



**Mateba v Republic (Criminal Petition E007 of 2021)  
[2022] KEHC 14305 (KLR) (25 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14305 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL PETITION E007 OF 2021  
JN KAMAU, J  
OCTOBER 25, 2022**

**BETWEEN**

**DENNIS OKELLO MATEBA ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Petitioner herein was tried and convicted for the offence of defilement contrary to section 8(1) as read with section 8 (3) of the *Sexual Offences Act* No 3 of 2006. He was sentenced to twenty (20) years imprisonment.
2. Being dissatisfied with the said decision, he lodged an appeal at the High Court in Kakamega HCCRA No 110 'B' of 2014 which was dismissed in its entirety.
3. On January 19, 2021, he filed this Petition for review of the sentence. In his affidavit in support of his Petition, he relied on the case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR, where the court held that mandatory sentences deprive the courts of the legitimate jurisdiction to exercise discretion to individualise an appropriate sentence to the relevant aspect of the character and record of each accused person hence unconstitutional.
4. In his Written Submissions that were filed on July 28, 2021, he argued that the Trial Court imposed a prescribed mandatory sentence which deprived the court from meting out a sentence that it could deem fit based on the circumstances surrounding the offender and the victim as noted in the case of *Benson Ochieng & another v Republic* [2018] eKLR.
5. He invoked section 26(2) of the *Penal Code* and contended that the sentence that was imposed by the Trial Court was manifestly excessive in the circumstances of the case. He also relied on article 50(2) (q)(p) of *the Constitution* of Kenya 2010 and the Judiciary Sentencing Policy Guidelines (2016) and argued that a court could impose a sentence that befits a particular case and/or accused person.



6. He added that this was in line with the separation of powers of the arms of government and practice of the independence of the judiciary and that the role of the Judiciary was to develop jurisprudence and offer appropriate relief.
7. He pointed out that the Prosecution's case was full of contradictions concerning his identification and the medical documents that it relied upon. He added that a prisoner could not be detained unless there were legitimate penological grounds for detention which included punishment, deterrence, public protection and rehabilitation. He argued that the court was obliged to look into the circumstances of the case and determine whether the applicant's incarceration had achieved the objective for which he was sentenced.
8. It was his contention that during the period he had been incarcerated, he had engaged in reformation programmes as he joined a primary school for his basic education and sat for Kenya Certificate of Primary Education (KCPE) and theological courses. He believed that he had been rehabilitated and would not participate in criminal activities and that the skills acquired would enable him integrate well back to society as was reflected in the case of *Timothy Kosgei v Republic* [2020] eKLR.
9. He averred that he was a first offender and was remorseful of the events that led to the offence. He pleaded with this court to consider that he was the sole bread winner of a family of ten (10) at the time of his conviction who were overwhelmed with the burden of responsibilities in meeting their basic needs. He urged the court to exercise leniency.
10. The respondent opposed his Petition for the reason that the July 2021 directions by the Supreme Court in *Francis Karioko Muruatetu & another vs Republic* (*supra*) did not invalidate the mandatory and minimum sentences in the *Penal Code*, the *Sexual Offences Act* or other statute and hence, the same did not apply to the defilement case herein.
11. It further pointed out that the petitioner had failed to supply the court with sufficient reasons and/or documents to show that he was remorseful in any way for his actions. It thus urged this court to dismiss the Petition herein.

### Legal Analysis

12. Notably, this was a matter that was handled by the Kakamega High Court following an appeal from the conviction and sentence of Hon C. Kendagor that was delivered in Criminal Case No 74 of 2012 on August 13, 2014.
13. As this court had no jurisdiction to determine this matter ab initio due to territorial jurisdiction, it found that it was prudent to allow the proper court handle the matter in view of the decision of Odunga J (as he then was) in Petition No E017 of 2022 *Philip Mueke Maingi & 5 others v ODPP & another* in which he declared that:-
  1. To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion of the trial court to determine the appropriate sentence to impose, such sentences fall foul of articles 28 of *the Constitution*. However, the Court (sic) are at liberty to impose sentences that are not deemed to be the mandatory minimum prescribed sentence.
  2. Taking cue from the decision of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (*Muruatetu 1*) those who were convicted of sexual offences 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.



14. In addition, in the absence of the appropriate court files from Kakamega Law Courts, this court was not in a position to know whether or not the Petitioner had previously filed a Petition seeking similar orders. Indeed, courts must be cautious not to handle matters from other jurisdictions to avoid delivery of conflicting decisions that could embarrass them.

**Disposition**

15. For the foregoing reasons, this court found it prudent not to delve into the merits or otherwise of the petitioner's petition and hereby directs that this file be and is hereby transferred to Kakamega High Court and that the same be placed before the Presiding Judge of that court on November 15, 2022 for further orders and/or directions.

It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF OCTOBER 2022**

**J. KAMAU**

**JUDGE**

