



REPUBLIC OF KENYA



**WC alias WT v ODPD (Criminal Petition 1 of 2023)
[2024] KEHC 3261 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3261 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDAMA RAVINE
CRIMINAL PETITION 1 OF 2023**

**RB NGETICH, J
MARCH 20, 2024**

BETWEEN

WC ALIAS WT PETITIONER

AND

ODPD RESPONDENT

RULING

1. By way of application dated 5th October, 2022, the Petitioner moved this court seeking re-sentencing. The petitioner was charged with the offence of incest by a male contrary to section 20(1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the charge were that on the 8th day of July, 2014 at Kampnyangale Centre in Rongai Sub- County within Baringo County the accused did cause his penis to penetrate the vagina of Cynthia Kangogo, a girl aged 11 years whom the accused knew to be his daughter contrary to section 20(1) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The Petitioner denied the charges and the case proceeded for full trial and upon conclusion of trial, the petitioner was convicted and sentenced to life imprisonment. Being dissatisfied and aggrieved by the conviction and sentence, the petitioner filed appeal to the High court vide Appeal No. 229 of 2017 which appeal was dismissed by the High court and he has now filed this petition relying on Article 50(6) of [the Constitution](#) of Kenya, 2010.
3. The Petitioner argues that this Honourable court has discretion in sentence re-hearing following powers vested in it under Articles 159(2), 160(1), 165(3) (a)(b), Section 316, 307, 364(d) of the criminal procedure code. He submits that he was a first offender and is remorseful of the offence and has been in custody for seven years which period is sufficient retributive factor and he has taken advantage of the rehabilitative programs offered in prison for re-integration back to the society.
4. When the matter came up for hearing on the 18th January, 2024, the petitioner stated that he was sentenced to life imprisonment and his prayer is to be granted a determinate sentence. This court



directed that a social inquiry report be availed before the court makes a determination on the appropriate sentence.

5. On 22nd February, 2024 through Ms. Ratemo the state did not oppose review of life sentence due to recent jurisprudence declaring life sentence unconstitutional. She however prayed for sentence of 40 years imprisonment for the reason that the victim was his daughter aged 11 years at the time of the incident. That social inquiry report indicates that home environment is receptive but since this is a sexual offence and the minimum sentence is life imprisonment, it would amount to an injustice to release sexual offender after a short period but left it to court's discretion.
6. Social inquiry report filed reveal that the petitioner is 53 years old. His parents are deceased. He has 3 other siblings. The family has no known history of crime. He attended school up to class 5. He did not train in any form of technical skill. He ventured in business activities; he was buying and selling milk within Mogotio town. He is married to 2 wives with 6 children. His family has a good relationship with him; they have kept contact with the petitioner while in prison and they have shown willingness to receive him back home and assist in his resettlement. The Inmate has no health concerns and has no dependency on intoxicating substances. He has no record of crime and ha stable residence on a 3-acre piece of land in Rongai.
7. The petitioner was convicted of defiling his own daughter and sentenced to life imprisonment. He seeks leniency and says the victim has expressed positive sentiments. He says he has taken prison rehabilitation positively with several certificates acquired. The family members who formed part of the inquiry included the prisoner's two wives, a nephew and extended family members. They all spoke positively about the prisoner. They described him as a peaceful person. They further stated that he was a hardworking person who was providing for his polygamous family. He was engaged in subsistence farming as well as selling milk.
8. The probation officer reached out to the prison welfare department, Naivasha Maximum Security Prison. The inmate has no record of indiscipline for the 8 years he has been in custody. He is attached at the industry section; He is recommended for a favorable resentence. The inmate has completed carpentry grade 3 training; he has also attempted to do grade 2 which is ongoing. He has a certificate in Prisoner's Journey. His brother Julius, the wives and the victim have visited him regularly in prison.
9. The victim who is a daughter to the prisoner is now aged 21 years old. The victim's mother separated from the father (prisoner) when she was of tender age. When the mother left, the victim was taken by the prisoner's mother who raised her until she died. Thereafter, she was taken care of by the prisoner's 3rd wife. She attended Athinai primary school up to class 3 at the time incest was reported. The biological mother to the victim took her to another family where she was later married and she continued with primary education from class 3 up to class 6 when she dropped out after her mother left to unknown place leaving her. She decided to go back to her father's (prisoner) home where she continued to live with her step mother.
10. When the victim became of age, she performed casual jobs in farms neighbouring Mogotio town. She was later employed as a house-help in Nakuru before moving to Nairobi in search of better jobs. She is a mother of a baby girl who is 2 years 8 months old. The baby currently lives with her aunt (sister to the prisoner).
11. The victim stated that she was advised by her mother to testify against her father after her mother and father differed and separated. She further stated that she has been keeping in touch with her father (prisoner) while in prison both by visiting him and calling him. She said her father (prisoner) had forgiven her and the two had reconciled and she has related well with all the family members of the prisoner.



12. Efforts to get in touch with the victim's biological mother did not bear fruit. The relatives said they too did not know of her whereabouts. Similarly, the local administrators did not have a clue on her place of residence and the victim stated that she too cannot tell where her mother lives and that she does not have a phone.
13. The victim's family members have no ill feelings against the prisoner. They also stated that they forgave the victim's mother who has kept away from the family for a long time. The area administrator described the petitioner as a peaceful person who worked hard to provide for his polygamous family. From the report, the petitioner is aged 53 years. None of the people interviewed is opposed to the petitioner being released on non-custodial sentence and the probation officer's opinion is that the home environment is receptive for the re-integration of the offender.

Determination

14. I have considered the application. I find that the application invokes the revisional jurisdiction of this court which gives the court powers, in appropriate cases, to review and vary any orders, decision or sentence passed by the trial court if the court is satisfied that the impugned order, decision or sentence was illegal or was a product of an error or impropriety on the part of the trial court. If the court is so satisfied, the law mandates it to make appropriate orders to correct the impugned order, decision or sentence and align it with the law. The above is the import of Section 362 as read with Section 364 of the Criminal Procedure Code.
15. In this case, the applicant has indicated that he is remorseful, he has reformed and prayed for determinate sentence considering that he was sentenced to serve life imprisonment. The prosecution have no objection to the application for review owing to the new jurisprudence which declared life imprisonment unconstitutional.
16. It is not disputed that the Applicant was sentenced to life imprisonment. I take note of the fact that there has been change of jurisprudence being in Malindi Court of Appeal Criminal Appeal No. 12 of 2021, Julius Kitsao Manyeso v Republic where the court of appeal declared life imprisonment unconstitutional. And in view of change in jurisprudence, the applicant has a right to approach this court for review of sentence. I have considered probation officer's report and I am of the view that the applicant herein should benefit from change of jurisprudence declaring life sentence unconstitutional. The applicant therefore deserves determinate sentence. I have taken into consideration the circumstances of this case and sentence the petitioner to 10 years imprisonment.
17. Final Orders: -
 1. Life sentence is set aside.
 2. Petitioner is sentenced to serve 10 years imprisonment.
 3. Period served in remand to be reduced from sentence.

**RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET
THIS 20TH DAY OF MARCH 2024.**

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**RACHEL NGETICH
JUDGE**

In the presence of:



Court Assistant, Mr Karanja.

Petitioner present.

Counsel for the state Ms Ratemo.

