



REPUBLIC OF KENYA



KENYA LAW
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**Githongo v Republic (Criminal Revision E023 of 2025)
[2025] KEHC 6152 (KLR) (14 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6152 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL REVISION E023 OF 2025
DKN MAGARE, J
MAY 14, 2025**

BETWEEN

JOSEPH MWANGI GITHONGO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. This is a ruling over a Notice of Motion application seeking to review the sentence imposed by Hon. D.K. Matutu. I had considered an earlier application in Nyeri Criminal Revision No. E025 of 2023. On the 30th day of July, 2024, I found no merit in the application for review. Only an appeal could change that. This court cannot sit on appeal from its own decision.
2. The section under which the Applicant was charged provides as follows:
 - (1) If any person makes or attempts to make any use of a firearm or an imitation firearm with intent to commit any criminal offence he shall be guilty of an offence and liable to imprisonment of not less than seven, but not exceeding fifteen years, and where any person commits any such offence he shall be liable to the penalty provided by this subsection in addition to any penalty to which he may be sentenced for that other offence.
 - (2) A firearm or imitation firearm shall, notwithstanding that it is not loaded or is otherwise incapable of discharging any shot, bullet or other missile, be deemed to be a dangerous weapon or instrument for the purposes of the *Penal Code* (Cap. 63).
 - (3) In this section, “imitation firearm” means anything which has the appearance of being a firearm, whether it is capable of discharging any shot, bullet or other missile or not.
3. The court found that the Applicant was liable to receive a minimum sentence of 7 years. The court gave 5 years. Subsequently, the Supreme Court has ruled that minimum sentences should be respected.



Having concluded the last review, the Applicant has no other remedy in this court. I was tempted to revert to the minimum sentence, which is the only lawful one. However, I cannot do so now after affirming it last time. The Supreme Court stated as follows regarding minimum sentences in the case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment):

Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term ‘mandatory minimum’ can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognised term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.

66. 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.
4. There is no basis for reviewing the judgment. If the applicant had anything worthwhile, he should have proceeded to the court of appeal, if there was any chance to do so, after my last decision. The court is *functus officio*.
5. The Applicant has two options, though the first is more reliable. First, to await his fate and serve the sentence as given. Secondly, petition the President under Article 133 of the *Constitution*, which provides as follows:
 - (1) On the petition of any person, the President may exercise a power of mercy in accordance with the advice of the Advisory Committee established under clause (2), by-
 - (a) granting a free or conditional pardon to a person convicted of an offence;
 - (b) postponing the carrying out of a punishment, either for a specified or indefinite period;
 - (c) substituting a less severe form of punishment; or
 - (d) remitting all or part of a punishment.
 - (2)
 - (3) ...



- (4) The Advisory Committee may take into account the views of the victims of the offence in respect of which it is considering making recommendations to the President.
6. The court finds no justifiable basis to interfere with the sentence imposed in this matter. The application for review of the sentence dated 18.2.2025 in Mûkûrwe'inî. SPMCRC No. E098 of 2022 is hereby dismissed as the court is functus officio.

Determination

7. The court makes the following orders: -
- a. The application for review of the sentence dated 18.2.2025 in Mûkûrwe'inî SPMCRC No. E098 of 2022 is hereby dismissed as the court is functus officio.
 - b. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 14TH DAY OF MAY, 2025.

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Applicant present

Mr. Kimani for the Respondent

Court Assistant – Michael

