



REPUBLIC OF KENYA



**Cheruiyot v Republic (Criminal Revision 7 of 2019)
[2023] KEHC 3540 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3540 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL REVISION 7 OF 2019
RB NGETICH, J
APRIL 27, 2023**

BETWEEN

PATRICK KIPKOSGEI CHERUIYOT APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Before this court for determination is application filed on November 21, 2019 by the Applicant Patrick Kipkosgei Cheruiyot seeking review of sentence of 20 years imprisonment which was enhanced from 15 years by this court following appeal from subordinate court.
2. The Applicant had been charged for offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* in Eldama Ravine law courts Criminal Case No. 924 of 2009.
3. The Applicant informed that court that he has abandoned his second appeal in compliance to section 361 of the *Criminal Procedure Code* in order to pave way for review of sentence.
4. The Applicant's argument is that this Court has jurisdiction to hear and determine this application. He relies on the decision in *Francis Karioko Muruatetu & another v Republic* Petition No. 15 & 16 (2017) in support of his argument that this Court is empowered to hear this application for sentence re-hearing. He filed written submissions on June 23, 2022.
5. In his submissions, the Applicant stated that has acquired a number of skills in vocational trainings including grade iii, ii, and I in upholstery and grade iii, ii and I in carpentry and joinery which will enable him sustain himself and his family including the minor who was born by the complainant if released
6. The Applicant further submitted that he has served 12 years and four months and is left with one year to complete the entire sentence and that if it was not for the enhancement, he could have completed



his sentence on March 29, 2020. He states that he is a reformed and transformed and urged this court to review his sentence.

7. He further submitted that the child who was born by the complainant is now in class eight; that he only saw her once when she was two years old and the child does not know where her father is. That she is lacking parental care and has never enjoyed the importance of having a father; He seeks a second chance to go and provide both necessities and school fees to his daughter.
8. On the December 21, 2022 the court ordered for the probation officers report to be availed in court and the same was filed in court on the 17.02.23. The report indicate that the Applicant has earned the title of a trustee in prison because of his reformed character and while in prison, he has done; Upholstery, wiring, mechanic, Masonry and counselling certificate.
9. From the probation officer's report, the Applicant has fully reformed; is of good conduct and he is remorseful of the offence he committed. That he has learned the above skills in prison and is ready and willing to put the same into practice so as to enable him earn a living and his immediate family is ready to assist him procure tools of trade so as to utilize the said skills. That he is willing to serve a non-custodial sentence for the remainder of the period.
10. The Probation officer's report further indicate that the victim has forgiven him and she is ready to assist him settle down; the local administration and the community support his sentence review application.
11. It is not disputed that the Applicant had his appeal heard and determined by this Court. The Applicant having appealed to this Court and his appeal determined did not pursue further appeal to the Court of Appeal.
12. What I wish to consider is whether this court has jurisdiction to review its own order and sentence. The Supreme Court considered the issue of review of judgements and orders in [Fredrick Otiemo 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:

- (i) the Judgment, Ruling, or Order, is obtained, by fraud or deceit;
- (ii) the Judgment, Ruling, or Order, is a nullity, such as, when the Court itself was not competent;
- (iii) the Court was misled into giving Judgment, Ruling or Order, under a mistaken belief that the parties had consented thereto;
- (iv) the Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision.”

13. From the above decision, the above conditions have to be met for a party to successfully move a court to review its own decision or that of a court with coordinate jurisdiction. The Applicant here has not demonstrated any of the above conditions to warrant review of sentence imposed by my predecessor. The ground cited by the applicant is reform of his character and the need to support his family and the child born out of the offence from which he was convicted and sentenced.



14. The Applicant has also cited the case of Muruatu 1 which declared mandatory nature of sentences unconstitutional. However, the Supreme Court in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR clarified the applicability of its decision to offences other than murder in *Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR. The supreme court stated as follows:-

“[10] It has been argued in justifying this state of affairs, that, by Paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the Court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision’s expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it, In that paragraph, we stated categorically that;

“[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right”.

Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the Judgment is only made to Section 204 of the Penal Code and it is the mandatory nature of death sentence under that section that was said to deprive the “courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases”.

[11] The ratio decidendi in the decision was summarized as follows;

“69. Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment”.

We therefore reiterate that, this Court’s decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute.”

[Emphasis supplied]

15. A reading of the Supreme Court judgement in Muruatetu 2 therefore shows that the mandatory minimum sentences provided under *Sexual Offences Act* remain the statutory and legal sentences for persons found guilty of the offence of defilement.
16. In view of the above, the applicant has failed to demonstrate that factors captured in paragraph 13 above exist to enable me review sentence imposed by this court. Further on resentence, in view of directions given by the supreme court on applicability of Muruatetu case, the applicant having been charged with the offence of defilement will not benefit from resentencing.



17. From the foregoing, this court is functus officio and lacks jurisdiction to entertain the Applicant's application.

18. Final orders:-

1. Application filed on 21st November is hereby dismissed.
2. Applicant to serve the remaining sentence.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT KABARNET THIS 27TH DAY OF APRIL 2023.

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RACHEL NGETICH

JUDGE

In the presence of:

Mr. Sitienci - Court Assistant.

Ratemo for State.

Applicant – Present.

