



**Langat v Republic (Miscellaneous Criminal Application E001 of 2020)
[2022] KEHC 16710 (KLR) (21 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16710 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
MISCELLANEOUS CRIMINAL APPLICATION E001 OF 2020
HK CHEMITEI, J
DECEMBER 21, 2022**

BETWEEN

DANIEL KIPROTICH LANGAT APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006. After a full trial he was convicted and sentence to serve life imprisonment.
2. His appeal to this court was dismissed on May 22, 2019. He has taken advantage of the recent decisions by this court and the Court of Appeal to apply that he be allowed to mitigate afresh as regards sentencing only.
3. His application filed on September 24, 2020 among others argues that the trial court did not have adequate legal capacity and or discretion to make a proper determination on the type of sentence as that discretion was fettered by the mandatory requirements of the Act.
4. When the matter came up for determination and direction the court directed that the parties file written submissions. Apparently it's only the applicant who complied. The respondent despite being granted time by this court did not file any pleading indicating whether it was opposing or not the application. This court takes it that the respondent is not opposed to the same.
5. It is evident that the applicant has exhausted his chances of appeal or at least chose to terminate the same at this court.
6. The issue of discretion on sentencing is a cardinal principal granted to the courts by the *constitution*. Fettering the same is therefore unconstitutional as has been pronounced by this court as well as the



Court of Appeal in recent decisions especially when it comes to the sexual offences and other capital offences.

7. The court however must take consideration of the circumstances of each case which must be treated independently. The extent of the offence, the victims age and other factors must be considered.
8. As regards the perpetrator, the courts must take into account his/her history and other antecedent factors like family background, the circumstances that led to the commission /omission of the offence and such like inexhaustible factors.
9. In this case, the victim was 8 years old girl. Definitely the applicant took advantage of the minor. The evidence on record shows that there was no proven penetration. Despite this however she must have been traumatised to the core.
10. There was however no discretion to be exercised by the trial court as regards the sentencing which in this case was only one, namely, life sentence. Probably had there been an opportunity to exercise discretion the trial court or this court on appeal may have thought otherwise.
11. For now, it falls on this court to take up the challenge. It is clear that the applicant was a first offender and ever since he was arrested he has been in custody for the last ten years. While at it he has improved himself by taking masonry and other religious courses. There is sufficient evidence on record.
12. In *Sammy Wanderi Njoroge v Republic*. (2021) eKLR, Gikonyo J summed up this position when he stated that;

“In aggravation the appellant used an unfair advantage to secure and satisfy his sexual desires on the minor. The court considers the offence to be quite egregious, and it was committed against a minor. It bears repeating that the penalties enacted in the SOA reflect a deliberate intention by the legislature; (1) to protect the rights of the child; and (2) to signify the seriousness of the offence of defilement.

[65]. The trial court sentenced the appellant to life imprisonment after considering his mitigation. The sentence is also lawful. Nonetheless, the manner section 8(2) of the *Sexual Offences Act* is couched portend and has been understood by many judicial commentators to portend a mandatory sentence. Such fettering of judicial discretion in sentencing is inconsistent with the *Constitution*. But, I proclaim a new approach; a new yardstick. Section 7 of the Transitional Provisions under the Sixth Schedule of the *Constitution* foresaw the dilemma of application of the *Constitution* upon existing law. It permitted existing laws to continue in force, but, provided courts with legal tool to construe such law with such modifications or adaptations or alterations or exceptions in order to bring it into conformity with the *Constitution*. The section provides: -

7. Existing laws

- (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

[66]. In light thereof, I do think, it is no longer a peremptory rule or requirement that courts should always strike down a provision of a statute- especially



existing law- if the offensive or objectionable element thereto could be resolved in the manner commanded in section 7 stated above. I will therefore, read the word “shall” in section 8(2) of the *Sexual Offences Act* to mean “may” in order to bring the section into conformity with the *Constitution*.

[67]. Be that as it may, Parliament and other state organs with legislative mandate should embark on harmonizing existing law with the *Constitution*. In the meantime, they should take up pronouncements such as this one, and carry out appropriate legislative enactments or amendments to existing law in order to bring it into conformity with the *Constitution*.

[68]. The possibility of fetter-real or perceived- on the discretion of the trial court in sentencing under this provision is likely. This is an important consideration here.

[69]. I note also that the appellant is a young person. The need to rehabilitate and reintegrate offenders into society to eke meaningful life after imprisonment is one of the objectives of punishment; it should never recede to the background in sentencing. In the circumstances of this case, life sentence may not serve such restorative or rehabilitative purposes for this young soul. I shall, therefore, impose a sentence that punishes the offender but also gives him an opportunity of re-integration into society to eke a meaningful life after imprisonment.”

13. The court takes judicial notice as per the medical report on record that the victim luckily and though traumatised did not suffer physical injuries during the heinous act.
14. In the premises, this court takes into account the fact that punishment ought to turn the perpetrator into a positive person in the society. Though life sentence was merited in the circumstances, the same may not be the only efficacious punishment. There must be a determinable period within which an offender can serve the sentence.
15. Taking the totality of the above facts and the fact that the state did not prefer any opposition to the application, I hereby exercise the discretion of this court and set aside the life imprisonment meted against the applicant herein and substitute it with an imprisonment of twenty (20) years from May 25, 2012.
16. Orders accordingly.

DATED SIGNED AND DELIVERED AT KABARNET VIA VIDEO LINK THIS 21ND DAY OF DECEMBER 2022.

H K CHEMITEL.

JUDGE

