



REPUBLIC OF KENYA



KENYA LAW
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**Matwi v Republic (Criminal Petition 032 of 2020)
[2025] KEHC 9753 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9753 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL PETITION 032 OF 2020**

JRA WANANDA, J

JULY 4, 2025

BETWEEN

BENJAMIN LIHUURU MATWI PETITIONER

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Petitioner was charged and convicted in Eldoret Chief Magistrate’s Criminal Case No. 4690 of 2012 with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#). The trial Court sentenced him to life imprisonment and he appealed against the same in Eldoret High Court Criminal Appeal No. 158 of 2013 which was however dismissed by C.W. Githua J, by the Judgment delivered on 08/10/2015.
2. The Petitioner has now returned to this Court by way of the Petition dated 19/02/2020 the subject of this Ruling seeking sentence re-hearing. He states that his age is so advanced and he has been in prison for a long time hence his case “needs some special attention”. He prays that he be placed on probation. He cites Section 39 of the [Sexual Offences Act](#) and in the alternative, seeks a determinate sentence. He depones that he is remorseful, repentant and reformed because “he has been punished in the hands of the prison accordingly” and has “grown weary of the harsh prison conditions because of his advanced age”. He also depones that while in prison, he has “acquired treasures in biblical studies with various certificates”, and that he is now “saved” and Jesus is his Lord. He also cites the decision in Francis Karioko Muruatetu and Others vs Republic.
3. Although I granted the parties leave to file written Submissions, the Petitioner informed the Court that he would not be filing any such Submissions. The Respondent, on its part, through Prosecution Counsel Leonard Okaka filed the Submissions dated 24/02/2025.



4. Mr. Okaka, in his Submissions, contended that life imprisonment for defilement was upheld in Criminal Appeal No. 158 of 2013 and thus opposed the substitution thereof with a determinate incarceration, or non-custodial sentence. He submitted that under Section 8(2) of the *Sexual Offences Act*, the statutory minimum sentence is life imprisonment and given that it sets the floor, rather than the ceiling, the Supreme Court in the case of Republic vs. Joshua Gichuki Mwangi (Petition E018 of 2023) [2024] KESC 34 (KIR) found such sentence not unconstitutional; and that trial Courts have no discretion to go below.
5. He also submitted that the threshold for finding of unconstitutionality of a statute has not been met as this is not a special Constitutional Proceeding and the procedure for addressing indeterminate nature of life imprisonment ought to be as was held in Joshua Gichuki Mwangi (supra). He also cited the case of Moses Walubengo v R, Eldoret HCCRPet E029 of 2018. He urged further that the Petition also misconceives the object of Section 39 of the *Sexual Offences Act*, clarified in among others, the case of Lagat v R Criminal Petition 87 of 2020) [2023] KEHC19746 KLR, and also the case of Vincent Ngesa Nverekwe v R. Eld Misc. Criminal Application No. 252/2019 KLR.

Determination

6. The issue for determination is “whether the Court should review the life imprisonment sentence imposed by the trial Court”.
7. In answering the said issue, I reiterate that the Petitioner appealed to this same High Court against the decision of the Magistrate’s Court, both on conviction and sentence. As aforesaid, the Appeal was dismissed vide the Judgement delivered by C.W. Githua J on 08/10/2015. In dismissing the Appeal, the Judge found that the trial Court arrived at the correct conclusion and further, that the sentence was lawful as it was the one prescribed in law.
8. It is therefore clear from the foregoing, that the Petitioner’s grievances on the issue of the sentence imposed were the same that were raised on appeal before a Judge of equal jurisdiction presiding over this very Court and who conclusively dealt with and determined the same. The Petitioner has now returned to this same Court which had already dismissed his Appeal, asking for the same sentence already upheld by this very Court to be reduced. This, the Court cannot do since this Court cannot sit on appeal on a decision of its own. In the circumstances, I find that this Court is now functus officio, and cannot purport to interrogate the decision of C.W. Githua J. The Petitioner’s recourse was to appeal to the Court of Appeal, not to come back to this same High Court
9. I therefore find that this Court, having already pronounced itself on both conviction and sentence, is bereft of the jurisdiction to again review the sentence that it had already affirmed in Eldoret High Court Criminal Appeal No. 158 of 2013.
10. I find persuasion in the case of Joseph Maburu alias Ayub v Republic [2019] eKLR in which Kiarie Waweru, J held as follows:

“Sentencing is a judicial exercise. Once a judge or a judicial officer has pronounced a sentence, he/she becomes functus officio. If the sentence is illegal or inappropriate the only court which can address it is the appellate one.”

Remitting a matter to the trial court which had become functus officio after sentencing flies in the face of the doctrine of functus officio. It amounts to asking the trial court to clothe itself with the jurisdiction of an appellate court. This is an illegality.”



