



**Gudo v Republic (Criminal Revision E010 of 2024)  
[2025] KEHC 5384 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5384 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL REVISION E010 OF 2024**

**EN MAINA, J**

**APRIL 24, 2025**

**BETWEEN**

**ERIC OMONDI GUDO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. This revision was instituted by way of a Notice of Motion filed on 7<sup>th</sup> February 2024. simply put the application seeks a review of the sentence currently being served by the Applicant for the offence of defilement.
2. The Application is supported by an affidavit sworn by the Applicant in which he depones that he was tried, found guilty and convicted for the offence of defilement contrary to section 8(1) as read with Section 8(2) of the *Sexual Offences Act* and subsequently sentenced to a term of imprisonment for 35 years. He deposes that being aggrieved by the conviction and sentence he preferred an appeal in the High Court sitting in Machakos in MHCCRA Appeal No E037 of 2021; that the appeal was heard and dismissed in a judgment rendered on 27<sup>th</sup> June 2022 but he has no intention of appealing further.
3. He contends that that the sentence is harsh in view of his age; that as he has undergone extensive training and rehabilitation programs in prison he is ready to be integrated back to the society deserves to be released to serve the remaining seven years within the community by way of a non-custodial sentence.
4. The application is vehemently opposed. In a Replying affidavit sworn on 4<sup>th</sup> October 2024 Learned Prosecution Counsel states that whereas the Appellant had been convicted for the offence of defilement and sentenced to imprisonment for 35 years when he appealed to the High Court the conviction was substituted with the offence of sexual assault contrary to Section 5 (1)(a)(1) as read together with Section 5(2) of the *Sexual offences Act* and the sentence substituted to one of



imprisonment for 16 years imprisonment. Counsel contended that this court is not therefore seized of jurisdiction to review the sentence and the only recourse open to the Applicant is the Court of Appeal.

5. The Application was canvassed by way of written submissions with those of Applicant being filed on 10<sup>th</sup> March 2025. By those submissions he reiterates that he has undergone rehabilitation and training and acquired certificates in, inter alia, KCPE, Diploma in Biblical Studies by AFCM International Training Centre, Diploma in Biblical Studies by Emmaus Bible College, Voice of Prophecy Certificate by Discover Bible School, Certificate in Peer Counselling, mindful leadership and personal development training hence he is suitable for a sentence review. To support his application the Applicant cites the case of Vinter and Others vs the UK, Application no 66069/09, 130/10 and 3896/10 and S vs Jansen 1999 SACR 368 (C).
6. Through submissions dated 27<sup>th</sup> March 2025 and relying on the case of Raila Odinga & 2 others vs IEBC (2013)e KLR and Jersey Evening Post Limited vs Al Thani (2002) eKLR the Respondent argues that this court, is functus officio having heard and determined the Applicant's appeal, albeit differently constituted. Learned Prosecution Counsel contended that the sentence was lenient considering the Appellant was the father of the 11year old victim and took advantage of his position of trust to sexually assault the victim when the mother was away.

### **Analysis and determination.**

7. This court has carefully considered the application, the grounds for the application, the response thereto, the rival submissions of the parties and the law. To begin with it is fully in agreement with the quote cited by the Applicant to the effect that “a court should never be influenced by the weather of the day.....”. Indeed, the decisions of the court must always be anchored on the law and this case is no exception.
8. This application is premised on the ground that the Applicant has since he was convicted and sentenced undergone a complete change of character. It is his contention that he has undertaken many trainings and courses which have transformed him and hence he is suitable for reintegration into the society. This change of heart and character is indeed commendable.
9. However, it is instructive that the sentence which he is asking this court to review is one that was meted by a court of concurrent jurisdiction as this court but not by a lower court. The jurisdiction conferred upon this court by the law, though wide, does not extend to sitting on appeal against the judgment of a court of concurrent jurisdiction. The court's power of revision under the Article 165 of *the Constitution* and Section 364 of the *Criminal Procedure Code* can only be exercised in respect to the findings, orders and sentences of a subordinate court. Even then the same cannot be exercised in favour of an applicant who has a right to appeal but has elected not to do so - see Section 364(5) of the *Criminal Procedure Code*.
10. Further, while a convicted person is entitled to a review of his case that review can only be by a higher court- see Article 50(2)(q) of *the Constitution*.
11. The Supreme Court and the Court of Appeal have also recently settled the issue of the power of the courts to review the minimum sentences under the *Sexual Offences Act*. In the case of Republic v Joshua Gichuki Mwangi (Petition E018 of 2023) [2024] KESC 34(KLR) (delivered on 12<sup>th</sup> July, 2024) the Supreme Court stated-type paragraphs 56,57.

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“(56) Black’s Law Dictionary, 9th Edition, defines a mandatory sentence as follows: “A sentence set by law with no discretion for the judge to individualize punishment.” While minimum sentence is as defined as follows: “The least amount of time that a convicted criminal must serve in prison before becoming eligible for parole.”

(57) Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term ‘mandatory minimum’ can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognised term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.”

12. Relying on the decision of the apex court, the Court of Appeal pronounced itself as follows in the case of Nyarigoti v Republic (Criminal Appeal 271 of 2019) [2025] KECA 156 (KLR) (7 February 2025) (Judgment)-

“(22) In the present appeal, the appellant was charged under section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The only penalty under section 8(2) of the Act is life imprisonment. That is what the learned Judge imposed. By dint of the Supreme Court decision in Joshua Gichuki Mwangi Case, that sentence was lawful”

13. This application cannot therefore be allowed and it is dismissed.

Orders accordingly.

**JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 24<sup>TH</sup> DAY OF APRIL, 2025.**

**E. N. MAINA**

**JUDGE**

In the presence of:

Miss Nyauncho for the State

Applicant online from Kamiti Maximum Prison

C/A: Geoffrey

