



REPUBLIC OF KENYA



KENYA LAW
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**Kinyozi v Republic (Revision Case E002 of 2024)
[2024] KEHC 4061 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4061 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDAMA RAVINE
REVISION CASE E002 OF 2024
RB NGETICH, J
APRIL 25, 2024**

BETWEEN

ALI HASSAN ALIAS KINYOZI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant was charged before the Magistrates court at Eldama Ravine with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual offences Act No. 3 of 2006. The particulars of the charge being that on the 13th day of March, 2013 at [Particulars Withheld] village in Koibatek District within Baringo County the accused committed an act which caused the penetration of his penis into the vagina of Emmaculate Kayaja a child aged about 5 years old.
2. The Applicant was charged with alternative charge of indecent Act with a child contrary to Section 11(1) of the Sexual offences Act No.3 of 2006. The particulars of the charge were that on the 13th day of March, 2013, at [Particulars Withheld] village in Koibatek district within Baringo County the accused committed an act which caused his penis to come in contact with the vagina of Emmaculate Kayaja a child aged bout 5 years old.
3. The applicant denied all the charges and the matter was set down for full trial and by judgement delivered on the 8.04.2014, the trial court found the Applicant guilty of the offence, convicted and sentenced him to life imprisonment.
4. Dissatisfied with the decision of the trial court, the applicant appealed on both conviction and sentence in the High court at Nakuru being Criminal Appeal No.90 of 2015 which appeal was transferred to Kabarnet High Court and given a new number being Kabarnet High court criminal Appeal No. 112 of 2017.The appeal was dismissed in its entirety. Still dissatisfied with the decision of the High court, the Applicant herein lodged an appeal to the court of appeal.



Application For Review Of Sentence

5. The Applicant approached this court through Miscellaneous Criminal application No. 8 of 2020 seeking sentence re-hearing in view of Machakos Petition No. E017/2021 Philip Mueke Maingi & Others Vs. Odpp and section 362, 364(1) and 365 of the CPC Cap 75 Laws of Kenya and in reliance to Article 27(1)(2)(4), 22(1), 23(1), 25(c), 50(1)(2) and 51(1)(2) of the Constitution of Kenya,2010.
6. This court delivered a ruling on the 27th day of July, 2023 dismissing the application for review of sentence on ground that it lacked jurisdiction to handle the application and directed the Applicant to pursue appeal in the court of Appeal.
7. The applicant has now approached this court through a Notice of Motion Application brought under the provisions of Article 22(1), 23(1),25(c), 27(10(4), 50(2)(p)(q), 159(2) and 165(3) of the Constitution of Kenya, Section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 seeking revision of life sentence imposed in Eldama Ravine criminal case No. 218 of 2013. When the matter came up for hearing on the 13th March,2024, the applicant informed the court that his prayer is for a determinate sentence and that he wishes to withdraw Appeal No. 112 of 2014.
8. This court directed that a social inquiry report be availed together with the appeal file and further directed that the matter be mentioned on the 16th April,2024. On 16th April,2024 Ms. Ratemo representing the state informed the court that the social inquiry report had been filed. She stated that this court had done sentence review in Miscellaneous No. 8 of 2020 and a ruling delivered on 22nd July,2023 which ruling is in the file. She submitted that at the time the court delivered the ruling, the Court of Appeal decision which declared life imprisonment unconstitutional had not been brought to the attention of the court and in the circumstances, the court has jurisdiction to hear and determine the application for review of sentence but urged the court to take note that the victim was 5 years old and being a sexual offence, she prayed that if the court is inclined to set aside the life sentence, she recommends 30 years imprisonment beginning the time the applicant was arrested.
9. The applicant in response submitted that he was arrested on 26th March,2013 and was sentenced on 8th April,2015. He stated that he has been in prison for 9 years now where he has learned tailoring and has a waiting certificate issued in 2022. He stated that he is 34 years old and was 24 years old when he was arrested and at the time, he was not married. He stated that he schooled up to class 8.
10. The social inquiry report was filed on the 13th March,2024 and it indicate that the applicant who was born in 1989 schooled up to class 8 in the year 2007 and scored 210 out of 500 marks in KCPE but did not proceed to secondary school due to lack of interest in schooling owing to low academic performance. He embarked in performing casual jobs of construction as well as operating a barber (Kinyozi) business at his parent's premises. By the time of his arrest, he was not married and lived in the same homestead with his parents.
11. The applicant admits the offence and attributed it to temptation saying that the minor was dressed in torn clothes which revealed her private parts; that the minor was out playing away from home with her brother who was also a minor. The applicant is remorseful and regrets his actions and pleads with the court for leniency.
12. The report indicates that the parents of the victim were employees of a flower farm Karen Roses within Eldama Ravine Township and at the time of social inquiry, they had relocated back to their home area in western Kenya and later passed on and the victim's sentiments could not therefore be captured.
13. The local administrator did not associate the applicant with criminal history prior to the offence and the probation officer concluded that the social environment is fairly positive.



Analysis And Determination

14. I have considered the application, response by state and sentiments captured in social inquiry report and wish to consider whether this court has jurisdiction to revise sentence imposed by trial court.
15. The application before this court 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 was 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 was so satisfied, the law mandate 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.
16. Supreme Court considered the issue of review of judgements and orders in *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] eKLR and held that:

“...we hold that as a general rule, the Supreme Court has no jurisdiction to sit on appeal over its own decisions, nor to review its decisions, other than in the manner already stated in paragraph (90) above. However, in exercise of its inherent powers, this Court may, upon application by a party, or on its own motion, review, any of its Judgments, Rulings or Orders, in exceptional circumstances, so as to meet the ends of justice. Such circumstances shall be limited to situations where:

 - a. the Judgment, Ruling, or Order, is obtained, by fraud or deceit;
 - b. the Judgment, Ruling, or Order, is a nullity, such as, when the Court itself was not competent;
 - c. the Court was misled into giving Judgment, Ruling or Order, under a mistaken belief that the parties had consented thereto;
 - d. the Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision.”
17. In view of the above, I take note of the fact that after this court made determination on criminal application No. 8 of 2020 filed by the applicant, there has been change of jurisprudence being in Malindi Court of Appeal Criminal Appeal No. 12 of 2021, *Julius Kitsao Manyeso Versus Republic*, 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 age of the child defiled being 5 years and the impact of the applicants act on the innocent child. In view of the above, I find it appropriate to impose 30 years imprisonment.

18. Final Orders: -

1. The sentence of life imprisonment is hereby set aside.
2. The applicant to serve 30 years imprisonment.
3. The period applicant served in remand and the period he has been in prison after sentence to be computed in the sentence in 2 above.



RULING DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 25TH DAY OF APRIL 2024.

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RACHEL NGETICH

JUDGE

In the presence of:

Elvis/Momanyi – Court Assistants.

Ms. Ratemo for State.

Applicant present.

