



**Muchora v Republic (Miscellaneous Criminal Application  
313 of 2018) [2023] KEHC 21202 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21202 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS CRIMINAL APPLICATION 313 OF 2018**

**SM MOHOCHI, J**

**JULY 31, 2023**

**BETWEEN**

**PETER NJOROGE MUCHORA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An Application for Sentence Review under section  
362 and 364 of the Criminal Procedure Code CAP75)*

**RULING**

1. The Applicant is serving a sentence of imprisonment for life, having been found guilty, convicted and sentenced for the offence of defilement of a girl contrary to Section 8(1) of the *Sexual Offences Act*, 2006 in Molo Chief Magistrate's Court Criminal Case No 2000 of 2006.
2. The Applicant unsuccessfully challenged his conviction and sentence in High Court at Nakuru Criminal Appeal No 79 of 2007 thus dismissed his appeal and upheld the conviction.
3. On the June 15, 2020 the Applicant appeared before Hon Prof Ngugi J (as he then was) and requested that his sentence be reviewed owing to his advanced age of 83 years for consideration to serve a probation. The Court accordingly called for the Trial Court file Molo Chief Magistrate's Court Criminal Case No 2000 of 2006, to satisfy itself as to the correctness, legality and propriety of the sentence and also ordered the probation department to prepare a "sentence review report".
4. The record herein reflects that, the Trial Court file Molo Chief Magistrate's Court Criminal Case No 2000 of 2006 could not be traced at all and at one point the Court embarked on trying to locate the High Court at Nakuru Criminal Appeal No 79 of 2007 which was assumed would have the Trial Court file but this too was in vain.



5. A favorable re-sentence Report dated October 17, 2020 was prepared and signed by Kongani SN, Probation Officer Nakuru recommending review from imprisonment to a non-custodial sentence.
6. This Review and Ruling is reliant on the judgment the High Court at Nakuru Criminal Appeal No 79 of 2007 extracted online as at the time of the Ruling all primary records for review could not be traced in both the Molo Law Court and Nakuru registries.
7. The Court thus on the June 21, 2023 upon hearing the Applicant directed the review be undertaken on the basis of the judgment on appeal.
8. The Applicant has now been serving imprisonment for the last sixteen and a half (16, 1/2) years and is now eighty (86) six years old.
9. The Court notes the aggravating factors that informed the sentence noting that upon dismissal of his Appeal and in confirming the sentence Hon Lady justice M Koome (as she then was) that the sentence was as is prescribed in law thereby implying the straight jacketed nature of the penalty.
10. The Applicant, is Convicted from a process of trial and as such, a verdict of “guilty” has been entered against him, he no longer benefits from the age-long cardinal principle of “presumption of innocence”.
11. In the case of *Masrani v R* [1060] EA 321, it was held that: -
 

“Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction.”
12. This Court conforms to the school that disturbing discretion of a Subordinate Court should be done sparingly and only in the most deserving of cases See *Ogolla S/o Owuor v R* {1954} EACA 270 on when the Court will interfere with discretion of trial court in sentencing, that: -
 

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors. This was further echoed in the dictum of the cases in *R v Shershowsky* {1912} CCA TLR 263 as emphasized in Shadrack Kipkoech Kogo v R Criminal Appeal No 253 of 2003 thus “Sentence is essentially an exercise of discretion by the trial Court and for this Court to interfere it must be shown that in passing the sentence, the sentencing Court took into account an irrelevance factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered.” (See also *Sayeka v R* {1989} KLR 306)”
13. Owing to the foregoing, it is important for this Court to consider its jurisdiction as was held in the case of *Samuel Kamau Macharia vs KCB & 2 others*, Civil application No 2 of 2011: -
 

“A court’s jurisdiction flows from either the constitution or legislation or both. Thus, a court of law 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.”
14. Article 50(2) of the Constitution provides: -
 

“Every accused person has the right to a fair trial, which includes the right-

  - (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by the law.”



