REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA COUNTY

COURT NAME: MOMBASA HIGH COURT

CASE NUMBER: HCCRREV/E012/2025

JOHANNES JUMA VS ODPP

RULING

(Revision of sentence in S.O. Case No. E028 of 2022 at the Chief Magistrates Court Mombasa on 14th February, 2024 by Hon. A.K. Thuku (CM)

1. This Ruling follows a home-made Notice of Motion the applicant has moved the court for a review of his sentence. The applicant was charged, convicted and sentenced to seven (7) years imprisonment, for the offence of Defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act.
2. The particulars of the offense are that the applicant on the month of July the year 2021 at Kwa Hola area in Changamwe Sub-County within Mombasa County intentionally and unlawfully caused his penis to penetrate the Vagina of E.A. a girl aged 14 years old.
3. During plea taking, the facts and information of the offence was narrated and explained to the applicant to wit he conceded to the truthfulness and correctness of the facts, at which point he was convicted on his own plea of guilty.
4. Thereafter, the trial court in its discretion, on 14th February, 2024 sentenced the applicant to serve seven (7) years in prison, inclusive of the 2 years he was remanded in custody from 16th February, 2022.
5. The applicant in support of his application stated that under Sec 4 (2) of the Probation of Offenders Act, this court is empowered to release offenders on conditional release, having regarded the youth, character, antecedents, home surroundings, health and mental condition of the offender, nature of the offence or any extenuating circumstances in which of the offence was committed to expedite the release of the offender on probation, and make a probation order and require the applicant enter recognizance with or without sureties as the court may deem fit.
6. The State Department for Correctional Service, through the Officer in Charge Shimo La Tewa Medium Security Prison, wrote the applicant's progressive report, where it was recorded that in his period of incarceration the applicant has acquired certificates in Bible Studie and

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training in Weaving. Further, he has exhibited good behavior and remorse and recommended that he has reformed, and it may be necessary to consider a review of his sentence.

7. Equally a Sentence Review Report was undertaken and produced in court on 14th September, 2025, where Mr. S. Musyoka, the Community Service Officer, upon interviewing the applicant's family, the prison's authorities and the Investigative officer in the primary matter, noted that the applicant has no record of prison misconduct, his family is conducive for his reintegration.

Analysis and Determination

1. I have considered the application, noting that the same is not opposed by the respondent, who failed to submit on the same, as at the time of making this determination. Indeed, **Article 50 (2) (p) (q)** of the **COK** gives the Court the general power to review the decisions of the subordinate courts:

...

"(2) (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law."

1. Equally, this court's revisionary jurisdiction is provided for under **Section 362** of the ***Criminal Procedure Code*****.**

"362. The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."

1. **Section 4** of the **Probation of Offenders Act** states that:

"***4. Power of court to permit conditional release of offenders***

(1) Where a person is charged with an offence which is triable by a subordinate court, and the court thinks that the charge is proved but is of the opinion that, having regard to age, character, antecedents, home surroundings, health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may—

(a) convict the offender and make a probation order; or

(b) without proceeding to conviction, make a probation order, and in either case may require the offender to enter into a recognizance, with or without sureties, in such sum as the court may deem fit.

(2) Where any person is convicted of an offence by the High Court and the court is of the opinion that, having regard to the age, character, antecedents, home surroundings health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may, in lieu of sentencing him to any punishment, make a probation order, and may require the offender to enter into a recognizance, with or without

sureties, in such sum as the court may deem fit.

1. In **Kimutai vs Republic [2024] KEHC 6871 (KLR)** the court listed the considerations to appreciate when determining a custodial and non-custodial sentencing as follows:

In determining whether to impose a custodial or non-custodial sentence, the court is required to take into account the following factors: -

1. ***Gravity of the offence: - sentence of imprisonment should be avoided for misdemeanour.***
2. ***Criminal history of the offender. Taking into account the seriousness of the offences, first offenders should be considered for non-custodial sentence.***
3. ***Character of the offender: - non-custodial sentence are best suited for offenders who are already remorseful and receptive to rehabilitative measures.***
4. ***Protection of the community: - where the offender is likely to pose a threat to the community.***
5. ***Offender's responsibility to third parties: - where there are people depending on the offender.***
6. Further, in the case of **Republic v Felix Madalitso Keke Confirmation Appeal No. 404 of 2010 (unreported)** where the court held as follows:

"Considerations of the public interest when sentencing offenders must go beyond considerations of deterrence; there is always the consideration that the public whose interest the sentence wants to serve includes the prisoner before the court at first instance. It is in the public interest that sentences are passed which are not cruel, degrading and inhuman. Harsh or lenient sentences may not necessarily serve the public interest; they are likely to have an opposite effect. While sentences must fit the crime, the offender and the victim, they must also fit and cohere with overall sentencing goals, justice, reformation, restoration and rehabilitation. Our sentences may not be in the public interest if they only succeed in instilling crime and fail in bringing the prisoner a better person in society''''s continuum."

