



**Kipkemboi v Republic (Criminal Revision E004 of 2025)  
[2025] KEHC 7748 (KLR) (4 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 7748 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL REVISION E004 OF 2025  
RN NYAKUNDI, J  
JUNE 4, 2025**

**BETWEEN**

**EXAVIER KIPKEMBOI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

Representation:

M/s Sidi for the State

1. Before this court for determination filed on 17<sup>th</sup> of January 2025, brought under the provisions of article 50(2) (p) (q) of the *constitution* and section 362 and 364 of the CPC. The applicant seeks the following orders:
  - i. That the petitioner is seeking for sentence review in accordance to article 50(2)(p) (q) and section 362 and 364 of the *constitution* of Kenya 2010
  - ii. That this matter is certified as urgent and be heard at the first instance
  - iii. That the applicant will be seeking a declaration by the court that this application has merits and qualifies to be heard
2. The petitioner was charged, convicted and sentenced to 15 years' imprisonment for the offence of defilement contrary to section 8(1) as read with 8(4) of the *sexual offences Act*. He has since approached this court seeking sentence review on grounds that he has a first offender, he is remorseful and the sentence imposed by the trial court was too harsh



## Determination

3. To start, with provisions of Article 50(2) (p) (q) of the constitution provides as follows:

Every accused person has the right to a fair trial, which includes the right to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishments for an offence has been changed between the time that the offence was committed and the time of sentencing; and

If convicted, to appeal to, or apply for review by, a higher court as prescribed by law

4. Further, article 50(6) (a) & (b) of the constitution provides that: -

(6) A person who is convicted of a criminal offence may petition the high court for a new trial if: -

- a. The person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and
- b. New and compelling evidence has become available.

5. Under section 8(1) as read with 8(4) of the sexual offence Act prescribed a sentence of not less than 15 years' imprisonment. The trial court in imposing the said sentence was guided by the provisions of the sexual offences act highlighted above. The trial court in its sentenced ruling considered mitigation factors as represented by the applicant to wit; that he is taking care of his child who is in school, that he is an orphan taking care of his 2 siblings. The court's considered view is that the application had the benefit of mitigation which then informed the trial court to exercise its judicial discretion leading to a definite sentence of 15 years as prescribed by the Act.

6. The provisions of article 28 of the constitution provides for the right to dignity; and Article 27(1) provides for the right to equality before the law. These presumes that a person is not sentenced merely by the act he has done based on the age of the victim. Thus, mandatory sentences violate the dignity and respect for the person. They preclude the court from viewing an offender in an individual light as a person with individual humanity.

7. In my considered view, although there is nothing to prevent the courts from meeting the minimum sentence in appropriate circumstances after taking into account mitigation, clearly it must be evident that the mitigation was properly considered and fact adding in the final sentence

8. In the case of Taifa v Republic (Criminal Appeal E018 of 2022) [2022] KEHC 14230 (KLR) (24 October 2022) (Judgment) Aburuli J held:

“In other words, since the provisions of the Sexual Offences Act came into force earlier than the constitution, the prima facie mandatory sentences must now be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences do not take into account the dignity of the individuals as mandated under Article 28 of the constitution as appreciated in the Muruatetu 1 Case.

9. Similarly, In WOR v Republic (Criminal Appeal E017 of 2020 [2022] KEHC 412 (KLR) a (26 April 2022) (Judgment) FA Ochieng J (as he then was) held that mandatory sentences under the Sexual Offences was unconstitutional, when he stated inter alia that:“



50. Having received the mitigation from the Appellant, and the pre-sentencing report from the Probation Officer, the Court effectively decided that they counted for nothing
  51. Prior to the Supreme Court’s decision in the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR, the courts construed mandatory sentences in a literal sense; just like the trial court herein.
  52. However, as the Supreme Court held, the mandatory nature of prescribed sentences for the offence of Murder, was unconstitutional because it took away the Court’s discretion to be able to determine such sentence as may be informed by the particular circumstances of the case before it.
  53. ...
  54. However, I hold the considered view that if the mandatory nature of the death penalty was declared unconstitutional, a similar reasoning can extend to mandatory sentences such as those in Section 8 of the *Sexual Offences Act*.
  55. I am unable to see any distinction between the mandatory nature of the sentence for the offence of Murder, and the mandatory minimum sentence for the offence of defilement. In my view, what renders the sentence unconstitutional is the fact that the prescribed sentence completely precludes the Court from exercising any discretion, regardless of whether or not the circumstances so require.
  56. Accordingly, I do hereby set aside the sentences.”
10. Should this court substitute the mandatory sentence imposed? In the Taifa v Republic case (supra) Aburuli J held:
- “Taking into consideration the decision of the Supreme Court in Muruatetu 2021 (supra), it is clear that the mandatory sentence provided in section 8 (3) of the *Sexual Offences Act* is lawful but not necessarily mandatory, although, just like in the Muruatetu 2017 decision, the trial court may, having regard to the circumstances of each case, impose a death sentence, which sentence is lawful. For the above reasons, I hereby accord the appellant the opportunity to mitigate for this court to consider whether or not to reconsider the mandatory minimum sentence of 20 years imprisonment meted out on him.”
10. I have considered the mitigation factors pleaded in the first instance and the mitigation now availed. I have also considered the sentencing policy guidelines, which highlight the principles to be considered when imposing a sentence. They are:
- a. Retribution: To punish the offender for his/her criminal conduct in a just manner.
  - b. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
  - c. Rehabilitation: to enable the offender reform from his criminal disposition and become a law-abiding citizen.
  - d. 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.



- e. Community protection: to protect the community by incapacitating the offender.
  - f. Denunciation: To communicate the community’s condemnation of the criminal conduct.”
13. considering all these principle and guidelines I hereby reduce the sentence of the offender from 15 years to 12 years in the circumstances. The period shall take into account any period spent in custody
14. orders accordingly.

**DATED AND SIGNED AT ELDORET THIS 4TH DAY OF JUNE, 2025**

.....

**R. NYAKUNDI**  
**JUDGE**

