



**PNK v Republic (Criminal Miscellaneous Application E052 of 2024) [2025] KEHC 4709 (KLR) (7 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4709 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CRIMINAL MISCELLANEOUS APPLICATION E052 OF 2024**

**LN MUTENDE, J**

**APRIL 7, 2025**

**BETWEEN**

**PNK ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. PNK, the Applicant, was tried, found guilty and convicted for Incest contrary to Section 20(1) of the [Sexual Offences Act](#), having defiled his biological daughter aged 12 years. Following the conviction, he was sentenced to life imprisonment.
2. Aggrieved, he appealed to the High Court which dismissed the appeal in its entirety for lack of merit.
3. Discontented further, he instituted a Notice of Motion seeking review of the life imprisonment to be substituted by a more lenient sentence informed by mitigation and unique circumstances of the case. That the period spent in custody be computed pursuant to Section 333(2) of the [Criminal Procedure Code](#).
4. The application is based on grounds that Paragraph 4.8.14 of the Sentencing guidelines provides that all convicts can apply for re-sentencing to be handled by the sentencing court. That having not appealed to the Court of Appeal he has no appeal pending.
5. Subsequently, the Applicant instructed learned counsel Mr. Mathea of Mathea Gikunju & Co. Advocates who submits that the application is for re-sentencing whereby the court is called upon to do substantive justice without undue regard to technicalities as espoused in Article 159(2) of the [Constitution](#) which provides that:
  - (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—



- (a) justice shall be done to all, irrespective of status;
  - (b) justice shall not be delayed;
  - (c) alternative forms of dispute resolution including reconciliation, *Constitution of Kenya, 2010* mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
  - (d) justice shall be administered without undue regard to procedural technicalities; and
  - (e) the purpose and principles of this Constitution shall be protected and promoted.
6. On the jurisdiction of the court on resentencing, it is urged that the Supreme Court in *Republic v Mwangi & others* Petition No E018 of 2023 (2024) KESC 34(KLR) has raised an issue as to the SC’s position on constitutionality or otherwise of mandatory or mandatory minimum sentence. That the real issue before the SC was the question as to whether the court of appeal had requisite jurisdiction over a constitutional question that was not raised before the High Court and /or trial court.
7. That the SC came out clearly and said that *Muruatetu* did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other Statute but, gave guidance on what should occur if a person were aggrieved by the mandatory minimum sentences in the stated statutes.
8. That for there to be interference with the minimum sentence meted out by the lower court, there was need for there to be an existing declaration that such minimum sentence that is unconstitutional coming from the High Court based not only on evidence but sound legal principles of public law that informed the making decision of that specific law.
9. That in *Wachira & 12 others v Republic & 2 others* (Petition 97, 88, 90 & 57 of 2021 (Consolidated)) [2022] KEHC 12795 (KLR) (31 August 2022) (Judgment) the court observed that:
- “A declaration be and is hereby issued that sentencing remains a discretionary power, exercisable by the court and involves the deliberation of the appropriate sentence. To the extent that the provisions of sections 8(2), (3), (4), 11(1), 20(1) and 3(3) of the *Sexual Offences Act* deprive the court the discretion to determine the appropriate punishment taking into account the individual circumstances of each case, then the said provisions offend the notion of a fair trial contemplated under article 50(1) of the *Constitution*.
- ... A declaration be and is hereby issued that to the extent that the citizen in a given case of mandatory/minimum sentence has a right to put in a plea in mitigation to show that the imposition of the mandatory minimum sentence is not warranted in his case, then sections 8(2), (3), (4), 11(1), 20(1) and 3(3) of the *Sexual Offences Act* deprive an accused person the right to mitigate which is a core component of a fair trial contemplated under article 50(1) of the *Constitution*...”
10. That the High Court found that a convicted and imprisoned person could under the aforesaid statutes could seek to mitigate on resentencing.
11. In considering the application, I am also guided by *Republic v Mwangi* (Supra), a case that was decided after a myriad of decisions considered resentencing in cases other than murder including sexual offences.



12. The Supreme Court in the *Mwangi* case did deliver itself thus:

“The ratio decidendi in the decision was summarized as follows:

“69. Consequently, we find that section 204 of the *Penal Code* is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment”.

We therefore reiterate that, this court’s decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute.” (Emphasis added).

13. Nonetheless, this is a matter that was determined by the High Court which calls into play the principle of finality or functus officio. This court having finally exercised its authority in the case and determined the appeal after the Applicant was granted an opportunity to mitigate before the trial court, but opted not to; it would have no jurisdiction to re-open the case with a view of determining the question of time spent in custody. The doctrine of “functus officio” was clearly stated in *Telcom Kenya Ltd v John Ochanda* (2014) eKLR. The court delivered itself thus;

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered a final decision.”

14. The upshot of the above is that I have no power to grant orders sought. Accordingly, the application which is devoid of merit be and is hereby dismissed.

15. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 7<sup>TH</sup> DAY OF APRIL, 2025.**

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**L.N. MUTENDE**

**JUDGE**

