



**Ngugi v Republic (Miscellaneous Criminal Application E058 of 2022)  
[2023] KEHC 1364 (KLR) (24 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1364 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS CRIMINAL APPLICATION E058 OF 2022**

**TM MATHEKA, J  
FEBRUARY 24, 2023**

**BETWEEN**

**JAMES MUNGAI NGUGI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. This application is brought under Articles 22(1), 27(1), 28, 29, 50, 159, 165, 163(7) of the Constitution Section 39 of the Sexual Offences Act, seeking orders;

That he be granted a re-hearing of the sentence in the Chief Magistrate's Nakuru Criminal Case Number 50 of 2011, this Honourable Court be pleased to receive his mitigation for consideration of an appropriate sentence and to issue any other order it may deem fit for interest of justice.

2. In the affidavit of support, the applicant depones that he was found guilty of defilement and sentenced to life imprisonment on August 2, 2011.
3. That in view of the judgment in the Philip Mueke Maingi & Others v Republic [2022], High Court Petition No EO17 of 2021 this court has jurisdiction to hear resentencing and mete out appropriate an sentence in line with Article 165 of the Constitution 2010.
4. At the hearing of the application the applicant relied on his pleadings.
5. The prosecution left it to the court to make the appropriate decion.
6. Upon perusal of the file I noted that the applicant had filed High Court Misc Application No E013 of 2020. Vide a Notice of Motion filed on the October 19, 2020 the applicant had appeared seeking a sentence rehearing in CM's Nakuru Criminal Case No 50 of 2011. In that application he urged that this court was bound by the decision of the Supreme Court in n Francis Karioko Muruatetu that the



mandatory nature of the death sentence was unconstitutional. That the lower court had fettered its own discretion and sentenced him to the mandatory life sentence and on that basis his case ripe for review on the basis of the Muruatetu decision.

7. In a ruling delivered on the 19<sup>th</sup> of January 2022 I found and held that following Muruatetu 2 where the Supreme Court issued directions that its holding in Francis Karioko Muruatetu was not intended to apply to sexual offences, I dismissed the application.
8. There have been jurisprudential developments in this area and pronouncements from the High Court. These have prompted that applicant to try once again to have a sentence rehearing. He relied on *Philip Mueke Maingi & Others v Republic* [2022], High Court Petition No EO17 of 2021 (supra) where the court issued the following orders

“To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of the Constitution. However, the Courts are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences. ...Taking cue from the decision in Francis Karioko Muruatetu & Another v Republic [2017] eKLR (Muruatetu 1) those who were convicted of sexual offences and whose sentences were passed on the basis that the trial Courts had no discretion but to impose the said mandatory minimum sentence are at liberty to petition the High Court for orders of resentencing in appropriate cases...”
9. While the applicant’s case would fall onto these categories of cases, this court already pronounced itself on the same issue by directing the applicant to reinstate his appeal at the Court of Appeal. I pointed out that this court could not apply Article 165(7) of the *Constitution* upon itself, and that Article 50(2) (g) gave the applicant the right of appeal or review to a higher court.
10. This is what I said “In any event I have held the view in other similar applications that the avenue available for applicants seeking review of their sentences, after an unsuccessful appeal in the High Court is not resentencing at the same High Court, but an appeal at the Court of Appeal, as the High Court cannot apply Article 165 (7) of the *Constitution* upon itself, that provision applies to the supervisory powers of the High Court over subordinate courts at tribunals. Further Article 50 (2) (q) clearly states that if convicted, an accused person has the right of appeal to, or apply for review by, a higher court as prescribed by law.”
11. Having already pronounced myself on the issue I find that this court is functus officio. The applicant has not appealed against my ruling or sought to set it aside. As matters stand his option is to reinstate directed to reinstate his appeal in the Court of Appeal as we now have a bench sitting at Nakuru.
12. The application is accordingly struck out.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24<sup>TH</sup> FEBRUARY 2023.**

**Mumbua T Matheka**

**Judge**

Applicant appears in Person

Ms. Murunga for the Respondent

