



REPUBLIC OF KENYA



**KENYA LAW**  
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**Chikama v DPP (Criminal Petition E026 of 2021)  
[2023] KEHC 17442 (KLR) (16 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17442 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CRIMINAL PETITION E026 OF 2021**

**F GIKONYO, J**

**MAY 16, 2023**

**BETWEEN**

**JOHN CHIKAMAI ALIAS DJ BLESS ..... PETITIONER**

**AND**

**DPP ..... RESPONDENT**

**JUDGMENT**

1. Before me is an undated application received on 27/01/2023.
2. The application is seeking sentence review pursuant to Articles 2(5)(6), 19, 20, 2, 22(1), 23(1), 24, 25(c), 27, 28, 29, 48, 50, 165, 259 and Sixth Schedule (article 262) of *the Constitution*, articles 3 and 10 of the International Covenant on Civil and Political Rights, and section 8(1)(4) of SOA.
3. Discernible from the applications are three (3) grounds, namely: -
  - i. That he was sentenced to a mandatory sentence fixed by section 8(4) of the Sexual Offences Act;
  - ii. That the mandatory nature of the sentence is prejudicial to and contravenes article 25(c) and 50(2) of *the Constitution*- right to fair trial; and
  - iii. That time spent in custody was not taken into account in sentencing him.

**Brief background**

4. The applicant was charged with an offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* 2006. The particulars were that on 18<sup>th</sup> January 2015 at [particulars withheld] in Narok north sub-county within Narok county unlawfully and intentionally caused his penis to penetrate the vagina of O.K. a child aged 16 years.



5. In the alternative charge, he was charged with the offence of indecent act contrary to section 11(1) of the [Sexual Offences Act](#) no. 3 of 2006. The particulars were that on 18<sup>th</sup> January 2015 at [particulars withheld] in Narok north sub-county within Narok county unlawfully and intentionally touched the vagina of O.K. a child aged 16 years with his penis.
6. The applicant was convicted of the offence of defilement contrary to section 8(1) as read with section 8(4) of [Sexual Offences Act](#) and sentenced to serve 15 years' imprisonment.
7. The applicant dissatisfied with the decision of the trial court filed an appeal in Narok High Court Criminal Appeal No. 23 of 2016. His conviction and sentence was upheld on appeal. The applicant claims that he did not file a second appeal to the Court of Appeal
8. The applicant filed Misc. Criminal app. No. 25 of 2017 which was transferred to high court at Naivasha for directions as Bwonwong'a J. had disqualified himself from the matter due to his ruling dated 20/11/2017 in *Leteiyo Ole Karkar & 3 Others v R* in CR. AP Nos. 2A, 2B, 2C and 2D/16.
9. The applicant then filed myriads of applications; Narok Misc. Criminal Petition No. 25 of 2018, 65 of 2020, 25 of 2017, 9 of 2018, 9 of 2018, 9 of 2019, 29 of 2019, 23 of 2016 and 86 of 2015.
10. And now, the applicant has filed this petition for this court to review the sentence passed.

#### **Directions of the court**

11. The application was canvassed by way of written submissions. The applicant filed written submissions. The respondent did not.

#### **Applicant's Submission**

12. The applicant submitted that this court is not functus officio as the present matter is for review based on Constitution.
13. The applicant submitted that he is a bread winner.
14. The applicant submitted that he has been rehabilitated and has benefited from programs offered in the prison facility.
15. The applicant submitted that this court should consider the sentence already served and set him free.
16. The applicant submitted that this court should consider the period served in remand custody in respect of section 333(2) of the [CPC](#).

#### **Analysis and Determination**

17. I have considered the application herein and the written submissions. The issues for determination are:
  - i. Whether this court has jurisdiction to adjudicate upon this petition; and
  - ii. Whether the applicant's sentence should be reviewed.

#### **Jurisdiction**

18. Jurisdiction of the court has been challenged. The prosecution states that the court has no jurisdiction to entertain this petition since it already pronounced itself on sentence in the appeal.
19. The petitioner holds a different view; that this is review of sentence, thus, the court has jurisdiction.



