

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
MISCELLANEOUS CRIMINAL APPLICATION NO. E034 OF 2025

DOUGLAS MUGODO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant was convicted in **Eldoret Chief Magistrate’s Court Criminal (Sexual Offences) Case No. E002 of 2021** of the offence of defilement of a girl aged 15 years old contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. He was faced the alternative charge of committing an indecent act with the same girl. He pleaded not guilty and the matter proceeded to full trial. After the trial, he was, by the Judgment rendered by **Hon. Mukabi Kimani, PM** on 4/09/2024, convicted of the main offence, and on 16/10/2024, sentenced to serve 20 years imprisonment. The Applicant has now come to this Court seeking review of the sentence downwards.
2. Although I gave the parties leave to file written Submissions, only the Applicant filed the undated handwritten Submissions filed on 26/05/2025. In the Submissions, he urged that the sentence was imposed on the basis that it was the mandatory minimum sentence under statute which position has been declared unconstitutional, and was also harsh. He cited several authorities and also urged that he has since been rehabilitated while in prison. As aforesaid, the State did not file any Submissions.

Determination

3. The issue herein is ***“whether this Court should invoke its revisionary powers and review the sentence of 20 years imprisonment.”***
4. The jurisdiction of the High Court in respect to the powers of Revision is supervisory and is provided under the **Constitution** in **Article 165 (6)** and **(7)** in the following terms:

“6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred

to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

5. Section 362 of the **Criminal Procedure Code**, then provides that:

“Revision

362. Power of High Court to call for records

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.”

6. In considering applications for revision therefore, the operative phrase is “**correctness, legality or propriety**” of a finding, sentence or order made by the lower Court.

7. The purpose and nature of the revisionary jurisdiction of the High Court was then examined by **Odunga J (as he then was)** in the case of **Joseph Nduvi Mbuvi vs Republic [2019] eKLR**, in which he observed as follows:

“In my considered view, the object of the revisional jurisdiction of the High Court is to enable the high Court in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court’s revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well.”

8. On his part, **Nyakundi J**, in **Prosecutor vs Stephen Lesinko [2018] eKLR** outlined the limited instances when the High Court may exercise its revisionary jurisdiction, as follows: (a) where the decision is grossly erroneous; (b) where there is no compliance with the provisions of the law; (c) where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record; (d) where the material evidence on the parties is not considered; and (e) where the judicial
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discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.

9. Regarding the sentence imposed in this case, **Section 8(3)** of the **Sexual Offences Act** under which the Appellant was charged and convicted, provides as follows:

“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.”

7. In view of the above, it is clear that the sentence imposed by the trial Court, although the minimum prescribed, was within the law. The trial Court did not anywhere also state that it was imposing the sentence because it was the minimum prescribed. Nevertheless, it is also true that there has recently been emerging jurisprudence that strict adherence to mandatory minimum sentences should be discouraged and that Courts should retain the discretion to depart therefrom where circumstances deserve. In this regard, the Supreme Court in the case of **Francis Karioko Muruatetu and Another vs Republic [2017] eKLR**, while dealing with a case of murder, stated as follows:

“(66) It is not in dispute that article 26(3) of the *Constitution* permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in article 50(1) of the *Constitution* must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing.”

8. On the strength of the *Muruatetu* decision and reasoning, the High Court and even the Court of Appeal routinely reviewed mandatory or minimum sentences imposed for different offences other than murder, including for sexual offences and robbery with violence. Examples are the Court of Appeal decisions in the case of **Dismas Wafula Kilwake vs Republic [2018] eKLR**, the case of **GK v Republic (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR)**, and also the case of **Joshua Gichuki Mwangi vs Republic [2022] eKLR**. I may also mention the oft-cited decision of **Odunga J (as he then was)**, in the case of **Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR)**.

