



**Njiru v Republic (Miscellaneous Criminal Application
E004 of 2024) [2025] KEHC 7493 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7493 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS CRIMINAL APPLICATION E004 OF 2024**

EM MURIITHI, J

MAY 29, 2025

BETWEEN

DAVID NDAMBIRI NJIRU APPLICANT

AND

REPUBLIC PROSECUTION

RULING

1. The applicant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offence *Act No. 3 of 2006*. The particulars of the offence were that on 2nd October, 2011 at Kirinyaga county, intentionally and unlawfully caused his penis to penetrate the vagina of PM, a girl aged 8 years. He was sentenced to life imprisonment on 4th October, 2011. He lodged an appeal Criminal Appeal No. 25 of 2016 and the life sentence was substituted with 25 years' imprisonment.
2. The applicant seeks non-custodial sentence for the remainder of his period.
3. The accused submits that his mitigation at the lower court was not considered. He states that he is a first offender, young and a remorseful for the offence. Further, he has been rehabilitated while in prison. Lastly, he is 56 years old and his health condition is deteriorating.
4. The prosecution submits that the application for a sentence review stands to benefit from section 46 of the Prison Act, being consideration of remission on industry and good conduct.
5. The prison report dated 9th May, 2024 states that the applicant has maintained a clean record as he has never been charged with any offence within prison.

Issue

6. Whether the applicant is entitled to remission of sentence and reduction of sentence to one of Probation for the remaining period of his sentence.



Analysis

7. The applicant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offence [Act No. 3 of 2006](#). He is serving a 25 years' prison term.
8. The applicant seeks remission on his 25 years' sentence. He has been in prison for 14 years. The Petitioner urge by virtue of Section 46 of the [Prisons Act](#) he is entitled to benefit from 1/3 of the Sentence.
9. I should respectfully agree with the decision in Ibrahim Onyango Omondi v. Republic (2020) eKLR, where the Court held that the power to remit a sentence rests with the prison authorities under section 46(1) of the [Prisons Act](#). Section 46(1) of the [Prisons Act](#) provides:

“ 46. Remission of sentence:

- (1) Convicted criminal prisoners sentenced to imprisonment, whether by one sentence or consecutive sentences, for a period exceeding one month, may by industry and good conduct earn a remission of one-third of their sentence or sentences.

Provided that in no case shall —

- a. any remission granted result in the release of a prisoner until he has served one calendar month;
- b. any remission be granted to a prisoner sentenced to imprisonment for life or for an offence under section 296(1) of the Penal code or to be detained during the President's pleasure.

10. See also Ismael Mzee Ismael v Attorney General & another [2021] eKLR, the Court (Makau J.) said:
“Section 46(1) of the [Prisons Act](#) provides the remission is subject to good industry and conduct of the convict; while one is serving the sentence and which can only be assessed by the prison administration and not by any Court.
11. The prison report dated 9th May, 2024 indicates that the applicant has maintained a clean record. He has been in custody for 14 years.

Supreme Court Guidelines on sentencing in Sexual Offences

12. The sentence prescribed for the offence of defilement of a 12 year old child under section 8 (2) of the [Sexual Offences Act](#) is a minimum of twenty years, as follows:

“ (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

13. The Supreme Court recently ruled on the applicability of the Muruatetu Case in relation to mandatory and minimum sentences in sexual offences in Republic v Ayako (Petition E002 of 2024) [2025] KESC 20 (KLR) (11 April 2025) (Judgment), as follows:

52. In the Muruatetu II Case we reiterated that the rationale in the Muruatetu I Case was only applicable to the mandatory death penalty for the offence of murder under Section 203 as



read with 204 of the Penal Code. Further, we disabused the notion that the rationale could be applied as is to other offences with a mandatory or minimum sentence.

53. In the Republic vs Mwangi Case, we explained as follows:
- “(52) We therefore find that in this matter the Court of Appeal did offend the principle of stare decisis. Notably, we observe that the Court of Appeal determined that the ratio decidendi in the Muruatetu Case on the unconstitutionality of mandatory sentences could be applied mutatis mutandis to the mandatory nature of minimum sentences provided for in the Sexual Offences Act. In doing so, and with respect, the Court of Appeal failed to abide by the clear principles provided in both the Muruatetu case and the Muruatetu directions in this instance.”
54. It is therefore abundantly clear that it was not open to the Court of Appeal to apply the ratio decidendi in Muruatetu I in the instant matter. Therefore, to the extent that the Court of Appeal did so, it has offended the principle of stare decisis.”
14. The Judgment of Gitari, J. in Keroguya HCCRA NO. 25 of 2016 reducing the sentence of imprisonment to 25 years was delivered on 24/4/2020 before the Supreme Court clarified that the Court had no jurisdiction to commute a life sentence to imprisonment for a term of years, as shown above.
15. The applicant must be entitled to the benefit of the least severe sentence in terms of Article 50 (2) (q) of the Constitution providing for the right to “(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”.
16. So that even if this Court could lawfully reset the sentence to life imprisonment as the Supreme Court did in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR), the principle of least severe punishment dictates that the lesser sentence is maintained. However, I consider that such a course could only be taken by a higher Court, with warning to the accused of the possibility of enhancement, on an appeal upon setting aside the decision of the lower court. As this Court is a court of equal jurisdiction with the Court (Gitari, J.) which reduced the life sentence under section 8(2) of the Sexual Offences Act to imprisonment for 25 years, it is not competent to enhance or reset the sentence, and the applicant will continue to serve the sentence of imprisonment for 25 years as reduced by the Court.
17. If, as suggested by the report from Prisons on the applicant, the Commissioner for Prisons approves the 1/3 remission of the 25-year sentence, the applicant shall be released shortly after serving 16 ½ years, having already served 14 years of the sentence from 4th October 2011.

Orders

18. Accordingly for the reasons set out above, the Court finds that the applicant’s petition for reduction of his sentence to enable his release on probation after taking into account remission of his 25-year sentence must be declined in view of the Supreme Court’s guidelines on the sentencing in Sexual Offences.
19. File Closed.
- Order Accordingly.

DATED AND DELIVERED THIS 29TH DAY OF MAY 2025.



EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Mamba for DPP.

Applicant in person.

