



**Chege v Republic (Criminal Miscellaneous Application
20 of 2020) [2023] KEHC 20856 (KLR) (20 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20856 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL MISCELLANEOUS APPLICATION 20 OF 2020**

HM NYAGA, J

JULY 20, 2023

BETWEEN

PETER GITHINJI CHEGE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006 in Nakuru CMCC Criminal Case No. 249 of 2010 and upon trial he was convicted and sentenced to Life imprisonment.
2. Being dissatisfied by the conviction and sentence, the applicant filed an appeal to the Nakuru High Court of Kenya vide Criminal Appeal No.225 of 2013 which appeal was dismissed. He preferred a further appeal to the Court of Appeal at Nakuru being Criminal Appeal No.27 of 2014 which appeal he withdrew on 17th September,2020.
3. The Applicant through his undated Notice of Motion filed on 6th February,2020, seeks sentence Rehearing. The Application is supported by his Affidavit sworn on 6th February,2020. He deposed that the sentence meted on him was too excessive and harsh and relying on the case of Guyo Jarso Guyo v Republic [2018] eKLR & Francis Kariuki Muruatetu & another v Republic & 5 others [2016] eKLR he urged this court to mete out an appropriate sentence.
4. The parties canvassed the Application through written submissions. The Applicant filed his submissions on 15th June, 2023 while the Respondent submissions was filed on 10th May, 2023.



Applicant's Submissions

5. The Applicant referred this court to the case of *Francis Opondo v Republic of Kenya* [2017] eKLR in which the court cited its authority of *Dalmas Omboko Ongaro vs Republic* [2016] eKLR where it was stated that:

“The principles of sentencing were summarized at page 86 paragraph B of the Judiciary Bench Book for Magistrates in Criminal Proceedings (published by the Kenyan Judiciary in 2004) as follows:

“In determining what is the appropriate sentence to mete out, the Court has to consider such factors as the nature of the offence, the attitude of the accused person, prevalence of the type of offence, the seriousness of the offence, the circumstances under which the offence was committed, the effect of the sentence on the accused person, the fact that the maximum sentence is intended for the worst offenders of the class for which the punishment is provided, etc. (Makanga v R. Criminal Appeal No. 972 of 1983 (unreported)). The Court may also consider the value of the subject matter of the charge (Mathai v R [1983] KLR 442) and whether there has been restitution of the property by the accused (Hezekiah Mwaura Kibe v R [1976] KLR 118).”

The antecedents of an accused person also come into play when the Court is considering the appropriate sentence. If an accused person is a first offender the sentence ought to reflect this fact as the aim of the Court is to encourage reform and discourage recidivism.”

6. The Applicant thus submitted that he is remorseful and pleaded for leniency. He attributed the commission of the offence to lack of direction and contended that he has reformed and has undertaken rehabilitative program in theology.
7. He submitted that prior to arrest his family and mother depended on him. He promises to be a Law Abiding Citizen.
8. It was his further submissions that the circumstances of this case was not aggravated as no witness was injured.
9. He requested this court to consider the period he has spent in custody in determining his sentence in line with the provisions of Section 333(2) of the *Criminal Procedure Code*. To further buttress this position, he cited the case of *Ahmed Nkonge Abdulfathi Mohamed & Another vs Republic* Criminal Appeal Number 135 of 2016 on the position that any sentence is to run from date of arrest provided that applicant has all along been in custody.

Respondent's Submissions

10. The Respondent is not opposed to the Application for reasons that the Applicant is a senior citizen and he has been in custody for quite some time. However, it urged this court in exercising its discretion to consider the following aggravating circumstances: -
- a. The Victim was a child aged 11 years, innocent and living under the Applicant's roof and therefore she needed total protection from the Applicant but he instead took advantage of her innocence by defiling her repeatedly.
- b. The victim was a grandchild to the Applicant, thus the applicant committed an incestuous act which is an abomination in African society that needs cleansing.



- c. The Applicant denied the offence and took the court through trial thereby wasting court's time.
 - d. The offence falls in the category of gender-based violence offences aimed at demeaning the place of a woman by reducing them into a mere sexual object.
 - e. The victim in the process was infected with venereal diseases and that the Applicant showed no sympathy as he failed to protect himself and the victim from the same.
11. The Respondent submitted that based on *Philip Mueke Maingi & others vs Director of Public Prosecutions & another* (2022) eKLR courts were invited to look at the circumstances of each case separately while considering both the aggravating and mitigating factors. That the aggravating factors herein outweigh the mitigating circumstances.