9. However, by the clarification made by the same Supreme Court in its subsequent directions given in **Muruatetu & Another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions)**, the Court made it clear that *Muruatetu* only applied to murder cases, and not to any other type of case, not even sexual offences.
10. Recently, the Supreme Court reiterated the above directions when dealing with an Appeal emanating under the **Sexual Offence Act**. This was in the case 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)**. In setting aside the decision of the Court of Appeal which had applied the *Muruatetu* reasoning in setting aside the mandatory minimum sentence of 20 years imprisonment imposed on an Appellant for a defilement offence, the Supreme Court stated, *inter alia*, as follows:

“57. In the *Muruatetu* case, this Court solely considered the mandatory sentence of death under Section 204 of the Penal Code as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities.

.....”

11. In view of the decision and guidelines expressly set out by the Supreme Court as above, this Court will be acting *ultra vires* were it to set aside the sentence of 20 years imprisonment imposed herein, on the sole basis that the same, being a minimum sentence stipulated by statute, is unconstitutional. As clearly spelt out by the Supreme Court, *Muruatetu* is not applicable to cases under the **Sexual Offences Act**.
12. My above observation does not however mean that I cannot determine the issue whether the sentence deserves the invoking of this Court’s powers of Revision for being manifestly excessive or harsh, which I now proceed to do.
13. The Supreme Court, in the *Muruatetu* case, also guided that, in re-sentencing by the High Court, the following mitigating factors would be applicable; (a) **age of the offender**; (b) **Eldoret High Court Misc. Criminal Application No. E034 of 2025**

being a first offender; (c) whether the offender pleaded guilty; (d) character and record of the offender; (e) commission of the offence in response to gender-based violence; (f) remorsefulness of the offender; (g) the possibility of reform and social re-adaptation of the offender; and (h) any other factor that the Court considers relevant.

14. The sentence meted out on an offender must therefore be commensurate to the blameworthiness of the offender and before settling on a sentence, the Court must consider the facts and the circumstances of the case in its entirety. In restating the above principles, the Court of Appeal in the case of **Thomas Mwambu Wenyi Vs Republic (2017) eKLR** quoted the decision of the Supreme Court of India made in the case of **Alister Anthony Pereira Vs State of Maharashtra** where it was held as follows:

“70. Sentencing is an important task in the matters 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 strait jacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances 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 attendant circumstances.

71. 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.”

15. Similarly, in the case of **Daniel Kipkosgei Letting Vs. Republic [2021] eKLR**, the Court of Appeal stated as follows:

“..... we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing

should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to.”

16. Applying the above principles to the facts of this case, I have looked at the record and confirmed that the trial Magistrate, before sentencing, called for and received a pre- sentence Report which he then considered. As aforesaid, the trial Court did not anywhere also state that it was imposing the sentence because it was the minimum prescribed. The Applicant was also given the opportunity to mitigate, which he did. The trial Court also considered that the Applicant was a 1st offender, and also the period of time he had spent in remand custody before sentencing. The crime of defilement is also treated as a serious offence under Kenyan law and society and for this reason, it is always severely punished. The Applicant preyed on a young primary school-girl and from the record, he defiled the complainant on more than one date by using threats. In the process, he impregnated the girl and, at her young age, made her a mother, and he may have therefore perhaps even shattered her pursuance of further education. This is totally unacceptable. Considering the ordeal that the Applicant made the complainant go through, she will definitely be traumatised for the rest of her life. She will no doubt bear the scars of the incident for the rest of her life

17. Looking at the record, I cannot find any reason that may prompt this Court to invoke its revisionary powers and reduce the sentence imposed. He has not shown that the sentence imposed was not appropriate or was not proportionate to the offence he committed. This being a “**Revision**” application, the Applicant has therefore failed to demonstrate that there was any issue with the “**correctness, legality or propriety**” of the findings, or sentence or order made by the trial Court.

Final Orders

18. It is therefore this Court’s findings that the Application herein lacks merit, and it is accordingly dismissed.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 30TH DAY OF JANUARY 2026

.....
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

The Applicant (virtually from Eldoret Main Prison)

Ms. Mwangi for the State

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Court Assistant: Brian Kimathi