

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT LODWAR
CRIMINAL APPEAL NO. E046 OF 2024
MICHAEL EKUWOM.....

APPELLANT
VERSUS

REPUBLIC.....
RESPONDENT

**(Arising from the conviction and sentence of Hon. M K Mwangi, (CM), in CMC SO
Case No. 14 of 2019 delivered on 16/9/2021)**

JUDGMENT

1. Before the court for determination is an application seeking orders for revision of sentence but framed as an appeal. The matter was initiated by a document titled 'Chamber Summons' by which the Applicant seeks re-sentence hearing towards a reduction thereof.
2. The history provided is that the applicant was charged in Sexual Offences Case No. 14 of 2019 with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act, No. 3 of 2006.
3. The particulars of the charge were that on diverse dates between the 23rd of December 2018 and the 25th of January 2019, at Namukusa village in Turkana Central Sub-County, within Turkana County, the Applicant intentionally and unlawfully caused his penis to penetrate the vagina of minor C.A.K, a child then aged fifteen (15) years.
4. The Applicant when arraigned before the trial court entered a plea of not guilty. Following a full trial where the prosecution called four witnesses against the Applicant's sole defence. At the end of production of evidence, the court found the prosecution having proved their case to the required standards of beyond reasonable doubt. The Appellant was thus convicted and consequently sentenced to a fifteen (15) years imprisonment.
5. he was dissatisfied with the conviction and sentence and filed a first appeal before the High Court which heard the appeal on the merits and dismissed it thus affirming and upholding the trial court's findings on both conviction and sentence.

6. In 2023, the Applicant filed Lodwar High Court Criminal Misc. Application No. E016 of 2023, seeking a review of his sentence pursuant to Section 333(2) of the Criminal Procedure Code. On the 17th of October 2023, the High Court allowed that application, noting that the trial court had not been clear on when the sentence should commence. Consequently, the court ordered that the 15-year sentence be computed from the date of arrest, effectively crediting the Applicant with the two years and eight months he spent in pre-trial detention. The court further commented on legality of the sentence that the fifteen (15) years imprisonment was reasonably lenient noting that the offence of defilement with which the Applicant was charged with involving a child between the age of 12 years and 15 years is liable upon conviction to imprisonment to a term not less than 20 years.
7. The instant application represents a second attempt at revision, but this time with a slight tilt on the substantive leniency and the constitutionality of the sentence itself. Notably, the Applicant contends having served approximately seven years of the sentence when the pre-trial custody is taken.
8. The Applicant urges the court to exercise its inherent power of leniency and set him free or significantly reduce his 15-year sentence to a lesser one. He bases this request on what he deems significant jurisprudential developments. He cites the High Court ruling in **Philip Mueke Maingi & 5 others v Director of Public Prosecutions & another (2021) eKLR**, where it was held that mandatory minimum sentences are unconstitutional to the extent that they fetter judicial discretion and prevent the consideration of mitigating factors.
9. Secondly, the Applicant presents an account of his family's collapse since his incarceration. He his father passed away in 2024, leaving his two younger siblings; one in Grade 8 and the other in Grade 4 without a guardian. That his mother had long died while he was young and following his father's demise, his uncles took the family's goats and have neglected

to care for the minor siblings. He indicates that the children are currently surviving only through the intervention of a local church and that his presence is urgently required to protect their interests and their inherited wealth.

10. He argues that the intervening death of his father in 2024 and the resulting vulnerability of his siblings constitute exceptional circumstances that were not present during the original sentencing and the first appeal. He also stresses his successful rehabilitation during his seven years in custody. He expresses profound remorse, stating he has learned the importance of protecting the girl child and regrets the actions that led to his conviction.

Determination

11. The court having considered the instant application, identifies the issue for determination to be whether the Applicant has met the threshold for his sentence review. In this determination, the court first intends to address the preliminary question of whether it has jurisdiction to entertain the application or whether it is *functus officio*.
12. In the ordinary course of criminal procedure, once an appeal is heard and determined, the High Court cannot revisit the same issues unless there is a clear discovery of new evidence or a fundamental change in the legal landscape. Section 364(5) of the Criminal Procedure Code bars revisionary proceedings where a party could have appealed and did not, or where the appeal has already been dealt with.
13. Here, the sentence upon which the applicant seeks to review was already addressed by this court in Criminal Misc. Application No. E016 of 2023. The Application despite having been brought under the provisions of Section 333(2) of the Criminal Procedure Code, the court in allowing the same, also remarked on the legality of the sentence holding that the imposed sentence was overtly lenient noting that the offence of defilement with which the Applicant was charged, involving a child

between the age of 12 years and 15 years, is liable upon conviction to imprisonment to a term not less than 20 years.

14. As a general rule, the High Court can only review the Judgment of a subordinate court as provided for under sections 362 to 364 of the Criminal Procedure Code. The court therefore does not have the jurisdiction to review its own decision. In **John Kagunda Kariuki vs Republic (2019) eKLR**, Ngugi J. (as he then was) held that:-

“In the present case, the Applicant’s appeal has already been heard by the High Court. He cannot return to the High Court for a review of the sentence imposed. He is at liberty to make an argument for reduced sentence at the Court of Appeal.”

15. Similarly, this court in **Lawrence Kariuki Njeru vs Republic (2021) eKLR**, held: -

“...Further this court is bereft of jurisdiction to review the said judgment as doing so would be tantamount to sitting as an Appellate court on the judgment of the Learned Judge and which act the law abhors. The petitioner ought to ventilate the issue on the resentencing and/or excessive sentence at the Court of Appeal.”

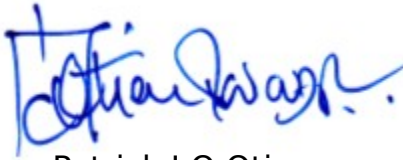
16. Accordingly, and in conclusion, the issue having been dealt with by court of concurrent jurisdiction and whereby the Applicant’s sentence was upheld, this court holds that any further recourse that the Applicant has in regards to his sentence lies in the Court of Appeal and not in this court.

17. the foregoing notwithstanding, even going by the Applicant’s assertion on the unconstitutionality of mandatory minimum sentences, the court appreciates that the principle relied on by the applicant has itself has long been altered by the Supreme Court in **Republic vs Joshua Gichuki Mwangi (Petition No. E018 of 2023)**. The court therein held that while

sentencing is a judicial discretion, it is the role of Parliament and not the Judiciary to set the parameters and floors for sentencing through statute. Further, that the mandatory minimum sentences under Section 8 of the Sexual Offences Act are lawful and remain so as long as the Act is in force.

18. It is thus the finding by the court that there is no legal basis for a High Court judge to further reduce a sentence that is already too lenient for being below the statutory minimum.
19. For the reasons above, the court besides being convinced to have become functus officio, finds no reasons to interfere with the sentence of 15 years imposed by the trial court as affirmed by Nyakundi J. in Criminal Misc. Appeal No. E016 of 2023. The Application therefore lacks merit and is hereby dismissed.
20. Let the court file be closed.

Dated, signed and delivered virtually this 10th day of April 2026.



Patrick J O Otieno

Judge