



JK v Republic (Criminal Appeal E067 of 2023) [2024] KEHC 7424 (KLR) (21 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7424 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CRIMINAL APPEAL E067 OF 2023**

JR KARANJA, J

JUNE 21, 2024

BETWEEN

JK APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant, JK appeared before the Senior Resident Magistrate at Kapsabet facing a charge of defilement Contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act.

Alternatively, the Applicant was charged with Indecent Act with a child Contrary to Section 11 of the Sexual Offences Act.

It was alleged that on the 9th July 2016 at Nandi County, the Applicant defiled a sixteen (16) years old girl known as ML He pleaded not guilty to the charges but was convicted after a full trial and sentenced to serve fifteen (15) years imprisonment from the 17th December 2019.

The Applicant appealed the conviction and sentence to the High Court at Eldoret but the appeal was dismissed on 28th January 2022.

2. There was an open window for a further appeal to the Court of Appeal, but the Applicant apparently opted to move this court for a re-hearing and review of the sentence imposed upon him by the trial court on the basis of the grounds set out in the Notice of Motion dated/filed on 6th September 2023 to wit: -

1. That, the Applicant is a first offender seeking the courts leniency.
2. That, the Applicant is extremely remorseful, repentant, reformed and rehabilitated and ready to be reconstituted back to the society for social re-adaptation.



3. That, the Applicant has acquired relevant skills during his time of incarceration and given a second chance in life he would be useful to the society.
 4. That, the sentence under the minimum – maximum provisions of the *Sexual Offences Act* was harsh and excessive considering the circumstances of the case.
 5. That, following the decisions in *Maingi and 5 others v Department of Public Prosecution and another* - HC Petition No E017 of 2021 at Machakos and *Muthui v Republic* - HCCR Appeal No 037 of 2021 at Kitui, this court is at liberty to order for re-sentencing.
 6. That, this court has jurisdiction to re-sentence and mete out appropriate sentences in line with the aforementioned decision of the High Court at Machakos.
3. The Applicant therefore prays that this Application be allowed and the sentence imposed upon him by the trial court be reviewed downwards. He appeared in person at the hearing of the application and orally argued his case along his supporting grounds and passionately pleaded with the court to exercise leniency on him for having since reformed, sought forgiveness from the Complainant mother of the baby conceived and born as a result of his unlawfully action and become a changed, religious, talented and industrious person with a zeal to rejoin the society and give it his best shot from the lessons learnt and the skills acquired while in prison.
4. The Respondent/State opposed the application and filed written submissions in that regard. In brief, the Respondent contended that the Applicant was properly convicted and lawfully sentenced to fifteen (15) years imprisonment. That, the sentence was at the discretion of the trial court and ought not be interfered with since the Applicant has not provided evidence for such interference in as much as the sentence was commensurate to the offence and the circumstances of the case. The Respondent, however conceded that the jurisprudence developing in recent times leans so much in favour of the superior courts reviewing minimum sentences imposed by the trial courts without losing sight of the trials court lawful discretion and the circumstances of each case.
5. Apparently, this application is a reflection of the advantage taken by the Applicant of the developing jurisprudence on the question of the Constitutionality of the minimum sentences prescribed by statutes such as the *Sexual Offences Act*. This is why the Applicant has cited and relied on the High Court decision in the *Maingi and others v Department of Public Prosecution and another* Case (*supra*) in which several decisions of the Court of Appeal were relied upon for the court to arrive at the following vital conclusions: -

“(1) to the extent that the *Sexual Offences Act* prescribe minimum mandatory sentence, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of the *Constitution*.

However, the courts are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences.

(2) Taking cue from the decision in *Francis Karioko Muruatetu and another v Republic* (2017) eKLR (Muruatetu 1) those who were convicted of Sexual Offences and whose sentences were passed on the basis that the trial courts had no discretion but to impose the said mandatory minimum sentence are at



liberty to petition the High Court for orders of resentencing in appropriate cases.”

6. Among the decisions of the Court of Appeal relied upon was *Daniel Kipkosgei Letting v Republic* [2021] eKLR, where it was stated that: -

“The purpose and objectives of sentencing as stated in the Judiciary Sentencing Policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensure that the principles of proportionately, deterrence and rehabilitation are adhered to. In this regard we think that the complaint that the sentence imposed was harsh and excessive is valid though it was the only sentence available then. We are therefore inclined to interfere with it.”

7. The other case was *Dismas Wafula Kilwake v Republic* [2018] eKLR, where the appeal court stated: -

“We hold that the Provisions of Section 8 of the *Sexual Offences Act* must be interpreted so as not take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should, be able to impose any of the sentences prescribed, if the circumstances so demand.

On the other hand, the court cannot be constrained by Section 8 to impose the provided sentence if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable and lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.”

8. All the foregoing authorities of the High Court and the Court of Appeal aptly apply to the present case and are most relevant for this court to arrive at its findings on the present application.

In that regard, this court must find that the sentence of fifteen (15) years imprisonment imposed upon the Applicant was lawful but may have been imposed upon the Applicant on the basis of the fact that Section 8 (4) of the *Sexual Offences Act* provided for a term of not less than fifteen years thereby curtailing the discretion of the trial court to impose any other sentence if the circumstances of the case demanded otherwise.

Such minimum sentences are now susceptible to inference by a court if the circumstances of a case demand.

9. In the present case the evidence showed that the Applicant committed the offence with the connivance of the Complainant (PW1) and out of the ignorance of the Criminal consequences of engaging in sexual intercourse with a minor or under age girl. The Complainant was at the time sixteen (16) years old i.e. two years shy of becoming an adult. The Applicant was a young adult. He said that to his knowledge, the Complainant who was his girlfriend, was an adult and could be taken to be so just by her physical looks.

The Complainant admitted that the Applicant was his boyfriend with whom she engaged in sex on more than one occasion. It was during one of those sexual escapades that the Complainant conceived and gave birth to a baby girl called CC. Her pregnancy was what let the “cat out of the bag” leading to the arrest and arraignment of her boyfriend (Applicant) for the offence of defilement.



10. In his oral submissions, herein, the Applicant expressed deep remorse and regret for the unlawful action but blamed it all on ignorance, naivety and juvenile delinquency. He said that he has since reconciled with the Complainant.

At the time of sentencing by the trial court the Applicant through his legal counsel on record beseeched the trial court to consider a more lenient sentence, even if non-custodial. However, due to the minimum sentence of fifteen (15) years imprisonment prescribed under Section 8(4) of the [Sexual Offences Act](#).....the Appellant was just given that sentence which thereby became harsh and excessive.

11. In this court's opinion, the circumstances of the case called for a more lenient sentence other than that prescribed by statute.

The Applicant has already served more than five (5) years of the sentence and if he was in custody throughout the course of the trial the years served would be approaching eight (8) years.

For all the reasons foregoing, the present application is well merited and is granted with orders that the sentence of fifteen (15) years imprisonment imposed upon the Applicant by the trial court be and is hereby set aside and substituted for a lesser period of the term already served.

Ordered accordingly.

DELIVERED AND DATED THIS 21ST DAY OF JUNE, 2024.

**J. R. KARANJAH,
JUDGE**

