



**K v Republic (Criminal Revision E036 of 2023)
[2024] KEHC 3716 (KLR) (4 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3716 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL REVISION E036 OF 2023
RB NGETICH, J
APRIL 4, 2024**

BETWEEN

SRK APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant was charged 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 of the charge were that on the 28th day of July, 2011 at District within Baringo County, the accused did intentionally and unlawfully caused his penis to penetrate the vagina of JN a girl aged 9 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. The particulars of the offence were that the on the 28th day of July, 2011 at Baringo County, the accused did intentionally and unlawfully cause his penis to come into contact with the vagina of JN a girl aged 9 years in violation of the said Act.
3. The Applicant denied the charges and after full trial, the applicant was convicted and sentenced to life imprisonment. Dissatisfied with the judgement of the trial court, the Applicant filed appeal to the court of appeal vide Eldoret High Court Criminal Appeal No 255 of 2011 which appeal was heard and dismissed in its entirety.
4. The applicant has moved this court through a notice of motion application filed in court on the 24th November,2023 seeking revision of life sentence. He relies on Article 50(2)(p)(q) of the Constitution being a right to benefit from the least severe sentence. The Applicant states that the life sentence contravenes Section 216 and 389 of the Criminal Procedure Code on mitigation and the values of sentencing as in the Sentencing Policy Guidelines 2016. He states that the High court has competent



jurisdiction to hear and determine this Application under Article 165(3)(b) of the Constitution of Kenya, 2010.

5. When the matter came up for hearing on the 30th November, 2023, the applicant stated that he was imprisoned for life and prays that the life sentence be set aside and a determinate sentence be imposed. He states that he has been in custody for 13 years.
6. Mr. Mongare representing the state submitted that the court has discretion to handle the issue of review of sentence.
7. The court directed that a social inquiry report to be filed. Social inquiry report filed revealed that there is no history of criminality in the applicant's family. The report further indicated that the applicant studied up to form 4 when he sat for his KCSE and attained a mean grade of C- (minus). After his KCSE, he began to engage in farming and he was still engaged in farming at the time of his arrest. He is married with 6 children. Health wise the inmate states that he has chest problems.
8. The chief of Kapkuikui indicated that the inmate and the victim were neighbors and after arrest, the applicant's wife went away leaving the children behind. The siblings and other relatives of the inmate took it upon themselves to raise the inmate's children. The local administration is not opposed to having the inmate re-sentenced to serve a definite number of years as opposed to serving a life sentence.
9. Through the local administration the probation officers were able to get the contacts of the uncle of the inmate who gave the family sentiments. He stated that as a family, they pray that the court be lenient towards the inmate and he be granted a non-custodial sentence. In the alternative, they pray that the inmate be sentenced to serve a definite number of years so that they can have hope that one day he will be free to re-join the community and rebuild his life. He added that the family of the inmate and the family of the victim have no animosity adding that the first born of the inmate has even been married by one of the relatives of the victim and they are all living peacefully.
10. From the report, the victim completed her primary school education but opted not to proceed to secondary school. Instead, she is pursuing a course in saloon and hairdressing at (Particulars withheld) vocational training college. When the family of the victim were approached by the probation officer, they talked and agreed that they are not opposed to determinate sentence as opposed to a life sentence on ground that the victim's family and the inmate's family reconciled and are living peacefully. They confirmed that the daughter of the inmate has been married by the victim's cousin and there is no animosity between the two families.
11. The inmate in this matter prays that this court sentences him to a non-custodial sentence and in the alternative if that is not possible, the court sets aside his life sentence and instead sentence him to a definite number of years or noncustodial sentence so that he can know he will one day leave the prison and rebuild his life. The inmate was sentenced to serve a life sentence from the 16th of December 2011 and has now spent about 12 years and 3 months in prison. While in prison he has undertaken a course in tailoring and carpentry.
12. The local administration does not oppose the inmate being sentenced to serve a definite number of years stating that the inmate was well known before the offence and were neighbors with the victim. The local administration confirmed that the two families are living peacefully. The victim is currently a student at (Particulars withheld) vocational training college. The victim's family met and they stated that as a family they do not oppose the inmate being sentenced to serve a definite number of years rather than a life sentence. They further indicated the two families are living peacefully and a cousin of the inmate has married the eldest daughter of the inmate, fostering a good relationship between the two families. The family of the inmate pray that the inmate be given a non-custodial sentence and if



not possible at least he be sentenced to serve a definite number of years. They further pray for leniency for the inmate.

Determination

13. The application herein invokes the revisional jurisdiction powers of this court under article 165(3) of the Constitution to review and vary any orders, decision or sentence passed by the trial court if the court was satisfied that the impugned order, decision or sentence was illegal or was a product of an error or impropriety on the part of the trial court. If the court was so satisfied, the law mandated it to make appropriate orders to correct the impugned order, decision or sentence and align it with the law. The above is the import of Section 362 as read with Section 364 of the Criminal Procedure Code.

14. The Supreme Court considered the issue of review of judgements and orders in Fredrick Otieno Outa v Jared Odoyo Okello & 3 others [2017] eKLR and held that:

“...we hold that as a general rule, the Supreme Court has no jurisdiction to sit on appeal over its own decisions, nor to review its decisions, other than in the manner already stated in paragraph (90) above. However, in exercise of its inherent powers, this Court may, upon application by a party, or on its own motion, review, any of its Judgments, Rulings or Orders, in exceptional circumstances, so as to meet the ends of justice. Such circumstances shall be limited to situations where:

- a. the Judgment, Ruling, or Order, is obtained, by fraud or deceit;
- b. the Judgment, Ruling, or Order, is a nullity, such as, when the Court itself was not competent;
- c. the Court was misled into giving Judgment, Ruling or Order, under a mistaken belief that the parties had consented thereto;
- d. the Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision.”

15. I take note of the fact that after this court made determination on appeal filed by the applicant, there has been change of jurisprudence being in Malindi Court of Appeal Criminal Appeal No 12 of 2021, Julius Kitsao Manyeso v Republic and in view of change in jurisprudence declaring life sentence unconstitutional, the applicant has a right to approach this court for review of sentence. The applicant therefore deserves determinate sentence. I have taken into consideration the age of the child who was the victim herein and find it appropriate to set aside life sentence and sentence the applicant to 25 years imprisonment.

16. Final Orders: -

1. Life sentence set aside.
2. The applicant sentenced to 25 years imprisonment.
3. The period served in remand to be considered in computation of sentence.

RULING DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET

.....
RACHEL NGETICH

JUDGE



In the presence of:

CA Sitienei.

Ms. Ratemo for state.

Applicant in person.

