



**Abdalla v Republic (Miscellaneous Criminal Application
E135 of 2022) [2024] KEHC 525 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 525 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CRIMINAL APPLICATION E135 OF 2022**

**A. ONG'INJO, J
JANUARY 25, 2024**

BETWEEN

NGALA SIRIA ABDALLA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant Ngala Siria Abdalla was charged in Mombasa Chief Magistrate's Court Criminal Case No. 2970 of 2013 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 in Count I.
2. Particulars of the offence were that the applicant between 20th day of November 2013 and the 6th day of December 2013 at [particulars withheld] area of Kisauni sub-county within Mombasa County intentionally caused his penis to penetrate the vagina of F. K. a child aged 14 years.
3. In Count II, the applicant was charged with the offence of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.
4. Particulars of the offence were that the applicant between 20th day of November 2013 and the 6th day of December 2013 at [particulars withheld] area of Kisauni sub-county within Mombasa County intentionally touched the vagina of F. K. a child aged 14 years with his penis.
5. The applicant was found guilty and sentenced on 21.11.2014 to serve 20 years imprisonment for Count I and 3 years imprisonment for Count II which sentences were to run consecutively.
6. The applicant appealed in Mombasa High Court Criminal Appeal No. 80 of 2015 seeking to quash the conviction and set aside the sentence of 20 years imprisonment imposed upon him for Count I and the sentence of 3 years imprisonment for Count II but the appeal was dismissed.



7. The application filed on 29th July 2022 seeks that the sentence be reviewed in consideration of the period spent in custody and his mitigating factors.
8. The applicant cited his mitigating factors to include several rehabilitative programs and several theological courses that he has undertaken during his long stay in the penal institution, that the prison administration has granted him a favourable progressive report on his character, that he is a first offender, and that he had left behind a jobless wife with two children, five siblings and his mother who are suffering because of his absence.
9. The applicant contended that the words ‘shall be liable to imprisonment of not less than 20 years’ under the penal provision of the relevant law is construed in mandatory terms which deprives him of his right to have his mitigation taken into consideration. That however, superior courts have clarified that the laws are not mandatory in nature and that what they imply is in fact discretionary upon the concerned magistrate to impose sentences that befit the offences committed.
10. The applicant cited the case of *D.W.M. v Republic* (2016) eKLR, *Opoya v Uganda* (1967) EA 752 and *Kichanjele s/o Ndamungu v Republic* (1941) EA CA 64 where the concerned courts concurred that the words ‘shall be liable to’ do not in their ordinary meaning require the imposition of the stated penalty but, merely express the state penalty which may be imposed at the discretion of the court.
11. The applicant further cited the decision of the Court of Appeal at *Malindi (Visram, Karanja & Koome JJA) in Swabir Bukhet Labbed v Republic* C.A. Cr. App. No. 52 of 2018 where it was held that it is common ground that where a sentence is couched under the prefix ‘shall be liable to’ the same connotes that the sentence prescribed herein is not a mandatory sentence rather it is the prescribed maximum sentence. Therefore, the sentencing court is clothed with discretion to determine the appropriate sentence of course, taking into account the surrounding circumstances of each case.
12. The applicant averred that courts have grappled with the issue of mandatory minimum penal provisions, the ultimate of them being the High Court in *Machakos in Philip Mueke Maingi & 5 Others v Republic*, Const. Pet. No. E017 of 2021 where the superior court in the case held that all accused persons deserve to have their mitigation taken into account, and equally any court is bestowed with the legitimate discretion to impose sentences that befit the offences committed.
13. Upon conviction of the applicant was sentenced to serve 20 years because that is the mandatory penalty stipulated by the *Sexual Offences Act*. In consideration of the principle in Francis Muruatetu and Others v Republic and the holding in *Philip Mueke Maingi & 5 Others v Republic*, Const. Pet. No. E017 of 2021, this court finds that constitutional right was infringed when the trial court failed to exercise discretion and consider his mitigation before sentencing on account of the mandatory minimum sentence of 20 years.
14. In *Christopher Ochieng v R* (2018) eKLR the Court of Appeal at Kisumu took guidance from the Landmark Supreme Court decision in *Francis Karioko Muruatetu & another v Republic* SC Pet No. 16 of 2015 and held: -

“In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.”



15. In *Philip Mueke Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment), Odunga, J. (as he then was) held: -

To the extent that the *Sexual Offences Act* prescribed mandatory minimum sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of article 28 of *the Constitution*. However, the court was at liberty to impose sentences prescribed thereunder so long as the same were not deemed to be the mandatory minimum prescribed sentences.

16. In consideration of the authorities cited above, in consideration of the 10 years that the applicant has spent in custody and in consideration of 11 months in remand, it is found the same is commensurate with offence committed. This court therefore orders that he should serve the remainder of period under supervision of the Probation Officer.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS
25TH DAY OF JANUARY 2024**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for Respondent

Applicant present in person- N/A- Held at Malindi Prison

HON. LADY JUSTICE A. ONG'INJO

JUDGE

