



**Kililo v Republic (Miscellaneous Application E051 of 2022)
[2023] KEHC 19664 (KLR) (29 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19664 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
MISCELLANEOUS APPLICATION E051 OF 2022
GMA DULU, J
JUNE 29, 2023**

BETWEEN

DAFTON KILILO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Before me is an application filed on December 20, 2022 under Section 4 of the [Probation of Offenders Act](#), and Article 50(2)(p)(q) of the [Constitution](#) seeking the following orders;-
 1. That the court be pleased to declare as being unconstitutional any provision of the [Probation of Offenders Act](#) and any other statute that bars those convicted of sexual offences from probation since it is discriminatory contrary to Article 27 of the [Constitution](#).
 2. That the court be pleased to place the applicant under probation for the remainder of his sentence as he has undergone sufficient rehabilitation while in prison.
 3. Any other order that the court deems fit to give in the interest of justice.
2. The application has grounds on its face that the applicant was convicted for defilement contrary to Section 8(1) as read with (3) of the Penal Code (should be [Sexual Offences Act](#)) in Wundanyi Magistrate's Criminal Case No 15 of 2018 and sentenced to fourteen (14) years imprisonment, that the High Court in Voi Criminal Appeal No E025 of 2021 dismissed his appeal on conviction but reduced the sentence from 14 to 10 years imprisonment, that he now has two (2) years to complete serving his prison sentence, that he was reliably informed by the Probation Officer that he was not qualified for probation sentence due to his conviction under the [Sexual Offences Act](#), that Article 27 of the [Constitution](#) declares all people as equal before the law, that Article 2(4) of the [Constitution](#) declared that any law which was inconsistent with the [Constitution](#) was invalid, that Article 165(3) grants the High Court sufficient jurisdiction to entertain an application of this nature.



3. The application was filed with a supporting affidavit sworn on November 29, 2022 by the applicant Dafton Kililo which amplifies the grounds of the application.
4. The application was canvassed through written submissions. In this regard, I have considered the submissions filed by the applicant as well as the submissions filed by the Director of Public Prosecutions.
5. Having perused and considered the application, the affidavit filed as well as the submissions of the parties, I note that the Director of Public Prosecutions has argued strongly that this court has no jurisdiction to entertain this application, as the applicant's appeal has already been determined by the High Court and sentence reduced from 14 years to 10 years imprisonment.
6. I note however, that the applicant herein is not looking for review of the sentence on appeal, but contending that he should be eligible for probation like other prisoners, and that the written law prohibiting probation sentence for those convicted for sexual offences is unconstitutional.
7. My view is that this court has jurisdiction to entertain the application as it relates to an allegation of constitutionality of existing statutory provisions. I however find that the application will fail for reasons hereafter stated.
8. Firstly, this application being an attempt to declare written provisions of the law as unconstitutional, should have been brought by way of a petition not through a miscellaneous application for review of sentence the way the applicant has done. The petition would have brought out clearly the complaints of violation against the petitioner, the sections of the law and the Constitution that would have to be considered by the court, and the reliefs sought.
9. As it is, this application is incurably defective, as this court has no power or jurisdiction to convert it to a constitutional petition. On that account, this petition is for striking out.
10. The second reason why the application will not succeed is that the applicant has not mentioned or brought out the sections of the Probation of Offenders Act that contradict the Constitution and how those provisions violate the Constitution. This court not having any statute or written law before it to compare with the cited constitutional provisions to find whether or not there is a conflict between the written law and the constitutional provisions, I am unable to make any decision one way or the other on the applicant's allegation.
11. This is another defect that renders the application unsustainable, and I will thus strike it out.
12. Consequently, and for the above reasons, I find that this application is fatally defective, and I strike out the same. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 29TH DAY OF JUNE 2023 AT VOI IN OPEN COURT.

GEORGE DULU

JUDGE

In the presence of:-

The applicant

Mr. Sirima for State

Mr. Otolo court assistant

