



**NNG v Republic (Constitutional Petition E053 of 2023)
[2023] KEHC 25972 (KLR) (27 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25972 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CONSTITUTIONAL PETITION E053 OF 2023
RM MWONGO, J
NOVEMBER 27, 2023**

BETWEEN

NNG PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Petitioner was convicted with two counts of Incest Contrary to Section 20 (1) of the Sexual Offences Act and sentenced to life imprisonment at PM Court Gichugu on 16th June, 2017. His appeal in the High Court in HCCRA no 44 of 2017 was dismissed.
2. He now filed this petition on 30th December, 2022 praying for the life sentence to be substituted with a less harsh sentence.
3. Parties were directed to file submissions. The petitioner did not file submissions but the Respondent did.
4. The Respondent submissions raise the issues at to whether the petition has merit
5. The Respondent points out, wrongly, that the Petitioner was sentenced to life imprisonment under section 8 (1)(2) of the *Sexual Offences Act* and that an accused person is liable to life imprisonment under section (2) if the victim is under the age of 11 years; and that the Petitioner has not demonstrated that he has been rehabilitated during the period in custody. The offence was incest contrary to section 20(1) of the *Sexual Offence Act* which he was sentenced to life imprisonment.
6. The court should consider the petitioner’s mitigating and aggravating factors while considering;
 - a. The age of the victim at the time of the offence.
 - b. The psychological effect imposed to her that she has to content with in life.



- c. The level of harm or damage inflicted on her at the tender age.
 - d. Whether the petitioner is remorseful.
7. The respondent submits that sentencing is within the sole discretion of the Court guided by the provisions of the Kenya Judicial Sentencing guidelines and in line with section 215 of the *Criminal Procedure Code*; and that the sentence should be considerate of individual circumstances of each person.

Issues for Determination

8. The issue for determination is whether the petitioner should be resented to a lesser sentence.

Analysis and Determination

9. The facts of the case are that on diverse days between July 2014 and 4th August, 2015 at Kimunye village, Kirima location in Kirinyaga East Sub- County within Kirinyaga County, being a male person, caused his penis to penetrate the vaginas of the two complainants, female juveniles aged 9 and 10 years respectively who were to his knowledge his daughters. The petitioner was convicted with two counts of Incest contrary to section 20 (1) of the *Sexual Offences Act* and sentenced to life imprisonment at SPM court Gichugu.
10. In this Petition, the Petitioner prays for the life sentence to be substituted with a less harsh sentence.
11. The power of this court in its revisionary jurisdiction is founded under Section 362 of the *Criminal Procedure Code* (CPC) which provides that:
- “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.”
12. Article 165(6) of the *Constitution* provides that:
- “The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”
13. The Petitioner was convicted with two counts of Incest contrary to Section 20 (1) of the *Sexual Offences Act* and sentenced to life imprisonment. That section provides:
- “Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:
- Provided that, if it is alleged in the information or charge and
- proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.”



Consequently, he was liable to upon conviction to imprisonment for life as the sentenced by the trial court.

14. The use of the word “liable”, connotes that the trial court has discretion to impose a lesser sentence where the circumstances so dictate. In the case of *Brian Nyachio v Republic* [2022] eKLR Kamau J held:

Kamau J held: Notably, the use of the word “liable”, connotes that the trial court has discretion to impose a lesser sentence where the circumstances so dictate. This was the holding in the case of *Daniel Kyalo Muema v Republic* [2009] eKLR where the Court of Appeal stated that the words “shall be liable to” did not in their ordinary meaning require the imposition of the stated penalty but merely expressed the stated penalty which could be imposed at the discretion of the court.

15. The appellant in his mitigation pleaded for mercy. He alleged that his children had been couched by the teachers to frame him. His wife and the headmaster had an affair and wanted to frame him jointly. The petitioner in petition stated that the imposition of the mandatory minimum sentence was a clear indication that his mitigation was not considered. However, the court duly considered the mitigation of the accused and the gravity of the offence prior to sentencing him to life imprisonment.
16. The respondent submit that sentencing is within the sole discretion of the Court guided by the provisions of the Kenya Judicial Sentencing guidelines and in line with section 215 of the *Criminal Procedure Code*.

Additionally, that the court has unfettered discretion in relation to sentencing but should be considerate of individual circumstances of each person.

17. In Criminal Appeal no 84 of 2015; *Joshua Gichuki Mwangi v Republic* the court held:

“In the end courts have a duty to dispense justice not only to the complainant but to the accused persons. For these reasons we allow this appeal and we set aside the 20-year sentence and substitute it with a 15 years sentence to run from the time the trial court imposed the sentence.”

The sentence provided for under Section 20(1) of the *Sexual Offence Act* for incest is that the offender is liable to life imprisonment. As already stated, the court has discretion as to whether to impose a life sentence or any other sentence.

Disposition

18. I have perused the Prisons Report dated 16th October, 2023. It notes that the offender has been in prison for 9 years since his arrest in 2014; that he has been fully engaged in both the life skills and spiritual rehabilitation programmes at the prison, and has achieved some certificates. He also has a clear record, has done carpentry, and is a good role model.
19. I have also perused the Probation Officer’s Report filed on 1st November 2023. It ultimately recommends the offender as suitable for a non-custodial sentence doing community service orders. The report indicates that the offender’s four children have forgiven the offender, and want him back home. The victim stated that she has since fully healed and recovered both medically and psychologically from the trauma.
20. The court notes that in this case the evidence of aggravating circumstances are that the accused used to defile the complainant minor daily for a period of time. As for mitigating circumstances, I note the



age of the Petitioner is 78 years old which I also take into account. Given the circumstances, I would reduce the sentence of the Petitioner from life imprisonment. I therefore sentence the Petitioner to Fifteen (15) years imprisonment. I so order.

21. The 15 years sentence is to be reckoned as follows:

- a) The Accused is entitled to remission of 1/3 of his sentence which leaves 10 years for him to serve.
- b) Of the Ten (10) years, he has served six (6) years and six (6) months in remand custody or in prison after conviction, which leaves a balance of 3 (three) years and 6 (six) months.
- c) The Petitioner shall serve a non-custodial sentence of Three (3) years in a community service programme designed and facilitated by the Probation Officer at Kamweti Health Centre.
- d) The balance of six (6) months of his sentence term shall stand suspended.
- e) However, should the Petitioner fall afoul of the law and be convicted of any offence, the Petitioner's sentence shall be reviewed forthwith by this court.

22. Orders accordingly.

DELIVERED AT KERUGOYA THIS 27TH DAY OF NOVEMBER, 2023

R. MWONGO

JUDGE

Delivered in the presence of:

Petitioner - Present at Nyeri Maximum Prison

Maari - for State

Court Assistant - Murage

