

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VIHIGA
CRIMINAL PETITION NO E008 OF 2023

FREDRICK KIBIENDA KISISWA.....
PETITIONER

VERSUS

REPUBLIC.....
RESPONDENT

JUDGMENT

INTRODUCTION

1. The Applicant herein was charged 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. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. He was convicted of the main charge and sentenced to life imprisonment.
2. Being aggrieved by the said decision, he lodged an Appeal **HCCRA No 14B of 2014**. The same was dismissed. He did not appeal to the Court of Appeal.
3. On 20th June 2023, he filed this Petition praying for a lenient sentence by way of a review of his sentence. He had asserted that he was remorseful and had done various Theological courses for reform and rehabilitation purposes. He also urged the court to consider the period that he spent in remand during trial pursuant to Section 333(2) of the Criminal Procedure Code.
4. He filed two (2) undated sets of Written Submissions. The first one was filed on 20th June 2023 while the second one was filed on 10th

September 2024. The Respondent did not file any Written Submissions despite being given the chance to do so by this court. They were also not on the court file at the time of reserving the Ruling herein. The Ruling herein is therefore based on the said Applicant's Written Submissions only.

LEGAL ANALYSIS

5. The Applicant placed reliance on the case of **Julius Kitsao Manyeso Vs Republic Criminal Appeal No 12 of 2021**(eKLR citation not given) where it was held that life imprisonment was unconstitutional. He submitted that due to the mandatory nature of the sentence imposition under Section 8(1) as read with Section 8(2) of the Sexual Offences Act, his mitigation, age and invocation of Section 216 and/or 329 of the Criminal Procedure Code were not considered hence he was prejudiced.
6. He also relied on the case of **Evans Wanjala Wanyonyi vs Republic** (eKLR citation not given) where he argued that in a similar matter, this court substituted a mandatory life sentence with a judicial evaluated sentence. He pointed out that the indefinite nature of the life sentence imposed on him was inconsistent with the provisions of Article 25, 27, 28, 29, 50 and 51 of the Constitution of Kenya, 2010 under which every person is guaranteed the right to personal dignity, fair trial, freedom from torture and benefits of law **(sic)**.
7. He added that his ability to have future based prospects of release was disenfranchised contrary to Article 28 of the Constitution of

Kenya. He also submitted that the indefinite nature of the sentence was harsh, excessive, cruel and degrading punishment as it amounted to psychological torture contrary to the provisions of Article 29 of the Constitution.

8. He was emphatic that incarceration without any prospect of release would totally ruin the rest of his life contrary to the primary purpose of a sentence of imprisonment as stipulated under the United Nations Minimum rule and the prison motto of “Kurekebisha na haki”.
9. He pleaded with this court to consider that he was a first offender and was thus guaranteed of a least punishment as held in the cases of **James Waweru Mwangi vs Republic Criminal Appeal No 36 of 2028** (sic) and **Francis Irungu Makiri vs Republic Criminal Appeal No 180 of 2014** (eKLR citations not given). He was categorical that every person was equal before the law and had equal right and benefit of the law.
10. He asserted that he was the sole breadwinner of his family of three (3) children who were unable to pursue their studies due to lack of parental care. He added that he was also taking care of his old parents who were rendered helpless after he was arrested.
11. He further contended that he had indulged in various rehabilitation programs during his incarceration which included NITA result of trade test grade three, polisher, AFCM Diploma international training center, Lamp and Light Diploma Bible correspondence course, ISOM Diploma, Emmaus Bible School

Diploma, Certificate of attendance transformed inside, Certificate in the way to happiness, Certificate of Completion, Philip Acts & Adult Certificate and Certificate in the Gospel Messenger Ministry.

12. He averred that he had acquired knowledge that would enable him re-integrate back into the society and live a self-reliant life as a law-abiding citizen if given a second chance through imposition of a least severe sentence. He expressed remorse and regretted having committed the offence.
13. Notably, the Applicant herein was sentenced under Section 8(2) of the Sexual Offences Act. The same provides as follows: -
“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”
14. This court could not therefore fault the Trial Court for having sentenced him to life imprisonment as that was lawful.
15. Prior to the directions of the Supreme Court in **Francis Karioko Muruatetu and Another vs Republic [2017] eKLR** on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.
16. Notably, in the case of **Joshua Gichuki Mwangi vs Republic [2022] eKLR**, the Court of Appeal reiterated the reasoning in the case of **Dismas Wafula Kilwake vs Republic [2018] eKLR** where it held that Section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing

offences and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.

17. Bearing in mind that the High Court was bound by the decisions of the Court of Appeal as far as sentencing in defilement cases was concerned, this court had been exercising its discretion to reduce the sentences for those who had been sentenced under the Sexual Offences Act.

