



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Katiku v Republic (Criminal Petition E020 of 2022)
[2023] KEHC 21014 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21014 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL PETITION E020 OF 2022**

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

BETWEEN

TITUS MUASYA KATIKU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. What is before this court is a notice of motion application dated June 13, 2022 wherein the applicant is seeking for orders of re sentencing. He had been charged before Machakos chief magistrate court with the offence of defilement of a girl aged 16 years contrary to provisions of section 8(1) and 8(4) 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 convicted and sentenced to serve 15 years on April 12, 2014. He appealed to the high court and the said appeal was dismissed.
2. The applicant in his brief application stated that he had been in prison from the time he was sentenced on 14.03 2014 and that the court erred in failing to consider his mitigation and also erred by enforcing the minimum mandatory sentence when it had discretion to uphold otherwise and should have imposed a different/more lenient sentence.
3. The applicant further stated that court ought to have considered the provisions of section 216, 329 and 323 of the criminal procedure code and provisions of the judiciary guidelines on sentencing to arrive at a relatively proper sentence. The court was urged to consider the persuasive authority of constitutional petition No 17 of 2021 *Philip Mueke Maingi and others vs Odpp & Attorney General* in relation to the constitutionality of the minimum mandatory sentence stipulated in the *sexual offences Act* No 3 of 2006.
4. It was thus in the interest of justice to have the orders sought to be granted and a different sentence upon review be melted upon him in line with article 23 of *the constitution* of Kenya 2010.



5. The respondent did file their submissions on March 20, 2023 and submitted that the applicant exercised his right of appeal and the said appeal was dismissed both on conviction and sentence. The applicant thus could not be heard to say that his mitigation was not considered. The sentence melted out was also lawful. Be that as it may the applicant had been in prison for 9 years and if he were to benefit from a remission which takes into account one third of the term of the sentence, then he remained with one year in custody.
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 objects 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 Kathewa 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 15 years for defiling a girl aged 16 years. The mandatory minimum sentence under provisions of section 8(4) of the [sexual offences Act](#) is fifteen (15) years.
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 Maharesbtra](#) 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. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1. Among others; the gravity of the offence, the threat of violence against the victim, the nature and type of weapon used by the Applicant to inflict harm. The same policy also is clear that after conviction, the court should set a date of sentencing and receive victim impact report (where relevant), probation report and consider the same before sentencing the accused.
16. In the circumstances of this case, I do find that the applicant was properly convicted and sentenced by the trial court and the same was upheld by the high court on appeal. The applicants ground that his mitigation was not considered has no basis for both courts considered the same.
17. There has been change in jurisprudence, which was not available to the trial court and high court especial as regards mandatory minimum sentence and the applicant has the right to benefit from the same given provisions of Article 23, 27 and 50(1) of [the constitution](#) of Kenya.
18. The respondent has also partially conceded and submitted that the appellant has been in prison for 9 years and if he is to benefit from remissions which takes into account one third of the sentence imposed, he should be released with the next one year. The respondent submitted that the applicant could be considered for a sentence review and he be placed on probation.



Disposition

19. Having considered the facts herein, I do find that this is a proper and fit case to exercise the courts desertion on re sentencing. The appellant has served 9 years and four months and is remaining with nine months before he can benefit for a remission.
20. Considering that the applicant is due for remissions of his sentence within the next nine (9) months I do therefore exercise my discretion and order that the appellant be released forthwith and he be placed on probation for the remainder of his prison term.
21. It is so ordered.

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

FRANCIS RAYOLA OLEL

JUDGE

