



**Makosi v Republic (Miscellaneous Criminal Application  
E094 of 2022) [2023] KEHC 1136 (KLR) (10 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1136 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS CRIMINAL APPLICATION E094 OF 2022**

**A. ONG'INJO, J**

**FEBRUARY 10, 2023**

**BETWEEN**

**PETER MUNYAO MAKOSI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(criminal appeal No 4 of 2019)*

**RULING**

1. The applicant was convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act* No 3 of 2006 in Kwale Chief Magistrate's Court Sexual Offence Case No 86 of 2017 and sentenced to serve 30 years imprisonment.
2. The particulars of the offence are that on diverse dates between the year 2016 and March 20, 2017 in Mivumoni Location of Kwale county within coast region unlawfully and intentionally committed an act which caused his penis to penetrate the vagina of MM a girl aged 15 years.
3. Aggrieved by the conviction and sentence of the trial court, he lodged an appeal in Mombasa High Court criminal appeal No 4 of 2019 where the court found no merit in the appeal and dismissed it.
4. Through an application filed in court on June 9, 2022 brought under section 216, 329, 354, 362 of the *Criminal Procedure Code*, section 8 (1) as read with 8 (4) of the *Sexual Offences Act*, articles 25 (a) and (c) of the *Constitution* of Kenya, and the Sentencing Policy Guidelines in the Republic of Kenya, the applicant prayed that due consideration is given to the mitigation factors in the application and his sentence reviewed accordingly.
5. The mitigating factors outlined by the applicant include favourable progressive report by the prison administration commending his character and conduct, that he is a first offender, that he is 63 years old and of good conduct, and that his siblings depend on him.



6. The applicant laid emphasis on section 8 (4) of the *Sexual Offences Act* which states that a person who commits an offence of defilement with a minor between the age of 15 to 17 years shall be liable to imprisonment of not less than 15 years. The applicant stated that the provision is construed to be couched in mandatory terms leaving the trial magistrate without any discretion to determine whether any other penalty can be imposed *in lieu* of the 15 years imprisonment.
7. The applicant relied on the holding in the cases of *D.W.M v Rep* (2016) eKLR, *Opoya v Uganda* (1967) EA 752 at page 754, *Kichanjele s/o Ndamungu v Republic* (1914) EA CA 64 where it was held that the words 'shall be liable to' are not mandatory but provide a maximum sentence only and while the liability exists, the court might not see fit to impose it. *Swabir Bukhet Labhed v Republic*, CA CR App No 52 of 2018 and *Fred Michael Bwayo v Republic* (2009) eKLR.
8. Upon perusal of the proceedings, this court finds that the applicant's mitigating factors of his age and being a first offender were considered by the trial magistrate during sentencing as follows: -

“The accused is 58 years old. He is just what the *Sexual Offences Act* was intended for to rid this crime of sex pests and pedophiles. I find that because of his age and he being a first offender but also considering that he took advantage of a very young girl who was at school and who for all intents and purposes was a relative. I jail him for 30 years.”
9. In the High Court Criminal Appeal, Nyakundi, J. stated that the trial magistrate when sentencing the appellant took into consideration the aggravating and mitigating factors.
10. Although the applicant relied on the holding in *Philip Mueke Maingi & 5 others v Republic*, Const Pet No E017 of 2021, the trial court had already exercised discretion in sentencing after considering his mitigation. The applicant did not only defile and impregnate the minor, but he also committed incest because he knew that the minor was his son's daughter.
11. Applications such as the one that is before this court can only be considered where mitigation was not considered by the trial court or in the appellate court. The applicant already had his mitigation considered and based on the circumstances of the case, the trial magistrate passed a sentence which was found to be lawful by the High Court in criminal appeal No 4 of 2018.
12. The application does not have merit and is dismissed.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,  
THIS 10<sup>TH</sup> DAY OF FEBRUARY 2023**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of:-**

**Ogwel- Court Assistant**

Mr. Ngiri for the Respondent

Applicant present in person

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

