



**Nyandoro v Republic (Constitutional Petition E096 of 2023)
[2024] KEHC 5903 (KLR) (22 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5903 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CONSTITUTIONAL PETITION E096 OF 2023**

TA ODERA, J

MAY 22, 2024

**IN THE MATTER OF ARTICLE 19(1) & (2), (3(A)&(B), 20(1) & (2), 21(1) &
(3), 22 (1) (2) & (3), 24 (1) (A) (B)& (C), 25 (A)& (C), 27(1), 28, 29 (A)& (D) (F) 48,
49 (1) 50 (1), (2) (P), (Q) (4) (6), 51 (1) AND 165 (3) (A), (B) AND (6) OF THE
CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF SECTION 8(1) AS READ TOGETHER WITH 8(2)
OF THE SEXUAL OFFENSES NO. 3 OF 2006**

AND

**IN THE MATTER OF SECTION 26(2) OF THE PENAL CODE CAP 63
LAWS OF KENYA**

AND

**IN THE MATTER OF SECTION 216 AND 329 OF THE CRIMINAL
PROCEDURE CODE CAP 75 LAWS OF KENYA**

AND

**THE MATTER OF THE MINIMUM MANDATORY SENTENCE UNDER
SEXUAL OFFENSES ACT NO. 3 OF 2006 BEING UNCONSTITUTIONAL
AS EMPHASIZED BY HON. JUSTICE G.V ODUNGA IN PET. NO. E017
OF 2021**

BETWEEN

KEVIN ONENGE NYANDORO PETITIONER

AND



RULING

Introduction

1. The Petitioner herein was charged in Ogembo Principal Magistrates Court Criminal case No. 82 of 2017 with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *sexual offences Act*. The particulars of which are that the accused on the 27th day of October, 2017 at Makara he caused his penis to penetrate the vagina of NN a child aged 9 (nine) years old.
2. The accused person was found guilty of the offence, convicted and later sentenced to life imprisonment. The lower court gave the appellant his undoubted right of appeal within 14 days which the petitioner duly exercised. The exercise of that right gave rise to Kisii HCCRA No.68 of 2008 which was heard by Justice D.S Majanja who in a judgment delivered on the 17th December, 2018 dismissed the appeal, upheld the life sentence meted upon him by the trial court.
3. The Petitioner has now approached this court vide this Petition dated 25th October, 2023 filed on 7th November, 2023 seeking for sentence review in his case. The applicant is seeking for a lenient determinate sentence under Article 50(2) (p) (q) of the *Constitution*. That the Honourable court be pleased to invoke the provisions of Section 26(2) and 329 of the *Penal Code* and the Criminal Procedure Code respectively to reduce his sentence from life sentence to a life sentence.
4. The Petition in his supporting affidavit averred that life sentence has been termed as unfair unjust, degrading, inhumane and declared unconstitutional citing recent decision of the High Court by delivered by G. V Odunga J (as he then was) in Machakos High Court Petition No. 17 of 2018.
5. In response to the Petition, the prosecution filed grounds of opposition dated 17th November, 2023 and stated that this court separately constituted pronounced itself on the sentence in HCCRA No. 68 of 2018 and thus this court lacks jurisdiction to review the sentence.

Determination

6. It is not disputed that the Petitioner had his appeal heard and determined by this Court. The Petitioner having appealed to this Court and his appeal determined did not pursue further appeal to the Court of Appeal. The issue is whether this Court has jurisdiction to review its own order and sentence.
7. The law on jurisdiction was stated by the Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others*, Application No. 2 of 2011 thus:

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...”
8. The question therefore is whether this court has power to review the decision made by Justice Majanja who upheld the sentence and dismissed the Petitioners Appeal. The Supreme Court considered the issue of review of judgements and orders in *Fredrick Ottieno 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.”

9. The sentencing guidelines 2022 provides that”

4.8.18 Resentencing cases shall be handled by the ‘Sentencing Court’ – e.g., if the last court that sentenced the convict was the Court of Appeal, then the re-sentencing hearing shall also be handled at the Court of Appeal and not a lower court. This applies *mutatis mutandis* “

The High Court is the last court which sentenced the petitioner as there is no evidence that he filed an appeal and so this court has Jurisdiction to re sentence him.

9. I take note of the fact that after this court made determination on appeal filed on by the Petition, 17th December, 2018 there has been change of jurisprudence in respect to life sentence following the decision by Court of Appeal in Malindi Court of Appeal Criminal Appeal No. 12 of 2021, [Julius Kitsao Manyeso v Republic](#) delivered on 7th July, 2023 where the court declared life sentence that was rendered under similar unconstitutional. The Appellant in the matter was facing similar sexual offenses to the one the petitioner is face safe that the minor in that case was aged 4½ years. The court of Appeal in its decision stated as follows;

“We note that the decisions of this court relied on by the appellant, namely *Evans Wanjala Wanyonyi v Rep* [2019] eKLR and *Jared Koita Injiri v Republic* Kisumu Crim App No 93 of 2014 were decided before the Supreme Court clarified the application of its decision in *Francis Karioko Muruatetu & another v Republic* [2021] eKLR and limited its finding of unconstitutionality of mandatory sentences to mandatory death sentences imposed on murder convicts pursuant to section 204 of the Penal Code. This fact notwithstanding, 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.”

10. The Petitioner in this case herein was sentenced to life imprisonment. In view of the emerging jurisprudence in respected to life sentence by case law, the applicant herein is entitled to re-sentence so as to comply with the law as it is now. I will therefore set aside life sentence and substitute it with a determinate sentence of 30 years imprisonment.
11. I take note of the fact that the applicant has been in prison for 5 years. He was arrested on 18.12.17 and convicted on 29.3.18. I note from the record that he did not secure bond and so he was in remand for the said period. Section 333 (2) of the [CPC](#) requires that remand period be taken into account during sentencing. I order that the said remand period be considered in computation of the sentence of the petitioner herein.
12. Final Orders:
 - i. The life sentence is hereby set aside and substituted with 30 years imprisonment.
 - ii. The remand period between 18.12.17 and 29.3.18 be considered in computing his aforesaid sentence.

TA ODERA

JUDGE

22.5.24

Delivered Virtually Via Teams Platform in the Presence of:

Petitioner

Koima for the State

Court Assistant - Oigo

