



**JMN v Republic (Criminal Petition E006 of 2023)  
[2024] KEHC 3978 (KLR) (23 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3978 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL PETITION E006 OF 2023**

**FR OLEL, J  
APRIL 23, 2024**

**BETWEEN**

**JMN ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant was charged and convicted (on his own plea of guilty) of the offence of Defilement contrary to section 20(1) of the [Sexual offences Act](#) No 3 of 2006 In Macahkos Cmcrr No 1518 of 2007 and was sentenced to serve life Imprisonment; He appealed against the said conviction and sentence vide MACHAKOS HCCR APPEAL NO 18 OF 2008 and the said appeal was dismissed on 4th June 2008.
2. The applicant did file this application/petition under provision of Article 22, 23, 27(1),(2), 48,50, 52(2)(q), 159 and 165 of the [constitution of Kenya](#) and seeks that this Honorable court be pleased to re consider the life sentence passed and be pleased to resentence him to a lenient definite sentence, premised on rehabilitate sentence rather than retributive punishment. The application was lodged purely on the basis on the legality of the mandatory nature of sentencing in line with the court of Appeal decision in [EVANS WANJALA WANYONYI VR REPUBLIC; CRISTORPHER OCHIENG VRS REPUBLIC \(2018\) Eklr, KISUMU CR APPEAL NO 202 OF 2011 & JARED KOITA INJIRI VRS REPUBLIC, KISUMU CR APPEAL NO 93 OF 2014.](#) where it had been held that mandatory sentences were unconstitutional as they infringed on the sentence discretion of the trial court.
3. The Applicant submitted that he was a first offender and had personally reformed and acquired good skill, while in prison. He was remorseful to the harm he caused the complainant and any other person who had been affected by his action. He prayed for leniency and for the court to have mercy on him. He was 37 years as at the time he committed the offence and did not appreciate the repercussions of his



action and the ripple effect it had on his life and that of his family. The period already served in prison was adequate and he prayed to be released to reintegrate back into the society as a reformed person.

4. The state did not oppose this petition and left it for the court to make a determination.

## **B. Analysis of Law**

- Nature and scope of resentencing

### **Jurisdiction**

5. It bears repeating that, the High Court has the mandate under Article 165 (3) of *the Constitution* to hear and determine matters on enforcement of rights and fundamental freedoms enshrined in *the constitution*. A further leapfrog development; under Article 50(2)(p) of *the Constitution* 2010:

50(2) Every accused person has the right to a fair trial, which includes the right—

- (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.

6. The Court of Appeal in the case of *William Okungu Kittiny -v- R* (2018) eKLR stated:

“The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit court below it from ordering sentence re-hearing in a matter pending before the courts. By Article 163 (7) of *the Constitution*, the decision of the Supreme Court has immediate and binding effect on all the other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases”.

7. In light thereof, nothing prevents the court from applying the decisional law and ordering sentence review in cases where the penalty imposed can be challenged on valid legal grounds. To me, denying an accused the benefit of court’s discretion to impose appropriate sentence is inconsistent with the right to fair trial. Fair trial includes sentencing. On that basis this court has jurisdiction to determine review of sentence.
8. A similar position was taken by the High Court, in *Stephen Kimathi Mutunga -v- Republic* (2019) eKLR where it was held that the High Court has unlimited jurisdiction in both Civil and Criminal matters, and was mandated to enforcing fundamental rights and freedoms as enshrined in *the Constitution*. The High Court thus had jurisdiction to deal with the petition for sentencing rehearing.

## **C. Sentencing**

9. The appellant was sentenced to life in imprisonment as provided for under section 20(1) of the *sexual offences Act* on 13<sup>th</sup> June 2007, for defiling his 12 years old daughter. He admitted the offence and pleaded guilty. The sentence as provided under the *Sexual offences Act* No 3 of 2006 had mandatory minimum sentencing provisions and did not leave the court discretion to vary the same. The applicant relied on the petition of Philip Mueke & 5 others and other citations, *Evans Wanjala Wanyonyi vr Republic; Christopher Ochieng vrs Republic* (2018) eKLR, Kisumu CR Appeal n0 202 of 2011 & Jared Koita Injiri vrs Republic, Kisumu Cr Appeal no 93 of 2014, which held that mandatory sentence was unlawful, to convince court that jurisprudence regarding mandatory sentencing had changed and thus prayed for a more balanced and fairer sentence.



10. In *Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR)(7 July 2023) (Judgment)Neutral Citation:[2023]KECA827(KLR)Court of Appeal at Malindi P Nyamweya, JW Lessit and GV Odunga, JJ which was a second appeal by an accused that was convicted of the charge of defiling a girl aged 4½ years. The appellant was sentenced to life imprisonment at the trial court. The appellant’s first appeal at the High Court was dismissed. The appellant further aggrieved filed the instant appeal on grounds that he committed the offence when he was only 18 years old and was a first offender. The Court of Appeal held that the constitutionality of the mandatory and indeterminate sentence of life imprisonment was discriminatory, inhumane and a violation of the right to human dignity. The Court of Appeal partly allowed the appeal, the life sentence was substituted with a sentence of 40 years’ imprisonment. The 40 years was to serve as a deterrent.
11. This court would not normally reconsider issue of re-sentencing, where the matter has regurgitated before the high court and/or court of Appeal, but based on the current jurisprudence and given that the high court judgment was made in 2008, the applicant can benefit from a sentence review under provisions of Article 27(1), 48, 50(2), (q) of *the constitution* of Kenya 2010. The high court as noted above has original jurisdiction under Article 165(3) of *the constitution* 2010, to hear and determine any petition touching on the petitioner’s fundamental right and where appropriate resentence him based on the current jurisprudence developed on mandatory sentencing, which tied the court hands as at the time he was convicted and sentenced.

#### **D. Determination**

12. Having considered all the above factors I do find that it is unlawful to jail the petitioner to an indeterminate period of time (life sentence) as that runs contrary to Articles 27(1) &(2),28 and 50(2), (q) of *the Constitution* of Kenya 2010.
13. In the circumstances of this case I do exercise my discretion and set aside the life sentence imposed on the Applicant/petitioner In MACHAKOS CHIEF MAGISTRATE COURT (SO) CASE NO 1518 OF 2007, and substitute the same with a sentence of twenty-five years (25) which will run from 13<sup>th</sup> June 2007, when the initial conviction and sentence was effected.
14. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 23<sup>RD</sup> DAY OF APRIL, 2024.

**FRANCIS RAYOLA OLEL**

**JUDGE**

**Delivered on the virtual platform, Teams this 23<sup>rd</sup> day of April, 2024.**

**In the presence of;**

Petitioner present from Kamiti Maximum Prison

Ms Otulo for Respondent

SamCourt Assistant

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