



**Said v Republic (Miscellaneous Criminal Application E123 of 2022)  
[2024] KEHC 566 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 566 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS CRIMINAL APPLICATION E123 OF 2022**

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

**BETWEEN**

**ABDUL AKIM SAID ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Application**

1. The applicant Abdul Akim Said was charged in Shanzu Senior Resident Magistrate's Court Criminal Case No. 638 of 2015 with the offence of attempted defilement contrary to Section 9 (1) (2) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence were that Abdul Akim Said on 3<sup>rd</sup> June 2015 in Kilifi County within Coast region intentionally attempted to cause his penis to penetrate the anus of SA a boy child aged 10 years.
3. In the alternative charge, the applicant Abdul Akim Said committed an indecent act with a child contrary to Section 11 (1) of the [Sexual Offences Act](#) No. 3 of 2006.
4. The particulars of the offence were that Abdul Akim Said on 3<sup>rd</sup> June 2015 in Kilifi County within Coast region intentionally touched the anus of SA a boy child aged 10 years with his penis.
5. The trial court found the applicant guilty of the offence of attempted defilement, convicted him and sentenced him to serve 10 years imprisonment.
6. The applicant being dissatisfied with the conviction and sentence appealed in the High Court of Kenya at Mombasa Criminal Appeal No. 198 of 2017 where the court upheld the decision of the lower court on 13.1.2022.



7. Vide Notice of Motion Application filed on 20<sup>th</sup> June 2022, the Applicant, now seeks for review of the 10 years imprisonment sentence in consideration of his mitigating factors.
8. The applicant in submissions gave mitigating circumstances that the prison administration has granted him a favourable progressive report, that he is a first offender and that he is 36 years of age and of good conduct.
9. The applicant stated that a person convicted under a mandatory minimum penal law is also deprived of their right to have his mitigation taken into consideration in the sentence to be imposed on them. The applicant further stated that superior courts have often clarified that the laws are not mandatory in nature and what they imply is in fact discretionary upon the concerned magistrate to impose sentences that befit the offences committed.
10. The applicant relied on decisions in the cases 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 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 also cited the decision by the Court of Appeal Malindi (Visram, Karanja & Koome, JJA) in *Swabir Bukhet Labhed v Republic*, C.A. Criminal Appeal 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' such as in the case above, the same connotes that the sentence prescribed therein 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 argued that courts have grappled with the issue of mandatory minimum penal provisions, the ultimate of them being the High Court in Machakos, *Philip Mueke Maingi & 5 Others v Republic*, Const. Pet. No. E017 of 2021 where it was 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. This court has established that the applicant spent 6 months and 25 days in custody pre conviction and 5 years 11 months post-conviction. In consideration of the application to factor in remand period sections 333(2) of the [Criminal Procedure Code](#) and in consideration of period served, this court finds that the application has merit and is allowed. The applicant is set at liberty unless otherwise lawfully held. Orders accordingly.

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

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of: -**

Ogwel- Court Assistant

Mr. Ngiri for the Respondent

Applicant present in person

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

