



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**MISCELLANEOUS CRIMINAL APPLICATION NO138 OF 2020.**

**IN THE MATTER OF: ARTICLE 19 (2) (3) (a), 20 (2) (3) (b), 21 (1 & 2) 25 (a & c) AND 28 OF THE CONSTITUTION OF KENYA  
2010 AND SECTION 329 OF THE CRIMINAL PROCEDURE CODE.**

**AND**

**IN THE MATTER OF: ENFORCEMENT OF BILLS OF RIGHT UNDER ARTICLE 23(1) (3) (f), 29 (a & f) 27 (1) (2), 50 (2) (p) OF  
THE CONSTITUTION.**

**AND**

**IN THE MATTER OF: COURT OF APPEAL CR. APP. NO. 149 OF 2017 AT ELDORET**

**AND**

**IN THE MATTER OF: HIGH COURT CR. APPEAL NO. 199 OF 2011 AT ELDORET**

**AND**

**IN THE MATTER OF: ORIG. CR. CASE FILE NO. 4158 OF 2010 CMC AT ELDORET**

**BETWEEN**

**NATHAN KHAEMBA MAKOKHA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**Mr. Mugun for the State**

**Applicant in person**

**RULING**

1. The applicant vide a chamber summons application dated 21<sup>st</sup> May, 2021 seeks the following orders: -

i. That this application be certified urgent and be heard expeditiously.

ii. That thus Honourable Court be pleased to re-consider the sentence I am serving (30 years imprisonment) which is still harsh and deterrence not premised to rehabilitate rather that to condemn completely as such becomes retributive punishment emanating from Leviticus 24:17-22 upon my mitigation as per the perspective of the Supreme Court in the case of Francis Kariuki Muruatetu & Another Vs Republic Pet. No 15 and 16 of 2015.

iii. That the substantive constitutional application be heard on priority basis.

iv. That the Court considers reviewing the applicant's sentence downwards to factor out my mitigation and progression since conviction to mete out a less severe sentence in flow to **Godfrey Ngotho Mutiso v R Cr. No. 17 of 2008.**

v. Such other orders that the Court may deem fair and just.

2. The application is premised on the provisions of Article 50 (2) (p) of the Constitution of Kenya, 2010 and the applicant prays to this Court to have the sentence re-considered based on his reform progression. He relied on the decision in **George Kuria Mwaura Vs Republic (2019) eKLR** as well as the decision in **Francis Muruatetu**. The grounds in support of the application are that the sentence meted was excessive and the same ought to be reviewed downwards. The Applicant extensively quoted the following authorities in support of his application; **George Kuria Mwaura Vs Republic (2019) eKLR**, **Rwabugande Vs Uganda Criminal Appeal No. 25 of 2014 as well as SV Scott Crossley 2008 (1) SAC 223 (SCA)**.

3. The applicant further swore a supporting affidavit wherein he re-iterated the grounds in support of the application and added that he was charged and convicted with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act, Number 3 of 2006 and sentenced to 30 years imprisonment by the Chief Magistrates Court at Eldoret. This sentence was later enhanced by the High Court sitting in Eldoret to life imprisonment. The second appeal to the Court of Appeal was dismissed and sentence remitted to 30 years imprisonment. He therefore sought leave of the Court to allow the application as he wishes to advance his studies by pursuing a degree at Machakos University.

4. The application was heard on 18<sup>th</sup> November, 2021 and the applicant appearing in person merely restated the contents of the application and the supporting affidavit. He further stated that he has served 20 years of his sentence and seeks to have the sentence reduced to 20 years since he intends to serve the community from the year 2022.

5. The state did not file any responses in opposition to the application.

6. The applicant was convicted for the offence of defilement and sentenced to 30 years in prison which was enhanced by the High Court to life sentence and later, the Court of Appeal remitted the sentence back to 30 years. The appellant was charged with the offence of defilement contrary section 8 (1) as read with Section 8(2) of the Sexual Offences Act which provides.

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

**8. (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.**

7. The issue for determination is whether the application is merited and deserving grant of the orders sought. Revision is provided for by sections 362 and 364 of the Criminal Procedure Code, Chapter 75 Laws of Kenya. Section 362 of the Criminal Procedure Code provides for; the *power of High Court to call for records*;

**“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.”**

Section 364 of the *Criminal Procedure Code* provides that: -

***(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may: -***

***(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;***

***(b) in the case of any other order other than an order of acquittal, alter or reverse the order.***

8. The principles that an appellate Court will act upon in exercising its discretion to interfere with a sentence imposed by the trial court are now well settled. The Court of Appeal in the case of **Ogolla s/o Owuor Vs Republic, [1954] EACA 270**, pronounced itself on this issue as follows:

***“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors”. To this, we would add a third criterion namely, “that the sentence is manifestly excessive in view of the circumstances of the case (R Vs Shershowsky (1912) CCA 28TLR 263).”***

In **Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003** the Court of Appeal stated thus: -

***“sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered.”***

As regards, the sentence I find that, the Applicant was sentenced to 30 years imprisonment by the trial Court which was enhanced to life imprisonment by the High Court and later remitted to 30 years by the Court of Appeal. The sentence provided for defilement of a child below

eleven (11) years as provided by the law then was life imprisonment. Considering the matter was later remitted to 30 years imprisonment, this Court shall not concern itself with the issues that were considered by the appellate Court to warrant reduction of the sentence to 30 years imprisonment. It is worth noting that the mandatory sentence of 30 years was set aside with a sentence of 30 years imprisonment. Therefore, the sentence meted was proper and lawful.

It is now a preserve of Courts to exercise discretion on offences where mandatory minimum sentences are prescribed since such sentences have been declared unconstitutional, on the basis that they deprive the courts of legitimate jurisdiction to exercise discretion to impose the appropriate sentences. In *Dismas Wafula Kilwake Vs R [2018] eKLR*, the Court of Appeal sitting in Kisumu had the following to say about the mandatory minimum sentences prescribed in the Sexual Offences Act: -

**“In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in *Francis Karioko Muruatetu & Another Vs Republic*, SC Pet. No. 16 of 2015], which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.**

**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.**

**The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.”**

It is trite that this Court cannot interfere with the sentencing discretion by the trial court unless it is established that the trial court took into consideration irrelevant factors or failed to take into consideration a relevant factor or applied the wrong principles of the law.

The court’s powers of revision are limited to satisfying itself as to the correctness, legality or propriety of any findings, sentence, or order recorded or passed and as to the regularity of any proceeding of any such subordinate court and in exercising supervisory jurisdiction under Article 165(6) of the Constitution, the court does not exercise appellate jurisdiction and therefore cannot review or re-weigh evidence upon which the determination of the lower court was based and can only upset an order which it considers erroneous and constitutes gross violation of the fair administration of justice.

In this case, I am convinced that the decision imposing a sentence of 30 years imprisonment upon the accused person was sound and ought not to be interfered with. The minimum sentence prescribed by law for the offence of attempted defilement as provided at Section 8 (1) and (2) of the Sexual Offences Act is Life Imprisonment and the Court of Appeal already remitted the sentence of life imprisonment to 30 years imprisonment.

This Court therefore finds that finds there is nothing in the application before this Court that is amenable to exercise of the powers of criminal revision of this Court. The request for revision is therefore disallowed.

It is so ordered.

**DATED, SIGNED AND DESPACHED VIA THE EMAILS AT ELDORET THIS 26<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**R. NYAKUNDI**

**JUDGE**