



REPUBLIC OF KENYA



KENYA LAW
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**Victor v Republic (Criminal Petition E003 of 2023)
[2023] KEHC 18479 (KLR) (5 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18479 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION E003 OF 2023
RN NYAKUNDI, J
JUNE 5, 2023**

BETWEEN

CHERUIYOT VICTOR PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The petitioner was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the [Sexual Offences Act](#) in Eldoret Chief Magistrate's Criminal Case no 112 of 2017. The matter proceeded to full hearing and the trial court, upon considering the evidence and the testimonies of the witnesses found him guilty and sentenced him to 20 years' imprisonment on May 8, 2019. The petitioner filed an appeal at the high court being High Court Criminal Appeal No 43 of 2019 which was dismissed on July 14, 2022.
2. The Petitioner approached this court vide a Notice of Motion Application filed on January 30, 2023 seeking sentence review and consideration of the time spent in custody. The same is premised on the grounds set out therein and the contents of the affidavit in support of the petition.
3. The petitioner filed submissions in support of his application. He submitted that the sentence was too harsh as he was a first offender and further, that the court should consider his mitigating circumstances. He urged that he has served a substantial part of his sentence and wished the court consider the same in granting him a lenient sentence. He humbly prayed that the court apply the constitutionality of articles 27, 28 of the [Constitution](#) and sections 354, 364 and 365 of the [Criminal Procedure Code](#) and decide on a lesser sentence.
4. The petitioner submitted that he is a reformed person as emphasized in his prison recommendation letter addresses the various courses he has undergone while in custody to enhance the ability of a changed person. He also cited the High Court Petition e017 of 2021 - Machakos and section 333(2)



of the Criminal Procedure Code urging the court to consider the time spent in custody. he prayed the court grant his petition as prayed.

Analysis & Determination

5. As this is an application for resentencing, the only issue for determination is whether the court should review the sentence.

Whether the court should review the sentence of the petitioner.

6. In light of recent jurisprudence, the current position on sexual offences is that there are no mandatory maximum or minimum sentences as the same are unconstitutional. The reason is that these mandatory sentences hamper the discretion of the court to deal with each case based on the circumstances. The Court of Appeal in *Criminal Appeal no 84 of 2015 – Joshua Gichuki Mwangi vs Republic* held that;

7. We acknowledge the power of the Legislature to enact laws as enshrined in the Constitution. However, the imposition of mandatory sentences by the Legislature conflicts with the principle of separation of powers, in view of the fact that the legislature cannot arrogate itself the power to determine what constitutes appropriate sentences for specific cases yet it does not adjudicate particular cases hence cannot appreciate the intricacies faced by judges in their mandate to dispense justice. Circumstances and facts of cases are as diverse as the various cases and merely charging them under a particular provision of laws does not homogenize them and justify a general sentence.

8. This being a judicial function, it is impermissible for the Legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes against the independence of the Judiciary as enshrined in Article 160 of the Constitution. Further, the Judiciary has a mandate under Article 159 (2) (a) and (e) of the Constitution to exercise judicial authority in a manner that justice shall be done to all and to protect the purpose and principles of the Constitution.

9. More recently, in the case of *Maingi & 5 others v Director of Public Prosecutions & another Petition E017 of 2021 [2022] KEHC 13118 (KLR)* (17 May 2022) GV Odunga J (as he then was) stated as follows;

'To the extent that the Sexual Offences Act prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of the Constitution. However, the Court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences.'

10. It follows that courts are allowed to prescribe sentences which may be similar to mandatory sentences but are not bound by said mandatory sentences under the act.

11. I had the advantage of presiding over an appeal by the petitioner and both conviction and sentence. The petitioner seems not have filed an appeal with the highest court of the Republic to seek a further interpretation on the validity of the conviction and sentence. In terms of Articles 50 (6) (a) & (b) of the Constitution:

In the matter of Article 1 (c) , 22(D) 22(1) (4), 23(1) 25 (c) 27(1), (28), 29 (A) (F) , 50 , 51, 59(2) AND 165(3) (A) (B) (d) of the Constitution of Kenya 2010 and Section 213, 216, 329, 362, 364 (1) (B) and 365 of the CPC.

12. In support of the petition on review of sentence he has relied on the following mitigating circumstances



1. That, am a first offender thus beg for leniency
 2. That, I am remorseful and reformed and I have learnt to take responsibility of my own actions
 3. That the sentence meted upon me was too harsh considering my mitigating factors and circumstances.
 4. That, I am praying may the honourable court consider review of sentence as I rely on jurisprudence of High Court Petition No E 017/2021 at Machakos on matter maximum-minimum mandatory provision under the sexual offence act no 3 of 2006
 5. That I am seeking for sentence review in accordance to section 362, 365(1) and 365 of CPC cap 75 laws of Kenya in reliance to article 27(1) (2) (4) 22(1) 23(1), 25 (c) 50 (1) (2) and 51 (1) (2) of the Constitution of Kenya 2010.
 6. That I rely on sentencing policy guidelines 2016 to review my sentence.
 7. That more grounds to be deduced during hearing thereof and determination of petition.
13. In summary both courts took into account the nature and gravity of the offence, the design and execution of the offence as against the victim. On appeal this court weighed the mitigating and aggravating circumstances that were present at the commission of the offence. In the jurisdiction of this court, to consider the petition one has to construe the provisions of Article 50 (6) (a) & (b) of the Constitution. Based on these provisions and in reference to the petition I find no new compelling evidence to interfere with the sentence save for the variation that the date of commencement be effected from the time and date of arrest pending arraignment before the trial court. It is apparent this aspect was never considered by either the trial or Appeal's court.
14. I have considered the mitigation of the petitioner and weighed it against the offence he committed. His victim was 12 years old and will continue to endure the consequences of his actions for the rest of her life. I find no reason to disturb the sentence meted out by the trial court save for the amendment of the committal warrants to indicate the custodial sentence be effected in consonant with Section 333(2) of the CPC to incorporate the period spent in remand custody. For all of those reasons the review on sentence partially succeeds.

It is so ordered

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 5TH DAY OF JUNE 2023

In the Presence of the

Applicant Present

Mr. Mugun for the state.

.....

R. NYAKUNDI

JUDGE

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