



REPUBLIC OF KENYA



KENYA LAW
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**Miriti v Republic (Criminal Revision E201 of 2025)
[2025] KEHC 12534 (KLR) (10 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12534 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION E201 OF 2025
RN NYAKUNDI, J
SEPTEMBER 10, 2025**

BETWEEN

PIUS MUGENDI MIRITI PETITIONER

AND

REPUBLIC RESPONDENT

RULING

Representation:

M/s Sidi for the State

1. The Applicant Pius Mugendi Miriti was charged defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of the year 2006 Laws of Kenya.
2. The brief facts of the particulars are that on the diverse dates between 8th and 12th of September 2019 in Kesses Sub-County within the Uasin Gishu County unlawfully and intentionally caused his penis to penetrate the vagina of EM a child aged (16) sixteen years.
3. On alternative charge he was charged with indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of the year 2006 Laws of Kenya. The facts are that on diverse dates between 8th and 12th September 2019 in Kesses Sub-County within the Uasin Gishu County unlawfully and intentionally touched the vagina of EM a child aged 16 years with his penis.
4. The applicant was tried, found guilty, convicted and sentenced to 5 years imprisonment. Thereafter this case docket was brought to my attention by the Head of the Station to peruse the record to satisfy myself whether the order on sentence meets the legislative scheme on punishment.
5. Following that reference, the Court on 6th August 2025 issued a direction to the applicant that his case file has been placed before me for a request on enhancement of sentence. In response to that notice,



he appeared before this court with a plea that the five years' sentence should not be enhanced for he regrets the offence and is remorseful.

6. In addition, the applicant invited this court to also determine the issues raised in the grounds of appeal as herein under stated

Decision

The Law

7. For this court to exercise discretion on matters emanating from the subordinate courts or tribunals it is clothed with jurisdiction under Article 165 (6) & (7) of *the Constitution* which reads as follows:

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

8. In addition to the constitutional framework, the Criminal Procedure Code also entrenches on what the Court has to take into account upon calling for the record of an inferior court or tribunal. Thus;

“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.

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.”

9. The statutory law being the Criminal Procedure Code provides a roadmap in the following provisions:

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.

1. At the hearing of an appeal the appellant or his advocate may address the court in support of the particulars set out in the petition of appeal and the respondent or his advocate may then may then address the court.
2. The court may invite the appellant or his advocate to reply upon any matters of law or fact raised by the respondent or his advocate in his address.



3. The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may-
 - a. In an appeal from a conviction-
 - i. Reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction;
 - ii. Alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence,
 - b. In an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;
 - c. In appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from the order dismissing a charge, hear and determine the matter or law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High Court thereon to the subordinate court for determination, whether by way of re-hearing or otherwise, with such directions as the High Court may think necessary and make such other order in relation to the matter, including an order as to costs, as the High Court may think fit;
 - d. In an appeal from any other order, alter or reverse the order, and in any case may make any amendment or any consequential or incidental order that may appear just and proper.
4. Subject to subsection (5), an appellant, notwithstanding that he is in custody, shall be entitled to be present, if he desires it, at the hearing of the appeal: provided that where the appeal is on some ground involving a question of law alone, he shall not be entitled to be present except with the leave of the High Court.
5. The right of an appellant who is in custody to be present at the hearing of the appeal shall be subject to his paying all expenses incidental to his transfer to and from the place where the court sits for the determination of the appeal: provided that the court may direct that the appellant be brought before the court in a case where in the opinion of the court his presence is advisable for the due determination of the appeal, in which case the expenses shall be defrayed out of moneys provided by Parliament.
6. Nothing in subsection (1) shall empower the High Court to impose a greater sentence than might have been imposed by the court which tried the case"



10. The Supreme Court of Uganda in *Ahikirundira Yustina versus Uganda*, Appeal No. 27 of 2015 [2018] UGSC 49 remarked:

“Before a convict can be sentenced, the trial court is obliged to exercise its discretion by considering meticulously all the mitigating factors and other pre-sentencing requirements as elucidated in *the Constitution*, Statutes, Practice Directions together with general principles of sentencing as guided by case law. it is the duty of this court while dealing with appeals regarding sentencing to ensure consistency with cases that have similar facts. Consistency is a vital principle of a sentencing regime. It is deeply rooted in the rule of law and requires that laws be applied with equality and without unjustifiable differentiation”.

11. I recognize that sentencing regime is a legislated aspect by Parliament and is the duty of our court system to apply the law to maintain consistency or uniformity in exercising its sentencing discretion. It is a delicate balancing act because crimes may share the same information in the charge sheet for example; the offence of murder contrary to Section 203, manslaughter contrary to Section 202, or robbery with violence contrary to Section 296(2) of the Penal Code etc. or defilement contrary to Section 8(1) (2) & (3) of the *Sexual Offences Act* but in essence they are never identical or committed under exactly the same circumstances. However, in all these, the principles and objectives of sentencing is one of the yardstick which must be applied in passing sentence. The Sentencing Policy Guidelines 2023 elucidated the objectives as follows:

- i. Retribution: To punish the offender for their criminal conduct in a just manner.
- ii. Deterrence: To deter the offender from committing a similar or any other offence in future as well as to discourage the public from committing offences.
- iii. Rehabilitation: To enable the offender to reform from his/her criminal disposition and become a law-abiding person.
- iv. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages sustained by the victim or the community and to promote a sense of responsibility through the offender’s contribution towards meeting those needs.
- v. Community protection: To protect the community by removing the offender from the community thus avoiding the further perpetuation of the offender’s criminal acts.
- vi. Denunciation: To clearly communicate the community’s condemnation of the criminal conduct.
- vii. Reconciliation: To mend the relationship between the offender, the victim and the community.
- viii. Reintegration: To facilitate the re-entry of the offender into the society.

