



REPUBLIC OF KENYA



Kakai v Republic (Petition 71 of 2020) [2022] KEHC 16697 (KLR) (16 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16697 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PETITION 71 OF 2020
RN NYAKUNDI, J
DECEMBER 16, 2022**

BETWEEN

RUEBEN KISUCHA KAKAI PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The applicant herein Rueben Kisucha Kakai had been charged with the offence of defilement contrary to section 8 (1)(3) of the *Sexual Offences Act* No 3 of 2006. He also faced an alternative count of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006. He pleaded not guilty and the case proceeded to full hearing. He was subsequently convicted to life imprisonment.
2. Aggrieved the Petitioner has filed this instant petition seeking review of the sentence imposed on him in light of the Muratetu Case.
3. The Petitioner case is that he was sentenced to life imprisonment by the Hon. Awito and his appeal to both the High Court and the Court of Appeal were dismissed. The Petitioner maintains that he is remorseful, repentant, reformed and rehabilitated as he has learned his lesson while in custody. The Petitioner further contends that the sentence that meted on him was too harsh and excessive. The Petitioner prayed for a non-custodial sentence. The Petitioner further argued that he has been in prison for too long and that he is (68) years old.

The Petition was canvassed vide written submissions.

4. In his submissions filed on October 3, 2022. The Petitioner submitted that the sentence meted on him by the trial Court was harsh and excessive. The Petitioner argued that the minimum-mandatory sentencing provisions under the *Sexual Offences Act* fetter the discretion of judges and magistrates in meting out sentences. The Petitioner submitted that mandatory sentences are unconstitutional. The Petitioner relied on the decision in *Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR)*



Determination

5. The applicant had been convicted for the offence of defilement contrary to section 8(1) as read with section 8(2) of the [Sexual Offences Act](#) No 3 of 2006 and was sentenced to serve 20 years' imprisonment. It is also not in doubt that under section 8(2) of the [Sexual Offences Act](#), a person found guilty of defiling a child aged 11 years or less is liable upon conviction to imprisonment for life. That being the position, the only issue for determination is whether the revision sought is merited.

In [R vs Scott \(2005\) NSWCCA 152](#), Howie J Grove and Barr JJ stated:

' There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...One of the purposes of punishment is to ensure that an offender is adequately punished...a further purpose of punishment is to denounce the conduct of the offender.'

6. According to the Sentencing Policy Guidelines, non-custodial sentence, except fines, is best suited for minor offences and prescribed limited length of sentences. The offence of defilement, and particularly of a child aged 11 years or below is quite grave and serious.
7. With regards to mandatory minimum sentences, the Court of Appeal had occasion to express itself in [Jared Koita Injiri vs Republic \[2019\] eKLR](#), thus:

Arising from the decision in Francis Karioko Muruatetu & Another vs Republic, SC Pet No 16 of 2015 where the Supreme Court held that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code was unconstitutional. The Court took the view that;

'Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the [Constitution](#); an absolute right.'

In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the [Sexual Offences Act](#), and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.'

In Kenya, sentencing is governed by the Judiciary Sentencing Policy Guidelines 2016. In order to safeguard decisions made through the exercise of judicial discretion, the Guidelines 2016 exist to ensure that judicial officers do not, in a whimsical manner met out sentences that are not only disparate and inconsistent but also disproportionate and unjustified under the circumstances of each case. The guidelines outline the purposes of sentencing at page 15, paragraph 4.1. as follows:

Sentences are imposed to meet the following objectives:

- (1) Retribution: To punish the offender for his/her criminal conduct in a just manner.
- (2) Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.



- (3) Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.
 - (4) Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
 - (5) Community protection: To protect the community by incapacitating the offender.
 - (6) Denunciation: To communicate the community's condemnation of the criminal conduct.
8. The Court of Appeal in *Daniel Kipkosgei Letting vs. Republic [2021] eKLR* where, the Court while citing with approval its decision in *Jared Koita Injiri v Republic [2019] eKLR* and guided by the sentiments of the Supreme Court in *Muruatetu 1* observed that:

' the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. In this regard we think that the complaint that the sentence imposed was harsh and excessive is valid though it was the only sentence available then. We are therefore inclined to interfere with it. We therefore set aside the sentence of life imprisonment imposed on the appellant. Having considered the mitigation proffered by the appellant on record the sentence that commends to us is 25 years imprisonment.'

9. In the Supreme Court in the case of *Francis Karioko Muruatetu & Another vs Republic, Petition Number 15 of 2015*, the Court in considering the provisions of section 329 of the Criminal Procedure Code gave guidance on sentencing as follows:

' The court may, before passing sentence, receive such evidence as it thinks fit in order to inform to inform itself as to the proper sentence to be passed...It is without a doubt that the court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at the appropriate sentence.'

10. Similarly, the Court of Appeal in *Joshua Gichuki Mwangi V R, Criminal Appeal No 84 of 2015* observed as follows;

'We acknowledge the power of the Legislature to enact laws as enshrined in the *Constitution*. However, the imposition of mandatory sentences by the Legislature conflicts with the principle of separation of powers, in view of the fact that the legislature cannot arrogate itself the power to determine what constitutes appropriate sentences for specific cases yet it does not adjudicate particular cases hence cannot appreciate the intricacies faced by judges in their mandate to dispense justice. Circumstances and facts of cases are as diverse as the various cases and merely charging them under a particular provision of laws does not homogenize them and justify a general sentence.

11. This being a judicial function, it is impermissible for the Legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes against the independence of the Judiciary as enshrined in Article 160 of the *Constitution*. Further, the Judiciary has a mandate under Article 159



(2) (a) and (e) of the Constitution to exercise judicial authority in a manner that justice shall be done to all and to protect the purpose and principles of the

12. Constitution. This includes the provision of Article 25 which provides that the right to a fair trial is among the bill of rights that shall not be limited. This was well articulated by this Court in *Dismas Wafula Kilwake vs Republic* [2019] eKLR as follows;

' Being so persuaded, we hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.'

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

14. In *S vs Toms 1990 (2) SA 802 (A) at 806(b)-807(b)*, the South African Court of Appeal (Corbett, CJ) held that:

' the infliction of punishment is a matter for the discretion of the trial Court. Mandatory sentences reduce the Court's normal sentencing function to the level of a rubberstamp. The imposition of mandatory sentences by the Legislature has always been considered an undesirable intrusion upon the sentencing function of the Court. A provision which reduces the Court to a mere rubberstamp, is wholly repugnant.'

15. Having said so, I take judicial note of the rampant incidences of defilement, and the purposes of sentence. Of course, there is an emerging jurisprudence that even life imprisonment ought to have a determinate period. From the foregoing I set aside the life sentence and substitute it with (30) years' imprisonment to run from the time of arrest and arraignment before the trial Court. Orders accordingly by amending the committal warrants on particulars of sentence.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 16TH DAY OF DECEMBER, 2022.

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R. NYAKUNDI

JUDGE

