



REPUBLIC OF KENYA



KENYA LAW
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**Langat v Director of Public Prosecution (Criminal Petition
E018 of 2021) [2023] KEHC 17740 (KLR) (15 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17740 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL PETITION E018 OF 2021**

F GIKONYO, J

MAY 15, 2023

BETWEEN

SAMWEL KIPRONO LANGAT PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

JUDGMENT

Sentence Review

1. Before me is an application dated October 3, 2021.
2. The application is seeking sentence review pursuant to Articles 2(5) & (6), 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 48, 50, 165, 128 and 359 of the Constitution, section 333(2) and sub-section 38 of the CPC.

Brief background

3. The applicant was charged with an offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, 2006. The particulars were that on December 6, 2010 at [particulars withheld] reserve in Narok South District within Rift Valley Province, inserted his genital organ into organ of NK a child aged 14 years.
4. 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 December 6, 2010 at [particulars withheld] reserve in Narok South District within Rift Valley Province committed an indecent act with NK a girl aged 14 years by rubbing his male genital organ (penis) against the said NK female genital organ (vagina).
5. The applicant was convicted of the offence of defilement and sentenced to serve 22 years' imprisonment.



6. Being dissatisfied with the decision of the trial court, the applicant filed an appeal in High Court in Nakuru Criminal Appeal No 188 of 2018. His conviction and sentence was upheld on appeal. The applicant claims that he did not file a further appeal in the Court of Appeal
7. The applicant has filed this application for this court to relook at the sentence passed.

Directions of the court.

8. The application was canvassed by way of written submissions.

Applicant's Submission

9. The applicant submitted that he has embraced the rehabilitation programs being offered in prison institution.
10. The applicant submitted that the 22 years' imprisonment which was imposed by the magistrate and affirmed by the appellate judge is too harsh and excessive in all circumstances. He urged this court to find that he is ready to be reintegrated back to the society. He prays that the time already served is sufficient.
11. The applicant submitted that the time spent in custody was not considered.
12. The applicant submitted that he is now remorseful and repentant for the offence committed.
13. The applicant has relied on the following authorities;
 - i. Section 107(1) of the *Evidence Act*.
 - ii. *William Okungu Kittiny vs Republic* (Ksm) Court of Appeal No 56 of 2013(2018) eKLR.
 - iii. *S Vs Mchumu and another* (Ar24) (Ii) (2012) Zakzphc 56
 - iv. *S Vs Scott- Crosssely*(2008) (1) SACR, 223(SCA)
 - v. *S Vs Toms* (1990) (2) Sa 802(a) At 806(2) -807(b)
 - vi. *Ahamed Abolfathi Mohamed* in Criminal Appeal No 15 of 2016.

Respondent's Submission

14. The respondent opposed the application.
15. The respondent submitted that this re-sentence hearing application has been disguised as a constitutional petition and ought to be struck out. That the issue of sentence was considered by the appellate court in high court.
16. The respondent submitted that the high court is functus officio and the only remedy available to the petitioner was to appeal to the next superior court, the Court of Appeal.
17. The respondent submitted that the petition dose not disclose what constitutional rights of the petitioner have been infringed upon.
18. The respondent submitted that this court cannot review the sentence passed by a court of concurrent jurisdiction as this would offend article 165(6) of the *Constitution*.
19. The respondent submitted that the trial court considered the mitigation of the applicant and aggravating circumstances and passed the sentence of 22 years.



20. The respondent submitted that the trial court did not breach any law when it passed a sentence against the accused person, the trial court did not err in passing a sentence that was higher than the minimum sentence set out in the law.
21. The respondent relied on the following authorities;
 - i. [*Peter Nganga Muiruri v Credit Bank Limited & 2 others*](#) [2008] eKLR
 - ii. [*Sammy Abiyo Jילו v Republic*](#) [2021] eKLR

Analysis And Determination

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

Nature and scope of Re-sentencing

23. The applicant seems to be seeking some sort of re-sentencing. Re-sentencing is neither a hearing de novo nor an appeal. It is a proceeding undertaken within the court's power to review sentences only. It does not consider conviction. Re-sentencing, in the sense of Muruatetu decision should be done on the basis of the [*Constitution*](#) especially where the sentence violates the [*Constitution*](#). Therefore, resentencing will ordinarily check the legality or appropriateness of sentence. Thus, it will be concerned with *inter alia*, the penalty law, mitigating or aggravating factors, and the objects of punishments.
24. In this case, the applicant filed an appeal to the High Court in Nakuru vide appeal No 188 of 2011. He claims that he did not file a second appeal to the Court of Appeal. The Applicant has filed the application herein before me for review.

