Mungai v Republic (Miscellaneous Criminal Application E027 of 2024) [2025] KEHC 10200 (KLR) (17 June 2025) (Ruling)

Neutral citation: [2025] KEHC 10200 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

MISCELLANEOUS CRIMINAL APPLICATION E027 OF 2024

GL NZIOKA, J

JUNE 17, 2025

BETWEEN

BENARD NJOGU MUNGAI .... APPLICANT

AND

REPUBLIC .... RESPONDENT

RULING

1. By a notice of motion application dated 12th September 2024, the applicant is seeking for the following orders: -

   a. That this Honourable court be pleased to issue a declaration that section 20[1] of the *Sexual Offences Act* No. 3 of 2006 in so far as it imposes a mandatory sentence of life imprisonment is unconstitutional and infringes on the inherent right of the applicant to a fair trial as envisaged under Article 25 [c] of the *Constitution*.

   b. That this Honourable court be pleased to review the mandatory life sentence imposed on the applicant and find that the sentence already served is enough punishment by considering mitigating circumstances.

   c. That in the alternative to prayer [b] above, this Honourable court be pleased to review the mandatory life sentence imposed on the petitioner to a less severe sentence.

   d. That any other or further relief that the court may deem just in the circumstance to grant.

2. The application is supported by the grounds thereto and an affidavit of the even date sworn by the applicant. The applicant depones that he was arraigned before the Chief Magistrate's court charged *vide* Chief Magistrate's Criminal Case No. 42 of 2015 with the offence of incest contrary to section 20[1] of the *Sexual Offences Act* No. 3 of 2006 [herein "the Act"].

3. That he pleaded not guilty to the charge and the matter proceeded to a full trial. By a judgment dated 2nd February 2016, the trial court found him guilty as charged, convicted and sentenced him to serve life imprisonment.

4. That being dissatisfied with the conviction and sentence he filed an appeal vide High Court Criminal Appeal No. 10 of 2016, but the appeal was heard and dismissed. That, he filed an application before the Court of Appeal seeking for leave to file an appeal out of time but the subject application was dismissed on 26th July 2024. Consequently, he now seeks for re-sentencing.

5. He argues that this Honourable court has the requisite jurisdiction to hear this matter and that the petition is based on the ground that, the mitigation he offered in the trial court was not considered in that the law provides a mandatory sentence for the offence he was charged with. That, by its nature, the subject sentence violates article 50 of the *Constitution* of Kenya 2010, as it denies a trial court the power to consider mitigation on sentence and the pre-sentencing policy.

6. That, he has petitioned this court in accordance with the Supreme Court of Kenya's decision on mandatory nature of sentence that it declared mandatory sentences unconstitutional. Further that he relies on articles 27[1] and 59 [c] of the *Constitution* of Kenya. Furthermore he is remorseful, has sought forgiveness from the complainant, he has undergone several trainings, been of good conduct and spent nine [9] years on sentence. Hence the plea that, he be released on a lenient sentence.

7. However, the application was opposed *vide* grounds of opposition dated 23rd January 2025 in which the respondent states that:

    a. That the court has no power to entertain constitutional application that has not been properly placed before it.

    b. That the question of sentences under *Sexual Offences Act* and their legality therein is a matter that is now well settled vide Muruatetu one and two by the Supreme Court of Kenya.

    c. That the question raised in the application by the applicant, were dealt by this court in the appeal that was filed by the applicant and a decision delivered by this Honourable court on 26th day of June 2018, at paragraph 24 and 26 of the said judgment the learned Judge addressed the issue of the sentence and their legality.

    d. The applicant has approached the Court of Appeal and his application before the Court of Appeal was subsequently dismissed on the 26th day of July 2024.

    e. That this application seeks to reopen a case which this court has already become functus officio in this matter.

    f. That section 364[5] of *Criminal Procedure Code* provides that when an appeal lies from a finding or a sentence or an order, and the same is pursued or not, no proceedings by way of revision shall be entertained at the instance of a party who could have appealed.

    g. That this application is not properly before this court and the same should be considered as being vexations, frivolous and scandalous whose sole purpose is to waste the very limited judicial time of this honourable court.

    h. That the application raises constitutional issues, which have been framed in wrong application, hence brought before a wrong forum

    i. That the application invites this Honourable court to reopen the appeal through a back door, a matter that this court has no such jurisdiction to entertain.

8. The application was disposed of vide filing of submissions considered herein. The applicant in submissions dated 19th February 2025 argued that, the grounds of opposition were not followed up with a replying affidavit as such they do not aid the respondent and therefore the application is unopposed.

9. The applicant relied on the following three cases: -

   a. *Kennedy Otieno Odiyo & 12 others v Kenya Electricity Generating Company Limited* [2010] eKLR.

   b. *Mohamed & Another v Haidara* [1972] E.A. 166

   c. *Mustano Rocco v Aniello Sterelli* [2019] eKLR

10. That on the issue as to whether the applicant has properly moved the court, the applicant argues that, the application is for re-sentencing and the court has the power under Article 165[3] of the Constitution of Kenya to entertain court.

