



REPUBLIC OF KENYA



KENYA LAW
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**Kisule v Republic (Criminal Petition E026 of 2022)
[2023] KEHC 3603 (KLR) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3603 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL PETITION E026 OF 2022**

FR OLEL, J

APRIL 25, 2023

BETWEEN

STEPHEN MUSYOKA KISULE PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The Petitioner/Applicant moved court with his petition dated 29th august 2022 and sought for orders of re-sentencing while relying on orders granted by Justice G.V Oduga in petitioner no. E0107 of 2021 Phillip Mueke & others versus ODPP which petition was challenging the constitutionality of the minimum mandatory sentencing as provided for under the *Sexual Offences Act* no. 3 of 2006.
2. The applicant had been convicted for the offence of defilement contrary to the provision of 8(1) as read with Sec 8(3) of the *Sexual Offence Act* 8 sentenced to 20 years. The applicant filed an appeal being Machakos High Court Criminal appeal no.98 of 2013 which appeal was dismissed on 2nd November 2016 for lack of merit.

Applicant Submissions

3. The Applicant's case in that he was convicted and sentenced to 20 years imprisonment of the basis of mandatory minimum sentence as stipulated by Section 8(3) of the *Sexual Offences Act*. That vide a judgment of Hon. G.V Odunga delivered in Machakos Petition no.E017 of 2022 *Phillip Mueke and others versus ODPP* proffered that mandatory minimum sentence was illegal and violated the applicants rights as enshrined under Articles 25,28,50(2)(p) of *the constitution* of Kenya 2010, provision of Section 216 and 329 of the *Criminal Procedure Code* and Provision of Judiciary sentencing policy guidelines. Placing reliance on the said findings the applicant urged this court to reconsider his sentence and review it downward.



4. The applicant also submitted that other court had also made findings that mandatory minimum sentence mete out was unconstitutional. The authorities cited included Court of Appeal Criminal Appeal no 312 of 2018 *Evans Wanjala Wanyonyi v Republic*, *Christopher Ochieng v Republic* [2018] eKLR, Kisumu Criminal Appeal No.202 of 2011 and *Jared Koita Injiri v Republic* Kisumu criminal appeal no.93 of 2014. This court further had power under Article 23 of *the Constitution* to grant the orders sought or make any other order/relief as it may deem fit to grant.
5. The state did not tile any response or submission in opposition to the applicant filed.

Background

6. In December 2017, the Supreme Court did deliver a land mark judgement in the Francis Muruatetu case where it declared that mandatory death sentence was illegal. It was general accepted that the principal outlawed all mandatory or minimum sentencing provisions provided for under the Penal Code and other Acts of ~Parliament which created Criminal offences and provided such sentences. The Supreme Court later clarified the import of Francis Karioko Muruatetu case, by direction that the principle should only apply in murder cases. Previously the principle in Muruatetu had been applied to case under Sexual Offence Act and other offences as well.
7. There was another petition filed challenging mandatory miimum sentences provided for under the sexual offence Act no.3 of 2006. In *Maingi & 5 others v Direct of Public Prosecution and another* (petition no.E117 of 2021) 2022 KEHC 13118(KLR).
8. By his considered judgment dated 17th May 2022 the learned trail Judge did find that;

“To the extent that the *sexual offences Act* prescribed 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 mandatory minimum prescribed sentence.”

Determination

9. In *Kimutai v Republic* (Criminal Petition No.E045 of 2021)[2022] KEHC 11784(KLR) Justice R. N Nyakundi J stated that;

“it is important to point out at the onset that a resentencing hearing or any other sentencing hearing for that matter is neither a hearing denovo nor an appeal. Such proceedings are undertaken on the understanding that conviction is not in issue. It therefore follows that in those proceedings the accused is not entitled to take up of the propriety of his conviction. He must proceed on the understanding that the conviction is lawful and restrict himself to the sentencing and address court only on the principles guiding the imposition of sentences and on the appropriate sentence in the circumstances. Similarly the court can only refer to the evidence adduced in so far as it is relevant to the issue of sentencing, but not with a view to making a determination as to whether the conviction was proper.”
10. The applicant was sentenced for 20 years for defiling a minor. He filed Machakos High court Criminal appeal no.98 of 2013 against both conviction and sentence. The said appeal was dismissed on 2nd November 2016. Upon perusal of the court file, this court noted that the applicant had earlier filed Misc Criminal Application No.145 of 2019. In the said application the appellant sought for



resentencing and vide a Ruling dated 26th May 2020 Hon. Justice O.K Kemei did find that the applicant having exhausted his appeal the court was factious officio and dismissed the said application.

11. That being the position this court is factious officio in so far as the issue of resentencing is concerned in dealing with the said principle, the Supreme Court in *Raila Odinga and 2 others v Independent Electoral & Boundaries Commission and 3 others* [2013] KLR cited with approval an excerpt from the Article by Dencel Malan Pretorius entitled “ the origins of the functious officio doctrine with special reference to its application in Administration law” [2005] 122 SALJ 832 to the effect that;

“ the functious officio doctrine is one of the mechanisms by means of which the law gives expression to the principles of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general Rule exercise those powers only once. In relation to the same matter.....the (principle) is that once a decision has been given, it is a subject to any right of appeal to superior body or functionary find end conclusive. Such a decision cannot be reviewed or valued by the decision maker.”

12. In view of the fact that the applicant appeal as against sentence had been dismissed and given the fact that the applicant earlier application for resentencing has been dismissed, this present application is resjudicated and lacks merit. The same lacks merit and is dismissed. The conviction and sentence of the applicant is upheld.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF APRIL 2023.

RAYOLA FRANCIS

JUDGE

Delivered on the virtual platform, Teams this 25th day of April, 2023.

In the presence of;

.....**for the Applicant**

.....**for Respondent**

.....**Court Assistant**