11. I also cite the decision of Hon. Lady Justice L. Njuguna, in the case of Boniface Gitonga Mwenda v Republic [2021] eKLR, where, faced with a similar situation, she held as follows:

“However, as I have noted, the Petitioner herein appealed the trial court’s decision to this court. The court in dismissing the appeal against the sentence held that the trial court’s sentence was within the law. The first appellate court being a court of concurrent jurisdiction with this court, I am of the opinion that the judgment of the said court in that respect cannot be reviewed by this court. The jurisdiction of this court in relation to review is limited to 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. (See Section 362-364 of the *Criminal Procedure Code*).

Reviewing of the sentence of a court of concurrent jurisdiction in relation to failure of the said court to take into account the period spent in custody would be tantamount to sitting as an Appellate court on the judgment of Hon. F. Muchemi J. The law abhors that practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. This court doesn’t have jurisdiction in that respect and as such, the prayer to that respect ought to fail.”

12. In any case, the Supreme Court, in its recent decision in the case Republic v Manyeso (Petition E013 of 2024) [2025] KESC 16 (KLR) (11 April 2025) (Judgment) [2025] KESC 16 (KLR) upheld the legality of the sentence of life imprisonment under Section 8(2) of the *Sexual Offences Act*. In doing so, the Court guided as follows:

“70. Our findings hereinabove effectively lead us to the conclusion that the Judgement of the Court of Appeal delivered on 7th July 2023 is one for setting aside. The Court of Appeal did not have jurisdiction to interfere with the sentence imposed by the trial court and affirmed by the first appellate court. Consequently, the life imprisonment sentence remains lawful and in line with Section 8 of the *Sexual Offences Act*.”

13. Similarly, the Supreme Court in its subsequent directions given in Muruatetu & Another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions), made it clear that its earlier decision in the case Francis Karioko Muruatetu and Another vs Republic [2017] eKLR which had criticized the imposing of mandatory minimum sentences, only applied to murder cases, and not to any other type of case, not even sexual offences.

14. The Supreme Court reiterated and restated the above directions when dealing with an Appeal emanating under the Sexual Offence Act. This was 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) in which the Supreme Court set aside the decision of the Court of Appeal which had applied the Muruatetu reasoning in setting aside a mandatory minimum sentence of 20 years imprisonment imposed on the Appellant. As clearly spelt out by the Supreme Court, Muruatetu is not applicable to cases under the *Sexual Offences Act*.

15. Regarding the application of Section 39 of the *Sexual Offences Act* cited by the Petitioner, I had occasion to deal with the same in the case of Lagat v Republic (Criminal Petition 87 of 2020) [2023] KEHC 19746 (KLR) (7 July 2023) (Judgment) in which I held and found as follows:



1. Section 39(1) and (2) of the *Sexual Offences Act* provide as follows:

- “(1) A court may declare a person who has been convicted of a sexual offence a dangerous sexual offender if such a person has--
- (a) more than one conviction for a sexual offence;
 - (b) been convicted of a sexual offence which was accompanied by violence or threats of violence; or
 - (c) been convicted of a sexual offence against a child
- (2) Whenever a dangerous sexual offender has been convicted of a sexual offence and sentenced by a court to imprisonment without an option of a fine, the court shall order, as part of the sentence, that when such offender is released after serving part of a term of imprisonment imposed by a court, the prisons department shall ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence.”

“ 11. I straight away find that Section 39 cannot apply in this case since nowhere in the trial Court’s Judgment or record was the Petitioner declared “a dangerous sexual offender”. On that ground alone, I do not see how then he can invoke this provision.

12. Although it is evident that the Appellant qualified for declaration as “a dangerous sexual offender” for purposes of Section 39 of the *Sexual Offences Act* since he was convicted of a sexual offence against a child, the trial Court never declared him so.

13. Counsel for the State has also argued that the “Court” referred to in Section 39(2) is the “Court” that convicted and sentenced the Petitioner. Indeed, Section 39(2) is explicit that:

“...the court shall order, as part of the sentence, that when such offender is released after serving part of a term of imprisonment imposed by a court, the prisons department shall ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence...”

14. I therefore find merit in the Prosecution Counsel’s submission that “Court” for the purposes of the aforementioned provision is the “trial Court” and not this High Court. Therefore, in the absence of an order of the trial Court made as part of the Petitioner’s sentence pursuant to Section 39(2) of the *Sexual Offences Act*, it



is misconceived for the Petitioner to seek to invoke this provision.

15. In any case, it is clear that the object of Section 39(2) is to provide a mechanism for the post-prison supervision of “dangerous sexual offenders” and not to secure their release as wrongly understood by the Petitioner. Clearly therefore, the orders sought by the Petitioner are untenable. Accordingly, I find that the Petitioner cannot invoke Section 39(2) of the *Sexual Offences Act*.”

16. It therefore evident that the Petitioner cannot come to the aid of the Petitioner herein.

17. In the premises, the Petition herein is dismissed.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 4TH DAY OF JULY 2025

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WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

The Applicant (present virtually from Eldoret Main Prison)

Ms. Muriithi for the State

C/A: Brian Kimathi

