



REPUBLIC OF KENYA



KENYA LAW
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**Lai v Republic (Criminal Revision E344 of 2024)
[2025] KEHC 5382 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5382 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION E344 OF 2024
RN NYAKUNDI, J
APRIL 30, 2025**

BETWEEN

AARON NDELEVA LAI APPLICANT

AND

REPUBLIC RESPONDENT

*(In the Matter of Sentence Review under section 362 as read with section
364 of the Criminal Procedure Code in reliance with Article 50(2) p)*

RULING

1. What is pending before me for determination is a Notice of Motion Application dated 25th July 2024 in which the Applicant is seeking the following orders:
 - a. That the Applicant is seeking for orders to review his sentence under section 362 as read with section 364 of the *Criminal Procedure Code* and the *Constitution* of Kenya 2010.
 - b. That the Applicant is seeking for orders to review his sentence for being mandatory in nature and had been rendered unconstitutional.
 - c. That the Applicant is seeking for orders to review his sentence on the failure to consider his mitigation factors before his sentencing.
 - d. That the Applicant is seeking for orders to review his sentence in adoption of new jurisprudence in the sentencing objectives.
2. That Applicant files this criminal review for consideration by the court on the following grounds:
 - a. That following the enforcement of a mandatory sentence the court failed to exercise its judicial discretion to impose on him a reduced appropriate sentence therefore denying him the benefit



of Article 50 (2)(p) of the Constitution of Kenya 2010. Reliance is placed on Dismas Wafula Kilwake v R (2018) eKLR.

- b. The Applicant faults the court for only indicating that his mitigation was considered but in reality it did not apply in his case. He is urging the Honourable Court to correct this omission of not considering that he was remorseful for his action, was a first offender. On post mitigation, he is currently undergoing a vocational training in carpentry and will soon be sitting for an exam in grade III, he has trained with NGO Rodi Kenya on soap making, yoghurt, petroleum oil, compost manure. The Court should reduce his sentence by 50% of 15 years to 7 years to comply with the sentencing policy.
 - c. That the courts are shifting from tormenting sentencing objective to modern objective of reconciliation, re-integration, rehabilitation among others as guided by the sentencing policy 2023.
3. The Application is supported by the annexed affidavit dated 29th July 2024 sworn by Aaron Ndeleva Lai, the Applicant herein where he avers as follows:
- a. That I was charged with the offence of defilement contrary to section 8(1) as read together with section 8(4) of the Sexual Offences Act No 3. of 2006 was convicted and sentenced to serve 15 years by CM's Court at Eldoret that was delivered on 19th March 2021 by the Hon. Obulutsa.
 - b. That the petitioner did not file an appeal after being sentenced but instead filed this criminal review for the consideration by the court.
 - c. I am praying that the court should consider reviewing my sentence to reflect the new trend.

Analysis and Determination

4. I have considered the application by the applicant. The issue manifest for determination is:

Whether the sentence review is merited

5. In resentencing, the court will ordinarily check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments.
6. A glimpse of the Petitioner's application clearly calls for a re-hearing of the sentence imposed. Article 50 (2) (p) of the constitution provides as follows:

Every accused person has the right to a fair trial, which includes the right—

- p. to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
7. The High Courts' revisionary jurisdiction is governed by section 364 of the Criminal Procedure Code which states as follows;
- (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.



- (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.
- d. A look at section 8(3) of the *Sexual Offences Act* No. 3 of 2006 provides that: (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. I take note that the Applicant was sentenced to serve 15 years by CM’s Court at Eldoret that was delivered on 19th March 2021 by the trial Magistrate.
8. There are circumstances under which the court can alter or decline to vary the sentence meted out. That is entirely at the discretion of the court. I have gone through the record of the court’s decision in the criminal trial, the judgment and sentence. I have noted the circumstances under which the offence was committed. I have also read the sentencing record of the court. The petitioner’s offered mitigation which the court considered before it sentenced the petitioner to the only sentence then allowed in law. In other words, the mitigation did not mean anything and that is precisely what the Supreme Court called unfair trial since with or without mitigation the court would still impose death penalty.
9. In *R v Bieber* [2009] 1 WLR 223 the Court of Appeal of the United Kingdom had held as follows:
- “The legitimate objects of imprisonment are punishment, deterrence, rehabilitation and protection of the public. Where a mandatory life sentence is imposed in respect of a crime, the possibility exists that all the objects of imprisonment may be achieved during the lifetime of the prisoner. He may have served a sufficient term to meet the requirements of punishment and deterrence and rehabilitation may have transformed him into a person who no longer poses any threat to a public. If, despite this, he will remain imprisoned for the rest of his life it is at least arguable that this is inhuman treatment...”
10. From the foregoing authorities, it is evident that mandatory sentences are unlawful. Having said so, I have considered The Sentencing Policy Guidelines, 2023 and its application which is intended to promote transparency, consistency and fairness in sentencing. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments.
11. In *Dismas Wafula Kilwake v Republic* [2018] eKLR, the Court of Appeal set out the factors to be considered in sentencing under the Act. It observed as follows:
- [W]e hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.
12. Therefore, in sentencing, the gravity of the offence and the consequences of the offence on the victim are relevant factors.



13. Section 333(2) of the *Criminal Procedure Code* provides that in sentencing, where an accused person was in remand custody the period spent in custody should be taken into account. It reads:

“Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to conclude the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

14. I have considered the application and all the information available. Given that mandatory sentences are now outlawed same as indeterminate sentences, I am inclined to interfere with the 15 years’ imposed and substitute it with a lesser sentence of 10 years’ imprisonment. The application therefore succeeds and in considering the provisions of section 333(2) of the *CPC* the sentence shall run from the date date of arrest being 4th October 2018.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 30 APRIL 2025

R. NYAKUNDI

JUDGE

