



**Oyugi v Republic (Criminal Miscellaneous Application
E068 of 2022) [2024] KEHC 6933 (KLR) (11 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6933 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL MISCELLANEOUS APPLICATION E068 OF 2022**

PN GICHOHI, J

JUNE 11, 2024

BETWEEN

THOMAS MOMANYI OYUGI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Before the trial court, Thomas Momanyi Oyugi (hereafter referred to as the Applicant), was charged with the offence of Defilement contrary to Section 8 (3) of the *Sexual Offence Act* No. 3 of 2006 in Molo Senior Principal Magistrate's Court Criminal Case No. 997 of 2008. After hearing, he was convicted and sentenced to serve 21 years imprisonment.
2. Aggrieved by both conviction and sentence, he appealed before High Court in Criminal Appeal No. 76 of 2013. In its judgment dated 13th day of December 2018, High Court upheld the conviction but substituted the 21 years imprisonment with a sentence of 20 years imprisonment.
3. The Applicant did not appeal that judgment but he has now come before this Court seeking re-sentence on the grounds that he has served more than three-quarters of the sentence, is now a born-again Christian who has realised that crime never pays.
4. He states that he is now a trusted inmate who has undertaken rehabilitation programmes offered in prison which have made him progress to become a teacher, preacher and counsellor. He seeks to be set at liberty so that he can join other Kenyans to build the nation.
5. In support, he attached certificates awarded while in prison. These include Diploma Certificates on Discover Bible School Lessons and National Grade Test Certificate Grade III in Carpentry and Joinery.
6. The Respondent filed a Replying Affidavit sworn on 9th May 2024 by Prosecution Counsel James Kihara. While citing *Philip Mueke Mainigi and 5 others v Republic* [2022]eKLR regarding sentence



that was based on minimum mandatory, Counsel stated that the Respondent has no objection to resentencing but urged the Court to be guided by sentencing policy guidelines on as to when the Court can with the discretionary powers of a trial court in sentencing.

Determination

7. This Court has heard the parties. From the record, the victim herein was said to be 14 years of age when she was defiled. The Prosecution urged though there were no previous records for the Applicant herein, the trial court should consider age of the complainant, that the Applicant took advantage of the complainant who was an IDP and therefore “set an example to other men taking advantage of minors.”

8. In mitigation, the Applicant had stated:-

“I have children. I am the sole breadwinner.”

9. In sentencing the Applicant to 21 years imprisonment, the trial court had stated:-

“The accused has children of his own, yet he turned on his neighbour’s child to quench his sexual thirst. The accused’s behaviour cannot be condoned. He ought to be used as an example to other men who leisure in having sex with children.”

10. There is nothing in that sentence to show that the trial court was bound by minimum sentence. That sentence was reasoned and discretionary.

11. However, regarding appeal on sentence, High Court held:-

“On sentence, the minimum prescribed sentence for the offence is twenty (20) years imprisonment. Therefore, I set aside the sentence imposed and substitute it with twenty (20) years imprisonment from the date of conviction by the trial court.”

12. What is clear is that while substituting the trial court’s sentence, the High Court’s finding above was based on mandatory minimum sentence and that was in year 2018. However, the Court of Appeal in [*Dismas Wafula Kilwake v Republic*](#) [2019] eKLR held:-

“In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the [*Sexual Offences Act*](#), which do exactly the same thing.”

13. Further, High Court in [*Philip Mueke Maingi and 5 others*](#) (*supra*) allows the Applicant to seek resentencing in the circumstances when it held:-

“1) To the extent that the [*Sexual Offences Act*](#) prescribe minimum mandatory sentences, 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 & Another vs. 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.

14. That means that courts can go below the mandatory minimum sentence even in sexual offences. In this case and in the circumstances, and as long as the substituted sentence by High Court was based on mandatory minimum sentence, this Court has jurisdiction to resentence the Applicant bearing in mind that the Applicant opted not appeal the sentence at the Court of Appeal.
15. The record shows that there was a tear on the 14-year-old complainant's labia minora and labia majora. The impact of violation on the minor as portrayed in this case was traumatic. The Applicant did not have any remorse. His concern was his own children to who he claimed to be the bread winner.
16. This Court is satisfied that while the Applicant clamours for a resentence results in an opportunity for rehabilitation having notably reformed while in prison, he also merits a deterrent sentence in the circumstances.
17. For those reasons and in conclusion, this Court makes the following orders:-
 1. The mandatory minimum sentence of 20 years be and is hereby substituted with a sentence of 15 years imprisonment.
 2. That sentence should therefore run from the date of conviction being 29/04/2013 as the Applicant was out on bond during trial.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 11TH DAY OF JUNE, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Thomas Momanyi Oyugi-Applicant

Mr. Kihara for Respondent

Ruto- Court Assistant

