



**Kitheka v Republic (Miscellaneous Criminal Petition E016 of 2022)
[2023] KEHC 23751 (KLR) (18 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23751 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS CRIMINAL PETITION E016 OF 2022**

**FR OLEL, J
OCTOBER 18, 2023**

BETWEEN

BERNARD MBINDYO KITHEKA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

A. Introduction

1. Before this court is a notice of motion application dated 13th June 2022 wherein the petitioner is seeking for orders of re sentencing. He had been charged before Machakos chief magistrate court with the offence of defilement of a girl aged 17 years contrary to provisions of section 8(1) and 8(4) of the [sexual offences Act](#) and in the alternative, he was charged with the offence of indecent Act with a child contrary to section 11(1) of the [sexual offences Act](#). He was convicted and sentenced to serve 15 years on 20th July 2018. He appealed to the high court and the same was dismissed.
2. The petitioner in his brief application stated that he had been in prison from the time he was sentenced on 20.07.2018 and that he was entitled to have his sentence review pursuant to high court decision made in Petition No E017 of 2021 [Philip Mueke Maingi & Others Vs DPP & Attorney General](#), where it was held that mandatory minimum sentences for sexual offences were illegal as they interfered with the trial magistrates sentencing discretion and also infringed on the accused rights as protected by Article 27, 47 & 48 of [the constitution](#) of Kenya 2010. The petitioner also relied on COA Criminal Appeal No 312 of 2018 [Evans Wanjala Wanyonyi Vs Republic, & Christopher Ochieng Vrs Republic](#).
3. The respondent opposed this application and stated that the appellant had appealed and his appeal was dismissed. The petition as filed was thus incompetent and should be dismissed.



B. 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 object of punishment. 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 vs. 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 can be challenged on valid legal grounds. 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. I have perused the decision by this court, the applicant was sentenced to serve 15 years for defiling a girl aged 17 years. During trial she was explicit that the petitioner was her boyfriend and they had sex



out of their own will. The magistrate did find that his hands were tied and sentenced the petitioner to serve 15 years, being the mandatory minimum sentence under provisions of section 8(4) of the [sexual offences Act](#) is fifteen (15) years.

11. 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 Vs State of Maharesbtra](#) 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.

12. 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. The same policy also is clear that after conviction, the court should set a date of sentencing and receive victim impact report (where relevant), probation report and consider the same before sentencing the accused.
13. In the circumstances of this case, I do find that the applicant was properly convicted and sentenced by the trial court and the same was upheld by the high court on appeal but there had been change in jurisprudence, which was not available to the trial court and high court especial as regards mandatory minimum sentence and the applicant has the right to benefit from the same given provisions of Article 23, 27 and 50(1) of [the constitution](#) of Kenya.
14. The petitioner has already served five (5) years imprisonment and the probation officer’s report recommends that he serves three years’ probation sentence.

Disposition

15. Having considered the facts herein, I do find that this is a proper and fit case to exercise the courts discretion on re sentencing, especially considering the evidence of the complainant, who confirmed that the petitioner was her boyfriend.
16. I do therefore exercise my discretion and order that the period already served by the petitioner of five (5) years be deemed to be sufficient punishment for the offence committed and do order that the petitioner be released forthwith unless otherwise lawfully held.
17. It is so ordered.



RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 18TH DAY OF OCTOBER, 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 18th day of October, 2023.

In the presence of;

.....for Applicant

.....for ODPP

.....Court Assistant