Analysis & Determination

12. The only issue that the court should determine is whether the Applicant's plea for sentence rehearing is merited.
13. Sentencing is governed by *the Constitution*, the relevant legal provisions and the Judiciary *Sentencing Policy Guidelines* 2016.
14. The *Sentencing Guidelines* outline the purposes of sentencing at page 15, paragraph 4.1. as follows:
- “Sentences are imposed to meet the following objectives:
- 1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
 - 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
 - 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
 - 4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
 - 5. Community protection: To protect the community by incapacitating the offender.
 - 6. Denunciation: To communicate the community's condemnation of the criminal conduct.”
15. Under section 8(2) of the *Sexual Offences Act*, it is provided that where the victim is aged 11 years or less, the prescribed punishment is life imprisonment. This, until recently, was seen as the 'mandatory' sentence imposed by the statute.
16. The issue of mandatory sentences was addressed in *Francis Karioko Muruatetu & others vs Republic* (2017) eKLR (Muruatetu 1) where the Supreme Court held that the mandatory death sentence



prescribed for the offence of Murder by section 204 of the Penal Code was unconstitutional. The Court took the view that:

“Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; an absolute right.”

17. The Supreme Court further stated that in considering the provisions of Section 329 of the Criminal Procedure Code gave guidance on sentencing as follows:

“The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed...It is without a doubt that the court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at the appropriate sentence.”

18. Subsequent to the above decision, a lot of emerging jurisprudence has come to the fore on the question of these so called mandatory sentences in other offences other than murder.

19. For instance, in Makambi Subui Wanyeso vs Republic Mombasa Criminal Appeal No. 110 of 2022, the Court of Appeal stated as follows in regards to indeterminate sentences: -

“...What has caused us concern is that those who are convicted for either long periods of time or for indeterminate sentences are left with no possibility of their conditions being reviewed since we do not have parole system in this country. Therefore, such persons are subjected to the vagaries of harsh prison conditions even when it is clear that their continued stay in prison can no longer be justified under any of the penological grounds and to the contrary, is detrimental to the health of the prisoner and a burden to the prison authorities who have to take care of people who may well be in vegetative state...”

20. In Jared Koita Injiri vs Republic [2019] eKLR the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) (2) of the Sexual Offences Act. The Court of Appeal opined that

“if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.”

The court further stated:

“The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.

Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (*supra*), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court.”



21. The Court of Appeal in *Dismas Wafula Kilwake vs R* [2018] eKLR, held that the mandatory minimum sentence under Section 8 of the *Sexual Offences Act* is unconstitutional as it denies the court discretion in sentencing.
22. In *Philip Mueke Maingi & others vs Director of Public Prosecutions & another* (*supra*) the court was called upon to determine a petition by convicts charged with sexual offences and who had been sentenced to mandatory sentences. The case called for fresh jurisprudence following the 2 decisions of the Supreme Court. Justice V. Odunga (as he then was) held that;

“In my view the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to minimum sentences or non-optional sentences. My view is in fact supported by the Kenya Judiciary Sentencing Policy Guidelines where it is appreciated that:

Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders.

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.

Taking cue from the decision in *Francis Karioko Muruatetu & Another vs. Republic* [2017] eKLR (Muruatetu 1) 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 said mandatory minimum sentence are at liberty to petition the High Court for orders of resentencing in appropriate cases.”
23. In the premises, a court can in an appropriate case, impose a sentence other than the life sentence in a case of defilement.
24. In this case, the complainant was aged 11 years. She testified that the Applicant herein defiled her twice. The first time he instructed her to sleep on the seat and at night he went there and carried her to his bed, and defiled her. The second time he told her to accompany him to the farm so that he could give her sugar cane. While there, the accused took the complainant to the bushes and defiled her again. The Clinical officer who examined the minor confirmed that she got an infection as a result of defilement. Clearly, these circumstances showed that the Appellant had shamelessly plot to defile the minor and he did so twice! He took advantage of a young girl whom he was supposed to protect. In the premises I agree with the respondent that the Applicant’s acts espoused above, are aggravating factors.
25. The extenuating circumstances in this matter are; the Applicant was a first time offender, he is demonstrably remorseful; he is old aged about 71 years old now; & he has been in custody from 15th October,2010 to date.
26. The Court in *Yussuf Dahar Arog vs Republic* [2007] eKLR stated that the Court in exercise of its wide discretion ought to take into account the ordinary span of life of a human being; the general circumstances surrounding the commission of the offence; the possibility that the culprit may reform and become a law-abiding member of the community; the goals of peace and mutual tolerance and accommodation among people – those who are injured, and those who have occasioned injury.
27. I am of the view that the Applicant is a senior citizen and has demonstrated the possibility to reform and become a law abiding citizen. I believe he has atoned for his sins for the period he has been in custody incarceration for life will serve no useful purpose.



28. The Court of Appeal in *Makumbi Subui Wanyeso vs Republic (supra)* while determining the appropriate sentence of a 70-year-old Appellant who had been convicted and sentenced to life imprisonment for the offence of defilement also took into account the period of about 16 years already served by the Appellant and proceeded to set him at liberty.
29. Considering the entirety of the facts herein, I hereby set aside the life imprisonment meted upon the appellant and substitute it with a term of 16 years imprisonment.
30. Under section 333(2) of the *Criminal Procedure Code* I direct that the sentence be deemed to have commenced on October 15, 2010, when the accused was first remanded in lawful custody.
31. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 20TH DAY OF JULY, 2023.

HESTON M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Ms Murunga for state

Applicant present

