



**Kioko v Republic (Criminal Petition E025 of 2023)
[2023] KEHC 20095 (KLR) (5 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20095 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL PETITION E025 OF 2023**

FR OLEL, J

JULY 5, 2023

BETWEEN

NICODEMUS MUTUKU KIOKO PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. What is before this court is an application/petition dated 16.08.2022 wherein the applicant is seeking a re sentencing order pursuant to the finding in Petition No E017 of 2021 delivered at Machakos High court by Justice GV Odunga in the petition of *Philp Mueke & others v ODPP*. The applicant prays that the court finds that his rights under article 28, 50(2)(p) of the *Constitution* of Kenya, Section 216 and 329 of the *Criminal Procedure Code* and provisions of the judiciary sentencing policy guidelines were violated. He thus prays that he be resented
2. The applicants' case as pleaded in the supporting affidavit is that he was convicted by Hon C.C Olouch at Mavoko court vide Mavoko criminal case (s.0) No 20 of 2018 and sentenced to serve 20 years imprisonment for various offences of defilement contrary to provisions of section 8(1) and 8 (2) of the *Sexual Offences Act* No 3 of 2006. The applicant filed an appeal as against the said sentence being Machakos high court criminal Appeal No 22 of 2020. The same was heard by Justice G.V Odunga, who reversed the lower court decision and sentenced him to serve ten (10) years imprisonment for the alternative count of indecent Act with a minor contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006.
3. The applicant further pleaded that this court has jurisdiction to hear this petition under article 22, 23, 159, 160(1), 165(2),(b)(d) of the *constitution*. The applicant states that the sentence melted out in his case was the minimum prescribed sentence, and this court should consider his mitigation and exercise its discretion to further re sentencing him. He relied on the finding of Honorable Justice GV Odunga



issued in Machakos Petition No 17 of 2021 *Philip Mueke Maingi & others v ODPP & Attorney General* and section 216 and 329 of the *Criminal Procedure* Act.

Analysis and Determination

Nature and scope of resentencing

4. Re-sentencing is neither a hearing de novo nor an appeal. It is a proceeding undertaken within the court's power to review sentence. The court will ordinarily check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments. In re-sentencing proceedings, conviction is not in issue.

Jurisdiction

5. It bears repeating that, the High Court has the mandate under article 165 (3) of the *Constitution* to hear and determine matters on enforcement of rights and fundamental freedoms enshrined in the *constitution*. A further leapfrog development; under article 50(2)(p) of the *Constitution*: 50(2) Every accused person has the right to a fair trial, which includes the right—

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing

6. In *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others*, Application No 2 of 2011, the supreme court did pronounce itself that:

“A court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...”

7. The Court of Appeal in the case of *William Okungu Kittiny v R* (2018) eKLR stated:

“The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit court below it from ordering sentence re-hearing in a matter pending before the courts. By article 163 (7) of the *Constitution*, the decision of the Supreme Court has immediate and binding effect on all the other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases”.

8. In *Michael Kathewa Laichena & another v Republic* [2018] eKLR Majanja J. stated:

“by re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by the imposition of the mandatory death sentence”

9. In light thereof, nothing prevents the court from applying the decisional law and ordering sentence review in cases where the penalty imposed was mandatory penalty in law even if the cases are finalized. To me, denying an accused the benefit of court's discretion to impose appropriate sentence is inconsistent with the right to fair trial. Fair trial includes sentencing. On that basis this court has jurisdiction to determine review of sentence.



Sentence

10. In *Dismas Wafula Kilwake v Republic* [2018] eKLR, the Court of Appeal set out the factors to be considered in sentencing under *Sexual Offences Act* It observed as follows: -

“We hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offence is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.”

11. I have perused the decision by this court, the applicant was charged with the offence of defiling four different minors, on various dates within Daystar are in Athi River. At the conclusion of the trial before the magistrate court he was found guilty and sentenced to serve twenty (20) years on each count. The sentences were to run concurrently. The appellant filed an appeal being Machakos HCRA No 22 of 2022. The learned Judge Justice G.V Odunga considered the same and reduced the conviction to indecent assault and reduced the sentence to ten (10) years to run concurrently from the date of his incarceration on 28th August 2018.

12. Sentencing is a discretion of the trial court. But the court should look at the facts and the circumstances of the case in its entirety so as to arrive at appropriate sentence. The Court of Appeal in *Thomas Mwambu Wenyi Vs Republic* [2017] eKLR cited the decision of the Supreme Court of India in *Alister Anthony Pereira v State of Mahareshra* at paragraph 70-71 where the court held the following on sentencing

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

13. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1. Among others; the gravity of the offence, the threat of violence against the victim, the nature and type of weapon used by the Applicant to inflict harm.



14. It should be noted that, where appropriate, courts still have the discretion to apply maximum sentence prescribed having considered the circumstances of the case. Petition No E017 of 2021 Philip Mueke Maingi (*Supra*) relied on by the appellant was also clear on this aspect
15. In the circumstances of this case, having reviewed the entire record of the lower court and the high court appeal judgment, a deterrent sentence was appropriate as it was adequately proved that the appellant had indecent contact and acts, with various children over a period of time. There are no mitigating factor or circumstances that favour the applicant. Further I have looked at the probation report filed by the probation office dated 12.04.2023. The victims are still emotionally traumatized and psychologically disturbed by what then underwent and they felt that the sentence melted out was fair. The said report does not recommend for the applicant to be released.

Disposition

16. The petition filed herein and dated 16.06.2022 therefore lacks merited and the same is dismissed.
17. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 5TH DAY OF JULY 2023.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 5TH DAY OF JULY, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant

