



**Tangus v Republic (Criminal Petition E021 of 2021)
[2024] KEHC 16482 (KLR) (16 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16482 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL PETITION E021 OF 2021
F GIKONYO, J
DECEMBER 16, 2024**

BETWEEN

PHILIP TANGUS PETITIONER

AND

REPUBLIC RESPONDENT

*(Revision from Original Conviction and Sentence in Narok
CMCR No. 1235 of 2013, and Naivasha HCCRA NO. 52 of 2015)*

JUDGMENT

Sentence review on mandatory sentence

1. The petitioner was charged with the offence of defilement contrary to section 8(1)(3) of the [Sexual Offences Act](#). The offence was perpetrated against M.C. a girl aged 14 years old.
2. The petitioner was convicted and sentenced to serve a term of 20 years imprisonment.
3. Aggrieved by the judgment of Hon. Z. Abdul (RM), the petitioner filed an appeal; Naivasha HCCRA No. 52 of 2015. The appeal was dismissed by C. Meoli J.
4. Vide notice of motion dated 22/10/2021, sought interpretation of the [Sexual Offences Act](#) on the mandatory nature of sentences in light of the sixth schedule (article 262) rule 7(1) of the [Constitution](#). The petitioner also sought a review of the 20 years imposed on him to a lenient sentence.

Directions of the court.

5. The petition was canvassed by way of written submissions.



Petitioner's Submissions

6. The Petitioner argued that the sentence imposed on him was the mandatory minimum sentence provided; twenty (20) years imprisonment. He states that the sentence is harsh.
7. He took the view that section 8(3) of the *Sexual Offences Act* is couched in mandatory terms in respect of the minimum sentence. The petitioner relied on the decision in *Mainigi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment) Respondent's Submissions.
8. The respondent submitted that the prosecution proved beyond reasonable doubt that the victim was a child, there was penetration and the penetration was by the petitioner. The respondent relied on section 2 of the *Children's Act*, *Nabayo Syprian v Republic* [2016] eKLR, and testimonies of the prosecution witnesses.
9. The respondent submitted that the sentence meted out to the petitioner is provided for under section 8(3) of the *SOA act*; thus, the same is not harsh or unconstitutional. The respondent relied on *Abdala; Republic* (Respondent) (Criminal Appeal 44 of 2018) [2022] KECA 1054 (KLR) (7 October 2022) (Judgment), The *Republic v Joshua Gichuki Mwangi and others* (Respondent) (Criminal Petition No E018 of 2023) 120241 (KLR) (12th July 2024) (Judgment).

Analysis And Determination

Context

10. The petitioner was charged and convicted for the offence of defilement contrary to section 8(1)(3) of the *Sexual Offences Act*. He was sentenced to serve 20 years in prison.
11. He was sentenced under Section 8(1)(3) of the *Sexual Offences Act*, which provides as follows:
 - “(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

Issue

12. Discretion in sentencing is the critical question here; noting however, that, he filed an appeal in the High Court on conviction and sentence which was dismissed.
13. Mitigation was recorded as follows:
 - “The prosecution witness lied to the court. I did not commit the offence”
14. In sentencing the petitioner, the trial court stated:
 - “The accused is not remorseful. The offence committed is very serious and rampant in this county. There is need to impose a different sentence. The law provides for only one punishment and that is 20 years imprisonment”
15. The petitioner argued that he was a victim of a mandatory minimum sentence in section 8(3) of the *Sexual Offences Act*, thus, making the sentence harsh and excessive. The respondent submitted that the sentence meted out upon the petitioner is provided for under section 8(3) of the *SOA*; thus, is not harsh or unconstitutional.



16. These arguments were extremely limited and terse.
17. Of significance nonetheless, is that, there is new jurisprudence from the Supreme Court: ‘Minimum sentences set the floor rather than the ceiling when it comes to sentence. What is prescribed is the least severe sentence a court can issue leaving it open to the discretion of the courts to impose a harsher sentence. Although sentencing is an exercise of judicial discretion, it is parliament and not the judiciary that sets the parameters of sentencing for each crime in statute’. *Republic v Joshua Gichuki Meangi And Initiative For Strategic Litigation in Africa (ISLA) And 3 Others* Supreme Court Petition No. E018 of 2023.
18. But, the Supreme Court did not foreclose interrogation of constitutionality or otherwise of minimum sentences in ‘a proper case’, or whether trends elsewhere in dealing with the subject could apply to Kenya. It may profit the debate to have a discussion around; the teleological exercise of discretion-towards ‘the ceiling’; whilst limiting the exercise of discretion below ‘the floor’ in sentencing; whether such an approach fits within the constitutional concept of least severe sentence; as well as what it means or entails that, ‘it is Parliament...that sets the parameters of sentencing for each crime in statute’; setting the stage for proper situating of the legislative function to prescribe penalty for an offence in a contest between judicial sentencing, and ‘legislative sentencing’.
19. The ‘proper case’ should not also be taken to mean that, there is no work that has been done on the subject of minimum or mandatory minimum sentences by courts, lawyers, and other multi-disciplinary eminent scholars and practitioners in Kenya. And, the wisdom in tapping into such a body of work as we craft the final touches on the dress.
20. It is encouraged to carrying out critical evaluation and seek relevance of decisions in such cases as *Mainji & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment) where it was stated by the court that:

“In arriving at its decision the Court was similarly guided by the decision of the Constitutional Court of Uganda in *Susan Kigula & 417 Others v Attorney General*, Const. App. No. 3 of 2006 that it is the duty of the courts to pass appropriate sentences on persons convicted of crime and that sentencing is an exercise of judicial function rather than of legislative function and concluded that:

“The legislature has all the powers to make laws including prescribing sentences. But it is the duty of the courts to ensure that the sentences so prescribed are imposed in accordance with the Constitution.”
21. Be that as it may, the appellant filed an appeal on conviction and sentence in the High court which was dismissed. There is no indication whether he filed an appeal in the Court of Appeal.
22. In these circumstances, and in light of the extremely terse arguments made by the petitioner, the opportunity in ‘a proper case’ is lost.
23. Punishing for the offence for purposes of deterring others from committing similar serious offences is an important object of punishment. Nonetheless, a sentence should also give a person an opportunity to be reintegrated back into society and eke a living as a free person at some point of meaningful days of life
24. His mitigation and the law were considered. In the circumstances, the sentence of 20 years’ imprisonment is lawful and appropriate sentence where the offence is serious and rampant, and also gives him an opportunity for reintegration back into society.



25. Accordingly, this court finds no reason to interfere with the sentence of the trial court. The petition is therefore, dismissed.

26. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 16TH DAY OF DECEMBER, 2024.

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HON. F. GIKONYO M

JUDGE

In the Presence of:

C/A – Otolu

Ms. Rakama for DPP – Present

Petitioner - Present

