



**Kiprop v Republic (Miscellaneous Application E022 of 2021)  
[2023] KEHC 18293 (KLR) (27 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 18293 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
MISCELLANEOUS APPLICATION E022 OF 2021  
SM MOHOCHI, J  
JANUARY 27, 2023**

**BETWEEN**

**VINCENT YATICH KIPROP ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. This is an application by way of notice of motion supported by an affidavit pursuant to the provisions articles 19, 22(1),(2),(3),(4), 25, 26, 27(1), 28, 29, 50(2)q, 159(1) 160(1) , and 165(3)(b) of the Constitution and section 333 (2) of the Criminal Procedure Code, for sentence re-hearing anchored on the now famous case of Francis Muruatetu & another v Republic petition No. 16 of 2015, a decision by the Supreme Court of Kenya and Guyo Jarso Guyo v Republic petition No 6 of 2008 High Court at Marsabit.
2. At the hearing of the application the applicant and the respondent both canvassed by way of oral submissions, to wit;
  - a. Appellant:

That he had appealed against the conviction and sentence criminal appeal No 48 of 2011 in the High Court at Eldoret and that the court dismissed the same and he felt aggrieved against both the trial court and the appellate court urging that his fair trial rights were thus infringed by both courts.
  - b. Respondent  
That the appellant had filed his 1<sup>st</sup> appeal against his conviction and sentence and the appellate court re-evaluated the evidence thereby upholding the conviction and sentence and that the High Court thus became “*functus officio*” in relation to the conviction and sentence and that the court in this instance lacked jurisdiction to review a decision of a court of equal jurisdiction



3. The applicant was initially arraigned and charged in Principal Magistrate’s Court at Kabarnet Criminal Case No 596 of 2010 for the offence of defilement contrary to section 8(1) as read together with section 8(2) of the *Sexual Offences Act* 2006 and was convicted and sentenced to life imprisonment.
4. The applicant being aggrieved, appealed against the trial court’s conviction and sentence in criminal appeal No 48 of 2011 in the High Court at Eldoret, which appeal upon hearing, was dismissed by justice G.K Kimondo on the November 28, 2013.
5. In the 1<sup>st</sup> appeal the court, undertook an in-depth re-evaluation of all the evidence and concluded that the main charge of defilement, had been proved beyond reasonable doubt. The defense put forward by the appellant at the trial was inconsistent with his plea of innocence. That the complainant was a ten (10) years old, class three student in primary school and a grave offence had been perpetrated against a defenceless child, a vulnerable person as defined in section 2 of the *Sexual Offences Act*. Furthermore, the victim will carry the scars for life, thereby upholding the conviction and affirming the sentence that the appellant spends the rest of his life in jail.
6. The applicant has not challenged the decision of the High Court in his 1<sup>st</sup> appeal.
7. The applicant’s affidavit in support of the application depones and explicitly accede that, he has not exhausted his appeal opportunity.
8. The applicant contends that his trial, in the subordinate court and in the 1<sup>st</sup> appellate court contravened his fair trial rights on sentencing that was too harsh and excessive.
9. With regard to the request for review of sentence, the Supreme Court has revisited the Muruatetu petition No 15 and 16 of 2015 (consolidated) and issued directions on July 6, 2021.
10. The Supreme Court has explicitly clarified that its decision in the Muruatetu case only related to the mandatory death sentence for murder cases under section 203 and 204 of the *Penal Code*, and did not apply to any other statutory mandatory death sentences or minimum sentences.
11. Specifically, the Supreme Court issued the following guidelines.
  - “ 18. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the courts below as follows –
    - a. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under section 203 and 204 of the *Penal Code*.
    - b. The Judiciary Sentencing Policy Guidelines to be revised in tandem with the new jurisprudence enunciated in Muruatetu.
    - c. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.
    - d. Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.
    - e. In re-sentencing hearing, the court must record the prosecution’s and the appellant’s submissions under section 329 of the



Criminal Procedure Code as well as those of the victim before deciding on the suitable sentence.

- f. An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.
  - g. In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following will guide the court –
    - i. Age of the offender
    - ii. Being a first offender
    - iii. Whether the offender pleaded guilty.
    - iv. Character and record of the offender
    - v. Commission of the offence in respect of gender-based violence.
    - vi. The manner in which the offence was committed on the victim.
    - vii. The physical and psychological effect of the offence on the victim’s family.
    - viii. Remorsefulness of the offender.
    - ix. Possibility of reform and social adaptation of the offender.
    - x. Any other factor the court considers relevant.
    - xi. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.
    - xii. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under section 204 of the Penal Code before the decision in Muruatetu.
12. The application as filed seeks to invite the court to reopen the 1<sup>st</sup> appeal and that this court lack jurisdiction to review a judgement on appeal by a High Court.
13. The court observes that, sentencing is the discretion of the trial court and that this court shall only (in the 1<sup>st</sup> appeal) interfere with a sentence, where it is demonstrated that the discretion was not exercised judiciously and that it failed to consider all relevant factors, or if it is demonstrated, that the sentence imposed is not legal, or is harsh and excessive, as to amount to miscarriage of justice.
14. Notwithstanding the want of jurisdiction by this court the instant application has not in any way showcased;



- i. how (if any) the trial court and the appellate court failed to judiciously exercise its discretion; or what relevant factors (if any) were disregarded during sentencing; or
  - ii. How the sentence imposed is illegal or harsh and excessive to constitute miscarriage of justice.
15. From the foregoing therefore, this being a matter where the applicant was convicted and sentenced for offence of defilement contrary to section 8(1) as read together with section 8(2) of the [Sexual Offences Act](#) 2006, He filed his appeal that was heard and determined in the High Court, in this instance the court has no jurisdiction to review the sentence imposed and upheld by a High Court, based on the Muruatetu decision.
16. Consequently, the application for review of sentence is hereby dismissed.  
The applicant has 14 days right of appeal

**RULING READ, SIGNED AND DELIVERED IN OPEN COURT BY;**

**S. MOHOCHI (JUDGE)**

**27. 1 .2023**

**In the Presence of;**

**Appellant in Person**

**Mr. Obwanyo for the Republic**

**M/s Okok-S.C**

**Mr. N. Kemboi C.A**

