



REPUBLIC OF KENYA



KENYA LAW
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**Mutai v Republic (Criminal Petition E073 of 2021)
[2023] KEHC 21206 (KLR) (7 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21206 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION E073 OF 2021
RN NYAKUNDI, J
AUGUST 7, 2023**

BETWEEN

DAVID MUTAI PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The applicant approached this court vide a petition dated December 17, 2021 seeking a non-custodial sentence. The applicant was charged and convicted of the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*. The petitioner then approached this court vide petition number 27 of 2019 seeking resentencing. However, this was after he had approached the court of appeal vide Criminal Appeal No 109 of 2017. In the Court of Appeal, his conviction was upheld and his sentence was not considered as the court held that it was an issue of fact and therefore not open for consideration on a second appeal.
2. The petition is premised on the grounds that the applicant is a first offender and that he is remorseful and repentant. Further, that he has served two thirds of the sentence and has exhausted all avenues of appeal.

The appellant filed written submissions on the petition.

Appellant's case

3. The appellant submitted that he was sentenced to the mandatory minimum for defilement which has since changed by virtue of petition E017 of 2021 - *Maingi & 5 others v Director of Public Prosecutions & another* where Hon. Odunga which opened a door for convicts to make prayers to the High Court for resentencing. He urged the court to review his sentence and make any available orders in respect to the undeniable constitutional discretion and powers of the court. he urged the court to consider a non-custodial sentence as per the holdings in the cited case.



4. In support of his application, he stated that the high court has jurisdiction to hear the petition after he had exhausted all the avenues of appeal, citing the cases of *Ben Pkiech Loyatim v Republic* (2019) eKLR, *Isaack Kipruto Naibei v Republic* (2020) and Erick Kipsang' Kangogo v Republic (2020) eKLR where the petitioners therein had exhausted all avenues of appeal but were re-sentenced.
5. The petitioner urged the court to consider his petition and grant him a non-custodial sentence.
The respondent did not tender any submissions.

Analysis & determination

6. In light of the fact that the appellant has approached this court vide a constitutional petition, after exhausting all avenues of appeal, it is of essence to state the jurisdiction of this court in the present case. The court's jurisdiction to hear and determine an application for redress on denial or breach of fundamental rights and freedoms is set out in Article 165(3) of *the Constitution* provides as follows;
Subject to clause (5), the High Court shall have-
 - (a) Unlimited original jurisdiction in criminal and civil matters;
 - (b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - (d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-
 - (i) The question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) Any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government and
 - (iv) A question relating to conflict of laws under Article 191; and
 - (e) Any other jurisdiction, original or appellate, conferred on it by legislation.Article 50(2)p as read with (q) provides as follows;
 - (2) Every accused person has the right to a fair trial, which includes the right—
 - (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
 - (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.
7. The current constitutional dispensation informed by recent court of Appeal and High Court decisions is that mandatory sentences are unconstitutional. In *Maingi & 5 others v Director of Public Prosecutions*



§ another Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) where GV Odunga J (as he then was) stated as follows;

To the extent that the Sexual Offences Act prescribe 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 Court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences. (emphasis mine)

8. The Court of Appeal in Criminal Appeal No 84 of 2015 – Joshua Gichuki Mwangi v Republic (2022) eKLR held that;

We acknowledge the power of the Legislature to enact laws as enshrined in the Constitution. However, the imposition of mandatory sentences by the Legislature conflicts with the principle of separation of powers, in view of the fact that the legislature cannot arrogate itself the power to determine what constitutes appropriate sentences for specific cases yet it does not adjudicate particular cases hence cannot appreciate the intricacies faced by judges in their mandate to dispense justice. Circumstances and facts of cases are as diverse as the various cases and merely charging them under a particular provision of laws does not homogenize them and justify a general sentence.

This being a judicial function, it is impermissible for the Legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes against the independence of the Judiciary as enshrined in Article 160 of the Constitution. Further, the Judiciary has a mandate under Article 159 (2) (a) and (e) of the Constitution to exercise judicial authority in a manner that justice shall be done to all and to protect the purpose and principles of the Constitution.

9. It follows that the punishment for the offence committed by the petitioner has since changed from the time of his sentencing and as such can be considered for resentencing in the circumstances.
10. the petitioner was sentenced to 15 years' imprisonment on July 12, 2013 and as evidenced by the documents he has supplied he has undergone various trainings and acquired various skills including carpentry, resource-oriented development among others. The purpose and objectives of sentencing as espoused in the judiciary sentencing guidelines at 4.0 are;

4.1 Sentences are imposed to meet the following objectives:

1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.
4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
5. Community protection: To protect the community by incapacitating the offender.



6. Denunciation: To communicate the community's condemnation of the criminal conduct.
11. I have considered the petition and the same is res judicata in view of the decision by Githinji J dated March 18, 2021. This court has no jurisdiction to sit on appeal of a decision from a court of concurrent jurisdiction.
12. It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 7TH DAY OF AUGUST 2023

In the Presence of

Applicant Present

.....

R. NYAKUNDI

JUDGE

Mark.mugun@gmail.com

