



**Nyambu v Republic (Miscellaneous Criminal Application
E079 of 2022) [2022] KEHC 14660 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14660 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CRIMINAL APPLICATION E079 OF 2022**

A. ONG'INJO, J

OCTOBER 21, 2022

BETWEEN

RAYMOND MWANGAMA NYAMBU APPLICANT

AND

REPUBLIC RESPONDENT

*(Originating from the Chief Magistrate's Court at Kwale
under Criminal Case No 1337 of 2013 by hon D Mulekyo)*

RULING

1. The applicant Raymond Mwangama Nyambu was charged in Kwale Chief Magistrate's Court Criminal Case No 1337 of 2013 with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* No 3 of 2006. He was convicted and sentenced to serve 25-year imprisonment in accordance with the law. Being aggrieved by the conviction and sentence, he appealed in Mombasa High Court Criminal Appeal No 91 of 2017 but hon justice P Nyamweya upheld the conviction and sentence.
2. The applicant seeks that the 25-year sentence imposed upon him be reviewed pursuant to the ruling in Narok High Court Misc Criminal Application No E014 of 2021 in *Baragoi Rotiken v Republic* where the applicant who was charged and convicted under similar provisions of section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* No 3 of 2006 was given a chance for resentencing and the life sentence was substituted to 25-year imprisonment. The application was premised on the following grounds: -
 1. That touching on Misc Criminal Application No E014 of 2021 High Court Narok, *Baragoi Rotiken v Rep* the applicant was charged and convicted under similar provisions of section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*, was given a chance for resentencing



and the life sentence was substituted to 25 - year imprisonment, an opportunity which the applicant was denied.

2. That section 216 and 329 of the *Criminal Procedure Code* limits second appeal to convictions only, if not set aside by the first appellate court, the 25 years therefore violates the right to a fair hearing under article 50(2)(q) of the *Constitution* 2010 which cannot be limited by article 25 of the said *constitution*.
3. That section 354 of the *Criminal Procedure Code* entitles any person who has undergone a criminal trial to appeal to or seek a judicial review from a High Court.
4. That the applicant was heard for purposes of sentencing upon conviction but such mitigation circumstance was not considered because the wording of section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*.
5. That the judicial officer who heard the case and sentenced him was only limited to his freedom to consider mitigation circumstances.
6. That at the point when he was being sentenced, he did not have any criminal records, a considerable mitigation factor in his case.
7. That he was relatively young and showed remorse a head of his sentencing by the trial court.
8. That the applicant has been in the prison facility under confinement for a period of over 5 years with considerably good reputation.
9. That the applicant is substantially remorseful for the action that led to serve the term of 25 – year sentence.
10. That the offence worded in section 8 (1) as read with 8 (2) of the *Sexual Offences Act* restricted the judicial officers to listening to his case to only punish him to serve 25 – year sentence despite the diverse situation at the point of committing the offence.
11. That section 8 (1) as read with 8 (2) of the *Sexual Offences Act* violate the provision of article 25 (c) and 50 (2)(q) of the *Constitution* of Kenya by limiting the applicant’s right even though the *Constitution* is clear that the same may not be limited.
12. That mitigation in criminal trial process as provided for under Section 216 and 329 of the *Criminal Procedure Code* forms part of fair trial under article 25 (c) of the *Constitution*.
13. That the current trial process discriminates against him contrary to article 27 (1) of the *Constitution* because touching on Misc Criminal Application No E014 of 2021 High Court Narok, *Baragoi Rotiken v Republic*, the applicant was charged and convicted under similar circumstances and was given a chance for re-sentencing where the life sentence was substituted to 25 – year imprisonment, an opportunity which the applicant was denied and will continue to suffer if the application herein is not heard and dispensed with in the first instance.
14. That the High Court had powers under section 354 of the *Criminal Procedure Code* to review the lower court findings and if possible set aside the sentence imposed upon the applicant.
15. That certiorari to move this court to review the decision of the learned magistrate made by hon D Mulekyo CM in Criminal Case No 1337 of 2013 at Kwale Law Courts.



Analysis and Determination

3. The applicant was charged under section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*. The said provisions state: -
 - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
4. The applicant was sentenced to 25-year imprisonment which was commensurate to the offence. He relied on the case of Misc Criminal Application No E014 of 2021, *Baragoi Rotiken v Republic*. However, the said authority substituted life imprisonment with 25 years imprisonment. The applicant herein was not sentenced to life imprisonment under which he is seeking to be reviewed. Whereas section 8 (1) as read with section 8 (2) recommends for life imprisonment, the applicant was given 25-year imprisonment which was lower than the life imprisonment sentence. Proceedings started on November 25, 2013, a surety was examined and approved on December 2, 2013 for release of the applicant. This allowed him to conduct his trial while out on bond.
5. Further, under paragraph 28 of the judgment in Mombasa High Court Criminal Appeal No 91 of 2017, hon justice P Nyamweya stated as follows: -

“The prosecution had initially served the appellant with a notice of enhancement which it later withdrew due to the concession as regards the complainant’s date of birth. I will therefore give the appellant the benefit of the lesser sentence that was initially meted by the trial court.”
6. Additionally, the applicant’s mitigation in the Chief Magistrate’s Court at Kwale under Criminal Case No 1337 of 2013 from which the appeal and the application herein arose from was considered by hon D Mulekyo in arriving at the correct conclusion. The applicant’s allegation that mitigation circumstance was not considered is therefore baseless.
7. The Court of Appeal in *Samson Mumbaa Murigi v R* [2020] eKLR adopted the following approach where it held that: -

“In this instance, it is significant to note that at the time of committing the crime, the appellant was given the minimum penalty of 20 years imprisonment which was the prescribed sentence for the offence of defilement under Section 8(3) of the *Sexual Offences Act*. The record indicates that the trial court took into consideration the mitigation of the appellant and the victim impact status report. The sentence imposed by the trial court and affirmed by the High Court cannot therefore be said to be unlawful or manifestly unjust. The trial court took into consideration both aggravating and mitigating factors and arrived at the correct conclusion. Consequently, the appeal against sentence fails.” (Emphasis added).
8. In conclusion, this court finds that the applicant’s application for review of the sentence that was filed on May 16, 2022 has no merit and the same is hereby disallowed. The conviction and sentence by the High Court in Criminal Appeal No 91 of 2017 was therefore not illegal, unlawful, harsh or excessive.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 21ST DAY OF OCTOBER 2022**



HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Ms. Kambaga for Respondent

Applicant present in person

