



**Muthoni v Republic (Criminal Revision E151 of 2023)
[2025] KEHC 3257 (KLR) (6 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 3257 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL REVISION E151 OF 2023**

RM MWONGO, J

FEBRUARY 6, 2025

**IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS
UNDER ARTICLE 22 (1), 23 (1), 25 (D), 50 (2) (Q), 51 (2), AND 165 (3)
(A) (B) (D) (I) (II) (6) AND (7) OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF SECTION 327 (2), 362 AND 364 OF THE
CRIMINAL PROCEDURE CODE (CAP 75 LAWS OF KENYA)**

AND

**IN THE MATTER OF APPLICATION OF SECTION 216, 329 AND 333
(2) OF THE CRIMINAL PROCEDURE CODE (CAP 75 LAWS OF KENYA)**

BETWEEN

PATRICK MUTHI MUTHONI APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The applicant filed an undated notice of motion seeking the following orders:
 1. That, the court be pleased to grant an order rendering the review of the applicant's case in redress of unfair trial in sentencing that was conducted by the appellate courts;
 2. That may the court be pleased to allow this sentence review application be filed, heard and determined for the interests of justice in sentencing;
 3. That may the court be pleased to grant an order that will render invocation of section 216 and or 329 of the C.P.C. in order to inform itself as to the appropriate sentence ought to be imposed



upon the applicant as every person is equal before the law and has equal rights to the benefit of the law; and

4. That there be no order as to costs since the applicant is a pauper.
2. The facts set out in the application are that in Baricho Magistrate's Court Criminal Case No. 589 of 2014, the applicant was convicted of the offence of gang rape contrary to section 10 of the *Sexual Offences Act*. He was then sentenced to 15 years imprisonment by the trial court, but he appealed in Kerugoya HC Criminal Appeal No. 45 of 2015. On appeal, the applicant's sentence was enhanced from 15 years imprisonment to life imprisonment.
3. In his affidavit, he deposed that life imprisonment contravenes Articles 25, 27, 28 and 50 of the *Constitution* and Rule 4 of The United Nations Standard Minimum Rules for the Treatment of Prisoners. That the indeterminate nature of the life imprisonment sentence extinguished the prospects of him being released in the future. He stated that the life imprisonment sentence imposed on him is harsh and excessive and he urged the court to consider his mitigation, rehabilitation and other relevant factors to reduce the sentence, and consider reverting to the sentence imposed by the trial court.
4. There is no response to the application on record. The application was canvassed by way of written submissions.

Applicant's submissions

5. The applicant submitted that since his rights as mentioned hereinbefore have been violated, the court should consider his case and also make a declaration of rights. He relied on the case of *Philip Mueke Maingi & 2 others v Republic* [2022] eKLR and prayed for a review of the life sentence. He produced 8 certificates he has received whilst in prison and urged that these are positive skills that can be put to work once, he is released from prison. He stated that he has since reformed and is remorseful. He also urged the court to apply Section 333(2) of the *Criminal Procedure Code* to his sentence and consider time spent in custody before he was arraigned.

Respondent's submissions

6. The respondent submitted that this court has jurisdiction to determine the application; That the court has pronounced itself on minimum and maximum sentences in law and that mitigating and aggravating factors should be considered before a court resentsences the applicant. It was asserted that the sentence imposed is appropriate given the circumstances of the case.

Issues for Determination

7. The core issue for determination is whether, the applicant's sentence should be reviewed.
8. Section 362 of the *Criminal Procedure Code* provided as follows on the High Court's supervisory jurisdiction:

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”
9. The applicant was convicted and sentenced to 15 years imprisonment for the offence of gang rape. On appeal in the High Court, his sentence was enhanced to life imprisonment. This means that the



sentence sought to be reviewed and which the applicant is currently serving was imposed by the High Court. Paragraph 4.8.18 of the [Judiciary Sentencing Policy Guidelines](#) 2023 provides:

“Resentencing cases shall be handled by the ‘Sentencing Court’ – e.g., if the last court that sentenced the convict was the Court of Appeal, then the resentencing hearing shall also be handled at the Court of Appeal and not a lower court. This applies mutatis mutandis to cases in either superior or inferior courts.”

10. Therefore, this court bears jurisdiction to determine the application at hand.

11. The sentences imposed by the trial court and the High Court are both provided for as the minimum and maximum sentence under section 10 of the [Sexual Offences Act](#) under which the applicant was charged. It states:

“Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.”

12. The applicant has relied on the decision in [Philip Mueke Maingi & 2 others v Republic](#) [2022] eKLR where the High court frowned upon the life imprisonment sentence, terming it as unconstitutional. Recently, the Supreme Court has guided on the issue of sentencing and held that if a sentence prescribed in statute is to be struck down, it must be based on evidence and sound legal principles. Regarding the sentences prescribed under the [Sexual Offences Act](#), the apex court stated that for as long as the sentences remain constitutional, they should be applied as provided. In case of [Republic v Mwangi; Initiative for Strategic Litigation in Africa \(ISLA\) & 3 others \(Amicus Curiae\)](#) (Petition E018 of 2023) [2024] KESC 34 (KLR), the Supreme Court held:

“We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.”

13. Having said that, the Court of Appeal in the case of [Julius Kitsao Manyeso v. R](#) held that a life sentence is *ipso facto* unconstitutional as being indeterminate. Such sentence violates human dignity in that it presupposes that a convict cannot, throughout his life, be reformed or rehabilitated; that the capacity for his improvement from the state of criminality for which he was incarcerated is non-existent. On this basis, such a life sentence negates humanity or human experience and ought not to be meted.



Conclusion and Disposition

14. On the strength of the Julius Kitsao case, I hereby find that the life sentence imposed on the applicant is unconstitutional and it is hereby set aside.
15. Given the circumstances surrounding the offence for which the applicant was imprisoned, it is my view that a sentence of twenty (20) years imprisonment is appropriate.
16. Accordingly, I allow the application and hereby set aside the order of the High Court enhancing the applicant's sentence to a life sentence. The same is hereby substituted with a sentence of twenty (20) years to take into account the period already spent in custody by the applicant.
17. Orders accordingly.

DELIVERED VIRTUALLY AT KERUGOYA HIGH COURT THIS 6TH DAY OF FEBRUARY, 2025

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R. MWONGO

JUDGE

Delivered in the presence of:

1. The Applicant in person at Kisumu Maximum Prison
2. Mamba for the DPP, Respondent
3. Francis Munyao - Court Assistant

