



**Ngwatu v Republic (Miscellaneous Criminal Application
E134 of 2022) [2023] KEHC 19510 (KLR) (22 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19510 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CRIMINAL APPLICATION E134 OF 2022**

**A. ONG'INJO, J
JUNE 22, 2023**

BETWEEN

AMBROSE MWAMINDO NGWATU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant Ambrose Mwamindo Ngwatu was charged in Voi Senior Resident Magistrate's Court Criminal Case No 915 of 2009 with the offence of defilement contrary to Section 8(1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006.
2. The particulars of the offence were that the applicant on diverse date between July 2009 and August 2009 in Voi District within Coast Province unlawfully caused his penis to penetrate the vagina of G M a girl aged 14 years thereby causing her to conceive. The applicant was found guilty and sentenced to serve 20 years imprisonment.
3. The application filed on July 29, 2022 seeks that the sentence be reviewed in consideration of the period spent in custody and his mitigating factors.
4. The applicant cited his mitigating factors to include rehabilitative programs and several theological courses that he has undertaken during his long stay in the penal institution, that the prison administration has granted him a favourable progressive report on his character, and that he is a first offender.
5. The applicant contended that the words 'shall be liable to imprisonment of not less than 20 years' under the penal provision of the relevant law is construed in mandatory terms which deprives him of his right to have his mitigation taken into consideration. That however, superior courts have clarified that the laws are not mandatory in nature and that what they imply is in fact discretionary upon the concerned magistrate to impose sentences that befit the offences committed.



6. The applicant cited the case of *D W M v Republic (2016) eKLR*, *Opoya v Uganda* (1967) EA 752 and *Kichanjele s/o Ndamungu v Republic* (1941) EA CA 64 where the concerned courts concurred that the words ‘shall be liable to’ do not in their ordinary meaning require the imposition of the stated penalty but, merely express the state penalty which may be imposed at the discretion of the court.
7. The applicant further cited the decision of the Court of Appeal at Malindi (Visram, Karanja & Koome JJA) in *Swabir Bukhet Labhed v Republic* C.A. Cr. App. No. 52 of 2018 where it was held that it is common ground that where a sentence is couched under the prefix ‘shall be liable to’ the same connotes that the sentence prescribed herein is not a mandatory sentence rather it is the prescribed maximum sentence. Therefore, the sentencing court is clothed with discretion to determine the appropriate sentence of course, taking into account the surrounding circumstances of each case.
8. The applicant averred that courts have grappled with the issue of mandatory minimum penal provisions, the ultimate of them being the High Court in Machakos in *Philip Mueke Maingi & 5 Others v Republic*, Const. Pet. No. E017 of 2021 where the superior court in the case held that all accused persons deserve to have their mitigation taken into account, and equally any court is bestowed with the legitimate discretion to impose sentences that befit the offences committed.
9. The applicant cited Section 333(2) of the *Criminal Procedure Code* which provides that subject to the provision of Section 38 of the *Penal code*, every sentence shall be deemed to commence from and to include the whole of the day, the date on which it was pronounced, except where otherwise provided in this code. Provided that where a person sentenced under sub-section (1) has prior to such sentence, been held in custody, the sentence shall take into account of the period spent in custody.
10. Upon conviction of the applicant was sentenced to serve 20 years because that is the mandatory penalty stipulated by the *Sexual Offences Act*. In consideration of the principle in *Francis Muruatetu and Others v Republic* and the holding in *Philip Mueke Maingi & 5 Others v Republic*, Const. Pet. No. E017 of 2021, this court finds that the applicant’s constitutional right was infringed when the trial court failed to consider his mitigation before sentencing on account of the mandatory minimum sentence of 20 years.
11. In *Christopher Ochieng v R* (2018) eKLR the Court of Appeal at Kisumu took guidance from the Landmark Supreme Court decision in *Francis Karioko Muruatetu & another v Republic* SC Pet No. 16 of 2015 and held: -

“In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.”
12. In *Philip Mueke Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment), Odunga, J. (as he then was) held: -

To the extent that the *Sexual Offences Act* prescribed mandatory minimum sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of article 28 of the *Constitution*. However, the court was at liberty to impose sentences prescribed thereunder so long as the same were not deemed to be the mandatory minimum prescribed sentences.
13. In consideration of the authorities cited above and in consideration that the 14-year-old complainant in her evidence stated that she was in a consensual relationship with the applicant and went to his



home over a period of time. In consideration that the complainant also said that the applicant was not the only boyfriend and that her pregnancy was discovered by her teacher, this court finds that circumstances of the case herein called for a more lenient sentence against the applicant. The applicant is a young man with a whole life ahead of him. He has also undergone rehabilitative programs for the period of 14 years that he has been in custody since his arrest and it is inexpedient to inflict more punishment than what has already been served. In giving him a second chance to be a better person in society, this court therefore sets him at liberty unless otherwise lawfully held.

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

THIS 22ND DAY OF JUNE 2023

HON LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr Ngiri for Respondent

Applicant present in person

HON LADY JUSTICE A ONG'INJO

JUDGE