1. In the instance the applicant was charged, convicted and sentenced with the offence the offence of Defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act.
2. **Section 8(1)** of the **Sexual Offences Act** provides as follows:

"8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

...

(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."

1. From the onset the offense is not a misdemeanor. The record shows that applicant pleaded guilty to the charge. He had no previous conviction. He was therefore a first offender. He cooperated and saved the court's time of subjecting it to lengthy trials. In his mitigation he

pleaded for leniency.

2. This notwithstanding, in weighing the offence, the circumstances thereof as against the sentence meted out, the applicant was lucky to get a considerably lenient seven (7) year sentence over an offence which carries a minimum sentence of twenty (20) years.
3. For what is worth, among 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 way the crime is done. Whereas there is no straight blanket formula for sentencing an accused person on proof of crime, the courts have adopted the twin objectives as deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the court must keep in mind the gravity of the crime, motive for the crime nature of the offence and all other attendance circumstances.
4. The nature and seriousness of the instant offence cannot be gainsaid. So much so, that the legislators imposed a minimum mandatory sentence upon conviction on the offence. In my view, the reduction and/or substitution of the sentence to a non-custodial sentence cannot extend to serious offences such as sexual offences because the same carry minimum mandatory sentences.
5. In the recent decision of **Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment)** the Supreme Court considered the constitutionality of the minimum offence under the ***Sexual offences Act*** and categorically and emphatically held that the same are constitution and the courts must impose the same unless and until they are declared unconstitutional. In the case of **Charles & Another v Republic (Criminal Appeal 38 of 2019) [2024] (Judgment) [2024] KECA 1902 (KLR)** the Court of Appeal ceded to the binding nature of the decisions of the Supreme Court and stated:

"(35)We will now come to the final issue: sentence. The appellants complain against the mandatory nature of the minimum sentence terming it unconstitutional for not permitting individualized mitigation. In the circumstances of the case, they both complain that the minimum sentence was harsh and excessive since they were both of extreme youth; first offenders; and were remorseful. Additionally, they showed great capacity for reform and rehabilitation.

36. All these extenuating factors are true. It is also true that our jurisprudence had taken a turn to impugning the constitutionality of the minimum sentences prescribed in the Sexual Offences Act. Unfortunately for the appellants, that jurisprudential trajectory was halted by the recent decision by the Supreme Court in Republic v Joshua Gichuki Mwangi (Petition E018 of 2023) [2024] KESC 34 (KLR)(delivered on 12th July, 2024). In that case, the Supreme Court held that the mandatory minimum sentences in the Sexual Offences Act are not unconstitutional; and that trial courts have no discretion to go below the minimum statutory minimum sentences in sexual offences.

37. The Supreme Court held:

"56. Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. 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. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two

words. Although, the term 'mandatory minimum' can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognized term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.

38. This decision is binding on us under the doctrine of stare decisis. In the present case, the appellants were convicted under section 8(2) of the Sexual Offences Act. The statutory minimum sentence under that sub-section is twenty (20) years imprisonment. That was the sentence imposed on the appellants. Given the Supreme Court's binding precedent, we cannot interfere with that sentence whatever our views on the extenuating circumstances."

1. Similarly, the decisions of the Court of Appeal and the Supreme Court are binding on this court and in the premises the invitation to interfere with the sentence is declined and this application is dismissed.
2. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI Virtually this 23 day of OCTOBER 2025.

W.K. MICHENI

JUDGE

IN THE PRESENCE OF;

THE APPLICANT

FOR THE RESPONDENT

MMR NGIRI

COURT ASSISTANT

BEBORA

''

SIGNED BY/FOR:
HON. LADY JUSTICE WENDY MICHENI

THE JUDICIARY OF KENYA.
MOMBASA HIGH COURT
HIGH COURT CRIMINAL
DATE: 2025-10-28 17:52:26