



REPUBLIC OF KENYA



**Birech v Republic (Criminal Petition E005 of 2023)  
[2023] KEHC 21787 (KLR) (8 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21787 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL PETITION E005 OF 2023  
RN NYAKUNDI, J  
AUGUST 8, 2023**

**BETWEEN**

**CAROLY CHERUIYOT BIRECH ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Petitioner was charged and convicted of the offence of attempted defilement contrary to section 9(1)(2) of the *Sexual Offences Act* in Eldoret CM SO Case No. 165/2018. Upon filing his appeal vide High Court Criminal Appeal 178 of 2019, the same was dismissed in its entirety on October 5, 2022. The Petitioner then approached this court vide a Notice of Motion application dated January 31, 2023 seeking a review of sentence premised on the following mitigating grounds;
  1. That, (I) am a first offender thus beg for leniency.
  2. That, (I) am remorseful and reformed and I have learnt to take responsibility of my own actions.
  3. That, the sentence meted upon (m)e was too harsh considering (my) mitigating factors and circumstances.
  4. That, (I) am praying may the honourable court consider review of sentence as I rely on jurisprudence of High court petition No E 017/2021 at Machakos on matter maximum-minimum mandatory provision under the sexual offence act no 3 of 2006.
2. The appellant urged the court to be lenient and reduce his sentence or set it aside. He stated that since the purpose of sentencing was rehabilitation and salvaging the offender, the savage sentence does not serve any importance. He is reformed and rehabilitated and has been reflective of his actions. He urged the court to consider the time he spent in custody pre-trial in considering his appeal.



The issue for determination herein is; whether the sentence should be reviewed.

### **Whether the sentence should be reviewed**

3. In recent decisions, it has emerged that mandatory sentences are unconstitutional. In *Maingi & 5 others v Director of Public Prosecutions & another* Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) where G.V 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. (emphasis mine)

4. The upshot of the foregoing is that the court can consider the mitigation of the appellant in determining whether the sentence warrants review 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;. Under Article 50(2)(q) of *the constitution* an accused person has the right.

Section 9(2) of the *Sexual Offences Act* states;

- (2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

5. I have considered the submissions of the appellant and the mitigation therein and it is my considered view that the application for review of sentence partially succeeds in terms of Section 333(2) of the *CPC* 'by way of a credit term of one year and 6 months towards to the overall custodial sentence imposed by the trial court. The warrant of commitment to prison be amended to factor a discount term period of one year and 6 months.

Orders accordingly.

**DATED, SIGNED AND DELIVERED ON THIS 8<sup>TH</sup> DAY OF AUGUST 2023**

.....

**R. NYAKUNDI**

**JUDGE**

