



**Chaka v Office of the Director of Public Prosecution (Miscellaneous Criminal Application E136 of 2022) [2022] KEHC 16403 (KLR) (22 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 16403 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS CRIMINAL APPLICATION E136 OF 2022**

**A. ONG'INJO, J**

**NOVEMBER 22, 2022**

**BETWEEN**

**NYAMAWI NDORO CHAKA ..... APPLICANT**

**AND**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

**RULING**

1. Nyamawi Nodoro Chaka was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006 in Kwale Court CR. Case No. 874 of 2013. He was convicted & sentenced to serve life imprisonment for reasons that was the stipulated penalty. The Applicant lodged an appeal against conviction and sentence in Mombasa H.C. CR. A. No. 102 of 2015 and the Court of Appeal (particulars) not supplied and the conviction and sentence were upheld.
2. Subsequently the Applicant filed constitutional petition no. 197 of 2018 and E. Ogola J on November 11, 2019 substituted his sentence of life imprisonment with 35 years jail given in *Francis K. Muriatetu & Christopher Ochieng v Republic* (2018) eKLR.
3. The applicant while citing holding in Court of Appeal case of *Ali Abdalla Mwanza vs Republic* CR. A. No. 259 of 2012 argued that if the learned Judges of Appeal could reduce a sentence of 40 years to 20 years in a case of murder for being excessive in consideration of life expectancy, he should also be treated in a similar manner pursuant to Article 27 of the *constitution*.
4. The Applicant argued further that right to fair trial pursuant to Article 50 is one of those fundamental rights & freedoms that cannot be limited under Article 25( C ) of the *Constitution* and therefore laws that confine the discretion of the trial courts to taking the prosecution's evidence only, restraining them from considering the accused persons mitigation are repugnant to the extent of that limitation of the accused's rights to fair hearing.



5. The Applicant also relied in the holding by G.V. Odunga J (Cathethen Was) in *Philip Mueke Mainga & 5 Others v Republic* Constitution Petition No. E017 of 2021 where it was held that all accused persons deserve to have their mitigation taken into account, and equally any court is bestowed with the legitimate discretion to impose sentences that befit the offences committed.
6. The applicant outlined his mitigation for the courts consideration as follows:- That he had undergone rehabilitative programs in a bid to rehabilitate him namely a certificate in Theology on a prisoner's journey. That he had lived well with his fellow inmates & prison authority. That he present Administrative had granted him a very favourable progressive report in which they commended his character and conduct in the manner he has interacted with both fellow inmates & prison officers. That he is a 1<sup>st</sup> offender. That he is 43 years of age and of good conduct. That he left behind a jobless wife, 4 children and a widowed mother all of whom are now living a destitute situation owing to his absence.
7. The applicant prays that his sentence be review and that the court takes into account the period that he has been in custody before and after a conviction.
8. I have perused the Petition No. 197 of 2018 and I wish to say it is a replica of the application herein. The orders that applicant is seeking were already granted in the said petition and there is no more orders to grant. Justice Ogolla said:-

“Applying the decisions in Muruatetu case & being bound by the Christopher Case (*Supra*) this Court is satisfied that the mandatory nature of sentence herein of life imprisonment meted out against the petitioner is unconstitutional and cannot stand and is hereby reviewed and set aside. In place thereof this court, being convinced of the gravity of the offence for which the petitioner was convicted, and being conscious of the need to properly punish the same herewith sentence the petitioner to serve thirty five (35) years in prison with effect from the date of arrest”.
9. The petition was lodged pursuant to Article 27(1) and 50(2) of the *Constitution* of Kenya 2010 which the pursuant to which the applicant has brought the current application and orders were accordingly granted.
10. This application was already determined in Constitutional Petition No. 197 of 2018 where the Judge ordered that 35 years will run from date of arrest and/or arraignment in court which from the proceedings is 1st August 2015.
11. Application is dismissed.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2022**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of:**

Ogwel – Court Asst.

Ms. Kambaga for State

Applicant – No appearance

**Hon. Lady Justice A. Ong'injo**

**Judge**



22/11/2022

