



**Kyalo v Republic (Criminal Appeal 3 of 2020) [2024] KEHC 16670 (KLR) (22 July 2024) (Review)**

Neutral citation: [2024] KEHC 16670 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CRIMINAL APPEAL 3 OF 2020**

**JL TAMAR, J**

**JULY 22, 2024**

**BETWEEN**

**ANTONY KYALO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Revision from original conviction and sentence in criminal S.O no 44 of 2016)*

**REVIEW**

**Brief background of the case.**

1. The applicant was charged in the lower court with the offence of defilement c/s 8 (1) as read with section 8 (3) of the *Sexual Offences Act* in criminal case no *S.O 44 OF 2016* and after the trial, the court entered a guilty verdict, convicted and sentenced the accused to life imprisonment.
2. The applicant initially petitioned for appeal against conviction and sentence meted out by the trial court on grounds set out in the Grounds of appeal filed on 6<sup>th</sup> march 2020. Subsequently, he withdrew the appeal on 18<sup>th</sup> march 2024 in favour of the application for review and resentencing. The applicant however, either alone or in collusion with others attempted to mislead this court as regard the sentence passed by the trial court on 24<sup>th</sup> January 2018.
3. From the original records of the trial court the appellant was sentenced to life imprisonment and committed to G.K Prison Kamiti. The warrant of commitment for sentence of life imprisonment was issued on 24<sup>th</sup> January 2018. The petition of appeal by the applicant filed on 6<sup>th</sup> March 2020 and the application for review dated 29<sup>th</sup> April, 2024 annex a copy of warrants committing the applicant to serve 15 years imprisonment. This is misleading because the original trial court records were clear and applicant was present when the judgement was read and the life sentence pronounced. He therefore knew the nature of sentence imposed by the court.



## The application and submissions

4. This notwithstanding, i shall proceed to consider the application for review filed on 29<sup>th</sup> of April 2024 and the submission in support.
5. I note that the prosecution submissions filed in this court on 30<sup>th</sup> of may 2022 relate to the appeal itself and not the application for review the subject of this decision.
6. The application is premised on Article 50 of the constitution and section 362, 364 and 333 (2) of the *Criminal Procedure Code*. The high court is clothed with revisionary powers in case of proceedings in a subordinate court, the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge. Under section 364 of the criminal procedure code, the high court in exercise of the revisionary powers may;
  - a. In the case of conviction, exercise any of the powers conferred on it as a court of appeal by section 354-358 and may enhance the sentence;
  - b. In case of any other order other than an order of acquittal, alter or reverse the order.
7. Article 165 of the *Constitution* provides; “that the high court shall have supervisory jurisdiction over subordinate court and over any person, body or authority exercising a judicial or quasi- judicial function, but not over a superior court”
8. Article 50 of the *Constitution* provides for the right of an accused person as follows;
  - (q) if convicted, to appeal to, or to apply for review by a higher court as prescribed by law.
9. The law on the court’s Jurisdiction is now settled in a number of cases including the most quoted, *Owners of motor vessel Lillians v Caltex Oil (Kenya) ltd* and *Samuel Macharia & Another v Kenya Commercial Bank*.
10. In his submission, the applicant urges to the court to consider the period spent in custody prior to sentence and computing the term of sentence in accordance with the provision of section 333 (2) of the *Criminal Procedure Code*.
11. Firstly, the applicant proceeded on the erroneous assumption that the sentence imposed by the court was 15 years. In my view section 333 (2) applies only where the sentence imposed by the court is numerical, definite and determinable. It does not apply where as in this instance the sentence is indeterminate.
12. However, up until 12<sup>th</sup> July 2024, the emerging jurisprudence from our superior courts is that life sentence although indeterminate, is amenable to the revisionary jurisdiction of the High court. In *PK v Republic* Criminal Revision E060 OF 2023.
13. The courts took note of the change in the jurisprudence in respect of life sentence following the decision by the court of appeal in *Julius Kitsao Manyeso v Republic* where the court declared the life sentence unconstitutional.
14. Similarly, in *John Kamau Wambugu v Republic* criminal petition no E009 of 2021 justice F. Gikonyo M. stated that the jurisprudence coming through the court of appeal suggest that a court of law may impose a definite period of imprisonment for life sentence.
15. The applicant/accused in this case was sentenced to serve a life imprisonment for the offence of defilement of a child aged slightly over 10 years contrary to section 8(1) as read with section 8 (2) of



- the *Sexual Offences Act*. The sentence was perfectly legal, constitutional and deserving as provided for by the Law.
16. The applicant premised his submissions and argument on the decision of the supreme court in *Francis Karioko Muruatetu & another v Republic*, petition no 15 of 2015 consolidated with Petition no 16 of 2015 {2017} eKLR.
  17. In this case the court declared section 204 of the penal code inconsistent with the constitution and invalid to the extent that it provides for mandatory death sentence for murder. The court further stated that the decision in Muruatetu did not invalidate Mandatory sentences in the penal code, the sexual offences Act and any other statute.
  18. The supreme court in *Republic v Joshua Gichuki Mwangi* petition no E018 of 2023 delivered on 12<sup>th</sup> July 2024, held that the mandatory minimum sentences as prescribed in the *Sexual Offences Act* are not unconstitutional.
  19. Although the decisions of the superior courts of concurrent jurisdiction earlier cited on the issue are persuasive, the decision of the supreme court above is binding on this court and all courts below it.
  20. Consequently, this court cannot review the decision of the trial magistrate passed under section 8 (1) 8 (2) without a clear re-sentencing legal framework for minimum or mandatory sentences under the *Sexual Offences Act*. Secondly section 333 (2) of the *criminal procedure code* does not apply in indeterminate sentences such as the one meted on the applicants.
  21. In the circumstances, this court lacks jurisdiction to deal with the applicant's application for review and re-sentencing of the minimum offences as prescribed by the *Sexual Offences Act* and pursuant to the decision of the Supreme court in Joshua Gichuki Mwangi *supra*
  22. Consequently, the undated application filed on April 29, 2024 seeking review of the sentence meted on the applicant is declined and the same is dismissed. The sentence of life imprisonment imposed by the court on 24<sup>th</sup> January 2018 stands.

**DATED AND DELIVERED VIRTUALLY AT KAJIADO THIS 22<sup>ND</sup> DAY OF JULY 2024**

**JOHN T LOLWATAN**

**JUDGE**