### **Nature and scope of re-sentencing**

20. The court notes that this petition is seeking what is commonly known as re-sentencing.
21. Re-sentencing is neither a hearing de novo nor an appeal. It is a proceeding undertaken within the court's power to review sentences on the basis of unconstitutionality of sentence. It does not consider conviction. Thus, in re-sentencing, the court will ordinarily check the legality, or appropriateness of the sentence in light of the grounds stated and proved. In focus, therefore, will be inter alia, the penalty law, fetter on discretion, mitigating or aggravating factors, and the objects of punishments.

### **Jurisdiction for Redress of violation of right**

22. This petition is filed on the basis of *the Constitution*; more specifically, on alleged violation of a right enshrined in the Bill of Rights. Accordingly, this court has jurisdiction under Article 165 (3) and 23 of *the Constitution* to hear and determine applications for redress of a denial, violation, or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights

### **The substance: Alleged violation and burden of proof**

23. Success or otherwise of the petition will follow after the circumstances of each case and proof offered of the alleged violation of a right or fundamental freedom guaranteed in the Bill of Rights. The petitioner therefore, bears the burden of proof.
24. The petitioner has argued that the mandatory nature of sentence prescribed in section 8(4) of the *Sexual Offences Act* is prejudicial to and contravened article 25(c) and 50(2) of *the Constitution*- right to fair trial. Article 25(c) is on non-derogation of the right to fair trial; and article 50(2) is on the right to fair trial of an accused person.

### **Possible objections on mandatory sentences**

25. The court is aware that the major objection to mandatory sentences is on the basis that enactment of mandatory sentences is in the nature of legislative sentencing regime or scheme, whose effect is to impose unacceptable restrictions on judicial discretion, and undermines fundamental constitutional or rule of law principles in sentencing.
26. Others argue that mandatory sentencing is also inconsistent with international human rights obligations of states; not to enact sentencing laws that are arbitrary and limit an individual's right to a fair trial by preventing judges from imposing an appropriate penalty based on the unique circumstances of each offence and offender. Examples often cited include; the prohibition against arbitrary detention as contained in Article 9 of the International Covenant on Civil and Political Rights (ICCPR). I should think article 2(5) & (6) of *the Constitution* is relevant here.
27. Related to fair trial argument, it has been argued that, whereas a right to appeal the conviction and sentence for an offence is provided for in *the Constitution*, mandatory sentences prevent any or substantial review of the penalty. Prior to Muruatetu decisional law, in a majority of cases, where appeal on conviction is unsuccessful, judges upheld mandatory sentences or enhanced lesser sentences imposed to mandatory sentences merely because the law provided for mandatory sentence. Many felt they had no discretion to impose other sentences; the tragedy being that any or other sentence below the prescribed mandatory sentence was deemed to be illegal sentence.
28. In a way, the right of appeal to a higher court on or for a review of sentence is restricted where mandatory sentence is prescribed in law and has been imposed by the sentencing court as the only



available sentence. I will borrow a leaf on this; the observation by the United Nations Special Rapporteur, explains the effects of mandatory sentences on the right of appeal contained in Article 14(5), that, the right:

‘...is negated when the trial judge imposes the prescribed minimum sentence, since there is nothing in the sentencing process for an appellant court to review. Hence, legislation prescribing mandatory minimum sentences may be perceived as restricting the requirements of the fair trial principle and may not be supported under international standards (Dato’ Param Cumaraswamy ‘Mandatory Sentencing: the individual and Social Costs’ [2001] 7(2) Australian Journal of Human Rights at <http://www.austlii.edu.au/au/other/ahric/ajhr/ajhrindex.html/2001/14.html#Heading140>.)

29. And, to others, mandatory sentencing disproportionately impacts upon the category of persons charged under the specified sections, for unlike other offenders, they are deprived of the benefit of discretion in sentencing. This argument rests on prohibited discrimination orientation as well as right to equal protection and benefit of the law.
30. But I doubt whether these arguments may be potent where the law prescribes for a maximum sentence, or minimum sentence but with discretion to the court to impose appropriate sentence. A consideration of certain stated major aggravating factors in the law help to neutralize otherwise indomitable constitutional objections to legislative sentencing schemes. A further discussion of this will be rendered later.
31. Be that as it may, the court takes the view that discretion in sentencing pertains to fair trial, and persons who suffer deprivation of discretion in sentencing may claim violation of the right to appropriate or less severe sentence- a principle embodied in *the Constitution* including article 50(2)(p). A mandatory sentence deprives a court of discretion in sentencing, thus, a law that prescribes a mandatory sentence is inconsistent with *the Constitution*.