15. Article 165(6) of the Constitution empowers the High Court to exercise supervisory jurisdiction over subordinate courts. The Criminal Procedure Code is the Statute that expounds on this jurisdiction. Section 362 of the Criminal Procedure provides: -
- “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 subordinate court.”
16. Section 364 of the Penal Code empowers the High Court to exercise its revisionary powers .... conferred to it as a Court of Appeal by Sections 354, 357 and 358 and may enhance sentence.
17. In the case of Prosecutor vs Stephen Lesinko [2018] eKLR Nyakundi J outlined the principles which will guide a Court when examining the issues pertaining to Section 362 of the Criminal Procedure Code as follows: -
- 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 is not based on evidence or it is result of misreading or non-reading of evidence on record;
  - d. Where the material evidence on the parties is not considered; and
  - e. Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.
18. This Court has considered the Application and the grounds therein, the favorable re-sentencing and finds legal basis to interfere with the sentence, in light of the recent case Court of Appeal Julius Kitsao Manyeso versus the Republic Criminal Appeal No 12 (2023) which held that “the indeterminate nature of the life imprisonment sentence without any prospects of being released or a possibility of review, to be unconstitutional, discriminatory, unfair and repugnant to the principal of equality before the law under Article 27 of the Constitution and constitutes inhumane treatment contravening the right to dignity as is enshrined under Article 28 of the constitution”.
19. This Court is of the considered view that the Trial Court had the discretion to entertain the Applicant’s mitigation thereby imposing a determinate imprisonment sentence as is provided for under Section 26(2) of the Penal Code provide that, “Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other period may be sentenced to any shorter term”; as read together with Section 66(1) of the Interpretation and General Provisions Act which provide; “where in a written law a penalty is prescribed for an offence under that written law, that provision shall, unless a contrary intention appears, mean that the offence shall be punishable by a penalty not exceeding the penalty prescribed”.
20. The Judiciary’s Sentencing Policy Guidelines has set out factors to be considered in sentencing elderly offenders by providing that: -
- “ 20.28 When imposing sentencing orders against terminally ill and elderly offenders, a court should be mindful to ensure that the sentence imposed does not amount to an excessive punishment in view of the extent of illness and age as well as in light of the offence committed. In particular, the court should ensure that the



sentence imposed does not amount to cruel, inhuman or degrading treatment in view of the extent of illness and age of the offender.

20.29 Non-custodial sentences should be considered unless, in light of the offence committed and other factors, justice would demand the imposition of a custodial sentence.”

21. Article 10(1) of the *UN International Covenant on Civil and Political Rights* (ICCPR) states that, ‘All deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person’, and Article 10(3) states that, “the purpose of the penitentiary system is the ‘reformation and social rehabilitation’ of prisoners”. It indicates that every prisoner should have the opportunity to be rehabilitated back into society and lead a law-abiding and self-supporting life, even those convicted of the most serious offences.
22. The Kenya Prison Service mandate is, “to contain offenders in humane safe conditions in order to facilitate responsive administration of Justice, Rehabilitation, Social Integration and Community Protection” as such the same is aligned to international best practice.
23. The *United Nations Standard Minimum Rules for the Treatment of Prisoners* {Nelson Mandela Rules} stipulate that the purposes of punishment are to protect society against crime and to reduce recidivism. Rule 4 reiterates that these purposes: -

‘can be achieved only if the period of imprisonment is used to ensure, so far as possible, the reintegration of such persons into society upon release so that they can lead a law-abiding and self-supporting life’.
24. This Court is of the considered view that an indeterminate life imprisonment sentence without possibility of release, would constitute inhuman degrading treatment or punishment and that the discretionary imposition of the same should be reserved for exceptional cases.
25. I have considered the Appellant’s advanced age. He was around 70 years old on the incident date has been in prison for the last (16 & 1/2) sixteen years and six months. I have also considered the nature of the offence the fact that the Applicant committed a heinous crime and occasioned trauma and suffering to a young girl of tender years whose scars shall remain with for the rest of her life. The Court Notes the favorable probation report that, the Applicants’ grandson is willing to take in the Applicant and support him in his reintegration in society, that the Prison Authorities had recommended him for presidential pardon through the power of mercy committee. As such, it is my view that he should not benefit from a non-custodial sentence.
26. This Court hereby reviews the sentence of life imprisonment, varies and substitutes the same with an imprisonment of Twenty (20) years on the following terms: -
  - a. The Period of Imprisonment period served by the Applicant of sixteen and a half (16, 1/2) years so far, shall form part of his sentence.
  - b. Applicant shall serve the remainder of his sentence under probation supervision for three and a half years (3,1/2) to be undertaken within the jurisdiction of the Court.
  - c. The Registrar of the High Court shall, enter Applicant’s details in the Register of Convicted Sexual Offenders in accordance with Section 39(13) of the *Sexual Offenders Act* and Rule 6 of the *Sexual Offences Regulations*, 2008.



- d. An Order is hereby issued, to the Nakuru County Probation Director, to develop and enforce the Applicant's probation supervision plan, ensuring that the Applicant is supported to reintegrate back to the society.

It is So Ordered.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU ON THIS 31<sup>ST</sup> JULY 2023.**

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**MOHOCHI S.M**

**JUDGE**

**In the presence of: -**

Applicant- Present on Teams Platform

Ms Mburu Prosecution Counsel for the state

Schola;CA

