Onyango v Republic (Criminal Miscellaneous Application E015 of 2021) [2025] KEHC 9854 (KLR) (9 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9854 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL MISCELLANEOUS APPLICATION E015 OF 2021

RN NYAKUNDI, J

JULY 9, 2025

BETWEEN

BENARD OCHIENG ONYANGO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant was charged and convicted with the offence of defilement contrary to section 8(1) as read with Section 8(3) of the *sexual offences Act* No. 3 of 2006. He equally faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *sexual offences Act* No. 3 of 2006.

2. The applicant pleaded not guilty, was tried, convicted and sentenced to serve 20 years imprisonment.

3. He has filed the present application seeking review of his sentence pursuant to the decision in the Muruatetu case. In supporting the application, he stated that he has never filed any appeal and he is only interested on sentence re-hearing.

Analysis and determination

4. I have considered the application and the grounds cited by the applicant. The issue manifest for determination is whether the application is merited.

5. The starting point would be Article 50 (2) (p) of *the constitution* which provides as follows:

> Every accused person has the right to a fair trial, which includes the right—

p. to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

6. Article 50(6) takes it a notch higher and speaks in the following terms:

(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 entitle to appeal, or the person did not appeal within the time allowed for appeal; and

b. New and compelling evidence has become available.

7. The foregoing provisions are instructive in matters brought before the high court for a new trial. I am of the considered view that the application before me seeks a new trial only on sentence. So that then my mandate is to view the application through the lens of Article 50 (2)(p) and (6) and determine whether the same is proper for a new trial only on sentence.

8. Has the application passed the test laid out in the foregoing legal provisions? My answer is in the affirmative for reasons that the applicant has availed new compelling evidence, which is the decision delivered in the Muruatetu case declaring mandatory sentences unconstitutional. It then follows that the applicant ought to benefit from the least prescribed punishment as per the provisions of Article 50(2)(p).

9. The Applicant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) 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(3) "A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

10. Without a doubt, he who breaches the trust bestowed upon him, also imposes upon himself a huge task of rebuilding such trust. When an offence is committed against a vulnerable member of the society, such as minors, the offender must appreciate that it calls for much greater effort on his part, to regain the trust of the society. The offence in question calls for a 20 years' imprisonment term as was rightly upheld by both the trial court.

11. However, mandatory sentences have now been outlawed and courts have moved towards imposing sentences that promote the objectives of sentencing in totality. The Court of Appeal in the case of Manyeso *v Republic (Criminal Appeal 12 of 2021*) [2023] KECA 827 (KLR)

> " we are of the view that the reasoning in Francis Karioko Muruatetu & another v Republic [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of *the Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in Vinter and others v The United Kingdom (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life

sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.

12. In R v Bieber [2009] 1 WLR 223 the Court of Appeal of the United Kingdom had held as follows:

> " The legitimate objects of imprisonment are punishment, deterrence, rehabilitation and protection of the public. Where a mandatory life sentence is imposed in respect of a crime, the possibility exists that all the objects of imprisonment may be achieved during the lifetime of the prisoner. He may have served a sufficient term to meet the requirements of punishment and deterrence and rehabilitation may have transformed him into a person who no longer poses any threat to a public. If, despite this, he will remain imprisoned for the rest of his life it is at least arguable that this is inhuman treatment...".

13. Having found so, I have considered The Sentencing Policy Guidelines, 2023 and its application which is intended to promote transparency, consistency and fairness in sentencing. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments.

14. In Dismas Wafula Kilwake v Republic [2018] eKLR, the Court of Appeal set out the factors to be considered in sentencing under the Act. It observed as follows:

> [W]e 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.

15. Therefore, in sentencing, the gravity of the offence and the consequences of the offence on the victim are relevant factors. I have considered the application and all the information available. I take the minimum sentence to be indicative of the seriousness of the offence.

16. However, given the facts of this case there is no compelling and circumstantial circumstances to review the 20 years custodial sentence and have it substituted with any other lesser offence. By this order the only computation is the one under Section 333(2) of the CPC on giving credit for the period spent in remand custody.

DATED AND SIGNED AT ELDORET THIS 9TH DAY OF JULY 2025

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R. NYAKUNDI

JUDGE