



REPUBLIC OF KENYA



**Maingi v Republic (Petition E001 of 2023)  
[2023] KEHC 21910 (KLR) (17 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21910 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
PETITION E001 OF 2023  
FN MUCHEMI, J  
AUGUST 17, 2023**

**BETWEEN**

**PETER GAKURU MAINGI ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The petition for determination dated February 23, 2023 seeks for orders for reduction of sentence.
2. The petitioner was charged in Senior Principal Magistrate Court in Mukurweini in Criminal Case No 15 of 2013 (S.O) with the offence of defilement contrary to Section 8(1) as read with 8 (2) of the *Sexual Offences Act*, No 3 of 2006 and sentenced to life imprisonment. He subsequently appealed to the High Court Nyeri vide Criminal Appeal No 48 of 2015, which appeal was dismissed on June 3, 2016. He then lodged an appeal in the Court of Appeal Nyeri vide Criminal Appeal No 29 of 2015 which was also dismissed and the sentence imposed by the trial court upheld. The petitioner has now sought rehearing of sentence and urges the court to grant him a lesser sentence than that of life imprisonment.
3. The parties filed written submissions for disposal of the petition.

**Petitioner's Submissions**

4. The petitioner relies on the cases of *Maingi & 5 Others v Director of Public Prosecutions & Another* (Petition No E017 of 2021) [2022] KEHC 13118 (KLR), *Christopher Ochieng v Republic* (2018) eKLR, *Jared Koita Injiri v Republic* (2019) eKLR, *Dismas Wafula Kilwake v Republic* (2019) eKLR and submits that mandatory minimum sentences such as the one he is serving pursuant to Section 8(1) (2) of the *Sexual Offences Act* No 3 of 2006 are unconstitutional. He further submitted that such sentences did not accord an accused person the right to mitigate and for the courts to consider those mitigating and aggravating factors at arriving at the appropriate sentence.



5. The petitioner further submitted that it is the duty of the court to pass appropriate sentences on persons convicted of crime, that sentencing is an exercise of judicial function and that sentencing is a matter within the discretion of the court. In support of the petition, the petitioner relied on the cases of *Susan Kigula & 17 Others v Attorney General* Const. App. No 3 of 2006 cited with authority in the case of *Maingi & 5 Others v Director of Public Prosecutions & Another* (Petition No E017 of 2021) [2022] KEHC 13118 (KLR) and *Daniel Kipkosgei Letting v Republic* (2021) where the Court of Appeal cited with approval its decision in *Jared Koita Injiri v Republic* (2019) eKLR.
6. The petitioner thus urges the court to review his sentence downwards and accord him a reasonable sentence which will allow him to join his family. He further submits that he has already served ten (10) years in prison which he considers as sufficient punishment.

### **Respondent's Submissions**

7. The respondent opposed to the petition for re-sentencing and submits that the petitioner has already appealed on the issue of sentencing twice, in the High Court and the Court of Appeal and the appeals were dismissed. Moreover, the respondent argues that it is evident from the trial court records that the petitioner was afforded the opportunity to mitigate which mitigation the court considered before sentencing him and the sentence was upheld by the High Court and the Court of Appeal. The respondent submits that the application is an abuse of the court process and prays that it be dismissed.

### **Issue for determination**

8. The main issue for determination is whether this Honourable Court has jurisdiction to hear the application. If the court finds it is possessed of jurisdiction, it will then look at the merits of the petition.

### **The Law**

9. Firstly, it is imperative to mention that the jurisdiction of a court of law is donated by *the constitution* and the statute. This was enunciated in *Samuel Kamau Macharia v KCB & 2 Others* Civil Application No 2 of 2011, where the court stated:-

“A court’s jurisdiction flows from either *the constitution* or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

10. It is not in dispute that the petitioner was convicted of the offence of defilement by the magistrate’s court and sentenced to life imprisonment. He appealed to the High Court in HC Criminal Appeal No 48 of 2015 and later the court of Appeal sitting in Nyeri in Criminal Appeal No 29 of 2015. Both appeals were dismissed for lack of merit. The conviction and sentence were upheld.
11. I have perused the submissions of the petitioner. He has referred this court to the case of *Maingi & Others v Republic* Petition No E17 of 2021 which decision he claims is relevant to this petition for review of sentence whereas Odunga J, as he then was held:-

“To the extent that the *Sexual Offences Act* prescribe maximum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences, fall out 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 sentences.



12. Of relevance herein is the Court of Appeal case of Julius Kisao Manyeso v Republic where Nyamwea, Lessit and Ondunga J.As set aside life sentence in an appeal where the appellant was convicted of the offence of defilement and substituted it with forty (40) years imprisonment. Since the Francis Karioko Muruatetu of 2017 jurisprudence in Kenya on the unconstitutionality of mandatory death sentence and indeterminate sentence has gone a notch higher. The convicts who were sentenced before Muruatetu Petition in murder cases can now apply for resentencing. The same case applies to cases of indeterminate sentences.
13. With that background, I am of the considered view that this court has jurisdiction to review sentence based on the principles of the Court of Appeal Maingi case among others.
14. The petitioner gave his mitigation before the learned magistrate on July 24, 2013. He was sentenced to life imprisonment since the legal position was that courts' had discretion to give other sentences other than those prescribed by statute and in particular, the *Sexual Offences act*. The petitioner's case was decided before jurisprudence on discretion on sentencing in offences with prescribed minimum sentences was developed. The petitioner said he had two children of school going age and that he does casual jobs to earn a living and that his wife was unwell as well as that he was the only breadwinner of the family.
15. I take into consideration the factors raised in mitigation by the petitioner and the fact that he was a first offender. The victim in this case was aged eleven (11) years during the time of the incident. She testified that she had taken milk to the accused on his request but on arrival at his house, he got hold of her and blocked her mouth to prevent her from screaming before undressing her and subsequently defiling her. The impact of the offence was such that the child was traumatised which must have adversely affected her. This is a factor that this court must take into consideration while sentencing the petitioner.
16. All considered, I hereby allow the petition on the following terms:-
  - a. That the sentence of life imprisonment imposed on the petitioner and upheld by the superior courts is hereby set aside.
  - b. That the petitioner is hereby sentenced to serve thirty (30) years imprisonment to commence on July 27, 2013.
17. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 17TH DAY OF AUGUST, 2023.**

**F. MUCHEMI**

**JUDGE**

**JUDGEMENT DELIVERED THROUGH VIDEO LINK THIS 17TH DAY OF AUGUST 2023.**

