



**Mutai v Republic (Criminal Petition E028 of 2020)
[2022] KEHC 13272 (KLR) (26 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13272 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL PETITION E028 OF 2020
JN KAMAU, J
SEPTEMBER 26, 2022**

BETWEEN

PHILIP MUTAI PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The petitioner herein was tried and convicted for the offence of rape of a person with mental disability contrary to section 7 of the [Sexual Offences Act](#) No 3 of 2006. He was sentenced to ten (10) years imprisonment.
2. He filed this Petition for review of the sentence on December 18, 2020. He sought for sentence reduction and urged the court to place him on probation instead.
3. In his written submissions that were filed on February 25, 2022, he contended that lack of representation by a learned counsel led to him not arguing his case well as he was illiterate and uninformed on matters of law. He added that the complainant was given an advantage over him as the case was heard under the court rules of 2014 (sic) whereby the trial court declared her a vulnerable witness and testified through an intermediary, one Esther Sang who was her mother which greatly affected his case. He further asserted that his defence was not considered by the learned trial magistrate.
4. He contended that he had a young family and the ten (10) years imprisonment was harsh as his family would suffer a double tragedy and punishment. He added that he was a first offender and was a law-abiding citizen and thus urged the court to reduce his sentence.
5. In its written submissions dated December 3, 2021 and filed on December 6, 2021, the respondent opposed the petition on the ground that there was overwhelming evidence against the petitioner herein. It added that the offence was against a person with mental impairment which made the act so dehumanising and degrading to her as a person. It was its argument that the sentence imposed



was the minimal sentence provided for under section 7 of the [Sexual Offences Act](#) and was therefore commensurate with the offence committed and not excessive or harsh.

6. It further contended that the petitioner had not supplied the court with any document to show that he was remorseful in any way for his actions or that there were sufficient reasons as to his ability to benefit from a reduction of the sentence if at all the court granted his prayer. It urged this court to dismiss his Petition and uphold his conviction and sentence.

Legal Analysis

7. Notably, although the petitioner had indicated that he did not wish to appeal, he nonetheless appeared to argue that the learned trial magistrate conducted the trial unfairly, to his detriment. Be that as it may, this court limited itself to considering if it could exercise its discretion to review of the sentence that was imposed on him and place him on a non-custodial sentence.
8. Unless an aggrieved party appeals a sentence or the [Community Service Order Act](#) No 10 of 1998 is being considered or if the aggrieved party has applied for review of sentence as was envisaged in the case of [Francis Karioko Muruatetu & Another vs Republic](#) [2017] eKLR, a court has no power or jurisdiction to review a sentence that has been meted upon a convicted person.
9. Notably, on July 6, 2021, the Supreme Court gave guidelines in the case of [Francis Karioko Muruatetu & Another vs Republic](#) (Supra) to the effect that the said decision was only applicable in murder offences under sections 203 and 204 of the [Penal Code](#) and not treason under section 40 (3), robbery with violence under section 296 (2) and attempted robbery with violence under section 297 (2) of the [Penal Code](#).
10. Going further, section 3(1) of [Community Service Order Act](#) states as follows:-
Where any person is convicted of an offence punishable with—
 - a. imprisonment for a term not exceeding three years, with or without the option of a fine; or
 - b. imprisonment for a term exceeding three years but for which the court determines a term of imprisonment for three years or less, with or without the option of a fine, to be appropriate,the court may, subject to this Act, make a community service order requiring the offender to perform community service.
11. Section 3(10) of the [Community Service Order](#) further provides that:-
Subsection (1) of this Act shall not apply to a person who is convicted under the following legislation—
the [Sexual Offences Act](#), 2006 (No 3 of 2006);
12. The petitioner was charged under section 7 of the [Sexual Offences Act](#) No 3 of 2006 which provides that:-
“A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years (emphasis court)”
13. It was therefore evident that the petitioner herein could not benefit from a non-custodial sentence in the nature of Probation.



14. Going further, as the said provision was couched in mandatory terms, he could not also benefit from a reduction as he was given the least sentence of ten (10) years imprisonment. This court was therefore not persuaded that this was a suitable case for it to exercise its discretion in that regard.
15. This court opted not to consider the merits or otherwise of the case as the petitioner still had an option of appealing against the same.

Disposition

16. For the foregoing reasons, the upshot of this court's decision was that the petitioner's petition for review filed on December 18, 2020 was not merited and the same be and is hereby dismissed.
17. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF SEPTEMBER 2022

J. KAMAU

JUDGE