11. The applicant relied on the following cases:

   a. B*enson Waiganjo Ngeche & another v Republic* [2019] eKLR.

   b. *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR.

   c. *Emmanuel Openda Wafula v Republic* [2021] eKLR.

12. The applicant further argued that the court has jurisdiction to hear and determine applications for redress of denial or violation of rights under Article 23[1] of the Constitution. That, further the principle in Muruatetu case has been applied to the mandatory minimum sentences under the *Sexual Offences Act*, in the case of:

   a. *William Okungu Kittony v Republic* [2018] eKLR

   b. *Christopher Ochieng v Republic* [2018] eKLR

   c. *Jared Koita Injiri v Republic* [2018] KECA 78 [KLR]

13. Finally, the applicant reiterated the averments in the supporting affidavit to the effect that, he is remorseful and reformed.

14. He relied on the cases of:

   a. *Yussuf Dahar Arog v Republic* [2007] eKLR

   b. *Nicholas Mukila Ndetei v Republic* [2019] eKLR

   c. *Baragoi Rotiken v Republic* [2022] eKLR

   d. *Githinji v Director of Public Prosecution* [2024] KEHC 6715 [KLR]

15. However, in response the respondent vide submission dated 23rd January 2025, argued that, the applicant has exhausted his right of audience before this court vide the appeal that was heard by this court and determined. That as such this court is functus officio. That under section 364 [5] of the *Criminal Procedure Code*, this court cannot entertain a revision application where an appeal should have been filed.

16. That, the applicant is inviting the court to re-open a case on issue already heard and determined. The respondent submitted that section 20 of the *Sexual Offences Act* is good law and that the issue

mandatory sentences has been litigated upon under Muratetu 2 where the Supreme Court pronounced that, sentences under the *Sexual Offences Act* are constitutional and lawful]

17. Having considered the application in the light of the materials placed before the court I note that, on prayer [a] I find for a party to invoke the power of the court for declaratory remedy, the party needs to file a legal action or petition, requesting the court to make a declaration that the subject provisions are indeed unconstitutional.

18. In most cases, the petitioner will be seeking for a remedy on the grounds of violation of his rights and to do so, the applicant has to file a proper pleading in court. He cannot seek for a declaratory remedy through a miscellaneous application.

19. Rule 4[1] of the *Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules, 2013* [Mutunga Rules] provides that: -

> " [1] Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules."

20. Further, Rule 10[1] of the *Mutunga Rules* states that: -

> " An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary."

21. The Supreme Court of Kenya in the case of; *Methodist Church in Kenya v Fugicha & 3 others* [2019] KESC 59 [KLR] dismissed the cross-petition on the ground that it did not comply with the Mutunga Rules and held that: -

> " 55. ... Moreover, this cross-petition did not comply with rule 15[3] of the Mutunga Rules which speaks to a respondent filing a cross-petition; and it was also not in conformity with rule 10[2] of these rules. Rule 10[3] cannot also be invoked as the replying affidavit of the interested party does not fit any of the descriptions contained therein.
>
> 57. We agree that the issues set out in the cross-petition did not afford the opportunity for the petitioner to respond to the same effectively. Firstly, because it introduced a different cause of action from that raised in the original petition; and secondly, because it was not framed in a manner, for which there was a known laid out procedure for an exhaustive response. The fact, that the petitioner may have referred to the issues therein through oral arguments, could not, as wrongfully determined by both the High Court and the Court of Appeal, have amounted to formal pleadings in response to those issues. [Emphasis added]

22. Further, in the case of; *Registrar of Trade Unions v Nicky Njuguna & 4 others* [2017] KECA 464 [KLR] the Court of Appeal stated that: -

> " Counsel for the appellant submitted and rightly so, that matters touching on constitutionality of laws should be commenced by way of Constitutional Petitions under the High Court Practice and Procedure Rules and Protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2013 [Mutunga Rules]. We agree because as much

as counsel dismissed this, as a mere procedural technicality, we reiterate the orders sought had far reaching implications and taking a short cut did not help the respondents."

On that ground alone, that prayer cannot be granted.

23. On prayer [b] and [c] the same cannot be granted as this court is functus officio having heard and determined this matter *vide* High Court Criminal Appeal No. 10 of 2016. In fact, it is on record that, the Court of Appeal has already been seized of the same matter, and therefore this court has no jurisdiction to reverse the orders of the Court of Appeal which has sealed the applicant's fate. His right to be heard lies in the Supreme Court of Kenya.

24. Furthermore, the argument that the application is for resentencing does not lie. The resentencing cannot arise where an appeal has been heard in the matter. Notably, the appeal was on both conviction and sentence.

25. Pursuant to the aforesaid I find that, this application has no merit and it is dismissed in its entirety.

DATED, DELIVERED AND SIGNED THIS 17TH DAY OF JUNE 2025.

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms. Mbirwe for the applicant

Ms. Chepkonga for the respondent

Ms. Hannah: court assistant