



REPUBLIC OF KENYA



**Kiptoo v Republic (Criminal Petition E006 of 2022)
[2024] KEHC 10020 (KLR) (9 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10020 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION E006 OF 2022
RN NYAKUNDI, J
AUGUST 9, 2024**

BETWEEN

SAMUEL KIPTOO PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The Petitioner, Samuel Kiptoo was charged and convicted of the offence of defilement contrary to Section 10 of the *Sexual Offences Act* No. 3 of 2006. The particular of the offence were that on the 1st day of November 2008 at Tigo Village, Mwamba Sub-Location, Lumakanda Location in Lugari District within Western Province, the Petitioner unlawfully and intentionally caused penetration of his genital organ into the genital organ (vagina) of IC a girl child of the age of 10 years.
2. He was also charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 OF 2006.
3. He was sentenced to life imprisonment. The Petitioner is now before this Court seeking review of sentence pursuant Article 50 (2) (p) (q) of the *Constitution* of Kenya, 2010. The Petitioner also relied on the judgment in *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) in support of his petition.
4. The Petitioner maintains that he has been in prison for a long period and has since been reformed and ready to be reintegrated into society.

Determination

5. Article 50 (2) (p) of the *Constitution* of Kenya, provides that every accused person has the right – to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment



for the offence has been changed between the time that the offence was committed and the time of sentencing.

6. Article 50 (2) (q) of the Constitution of Kenya, provides that every accused person has the right – if convicted, to appeal to, or apply for review by a higher court as prescribed by law.
7. In sentencing an offender, the sentence meted out on an accused person must commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence. (See Ambani v R). The Court of Appeal Thomas Mwambu Wenyi V Republic (2017) eKLR cited the decision of the Supreme Court of India in Alister Anthony Pereira v State of Maharesbtra at paragraph 70-71 where the court held the following on sentencing:-

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

8. In Francis Kariuki Muruatetu & Another v Republic Petition No. 15 and 16 of 2015, the Learned Judges of the Supreme Court held that Section 204 of the Penal code was unconstitutional in so far as it provided for the mandatory death sentence for the reasons that it limited the trial Court’s exercise of discretion while sentencing. The Court while remitting the matter to the high court for re- hearing on sentence held that: -

“The facts in this case are similar to what has been decided in other jurisdictions. Remitting the matter back to the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing.....”

9. The Court of Appeal in Joshua Gichuki Mwangi V R, Criminal Appeal No. 84 of 2015 observed as follows;

“We acknowledge the power of the Legislature to enact laws as enshrined in the Constitution. However, the imposition of mandatory sentences by the Legislature conflicts with the principle of separation of powers, in view of the fact that the legislature cannot arrogate itself the power to determine what constitutes appropriate sentences for specific cases yet it does not adjudicate particular cases hence cannot appreciate the intricacies faced by judges in their mandate to dispense justice. Circumstances and facts of cases are as diverse as the various cases and merely charging them under a particular provision of laws does not homogenize them and justify a general sentence.



This being a judicial function, it is impermissible for the Legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes against the independence of the Judiciary as enshrined in Article 160 of the Constitution. Further, the Judiciary has a mandate under Article 159 (2) (a) and (e) of the Constitution to exercise judicial authority in a manner that justice shall be done to all and to protect the purpose and principles of the

Constitution. This includes the provision of Article 25 which provides that the right to a fair trial is among the bill of rights that shall not be limited. This was well articulated by this Court in Dismas Wafula Kilwake v. Republic [2019] eKLR as follows;

“Being so persuaded, we hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to 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 of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or 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.”

In the end, courts have a duty to dispense justice not only to the complainants but also to accused persons. For these reasons we allow this appeal and we set aside the 20- year sentence and substitute it with a 15-year sentence to run from the time the trial court imposed its sentence.”

10. In S v Toms 1990 (2) SA 802 (A) at 806(h)-807(b), the South African Court of Appeal (Corbett, CJ) held that:

“the infliction of punishment is a matter for the discretion of the trial Court. Mandatory sentences reduce the Court’s normal sentencing function to the level of a rubberstamp. The imposition of mandatory sentences by the Legislature has always been considered an undesirable intrusion upon the sentencing function of the Court. A provision which reduces the Court to a mere rubberstamp, is wholly repugnant.”

11. The Courts now can exercise discretion when considering and passing sentence. The said discretion however should only be exercised in the deserving cases. (See Republic v Ruth Wanjiku Kamande [2018] eKLR).
12. In exercising discretion in sentencing, the Court must further have in mind the objectives of sentencing as laid down in the Sentencing Policy Guidelines, 2023 published by the Kenya Judiciary and which includes: -
- i. Retribution: To punish the offender for his/her criminal conduct in a just manner.
 - ii. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.



- iii. Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.
 - iv. Restorative Justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims, communities' and offenders' needs and justice demand that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
 - v. Community protection: To protect the community by incapacitating the offender.
 - vi. Denunciation: To communicate the community's condemnation of the criminal conduct.
 - vii. Reconciliation: To mend the relationship between the offender, the victim and the community.
 - viii. Reintegration: To facilitate the re-entry of the offender into the society.
13. Life imprisonment, particularly where no minimum term is specified, is but one, albeit the most common form of indeterminate sentence when it comes sexual offences in Kenya. Its distinguishing feature is that a prisoner has no guarantee of ever being released from custody. As such a young person sentenced to this penalty could theoretically serve many more years in custody than an older person. In view of the spirit of the Sentencing Policy Guidelines, one would perhaps argue that life imprisonment without parole, in particular, raises issues of cruel, inhuman and degrading punishment, and undermines the right to human dignity by removing any hope of release and rendering the rehabilitative purpose of imprisonment essentially meaningless. The Petitioner herein was only (24) years at the time when he committed the offence and has been behind bars for approximately (15) years for the offence of defilement. Having said so, I recognized that there is an emerging jurisprudence that even life imprisonment ought to have a determinate period. I also take judicial notice of the severity of the offence vice vis the number of years already spent in custody by the Petitioner and hereby set aside the life imprisonment and substitute it with (30) years' imprisonment to run from 1/11/2008 when he was first arrested.
14. It is ordered so.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 9TH DAY OF AUGUST 2024

R. NYAKUNDI

JUDGE

