



**Nduti v Republic (Miscellaneous Criminal Application
E116 of 2022) [2023] KEHC 770 (KLR) (8 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 770 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CRIMINAL APPLICATION E116 OF 2022**

A. ONG'INJO, J

FEBRUARY 8, 2023

BETWEEN

JOSHUA MUNYASIA NDUTI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* on February 12, 2019 in Mombasa CMCC No 1178 of 2013.
2. The particulars of the charge were that on April 26, 2013 at [particulars withheld] area in Changamwe, Mombasa County, he unlawfully and intentionally caused his penis to penetrate the vagina of JP a child aged 3 years. The applicant was sentenced to serve life imprisonment. His appeal in Mombasa High Court Criminal Appeal No 52 of 2019 was dismissed and conviction and sentence upheld. The trial judge said there is no other befitting sentence in consideration that the victim of the offence was 3 years and 3 months at the time she was defiled.
3. The applicant now seeks that his sentence be reviewed in consideration of the mitigating factors namely: -
 - (i) That during his long stay in custody he has undergone several rehabilitative programmes.
 - (ii) That during his incarceration, he has lived well with his fellow inmates and prison authorities and a favourable report has been made by the authorities to that effect.
 - (iii) That he is a first offender.
 - (iv) That he has a jobless wife and 5 children together with his mother who are suffering in his absence.



- (v) That he is 63 years of age and of good conduct.
4. The applicant also sought that the court takes into account the period that he has been in custody prior to his conviction and makes orders that it deems fit.
5. The trial magistrate considered the applicant's mitigation but finding that the offence was serious, he felt that the proportional and appropriate sentence was life imprisonment which is the maximum provided for. The trial magistrate properly exercised his discretion in meting out that sentence. The applicant's mitigation was also considered before the sentence was passed and the discretion of the trial magistrate was therefore not taken away. However, in consideration of the emerging jurisprudence and preference for determinate sentences, this court finds that the applicant is entitled to quantification of what is life sentence. In consideration of the age of the victim i.e. 3 years and 3 months, and in consideration of the holding in *Joshua Gichuki Mwangi v Republic*, Criminal Appeal No 84 of 2015, where the Court of Appeal set aside the 20 years sentence and substituted it with a 15 years sentence where the victim of defilement was 15 years old, this court substitutes the life sentence with 35 years. The sentence to run from the date of conviction namely February 12, 2019.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,

THIS 8TH 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

