



**Komen v Republic (Criminal Miscellaneous Application  
E045 of 2023) [2024] KEHC 2368 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2368 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CRIMINAL MISCELLANEOUS APPLICATION E045 OF 2023**

**RB NGETICH, J**

**MARCH 6, 2024**

**BETWEEN**

**KIBET ROTICH KOMEN ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant was charged in count one with the offence of defilement contrary to section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were that the accused on the 24<sup>th</sup> day of April,2010 at about 4:00 p.m at Marigat Township in Marigat District within Rift-Valley province intentionally and unlawfully did cause his penis to penetrate the vagina of JC a girl aged 11 years in violation of the said [Act](#).
2. The Applicant faced an alternative charge of Indecent Act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were that the accused on the 24<sup>th</sup> day of April,2010 at about 4:00 p.m at [particulars withheld] Township in [particulars withheld] District within Rift Valley province did intentionally caused his penis to come into contact with the breast of JC a girl aged 11 years contrary to section 11(1) of the [Sexual offences Act](#) No. 3 of 2006.
3. The accused pleaded not guilty to the charges and upon conclusion of trial, the trial court convicted the applicant and sentence him life imprisonment.
4. The applicant now seeks review of sentence to reduce his sentence of life imprisonment and to award him a lenient sentence under Article 50(2)(p)(q) of the [Constitution of Kenya](#), 2010. And urges court to invoke provisions of section 333(2) to consider period spent in custody being from 24<sup>th</sup> April, 2010 to 7<sup>th</sup> October,2010.
5. The Applicant states that this Honourable court is seized with jurisdiction under Article 165(3)(b) of the [Constitution of Kenya](#),2010 to hear and determine this matter pursuant to the Court of Appeal



decision at Malindi Criminal Appeal No. 12 of 2020 *Kitsao v Republic* and that since he has been in custody for 13 years he has learnt important lessons from his incarceration.

6. The state counsel Ms. Ratemo submitted that the applicant filed appeal at Eldoret High court which was dismissed in its entirety and this court therefore has no jurisdiction to review sentence as the Appellant has not exhausted appellate options. She however stated that they are not objecting to time spent in remand being deducted from the sentence.
7. A social inquiry report indicate that the applicant had formal education at [particulars withheld] Primary School but dropped out in the year 1998 due to financial constraints. After dropping out of school, he started doing casual jobs within the community and in the year 2009, he worked as a watchman at Labos bar. He is single and he is living positive.
8. Brief circumstances of the offence are that the applicant was within Marigat Township when he met the victim who is mentally challenged; he lured her into his house and defiled her. One of the witnesses who happen to be a neighbor alerted the mother to the victim and members of the public who were around leading to his arrest and subsequent charge.
9. The Applicant admits the offence as charged and prays forgiveness on grounds that he has reformed and currently while in prison he is a trustee. His major prayer is for his sentence to be reduced and if possible, he be admitted into non-custodial sentence since he has been in custody for the last 13 years.
10. The inmate's only sister indicated that she does not oppose the inmate's sentence being reduced and if he will be given non-custodial sentence, she is willing to facilitate his re-integration and supervision within the community. She said she has been living with the victim's family peacefully.
11. The victim's mother stated that her daughter is currently aged 27 years; she was able to learn up to standard seven and currently, she is staying at home. She confirmed that she is mentally challenged and cannot involve in any economic activity. That she has one child aged 3 years. The victim's mother is not opposed to applicant being released
12. The local administration did not oppose the inmate's sentence being reduced having been in custody for a period of 13 years. He confirmed that while applicant has been in custody, they have never experienced any hostility between the two families.
13. From the report, the applicant is 40 years old and he does not see any hostility that will arise if his sentence is reduced.

### **Determination**

14. I have considered sentiments by victim's mother, local administration and applicant's sister. All are not opposed to applicant's sentence being reduced or being released to serve on probation
15. The state is opposed to application for review for the reason that the applicant appealed the trial court's decision and the appeal was dismissed in its entirety. The state counsel's argument is that this court having determined appeal, is not seized with jurisdiction to review the sentence.
16. The supreme court in the case of *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] eKLR gave circumstances under which the court can review sentence. Under (d), the court can review decision on ground of repeal of statute. In the instant case, the applicant was sentenced to life imprisonment. However, the sentence of life imprisonment was declared unconstitutional by the court of appeal in Malindi Court of Appeal Criminal Appeal No. 12 of 2021, *Julius Kitsao Manyeso v Republic*.



17. The decision in the above case therefore brought about change in jurisprudence in respect to life sentence. In my view, the applicant is entitled to benefit from the decision by the court of appeal. From the foregoing I am inclined to set aside life sentence. I take note of the fact that the applicant has served 13 years in prison. I note from the social inquiry report that all persons interviewed are willing to accept the applicant back to the community. They all say the having been in prison for 13 years and in view of the fact that the family of the victim and the accused are living peaceful, he may be released.
18. In view of the above, I am inclined to impose determinate sentence of 20 years imprisonment. Period served in remand and prison to be reduced from the above sentence and the applicant to serve the remainder of sentence if any under probation.

**Final Orders :-**

1. Life sentence is hereby set aside.
2. The Applicant is hereby sentenced to serve 20 years imprisonment.
3. Period served by applicant while in remand and prison to be reduced from sentence in order 2 above.
4. The applicant to serve under probation for the remainder of sentence after compliance with order 3 above.

**RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 6<sup>TH</sup> DAY OF MARCH 2024.**

.....

**RACHEL NGETICH**

**JUDGE**

In the presence of:-

Applicant present.

Ms Ratemo for State.

Kibet, Court Assistant.

