Esther v Republic (Miscellaneous Criminal Application E021 of 2025) [2025] KEHC 6892 (KLR) (21 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6892 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

MISCELLANEOUS CRIMINAL APPLICATION E021 OF 2025

RM MWONGO, J

MAY 21, 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

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 20(1) (2)(4), 21(1), 48, 258(III) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 25(A)(D)(C), 26(1), 27(1) (2), 28, 29(A)(D)(F) AND 23(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARISING FROM SECTION 8(1) AS READ WITH SECTION 8(3) OF THE SEXUAL OFFENCES ACT AND THE JUDGMENT IN MURUATETU & ANOTHER V REPUBLIC; KATIBA INSTITUTE & 5 OTHERS (AMICUS CURIAE) (PETITION 15 & 16 OF 2015 (CONSOLIDATED)) [2017] KESC 2 (KLR)

BETWEEN

MAURICE MUKUNDI ESTHER ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

Background

1. Through Runyenjes MCSO E006 of 2020, the petitioner was convicted of defilement and sentenced to 20 years imprisonment with effect from 29/12/2020. He appealed against the conviction and sentence through Embu HCCRA E036 of 2022 but the appeal was dismissed.

The Petition

2. The applicant has now filed this sentence review application in the form of an undated petition. He seeks sentence review on the strength of Articles 54(1) and 51(1) of the *Constitution* and case law. He has asked the court to acquit him so that he can go home to care for his old crippled mother. The orders sought are as follows:

    a. The petition be allowed;

    b. The sentence of 20 years imprisonment be reviewed since the trial court and first appellate court were denied judicial discretion during sentencing;

    c. An order that the petitioner's rights mentioned hereinabove, were violated on account of the trial and appellate courts failing to apply discretion during sentencing, hence the trial was unfair; and

    d. An order that he sentence be reduced in light of the findings in *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* (Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC 2 (KLR).

Parties' Submissions

3. In this Petition, the respondent orally submitted that the conviction and sentence were upheld on appeal. Further, it submitted the court is not clothed with jurisdiction to review those findings of the trial and the High Court.

4. On his part, the petitioner stated that he is rehabilitated and that the court should allow his petition. He also filed written submissions relying on the case of *S v Toms; S v Bruce* (139/89, 289/89) [1990] ZASCA 38 in which the South African Supreme Court of Appeal held that mandatory sentences are unconstitutional. That curtailing the court's discretion offends separation of powers as was held in the cases of *S v Mofokeng and Another*, 1999 (1) SASV 502 (W) and *S v Jansen* 1999 2 SACR 368 (C).

5. He also relied on the cases of *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* (Petition 15 & 16 of 2015 (Consolidated) and *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) (Muruatetu and argued that they are applicable in his sentence review petition. He urged the court to be guided by the cases of *Christopher Ochieng v Republic* [2018] KECA 59 (KLR), *Jared Koita Injiri v Republic* [2018] KECA 78 (KLR), *Evans Wanjala Wanyonyi v Republic* [2019] KECA 679 (KLR), *Dismas Wafula Kilwake v Republic* [2019] KECA 5 (KLR) among others.

6. He stated that he was 22 years old at the time and is remorseful for the offence. That his father died and his mother is ailing but she visits him in prison with a lot of difficulty. He urged the court to reconsider his sentence.

Issue for Determination

7. The sole issue for determination is whether the court has jurisdiction to entertain the application.

Analysis and Determination

8. The petitioner has filed his petition as a revision application for sentence review. Upon conviction by the trial court, he appealed and the High Court upheld the 20-year imprisonment sentence. The petition raises constitutional issues but also seeks to review a High Court finding.

9. It is trite that the High Court can exercise its supervisory jurisdiction over subordinate courts, seldom upon itself. The revisionary power of the High Court is drawn from Article 165 (6) & (7) of the *Constitution* which provides:

> "(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
>
> (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

10. 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."

11. The present case cannot be treated and determined as a revision application since, in this instance, the High Court cannot supervise itself. However, the Court can address the constitutional issue raised, which is that discretionary powers of the High Court and the trial court were fettered when the sentence was imposed and upheld.

12. In *Muruatetu 1*, the Supreme Court was faced with the question of constitutionality of the mandatory death sentence in respect of murder offences under section 204 of the *Penal Code*. As part of its discussion, the Court found that the mandatory nature of that sentence is unconstitutional to the extent that it curtails the discretion of a court in murder trials. It held:

> "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".

13. Following *Muruatetu 1*, Superior Courts applied the same reasoning in other offences including the *Sexual Offences Act*. As a result, resentencing surged countrywide and mandatory sentences were being set aside. It is on this pretext that the superior courts in the cases of *Christopher Ochieng v Republic*

(*supra*), *Jared Koita Injiri v Republic* (*supra*), *Evans Wanjala Wanyonyi v Republic* (*supra*) and *Dismas Wafula Kilwake v Republic* (*supra*) set aside the mandatory sentences.

14. In light of this flurry of cases, it became necessary for the Supreme Court to elaborate its findings in *Muruatetu 1*. Thus, the Supreme Court in *Muruatetu 2* in 2021, held that the findings in *Muruatetu 1* are only to be applied in murder cases. That persons convicted under other laws must move the court separately for consideration of their own petitions. It stated thus, in the directions:

> "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....
>
> It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the *Constitution*.....
>
> To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40 (3), robbery with violence under section 296 (2), and attempted robbery with violence under section 297 (2) of the *Penal Code*, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached."

15. In this case, the sentence imposed upon the petitioner is a mandatory 20 years imprisonment sentence as prescribed under section 8(3) of the *Sexual Offences Act*. The Supreme Court has guided on the position that it is not the place of the court to reduce mandatory sentences prescribed in statute.

16. In July 2024, the Supreme Court in the case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others* (Amicus Curiae) [2024] KESC 34 (KLR) discussed the Court of Appeal's blanket application of the *ratio decidendi* in the *Muruatetu case* on mandatory sentences. Here, 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."

Conclusions and Disposition

17. As recently as 11th April 2025, the Supreme Court has reiterated this position in the cases of *Republic v Ayako* (Petition E002 of 2024) [2025] KESC 20 (KLR) (Ayako case) and *Republic v Manyeso* (Petition E013 of 2024) [2025] KESC 16 (KLR) (Manyeso case). It held that only Parliament can amend laws

to review mandatory sentences set down in statute. That the court does not bear jurisdiction to review any sentence mandatorily imposed by the legislature in a statute.

18. As to whether the petitioner should be acquitted, this court has already pronounced itself through its judgment on appeal. The same cannot be canvassed through this petition as the court has already exhausted its jurisdiction in that regard.

19. In the result, and for the foregoing reasons, this court lacks jurisdiction in this case to determine the sentence review petition. Moreover, the court is guided by the findings of the Supreme Court on the constitutionality of the mandatory 20-years imprisonment sentence imposed upon the petitioner.

20. As a result, the petition lacks merit and it is hereby dismissed in its entirety.

21. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 21ST DAY OF MAY, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:-

1. Applicant Present in Court

2. Ms. Nyika for the Respondent

3. Francis Munyao - Court Assistant