



REPUBLIC OF KENYA



**Opilo v Republic (Criminal Petition 28 of 2023)  
[2024] KEHC 1376 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1376 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL PETITION 28 OF 2023  
DO OGEMBO, J  
FEBRUARY 15, 2024**

**BETWEEN**

**JOHN ODHIAMBO OPILO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Application for Sentence Review from Sentence in  
Ukwala in SRM's Court Ukwala in Criminal Case No. 278 of 2015)*

**RULING**

1. The Applicant, John Odhiambo Opilo has moved this court by way of a Notice of Motion application filed herein on 13/7/2023. The application is brought under Article 25, 27, 50(2) and 159 of the Constitution of Kenya.
2. The application basically seeks revision of the Applicant's sentence on grounds that the sentence imposed on the applicant of 20 years' imprisonment was a mandatory minimum sentence in relation of Article 165 (3) of the Constitution.
3. The application of the Applicant is supported by the Affidavit of the Applicant is supported by the Affidavit of the Applicant sworn on 16/12/2022 in which he deposes that he was tried and convicted of the offence of Defilement contrary to Section 8(1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve a mandatory minimum sentence. The applicant relies on two cases ie. Machakos Petition No. E017/21 and Mombasa Petition No. 88/2021.
4. He has gone ahead to raise mitigation factous that he is remorseful, bread winner in his family, that he has reformed and that the sentence is excessive.
5. The prosecution opposes this application on grounds that the Applicant ought to use the avenue of appeal.



6. I have considered this application, the Affidavit in support of the same and the submissions filed by the applicant on 4/8/2023, and also the authorities relied on.
7. I have also considered the short submissions made by Counsel for the State.
8. From the submissions of the Applicant, this application is based on directions given by the Supreme Court of Kenya in the case of *Francis Karioko Muruatetu & Others v R*, the *Muruatetu case*. The Supreme Court in that case made a finding that minimum mandatory sentences are unconstitutional to the extent that they take away the discretionary powers of the court with regard to sentencing.
9. In the case, the Supreme Court referred the applicants back to the High Court for their mitigation to be taken before the court could re-sentence them.
10. I have read the record of proceedings of the trial court relating to this matter. Same shows that the Applicant was charged in court on 2/7/2015 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 was eventually found guilty as charged and on 16/3/2016, was sentenced to serve 20 years imprisonment.
11. The proceeding show that prior to passing sentence on 16/3/2016, the trial court gave the accused the opportunity to mitigate and the applicant had this to say.

“I am an orphan. We are 16 of us. My other 15 siblings have al died leaving me alone.... I am saddened that all this my children died. If I am put in prison, my kids will get spoilt. I am now 48 years and I have never been brought to court. This is my first appearance. I pray that the court grants me a certificate to go and preach.”

The court then noted in the sentence proceedings:

“ Accused’s plea in mitigation noted. He is a first offender but the offence is serious....”

12. The trial court clearly therefore took into account the mitigation of the accused before passing the sentence. in my view, the court having given the Applicant the opportunity to mitigate and having considered the said mitigation as raised by the Applicant, exercised its discretion in sentencing the applicant to serve 20 years imprisonment, which sentence is lawful. This application, based on the directions given by the Supreme Court in the *Muruatetu case*, therefore lacks any merit and must fail. I accordingly dismiss this application wholly. It is so ordered.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 15<sup>TH</sup> DAY OF FEBRUARY, 2024**

**D.O. OGEMBO**

**JUDGE**

**15/2/2024**

Court:

Ruling read out in court in the presence of Applicant and Ms. Mumu Mumo for State.

**D.O OGEMBO**

**JUDGE**

**15/2/2024**

