



**Tanui v Republic (Criminal Revision E003 of 2024)
[2025] KEHC 3879 (KLR) (28 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3879 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ITEN
CRIMINAL REVISION E003 OF 2024
JRA WANANDA, J
MARCH 28, 2025**

BETWEEN

PAUL KIMOLOI TANUI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. This Application arises from the prison sentence meted out in Iten Senior Principal Magistrates' Court (Sexual Offence) Case No. E008 of 2023.
2. In the said case, the Applicant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between 1st May 2022 and 31st May 2022 at Elgeyo Marakwet County, he unlawfully and intentionally caused his genital organ (penis) to penetrate the vagina of SJ, a child aged 14 years. He was also charged with the alternative offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual offences Act*.
3. By the Judgment delivered on 13/02/2023, the Applicant was convicted and then sentenced to serve 20 years imprisonment.
4. The Applicant has now approached this Court with the undated Notice of Motion but filed on 29/02/2024, whereof he basically urges this Court to invoke its powers of Revision and review the above sentence. His grounds are that he is a 1st offender, he begs for leniency, he is remorseful, repentant and reformed, and that the sentence was too harsh considering his mitigating factors.
5. Although I gave the parties leave to file written Submissions, only the Respondent, through Prosecution Counsel, Calvin Kirui, filed Submissions. The same is dated 13/06/2024.



6. In the Submissions, in respect to the Applicant’s plea for leniency and being a 1st offender, Prosecution Counsel submitted that these matters were considered by the trial Court and cannot be grounds manifesting any illegality or injustice. Regarding the Applicant’s allegations that he is remorseful, has reformed and is repentant, Counsel submitted that under the law, the Applicant was liable to imprisonment for a period of not less than 20 years and that therefore, the sentence was legal, lawful, not excessive or harsh given the circumstances of the case, and reflected the seriousness of the offence.
7. He added that according to the Judiciary Sentencing and Policy Guidelines 2016, one of the purposes of punishment is to act as a deterrence for the commission of offences, and that therefore, the purpose of punishment will not be served were the Court to allow the Application. He urged that an appellate Court should not interfere with the trial Court’s discretion in sentencing unless it is demonstrated that the sentence was manifestly excessive, illegal, improper or based on a misrepresentation of material facts. He cited the Court of Appeal case of Benard Kimani Gacheru vs Republic. According to him, the Applicant has failed to demonstrate any of the above grounds and thus urged the Court to dismiss the Application.

Determination

8. The issue for determination herein is “whether this Court should invoke its supervisory jurisdiction of revision and review the sentence imposed by the trial Court”.
9. The jurisdiction of the High Court in respect to the power 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.”
10. Section 362 of the *Criminal Procedure Code*, then provides as follows:

“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.”
11. The operative phrase in considering Applications for revision is therefore “correctness, legality or propriety” of any finding, sentence or order made by the lower Court.



12. The purpose and nature of the revisionary jurisdiction of the High Court was examined by Odunga J (as he then was) in the case of *Joseph Nduvi Mbuvi v Republic* [2019] eKLR 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.”

13. In respect to sentence, 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.”

14. In view of the above, it is clear that the sentence imposed by the trial Court, although the minimum prescribed, was within the law. 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 the 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.”

15. The Supreme Court then directed the Attorney General, the Director of Public Prosecutions and other relevant agencies to prepare a detailed professional review in the context of the Muruatetu Judgment with a view to setting up a framework to deal with sentence re-hearing cases. The Attorney General was then given 12 months to submit a progress report thereon.

16. 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 on convicts 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).

17. 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.
18. Recently, the Supreme Court reiterated and restated 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.

.....”

19. 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*.
20. 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.
21. 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) 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.
22. 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.”

23. 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.”

24. Applying the above principles to the facts of this case, I may repeat that the Appellant was liable to a sentence of not less than 20 years imprisonment, which coincidentally is the minimum prescribed by statute. In sentencing the Applicant, the trial Court remarked as follows:

“I have considered the offence and the mitigation by the accused person and the submission by the prosecution. The sentencing policy is clear and noticing that this is a rampant offence in the region a maximum sentence needs to be meted out as a deterrence”.

25. I have looked at the record and confirmed that indeed the Applicant was given the opportunity to mitigate, which he did. The Prosecution also informed the trial Court that the Applicant was a 1st offender. 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 primary schoolgirl and from the record, he defiled the complainant repeatedly over a long period of time by using threats. In the process, he impregnated the girl and, at her young age, made her a mother, and may have therefore perhaps even shattered her pursuance of further education. This is totally unacceptable.

26. Considering the horror that the victim went through, she will definitely be traumatised for the rest of her life. The victim will no doubt bear the scars of the assault by the Applicant for the rest of her life

27. Looking at the record, I cannot find any meaningful “mitigating” circumstances to prompt this Court to invoke its revisionary powers and reduce the sentence imposed.

28. This being a “Revision” application, the Applicant has not demonstrated that there was any issue with the “correctness, legality or propriety” of any finding, sentence or order made by the lower Court. In my view, the sentence imposed was appropriate and proportionate to the offence committed.



Final orders

29. The upshot of my findings above is that the Application herein lacks merit and is accordingly, dismissed.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 28TH DAY OF MARCH 2025

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

The Applicant (virtually from Eldoret Main Prison)

Ms. Mwangi for the State

Court Assistant: Brian Kimathi