Jurisdiction

25. It appears the applicant is challenging the sentence imposed on the basis that the trial court did not exercise discretion because of the fetter placed by section 8(3) of the Sexual Offence Act. He claims the section is inconsistent with the [*Constitution*](#) for prescribing a mandatory minimum sentence. He cited the specific constitutional provisions that have been infringed including article 50 of the [*Constitution*](#), as well as section 333(2) of the [*CPC*](#).
26. In light of the tenor and core of the application, it is an application for redress of a denial, violation, or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Accordingly, this court has jurisdiction in accordance with 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. And, I will deal with them as such.

Alleged violation of right

27. According to the applicant, the alleged violation of right to fair trial is in the mandatory sentence in section 8(3) of the [*Sexual Offences Act*](#), for it deprived the court of the discretion to impose appropriate sentence. Discretion in sentencing pertains to a 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) of the [*Constitution*](#).



28. Section 8(3) of the *SOA* provides: -

8(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

29. The court is aware that the penalty provisions in the *Sexual Offences Act* have been under constant attack that they prescribe for mandatory or mandatory minimum sentences. And, this is the dominant narrative by many including renown commentators, practitioners, judicial officers as well as across multi-disciplines. But when I dig the ancient well, I find there is no dearth of jurisprudence which should guide proper construction of such provisions. I will not multiply them except to cite the predecessor of the court in *Opoya versus Uganda* [1967] EA 752 at page 754 where Sir Clement DeLestang V.P. stated inter alia thus:

“It seems to us beyond argument that the words “shall be liable to” do not in the ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words, they are not mandatory but provide a maximum sentence only and while the liability existed, the court might not see fit to impose it.”

30. My view has been that, a proper construction of section 8(3) of the *Sexual Offences Act* is that, by adopting the phraseology ‘is liable upon conviction’, the section does not intend the sentence thereto to be mandatory, but merely expresses the sentence which may be imposed at the discretion of the Court. In the court’s estimation, the source of the belief that the section prescribes mandatory minimum sentence, may be the incongruous use of the phraseologies ‘is liable upon conviction’ with ‘not less than’ in the same sentence which really should be ironed out by careful legislative intervention.

31. I so hold.

32. Be that as it may, did the trial court fail to exercise discretion in sentencing the applicant?

Sentence

33. Applying the test, does the sentence herein violate the rights of the applicant?

34. It appears from the judgment of the trial court that the trial magistrate after considering mitigating factors found the sentence of 22 years to be the appropriate sentence in the circumstances of the case. He stated, thus: -

...circumstances of the offence considered. Mitigation taken into account. Accused sentenced to serve for a period of 22 years without the option of a fine. This is a serious offence.

35. There is nothing to show that the trial court did not exercise discretion in imposing the sentence upon the applicant. The trial magistrate exercised discretion in sentencing.

36. And, taking into account the seriousness of the offence- incest of a female minor and member of his family- and the need for deterrence of such abominable sexual attacks by the older members of the family who should protect the young girls in the family, the sentence of 22 years’ imprisonment is appropriate- it serves as deterrent yet it provides him with an opportunity to be re-integrated back into society.

37. Accordingly, I do not find any merit in the application and I dismiss it.



Time spent in custody

38. The record show that the applicant was first arraigned in court on December 9, 2010. He was sentenced on July 22, 2011.
39. The applicant remained in custody since arraignment, and pursuant to Section 333(2) of the CPC, the sentence shall run from the date he was first arraigned in court, that is, December 9, 2010.
40. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 15TH DAY OF MAY, 2023.

F. GIKONYO M.

JUDGE

In the Presence of:

Petitioner

Ms. Mwaniki for the Respondent

Mr. Kasaso - CA

