



**Mutuku v Republic (Miscellaneous Criminal Application
E101 of 2024) [2025] KEHC 7759 (KLR) (3 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 7759 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CRIMINAL APPLICATION E101 OF 2024**

JM NANG'EA, J

JUNE 3, 2025

BETWEEN

TONNY KAMAU MUTUKU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant was charged, convicted and sentenced to 10 (ten) years in prison for the offence of attempted defilement contrary to section 9 (1) as read with section 9 (2) of the *Sexual Offences Act* No. 3 of 2006 before the Magistrate's Court at Nakuru in Criminal Case File No. S.O E002 of 2022 . The particulars of the offence state that on the 2nd day of January 2022 within Nakuru County the Applicant intentionally attempted to cause his penis to penetrate the vagina of XY, a child aged 16.
2. It is alleged in the alternative that the Applicant committed an indecent act with a child contrary to section 11(1) of the same Act. The particulars of the charge are that on the same date and at the same place he intentionally and unlawfully touched the vagina of XY with his penis. He denied the charges.
3. The Applicant lodged an appeal with this court through Criminal Appeal File No. E006 of 2023, which appeal was dismissed.
4. The Applicant is now seeking re-sentence rehearing, seeming to complain that minimum mandatory sentence prescribed for the offence of which he was convicted is unconstitutional. He also seeks invocation of the provisions of section 333 of the *Criminal Procedure Code*. The Applicant avers that convicts like himself who had been allegedly wrongly sentenced are eligible to rehearing in line with "the chief justice directive dated 7th December 2022"(sic).
5. The Applicant did not file submissions.



6. The prosecution Counsel (Ms Sang) thinks that the application lacks in merit for the reason that this court has dismissed the Applicant's appeal against both conviction and sentence of the lower court. Citing inter alia the judicial determination in Daniel Otieno Oracha vs Republic (2019) eKLR Counsel submits that the court is bereft of jurisdiction in the circumstances.
7. The Constitutional and Human Rights Court's decision in consolidated Petitions Nos. 5 and 6 of 2022 (*Ramadhan & 8 Others vs Attorney-General and Another* 2024 KEHC 1173 (KLR) (6 February 2024) (Judgement) and Machakos High Court case, *Philp Mueke Maingi & Others vs Republic*, drawing from jurisprudence in the famous Supreme Court case of Francis Karioko Muruatetu, had concluded that minimum mandatory sentences prescribed for offences such as the Applicant was convicted of herein were declared unconstitutional for fettering judicial discretion to determine an appropriate sentence based on the peculiar facts and circumstances of each case,. A similar opinion was expressed in this court's decision in *William Okungu Kittiny vs Republic* (2018) eKLR.
8. The Supreme Court in what has come to be known as the Muruatetu 2 decision has, however, clarified that its earlier judgement in the Muruatetu 1 declaring the mandatory nature of the death sentence for the offence of murder as unconstitutional, only applied to murder cases. The apex court's more recent decision in Constitutional Petition No. 018 of 2023 (Republic vs Joshua Gichuki Mwangi & Others) also referred to by the Respondent reiterates the position and exhorts litigants wishing to challenge laws prescribing mandatory and/or minimum sentences for offences other than murder to mount the challenge from the High Court, and if necessary escalate the dispute to the Court of Appeal, for a final decision to be made.. The Supreme Court's decision in the Muruatetu 1 case does not therefore apply to defilement cases for the reasons given. The Applicant was lawfully sentenced.
9. The Applicant's plea to be accorded the benefit of section 333 of the *Criminal Procedure Code* is, however, valid. The record of the lower court does not show compliance with this statutory provision which requires the period the convict was in remand custody awaiting trial to be taken into account in computing and executing the prison sentence imposed. The period between the Applicant's arrest on 7th January 2022 and his release on cash bail on 14th January 2022 shall therefore be discounted from the prison term imposed.
10. Save for this limited extent only, the application is dismissed.

J. M. NANG'EA, JUDGE.

RULING DELIVERED THIS 3RD DAY OF JUNE 2025 IN THE PRESENCE OF:

The Prosecution Counsel, Ms Sang

The Applicant, present

The Court Assistant, Jeniffer

J. M. NANG'EA, JUDGE.

