



**Muchonge v Republic (Miscellaneous Criminal Application
E037 of 2024) [2025] KEHC 9532 (KLR) (3 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9532 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CRIMINAL APPLICATION E037 OF 2024**

FN MUCHEMI, J

JULY 3, 2025

BETWEEN

BENSON WAITHIMA MUCHONGE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Brief Facts

1. The application for determination dated 31st January 2025 seeks for orders of review of sentence on grounds that the applicant has reformed for the time he has been in prison.
2. The applicant states that he was convicted in Thika CM Criminal Case (S.O.) No. 28 of 2011 with the offence of defilement contrary to Section 8(1) as read with 8(2) of the *Sexual Offences Act* and was sentenced to life imprisonment. The applicant appealed to the High Court in Nairobi in Criminal Appeal No. 225 of 2011 whereas his appeal was dismissed on 11th December 2013. The applicant subsequently appealed to the Court of Appeal Nairobi in Criminal Appeal No. 176 of 2014 following which the appeal was dismissed.
3. The applicant states that he is rehabilitated and requests the court to review his sentence to a lesser sentence.
4. The respondent filed grounds of opposition dated 27th May 2025 and argues that the instant court became functus officio and has no jurisdiction to resentence since a court of concurrent or similar jurisdiction, that is, the Milimani High Court vide Appeal No. 225 of 2011 upheld the sentence of the trial court. Furthermore, the applicant filed a second appeal to the Court of Appeal being Criminal Appeal No. 176 of 2014 which was dismissed too. The respondent argues that the applicant having gone to the Court of Appeal cannot come to the present court and ask the court to overturn the decision of the superior court.



5. The respondent states that the offence which the applicant was found guilty of a felony which attracts life imprisonment sentence and is legal and constitutional. Furthermore, recent decisions of the Supreme Court have held that life imprisonment is legal and not in contravention of the Constitution in defilement cases.
6. Parties put in written submissions.

The Applicant's Submissions

7. The applicant refers to the case of Philip Mueke Maingi & 5 Others v Director of Public Prosecutions & the Attorney General Petition No. 97 of 2021 Mombasa High Court; Joshua Gichuki Mwangi v Republic (Criminal Appeal 84 of 2015) [2022] eKLR and Julius Kitsao v Republic Criminal Appeal No. 12 of 2021 and submits that life imprisonment is unconstitutional and ought to be substituted with a determinate sentence.
8. The applicant further submits that he is 70 years old and suffering from peptic ulcers due to old age and he is weak.

The Respondent's Submissions.

9. The respondent reiterates what she has deponed in her affidavit and submits that the instant application is an abuse of the court process and ought to be dismissed.

The Law

10. This court is empowered by Article 165(6) of the Constitution of Kenya to review a decision by a subordinate court. Article 165(6) provides:-

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.
11. In the case of Samuel Kamau Macharia v KCB & 2 Others, Civil Application No. 2 of 2011, it was stated: -

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
12. The applicant herein was convicted for the offence of defilement in Thika CM Criminal Case (S.O.) No. 28 of 2011 and sentenced to life imprisonment. He has stated that his appeal to the High Court in Nairobi Criminal Appeal No. 225 of 2011 as well as second appeal were both dismissed for lack of merit. The Court of Appeal in Nairobi Criminal Appeal No. 225 of 2011 in upholding the sentence held that the mandatory life sentence for the offence of defilement of a child aged eleven years or less under Section 8(1) as read with 8(2) of the Sexual Offences Act was legal and that it ought to be upheld.
13. The recent decisions of the Supreme Court on the same subject of sentence in defilement cases are found in the Petitions of Republic v Julius Manyeso Petition No. E013 of 2024 KESC (KLR) and in Petition No. E002 of 2024 KESC 20 KLR Republic v Evans Nyamari where it was held that sentences in defilement cases must be in accordance of Section 8 of the Sexual Offences Act. The applicant has already exhausted the option to appeal on two levels of Superior Courts. He cannot come before this court to seek review of the decision of which is a higher court than the High Court. This is against the provisions of Article 50 (2) (q) of the Constitution. This court is not possessed of jurisdiction to review



decisions of the Court of Appeal. The two Superior Courts dealt with both conviction and sentence during hearing of the appeals and found no merit in the said appeals.

14. Article 50(2)(q) of the *Constitution* is of relevance and it provides: -
 - (2) Every accused person has the right to a fair trial, which includes the right: -
 - (q) If convicted, to appeal to, or apply for review by a higher court as prescribed by law.
15. The applicant is kind of pleading for mercy of this court without relying on any legal provision that empowers this court to grant the orders he has sought. The applicant is advised to lodge an application to the Presidential Committee of Mercy which exercises power of Mercy of the President granted under Article 133 of the *Constitution of Kenya*.
16. Consequently, I find that this application is incompetent and misconceived and. It is hereby struck out of the record.
17. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 3RD DAY OF JULY 2025.

F. MUCHEMI

JUDGE

