



**Okare v Republic (Miscellaneous Criminal Application
E056 of 2022) [2023] KEHC 19073 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19073 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CRIMINAL APPLICATION E056 OF 2022**

HK CHEMITEI, J

JUNE 21, 2023

BETWEEN

PETER MOMANYI OKARE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was convicted and subsequently sentenced to 22 years' imprisonment for the offence of defilement by the Nakuru Children's Court. Being aggrieved by the said decision, the applicant appealed to the High Court and his appeal was dismissed. Thereafter, the applicant filed an appeal to the Court of Appeal which he later withdrew.
2. The application before this court seeks for re-sentencing of the 22 years imprisonment currently being served by the applicant issued by the trial court. The applicant in his application listed several mitigating factors, the same include; that this court has discretion on sentencing following the decision in Philip Mueke Maingi Petition No E017 and 16 of 2021 at Machakos, that he is a first offender, that he is a young man and that he had taken full advantage of rehabilitation programmes offered in the correctional facility.
3. In his submission, he pleaded for leniency by this court following the provisions of Article 50(2)(p) and (q) of the *Constitution*. He submitted that mandatory minimum sentence was unconstitutional and a threat to the doctrine of separation of powers and the independence of the Judiciary. He placed reliance on the cases of *Kalpana H, Rawal & 2 Others* [2016] eKLR, *S v Toms* 1990 (2) SA 802 (A) AT 806 (L)- 806 (L)- 809(B), *S v Jansen* 1999 (2) 1999 (2) SACR 368 At 373 (G)- (H), *Dismas Wafula Kilweke v Republic* [2018] eKLR, *Evans Wanjala Wanyonyi* HCCR App 174 of 2015, Criminal Appeal No 312 of 2018 and *Philip Mueke and 5 Others* Petition No E017 and 16 of 2021. He urged this court to offer him a second chance by awarding him a more lenient sentence as he was a first offender and was also remorseful.



4. The learned state counsel opposed the application *vide* a replying affidavit dated February 6, 2023 and filed in court on same date. He averred that this matter could only be considered in light of Petition 17 of 2021 where the court decided on cases where the aggrieved person could seek resentencing in cases which the lower court gave the minimum mandatory sentences as prescribed by law. That the court was to revise the sentences in line with the said ruling as they were said to have violated Article 28 of the constitution.
5. He however opposed the reviewing of the trial court sentence as it was merited and in the interest of justice, the said sentence acted as a deterrent to persons who would want to commit such offences. That the high prevalence of defilement cases and the sentences seem not to reduce the high rate of defilement cases happening. Further, that the court while sentencing is guided by how the acts were committed, the high prevalence of the offence, and the need to give a deterrent sentence. In addition, that the applicant's mitigation was also considered and how remorseful he was and considering he committed the act on a family member
6. The learned state counsel went on to aver that he did not oppose the court considering the duration from which the applicant was in remand until sentence as envisaged in section 333 of the CPC. He urged the court not to interfere with sentence and should therefore dismiss the applicant's application as the same was unmeritorious.
7. The court has perused the record and clearly it is apparent that the applicant defiled the complainant who was a minor. The import of punishment as provided in our statute books is to try as much as possible ameliorate the suffering of the victims. Also, it is meant to somehow compensate the victim or family of the victim by having the perpetrator punished. The offence the applicant was charged with is a serious one and the sentence acts as a deterrent to persons who would want to commit such offences.
8. In the instant case, the applicant upon being dissatisfied with the lower Court, appealed to the High Court and his appeal was dismissed. This court addressed an application for re-sentencing by the applicant where he relied on the Muruatetu case in it earlier ruling date February 21, 2022. In the said ruling, this court opined that it had no power to revise the decision of a concurrent High Court Judge or the Court of Appeal. This court further opined that the only recourse for the applicant is to appeal to the Court of Appeal. Having said that this court takes note that the application herein by the applicant is similarly for re-sentencing an issue it had already dealt with but this time the applicant has relied on a different case of Philip Mueke Maingi.
9. In view of the foregoing, this Court is *functus officio* with issue of re-sentencing and therefore the application herein is dismissed. The applicant however may seek recourse from the court of appeal.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 21ST DAY OF JUNE, 2023.

H K CHEMITEI

JUDGE

