



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**CKK v Republic (Miscellaneous Criminal Application  
E026 of 2021) [2023] KEHC 3607 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3607 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
MISCELLANEOUS CRIMINAL APPLICATION E026 OF 2021**

**CM KARIUKI, J**

**APRIL 27, 2023**

**BETWEEN**

**CKK ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The application herein seeks that: -
  2. Spent
  3. That this court may be pleased to issue orders for a special hearing of this application for resentencing pursuant to the decision in *Philip Mueke Maingi & Others vs. Republic* Petition No. E017 of 2021.
  4. That the honorable court be pleased to issue any further orders as it may deem fit and expedient in the circumstances of this application.
2. The Applicant sought the aforementioned remedy by virtue of the court's judgement in *Francis Karioko Muruatetu & Others vs. Republic* Petition No. 15 of 2015 consolidated with Petition No. 16 of 2015 and *Philip Mueke Maingi & Others vs. Republic* Petition No. E017 of 2021. The Applicant averred that in the latter decision it was held that the mandatory sentencing provisions under the [Sexual Offences Act](#) are unconstitutional in so far as they deny trial courts the discretion to give regard to mitigating circumstances and other antecedents before sentencing.
3. The Applicant was charged with the offence of incest contrary to Section 20 (1) of the [Sexual Offences Act](#) No. 3 of 2006 vide Criminal Case No. 2702 of 2011 at Nyahururu Law Courts. He was found guilty as charged and was sentenced to life imprisonment.



### **Applicant's Submissions**

4. The Applicant expressed his remorse and apologized to his family, the victim and society at large. He stated that he is a first offender and stated that he was arrested at of 57 years of age and he is now 68 years old and wise enough to make good decisions.
5. It was submitted that the court be pleased to find the time spent which is 11 years to be sufficient sentence in the instance case taking into account that the Applicant is a father of five children and prior to his arrest he was an alcoholic and did not care about his family but he does now. He stated that if given a chance he wants to live an alcoholic free life and mentor other young men who might still be trapped in that addiction.
6. Reliance was placed on Section 52 (2) (q) of the *Constitution*, Court of Appeal Criminal Appeal No. 102 of 2017 *Eliud Waeru Wambui vs. Republic*, Francis Otwoma Omwangale vs. Republic Chief Magistrates' Court Misc. Application No. 472 of 2019
7. The Applicant stated that he had not been able to engage himself in rehabilitative activities proposed by the prison authorities due to his ill health but in prison he maintained high discipline. He referenced the following to illustrate the same: -
8. Recommendation Letter from the Officer in Charge Kamiti Prison which is equivalent to a Certificate of Good Conduct in the prison community.
9. Certificate in HIV/AIDS & Substance Abuse dated 2015.
10. Certificate in Alternative to Violence project dated 2016.
11. Certificate in HIV Peer Counseling dated 2016.
12. Certificate in bible study from Bible League International dated 2021
13. He sits in the Inmates' Dispute Resolution Committee.
14. Member of the Crime Si Poa – an inmate based peace initiative.
15. It was stated that the Applicant was a man of faith, focused and looking forward to lead a crime free life and that he is fully transformed to a better person in the course of his incarceration.
16. Lastly, he submitted that this court should take into account the time he spent in custody while undergoing trial and that the sentence run from 2nd November 2010 when he was arrested. He relied on Section 333 (2) of the *Criminal Procedure Code*, Article 25(c) of *the Constitution* and Ahamad A. Mohamed Criminal Appeal No. 135 of 2016. He asked the court to appreciate his deteriorating health due to age and the fact that he is at risk of contracting opportunistic diseases due to prisons poor diet.

### **Respondent's Submissions**

17. Not filed by the time of drafting this opinion.

### **Analysis and Determination**

18. Having considered the application, the affidavits thereto and the submission filed, the only issue or determination herein is whether the applicant should be granted the orders in relation to resentencing as sought.



19. I have perused the trial court proceedings, and I note that the Applicant's victim was his granddaughter, who was aged 14 years old at the time. The Applicant heinously took advantage of her and abdicated his role as her protector and caregiver, and turned into her abuser.
20. On the other hand, I also took note that during the trial court mitigation, the Applicant was remorseful. Notably, the victim of the Applicant's crime filed an affidavit dated June 2018 stating that the offence was committed in 2010 and that she went through counseling and she has since forgotten about the incident and has forgiven his grandfather. She stated that she was married with two children and that she has since reconciled with her grandfather and it is her wish that he be released and be reunited with his family. She reiterated that she has no objection to his release from prison so that he can be reunited with his family. The Applicant also reinforced the fact that he is very remorseful in his submissions. Consequently, the Applicant appears to be genuinely remorseful and prays for a second chance.
21. The objective of a sentence is to be deterrent, rehabilitative and retributive. Accordingly, the Applicant asserted that he had transformed his life and become a better person. He also made reference to the courses and rehabilitative initiatives that he had taken part in in prison, as evidenced by way of the attached certificates. The Applicant seems to have realized his ways' folly and has become a better person.
22. The Applicant's age is also not lost to me. He is now 68 years old. He asked the court to appreciate his deteriorating health due to age and the fact that he is at risk of contracting opportunistic diseases due to the prison's poor diet.
23. In *Brown Tunje Ndago vs. Commissioner-General of Prisons* [2019] eKLR it was held;
  - a. "There is no reason why a convict with a determinate or definite prison term should not benefit from remission. For a prisoner, remission is one of the beacons of hope for a life outside prison. It is a motivating factor towards reformation. There is no reason why a person who commits murder, robbery with violence, or "simple robbery" should be denied remission if they have been sentenced to serve fixed prison terms. It is true that these are indeed very serious offences. They are, however, not the only grave offences. The gravity of the offences cannot be good reason for denying these convicts remission for those convicted of grave offences like sexual offences are entitled to remission of their sentences. It is, therefore, discriminatory and unconstitutional to deny sentence remission to a certain category of prisoners serving definite sentences.
24. The constitutionality of the minimum mandatory sentences provided for under the *Sexual Offences Act* No. 3 of 2006 was dealt with by the High Court at Machakos in High Court Petition No. E01 of 2021 *Philip Mueke Maingi & 5 Others vs ODPP & the AG* where Justice G.V. Odunga on finding that the minimum mandatory sentences offend Article 28 of *the Constitution* of Kenya, further observed that: -
  - a. "Taking a cue from the decision in *Francis Karioko Muruatetu & Another vs Republic* [2017] eKLR (Muruatetu 1) those who were convicted of sexual offenses and whose sentences were passed on the basis that the trial courts had no discretion but to impose the said mandatory minimum sentences are at liberty to petition the high court for orders of resentencing in appropriate cases."
25. Accordingly, the trial magistrate is sentencing the applicant to life imprisonment, stating that his hand was tied as the sexual offenses act gives the sentence to be passed if the complainant is below 18 years old. Given the holding of the court Philip Mueke Maingi Case [supra], the trial court should have



the discretion to give regard to mitigating circumstances and other antecedents in resentencing the applicant.

26. In the aforementioned premises, the order on the life sentence is hereby set aside, and the matter is hereby referred to Chief Magistrate's Court Nyahururu for resentencing.

**DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 27TH DAY OF APRIL 2023.**

.....

**CHARLES KARIUKI**

**JUDGE**

