



REPUBLIC OF KENYA



**Makabila v Republic (Criminal Appeal E44 of 2022)
[2023] KEHC 18751 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18751 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E44 OF 2022
JRA WANANDA, J
JUNE 21, 2023**

BETWEEN

CHARLES MAKABILA APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. On May 26, 2023, I delivered a Judgment in the Appeal.
2. The Appeal arose from the Appellant’s conviction and sentence of imprisonment imposed in Butere Chief Senior Principal Magistrate’s Court Sexual Offence Case No 54 of 2020 for the offence of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*.
3. The trial Court had sentenced the Appellant to serve 10 years imprisonment.
4. In the Appeal, the Appellant raised various grounds both on the conviction and sentence. In my said Judgment, I dismissed the Appeal against conviction but reduced the sentence. However, it has now been brought to my attention that the final Orders that I gave may contain a mix-up on the duration of the period by which I reduced the prison sentence.
5. In the Judgment, I made the following remarks:

“

“ 50. . I now consider whether to revise the sentence of 10 years imprisonment imposed herein. In *Shadrack Kipkoech Kogo vs R*, Eldoret Criminal Appeal No 253 of 2003, the Court of Appeal stated as follows:

“Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into



account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered.”

51. Section 11(1) of the *Sexual Offence Act* provides as follows:

.....

52. 10 years imprisonment is therefore the maximum sentence provided under the said Section. While the trial Magistrate did not expressly mention it, it appears that he may have construed the above provision as compelling him to impose the 10 years imprisonment as a mandatory sentence. One cannot discuss the issue of mandatory sentences in Kenya without mentioning the now famous Supreme Court of Kenya case of *Francis Karioko Muruatetu & Another vs Republic* [2017] eKLR (commonly referred to as Muruatetu 1). It had been interpreted by many that the decision is authority for the view that those who were convicted of sexual offences and whose sentences were passed on the basis that the trial courts had no discretion but to impose the mandatory sentences are now at liberty to petition the High Court for orders of resentencing in appropriate cases.

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57. The Learned Trial Magistrate did not give reasons for imposing the maximum sentence. In the absence of extraneous circumstances, this Court takes the view that the Appellant ought to have benefitted from a lower sentence. In light thereof, I feel justified to interfere with the sentence of life imprisonment imposed by the trial Court.

58. I have taken into account the circumstances of the offence, the sentencing guiding principles, the authorities cited and the maximum sentence of 10 years provided in the Act. I have also taken into account the emerging jurisprudence encouraging exercise of judicial discretion even where mandatory and minimum sentences are stipulated. I have also considered the Appellant’s mitigation before the trial Court. Having done so, I am persuaded to alter the sentence downwards. I therefore hereby reduce the 10 years prison sentence to 5 years.

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59. On the issue of whether the sentence should run from the date of arrest or the date of conviction or sentencing, I note that the trial magistrate did not also mention whether he took into consideration the time spent by the accused person in custody as required by law.

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63. In his Submissions, the Appellant states that he was arrested on October 11, 2020, released on bond on June 18, 2021 and remanded back in custody when he was convicted on April 27, 2022. The sentence was then passed on May 25, 2022. The total period that he spent in custody between arrest and sentencing is therefore about 9 months. This period ought to be therefore factored and reduced from the 10 years prison sentence that this Court has now imposed.

Final Order



64. In the end, I make the following final Orders:
- i. I uphold the conviction by the trial Court.
 - ii. I set aside the sentence of 10 years' imprisonment imposed by the trial Court and substitute it with a sentence of 5 years imprisonment.
 - iii. The period of 9 months that the Appellant spent in custody between the date of arrest and the date of sentencing shall be factored in the computation of the sentence of 10 years imprisonment.”
6. From the foregoing, it is clear that there is a mix-up on the period to which I reduced the sentence. It is however evident and is all too obvious that I meant to reduce the prison sentence from the 10 years imposed by the trial Court to 5 years. In the circumstances, I invoke the “slip rule” and make corrections in the Judgement so as to achieve the intention of the Court.
7. In applying the slip rule, I cite the Supreme Court decision in *Fredrick Otieno Outa v Jared Odoyo Okello and 3 others* [2017] eKLR where the following was stated.
- “By its nature, the slip rule permits a court of law to correct errors that are apparent on the face of the judgment, ruling or order of the court. Such errors must be so obvious that their correction cannot generate any controversy, regarding the judgment or decision of the court. By the same token, such errors must be of such nature that their correction would not change the substance of the judgment or alter the clear intention of the court. In other words, the slip rule does not confer upon a court any jurisdiction or powers to sit on appeal over its own judgment, or, to extensively review such judgment as to substantially alter it. Indeed, as our comparative analysis of the approaches by other superior court demonstrates, this is the true import of the slip rule.”
8. I am satisfied that the case before me meets the parameters set out in the said Supreme Court decision. I therefore invoke the “slip rule” and correct paragraph 63 of the Judgment to read as follows:
- “In his Submissions, the Appellant states that he was arrested on October 11, 2020, released on bond on June 18, 2021 and remanded back in custody when he was convicted on April 27, 2022. The sentence was then passed on May 25, 2022. The total period that he spent in custody between arrest and sentencing is therefore about 9 months. This period ought to be therefore factored and reduced from the 5 years prison sentence that this Court has now imposed.”
9. Similarly, I correct the “Final Orders” section of the Judgment to read as follows:

Final Order

10. In the end, I make the following final Orders:
- i. I uphold the conviction by the trial Court.
 - ii. I set aside the sentence of 10 years' imprisonment imposed by the trial Court and substitute it with a sentence of 5 years imprisonment.
 - iii. The period of 9 months that the Appellant spent in custody between the date of arrest and the date of sentencing shall be factored in the computation of the sentence of 5 years imprisonment.

DATED AND SIGNED AT ELDORET THIS 21ST DAY OF JUNE 2023



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WANANDA J. R. ANURO

JUDGE