18. However, in a decision that was delivered on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case **Joshua Gichuki Mwangi vs Republic** (Supra) and stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence. The Supreme Court directed the relevant organs to abide by its decision noting that the appellant therein had since been released from prison.

19. Even so, this court had at the back of its mind the case of **Manyeso vs Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment)** where the appellant therein had been sentenced to life imprisonment under Section 8(2) of the Sexual Offences Act. In its decision, the Court of Appeal rendered itself as follows:-

“...an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the

reasoning of the European Court of Human Rights in *Vinter and others v The United Kingdom* (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.... we are of the view that having found the sentence of life imprisonment to be unconstitutional, we have the discretion to interfere with the said sentence... We, therefore in the circumstances, uphold the appellant’s conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction.”

20. Article 50 (p) of the Constitution of Kenya provided that an accused person was entitled to the least severe punishment prescribed by the law. It states as follows:-

“Every accused person has the right to a fair trial, which includes the right 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.”

21. Further, Article 50(q) of the Constitution of Kenya stipulates that:-

“Every accused person has a right if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”

22. According to Article 27(1) of the Constitution of Kenya:-

“Every person is equal before the law and has the right to equal protection and equal benefit of the law.”

23. The Court of Appeal decision **Manyeso vs Republic** (Supra) was delivered way after the Petitioner herein was convicted. It was also way after Musyoka J had delivered his decision in **HCCRA No 19 of 2020** on 12th November 2021. Due to the hierarchical nature of our courts, this court was bound by the decision of the Court of Appeal.

24. The Petitioner herein had a right to apply for review of his sentence to benefit from least severe punishment that was being meted out for the offence of defilement under Section 8(1) as read with Section 8(2) of the Sexual Offence Act that attracts the sentence of life imprisonment.

25. He was entitled to equal benefit and protection of the law. Failure to accord him this benefit could amount to discrimination against him which is prohibited by Article 27(4) of the Constitution of Kenya that states that:-

“The State shall not discriminate directly or indirectly against any person on any ground (emphasis court), **including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”**

26. This court struggled with the nature of sentence to mete out to the Petitioner as it was bound both by the Supreme Court and the Court of Appeal decisions. However, in view of the fact that the Court of Appeal decision **Manyeso vs Republic** (Supra) regarding the constitutionality or otherwise of life imprisonment had not yet been overturned by the Supreme Court, this court was persuaded to reduce the life sentence that was meted upon the Petitioner herein to a determinate sentence.

27. He committed a heinous crime against a vulnerable ten (10) year old child. The Complainant’s mother was deceased while the whereabouts of his father were unknown. The Petitioner abducted and defiled her for several days. His mother would take her to the toilet because she was not allowed to be alone. That was extremely evil of both of them. No number of years could ever erase the trauma that she and her grandmother went through. This court took the view that a sentence of thirty (30) years imprisonment was adequate to punish the Petitioner for the offence that he committed and to deter him and others from committing similar offences.

28. This court could have left the life imprisonment undisturbed. However, it put the term of imprisonment to thirty (30) years in line

with the of case of **Ayako vs Republic [2023] KECA 1563 [KLR]**

where the Court of Appeal held as follows:-

“On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years’ imprisonment.”

29. As the sentence was now determinate, this court could now consider his prayer that the period that the Petitioner spent in prison while his trial was going on be taken into account in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

30. The said Section 333(2) of the Criminal Procedure Code provides that:-

“Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody”

(emphasis court).

31. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in **Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR.**

32. Further, Clauses of the Judiciary Sentencing Policy Guidelines provide that:-

“The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

33. The Charge Sheet indicated that the Petitioner herein was arrested on 9th March 2012. He was convicted on 31st December 2013. However, the proceedings of the lower court were incomplete. The committal warrant was also missing from the court file. This court could not therefore determine whether or not he was granted bond/bail or when he was sentenced or if the Trial Court considered the period he spent while the trial was ongoing to enable it consider his application under Section 333(2) of the Criminal Procedure Code.

DISPOSITION

34. For the foregoing reasons, the upshot of this court's decision was that the Applicant's undated Petition dated 20th June 2023 was partly merited. His conviction be and is hereby upheld as the same was safe.

35. However, the sentence of life imprisonment that was imposed on him be and is hereby set aside and/or vacated and replaced with an order that he is hereby sentenced to thirty (30) years imprisonment.

36. The DR High Court Vihiga be and is hereby directed to liaise with the Trial Court to obtain the missing proceedings to enable this court consider the Petitioner's prayer under Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

37. It is also hereby directed that this matter will be mentioned on 29th April 2024 to confirm compliance and/or for further orders and/or directions.

38. It is so ordered.

DATED and **DELIVERED** at **VIHIGA** this **28th** day of **November**
2024

J. KAMAU
JUDGE