12. A sentence passed by a competent court with jurisdiction at a level of the subordinate court can only be interfered with by applying the principles in the *Benard Kimani Gacheru v Republic* [2002] eKLR:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial Court. Similarly, sentence must depend on the facts of each case. on appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy



and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

13. As the background of the record demonstrates, the applicant was charged with the offence of defilement contrary to Section 8(1) as read with 8(4) of the *Sexual Offences Act*. Once an offender is found guilty, convicted as per the law required, the prosecution having discharged the burden of proof beyond reasonable doubt unless exceptional circumstances are adduced before the trial court, the sentence prescribed by Legislature is 15 years’ imprisonment. In the instant case the applicant got away with a mere five (5) years imprisonment. This court therefore questions the exercise of discretion by the trial court in sentencing the applicant and imposing a sentence which is ultra vires the law.
14. The role of the judicial discretion in the sentencing process is a fundamental and inescapable issue. It tends to become obscured by the other issues, such as determinacy and penal policies. When it does come to the public’s attention, it is usually in the context of controversy over what a Judge or Magistrate has done. The legislature in enacting the various penal laws in my view was concerned with the appearance of disparity and inconsistency in sentencing of various offenders within our criminal courts. Presumably the Legislature might have reasoned that to promote public faith in the criminal justice system the public needed to believe that similar offenders who committed the same crime did not receive substantially different punishment. This court takes judicial notice that public perceptions are not based on comprehensive analysis of presentence reports from the Probation Officers or for that matter the Children Officers in representative samples of cases to determine the extent of unwarranted disparities in sentencing. On other reason for the public perception on disparities, is the frequent failures by Judges and Magistrates to explain reasons for the sentencing at any one given time.
15. The persuasive cases in *AB v The Queen* [1999] 198 CLR 111 and *Ryan v The Queen* [2001] 206 CLR 267 the learned Judges made some observations that:

“The acceptance of the role of instinctive synthesis in the judicial sentencing process is not opposed to the concern for predictability and consistency in sentencing that underpins the rule of law and public confidence in the administration of criminal justice. ... Judicial instinct does not operate in a vacuum of random selection. On the contrary, instinctive synthesis involves the exercise of a discretion controlled by judicial practice, appellate review, legislative indicators and public opinion. Statute, legal principle, and community values all confine the scope in which instinct may operate.” Kirby J in *AB Case* on his part made the following observations;

“I agree that there is no single correct sentence ... I also agree that sentencing is not a mechanical, numerical or rigid activity in which one starts from the maximum fixed by Parliament and works down in mathematical steps. The process is not so scientific. Because there are a multitude of factors to be taken into account ... the evaluation ... is necessarily imprecise. Human judgment is inevitably invoked ... That said, there are outer boundaries. They control the scope for judicial officers to indulge individual idiosyncrasies.”
16. One of the hallmarks of classical penology is its opposition to arbitrary sentencing powers vested in the Magistrates and Judges and it may be the cause of disparities and inconsistencies in our criminal justice system. If one was to take a sample size of the sentences imposed across the country, there is a temptation to view judicial discretion in sentencing as the overreach and a consequence of the decline in reliance on sentences fixed by Statutes and a concomitant rise in the use of indeterminate sentences fashioned more on disparities and inconsistencies.



17. How well have trial Judges and Magistrates handled the flexibility in decision making brought on by the forces of individualization? One needs not to go far to get the answer. The facts of this case are on point in that the learned trial Magistrate imposed a nonexistent sentence which is not in consonant with the provisions of Section 8(4) of the *Sexual Offences Act*. The reliability of that impugned sentence is materially affected by error of fact, error of law and the sentence itself is disproportionate to the crime. In determining the sentence, it has been said over and over again that the court shall in accordance with the rules of procedure, the applicable Statute and evidence take into account such factors as gravity of the crime and the individual circumstances of the convicted person. The text of the Statute dealing with *Sexual Offences Act* exhaustively does regulate in a way the sentencing proceedings and the available penalties to be imposed by various courts in their exercise of judicial discretion.
18. Discretion in sentencing is properly exercised when Judges and Magistrates follow established legal parameters and there should be no error to take into account wrong principles. Thus, by this very definition the sentence imposed by the trial Court of five years imprisonment is against the provisions of Section 8(4) of the *Sexual Offences Act* and represents an enormous coup on the part of the trial court by individualizing the sentence which cannot stand the test of the law. During the hearing of this case, the applicant was invited to make submissions on whether there exists any compelling and exceptional circumstances to sustain the five years' custodial sentence but there was none. For those reasons the unlawful sentence is reviewed, set aside and substituted with an enhanced term of imprisonment of fifteen (15) years. Notwithstanding, that order by this court, there is compelling evidence in terms of section 333(2) of the Criminal Procedure Code to give pre-detention credit of 2 years and 2 months which shall be discounted from the 15 years' custodial sentence which is in consonant with the provisions of the court. Leave to appeal allowed.
19. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 10TH DAY OF SEPTEMBER 2025.

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R. NYAKUNDI
JUDGE

