleadings. He stated that he was remorseful and had been in custody for three (3) years and 3 months during which period he had been able to appreciate the consequences of his action and vowed never to repeat such wayward misconduct again. The appellant also stated that he had undertaken various trainings and spiritual courses.



4. On sentencing he submitted that the court ought to consider the judiciary sentencing policy and use it to apply a lesser lenient sentence guided by the new jurisprudence relating to mandatory minimum sentencing in sexual offences. The prison was over crowded and the court had powers under section 362 – 367 of the CPC to decongest the prison by reducing sentences of deserving inmates.
5. The respondent did file their submissions on July 9, 2023 and submitted that the applicant exercised his right of appeal and on appeal his sentence was reduced from 21 years to 8 years imprisonment. The respondent had served four (4) years imprisonment and if he were to benefit from remission which takes into consideration one third of the term then he was remaining with just one year to serve.
6. The respondent conceded that the applicant could be considered for sentence review and if appropriate be considered for probation to enable him reconstruct his life.

Analysis And Determination

Nature and scope of resentencing

7. Re-sentencing is neither a hearing de novo nor an appeal. It is a proceeding undertaken within the court's power to review sentence. The court will ordinarily check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objective of punishments. In re-sentencing proceedings, conviction is not in issue.

Jurisdiction.

8. It bears repeating that, the High Court has the mandate under Article 165 (3) of the Constitution to hear and determine matters on enforcement of rights and fundamental freedoms enshrined in the Constitution. A further leapfrog development; under article 50(2)(p) of the Constitution: 50(2) Every accused person has the right to a fair trial, which includes the right—

- (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

9. In Samuel Kamau Macharia & Another vs Kenya Commercial Bank Ltd & 2 Others, Application No 2 of 2011, the supreme court did pronounce itself that:

' A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.'

10. The Court of Appeal in the case of William Okungu Kittiny -v- R (2018) eKLR stated:

' The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit court below it from ordering sentence re-hearing in a matter pending before the courts. By Article 163 (7) of the Constitution, the decision of the Supreme Court has immediate and binding effect on all the other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases'.



11. In *Michael Kabwera Laichena & Another -v- Republic (2018) eKLR* Majanja J stated:

' By re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by the imposition of the mandatory death sentence'.

12. In light thereof, nothing prevents the court from applying the decisional law and ordering sentence review in cases where the penalty imposed can be challenged on valid legal grounds. To me, denying an accused the benefit of court's discretion to impose appropriate sentence is inconsistent with the right to fair trial. Fair trial includes sentencing. On that basis this court has jurisdiction to determine review of sentence.

Sentence

13. I have perused the decision by this court, the applicant was sentenced to serve twenty-one (21 years) for defiling a girl aged 6 years, who was his step daughter. The appellant appealed as against this sentence and the conviction and sentence were set aside and the appellant convicted of the lesser charge of indecent assault and sentence to eight (8) years imprisonment.

14. Sentencing is a discretion of the trial court. But the court should look at the facts and the circumstances of the case in its entirety so as to arrive at appropriate sentence. The Court of Appeal in *Thomas Mwambu Wenyi Vs Republic (2017) eKLR* cited the decision of the Supreme Court of India in *Alister Anthony Pereira Vs State of Maharashtra* at paragraph 70-71 where the court held the following on sentencing:

' Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.'

15. In the circumstances of this case, I do find that the applicant was properly convicted and sentenced by the trial court and on appeal the same was reduced from twenty-one (21) years to eight (8) years.

Disposition

16. While the respondent did partially concede to this application and stated that the appellant could benefit from a revision, having considered all the facts herein and given the reduced sentence given on appeal, I do hold that this is not a proper and just case where the court's jurisdiction can be exercised in favour of the appellant

17. The appellant did commit an indecent act with his step daughter who was six (6) years. The victim impact statement clearly indicated that the minor suffered psychological trauma, physical injuries which affected her academic performance and social relationships. On appeal the applicant's sentence



was reduced to eight (8) years, while the maximum penalty for indecent assault under provisions of section 11(1) of the *Sexual Offences Act* is not less than ten (10) years. Despite this being the position, the learned judge did sentence the appellant to 8 years, which shows that the trial judge did consider the current jurisprudence on minimum sentence.

18. In re sentencing the court discretion is not based on sympathy, there must be an express right which was violated or which was for one reason or the other not considered, the basis upon which courts discretion can be based. In the instance case this was not shown to be the position and the applicant had already benefited from a lesser sentence.
19. I do therefore find that this application is not merited and the same is dismissed.
20. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 31ST DAY OF JULY, 2023.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 31ST DAY OF JULY, 2023.

In the presence of;

Appellant

.....for ODPP

.....Court Assistant