#### **Does s. 8(4) of SOA prescribe mandatory sentence**

32. The penalty section applicable here is Section 8(4) of the *SOA* which provides that: -
  - (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
33. The terminology used in the section- ‘is liable upon conviction’- does not in law connote or intend the sentence to be mandatory, and a court has the discretion to impose appropriate sentence which may be higher or lower than or the prescribed minimum sentence. It all depends on the circumstances of each case including the age of the child.
34. I should think the incongruous use of the phrase ‘...liable upon conviction...’ together with ‘...not less than...’ in the same sentence, could be responsible for the mistaken belief that section 8(4) and other similar penalty clauses in the *Sexual Offences Act*, prescribe mandatory minimum sentences.
35. Jurisdictions which have faced constitutional challenges against legislative sentencing scheme have adopted presumptive or prescriptive methods or a combination of both, in prescribing minimum sentences in order to meet the constitutional muster. A presumptive sentencing system prescribes a minimum penalty to be imposed unless the court determines a departure is justified on the basis of the facts of the case. Such is not mandatory sentence.



36. In other jurisdictions, a minimum sentence is prescribed with a provision for the court to depart from the minimum sentence if 'exceptional circumstances' are established. Again, such may not be mandatory sentence.
37. In prescriptive system, the legislation will stipulate the grounds- broadly or narrowly- on which a court may impose the minimum or greater sentence. These are mainly aggravating factors. But, still leaves discretion for the court to impose a lesser sentence if circumstances so demand.
38. In my view, section 8(4) of the Sexual Offences Act is prescriptive minimum sentence, which is merely indicative of the seriousness of the offence given the age of the victim. The section does not preclude judicial discretion. The trial magistrate was alive to this legal imperative on aggravating factors.
39. Consultation with the record of the trial court reveals that the applicant was convicted of the offence of defiling a child aged 16 years and was sentenced to serve 15 years' imprisonment. The trial court exercised discretion in sentencing the petitioner and was categorical on the mischievous, calculated and cruel manner the petitioner sexually attacked the girl, the fact that she was a minor and was protected by law from sexual debauchery, and the seriousness of the offence. He also considered the mitigation by the petitioner and considered the minimum sentence to be the appropriate sentence in the circumstances and imposed a sentence of 15 years' imprisonment. He stated, thus: -
- First offender. Plead for leniency citing his young age and family depended on him.
- The victim was also a young female person protected by law from sexual predation.
- In this case, the convict had used delaying wiles and tactics to procure false detention of the victim at his house on his pretext that he was keeping her there to wait for unknown person to deliver the cash only for him to pounce on and sexually predate on her.
- The court noting the plea for leniency and remorse imposes the minimum sentence of 15 years imprisonment as the girl was aged 16 years 10 months old at the time of the offence.
40. There is nothing to show that the trial court was tied to the prescription of the Act. The trial magistrate exercised discretion in sentencing the applicant.
41. In light thereof, I find that there is no violation of the right to fair trial or any contravention of the Constitution by the sentence imposed.
42. His petition for re-sentencing or review of sentence on the alleged violation of a right or contravention of the Constitution is devoid of merit and is hereby dismissed.

#### **Time spent in custody**

43. Nevertheless, should he get advantage of section 333(2) of the CPC?
44. The applicant was first arraigned in court on 21/01/2015. He was released on bond on 4/2/2015. He was later placed in custody as per proceedings of 22/06/2015. He was sentenced on 06/05/2016.
45. The applicant remained in custody from 22/6/2015. Accordingly, pursuant to Section 333(2) of the CPC, the sentence herein shall run from the date he was later placed in custody after cancellation of his bond, that is, 22/06/2015.
46. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 16<sup>TH</sup> DAY OF MAY 2023.**



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**F. GIKONYO M.**

**JUDGE**

**In the Presence of:**

**1. Ms. Mwaniki for DPP**

**2. Petitioner**

**3. Kasaso - CA**

