



**Muriuki v Republic (Criminal Appeal 66 of 2018)
[2022] KEHC 15897 (KLR) (30 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15897 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL 66 OF 2018
RM MWONGO, J
NOVEMBER 30, 2022**

BETWEEN

JOSEPH MUTHII MURIUKI APPELLANT

AND

REPUBLIC RESPONDENT

*(From original conviction and sentence in S.O. Case
no. 66 of 2018 of the Principal Magistrate at Baricho)*

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8 (1) (3) of the *Sexual Offences Act* No 3 of 2006. He was convicted and sentenced to 20 years' imprisonment on the December 17, 2018. He appealed against the conviction and sentence in this file.
2. The facts are that on the 25th day of June, 2017, at [particulars withheld] sub-location in Mwea West Sub-county within Kirinyaga County, he intentionally caused his penis to penetrate the vagina of JN, a child aged 14 years.
3. When he appeared before the court on March 29, 2022, he withdrew the appeal and pleaded with the court to treat his appeal as an application for review of sentence relying on mitigation grounds he had filed.
4. The court agreed and directed that submissions be filed, which the petitioner did. The state made oral arguments submitting in essence that the petitioner's only option lay in remission by the prison authorities.
5. The only question is whether the sentence should be reviewed.



6. This court has criminal revisionary jurisdiction under section 362 of the *Criminal Procedure Code* (CPC) which states 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.”

7. I do not think that is the appropriate power to be exercised in this case, because there is nothing challenged in the lower court’s decision upon which this court needs to satisfy itself as to the correctness, legality or as to the regularity of any such lower court proceedings.

8. What is sought by the petitioner is that this court use its discretion to offer leniency by looking at the petitioner’s mitigation and circumstances.

9. To that end I would say that the jurisdiction sought is the broader constitutional jurisdiction of the court to call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

10. That power is found in article 165(6) & (7) of the *Constitution* provides that:

“(6) 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.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

11. Section 8(1) (3) of the *Sexual Offences Act* No 3 of 2006, under which the petitioner is charged, reads:

“(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

12. Consequently, the petitioner was liable upon conviction to imprisonment for a term of not less than twenty years. The trial court imposed a twenty (20) year imprisonment sentence.

13. The use of the word “liable”, connotes that the trial court has discretion to impose a lesser sentence where the circumstances so dictate.

14. In *Brian Nyachio v Republic* [2022] eKLR 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 vs 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 during the trial stated that he was a first offender. He has a family. He is remorseful and prayed for pardon.
16. The court noted the mitigation but stated that the accused had been charged under provisions of the law that provide for a minimum sentence. He went on to sentence him to 20 years in prison.
17. In his mitigation submissions he submitted that he has spent 4 years in prison and lived peacefully with his fellow inmates and prison authorities. He has been rehabilitated and reformed. He has acquired tailoring and barber skills to earn him a living upon release from prison.
18. Whilst I think that this court, in the exercise of its article 165 (7) jurisdiction as read with article 159 (2) (a) has a constitutional mandate to exercise judicial authority in a manner that justice shall be done to all, the exercise of this special jurisdiction should be used only in exceptional cases.
19. The petitioner here did not avail any material which would enable the court to exercise that special jurisdiction. The petitioner was incarcerated in 2018; he has not availed evidence of any special commendations or recommendations or acts of human endeavor that would entitle this court to take cognizance by exercising the special jurisdiction; he has not gone out of his way to, for example save lives, make an invention or such-like that has attracted the special favour or clemency of the court.
20. For these reasons, the application is denied.
21. Orders accordingly.

DELIVERED AT KERUGOYA ON THIS 30TH DAY OF NOVEMBER, 2022.

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RICHARD MWONGO

JUDGE

In the presence of:

1. The Petitioner in Person
2. Mamba for the state
3. Mr. Murage Court Assistant

