Ngetich v Republic (Miscellaneous Criminal Application E140 of 2023) [2025] KEHC 9411 (KLR) (1 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9411 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

MISCELLANEOUS CRIMINAL APPLICATION E140 OF 2023

PN GICHOHI, J

JULY 1, 2025

BETWEEN

NICHOLAS KIPRUTO NGETICH ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. Before this Court for determination is the Applicant's Notice of Motion filed on 12th October, 2023, seeking for the following Orders;-

    1. The application be certified urgent and be heard on a priority basis.

    2. The honourable court be pleased to grant a re-hearing of the sentence in CM's Court Nakuru criminal case number 87 of 2016.

    3. The honourable court be pleased to receive mitigation from the applicant herein for consideration of an appropriate sentence.

    4. The honourable court be pleased to issue any other order it may deem fit for the interest of justice.

2. The Application is based on the undated supporting Affidavit filed 12th October, 2023. He stated that he was charged with defilement under Section 8(1)(3) of the *Sexual Offences Act* No. 3 of 2006 in Criminal Case Number 87 of 2016 before the CM's Court Nakuru. He was found guilty and sentenced to life imprisonment on 13th February, 2017 and that dissatisfied, he appealed to the High Court at Nakuru vide Criminal Appeal No. 19 of 2017, but his appeal was dismissed.

3. The Applicant is now seeking a re-hearing of his sentence, arguing that the High Court is bound by the Supreme Court's decision under Article 163(7) of the *Constitution*. He specifically relies on the High Court judgment in Machakos, *Maingi & 5 others v Director of Public Prosecutions & another*

[2022] KEHC 13118 (KLR), which held that individuals convicted of sexual offences with mandatory minimum sentences are at liberty to petition the High Court for re-sentencing in appropriate cases.

4. The Applicant asserts that this Court has jurisdiction to conduct re-sentencing and mete out an appropriate sentence in line with the *Philip Mueke Maingi* (*supra*), thereby discharging its constitutional obligation under Article 20 (3) (a)(b) of the *Constitution*. He further states that he is a pauper and unable to afford the costs.

5. The Respondent has opposed the application through the Replying Affidavit sworn on 20th May, 2025 by James Kihara, a Prosecution Counsel at the Office of the Director of Public Prosecution. He confirms that the Applicant was charged with defilement, convicted, and sentenced to life imprisonment on 13th February, 2017, and that his appeal to the High Court (Criminal Appeal 19 of 2017) was dismissed, upholding the conviction and sentence.

6. The Respondent opposes the application ground that the High Court lacks the capacity to review a sentence handed down by a Court of equal stature. He states that once a matter has been heard, the Court becomes functus officio and cannot alter the sentence.

7. He argues that the Applicant has not exhausted all avenues for sentence review and should appeal the sentence to the Court of Appeal. While acknowledging that under Article 163 (7) of the *Constitution* all courts are bound by Supreme Court decision, the Respondent contends that the High Court cannot revisit what has already been delivered and that the precedents cited by the Applicant have been overtaken by events and new precedents are in place.

8. The Respondent therefore depones that the application herein lacks merit and should be dismissed.

Applicants' Submissions

9. The Applicant contended that mandatory minimum sentences are unconstitutional, as they threaten the doctrine of separation of powers and the independence of the Judiciary. He cites Civil Application No. 11 of 2016 *Kalpana H, Rawal & 2 others v Judicial Service Commission & 3 others* [2016] eKLR, where J.B. Ojwang , SCJ emphasised the Judiciary's role as the ultimate arbiter with unlimited powers of interpretation.

10. The Applicant also cited the case of *Wilfred Manthi Musyoka v Machakos county Assembly & 4 others* [2018] eKLR and Montesquieu's theory on separation of powers, noting that the Kenyan Constitution reflects this principle by delegating sovereign power to the Executive, Legislature, and Judiciary, as seen in Article 1(3) of the *Constitution* and argues that this was further appreciated in *Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemu (Interested Party); With Kenya Human Rights Commission & another (Amicus Curiae)* (Petition 229 of 2012) [2012] KEHC 2480 (KLR) which highlighted that the *Constitution* expects each branch to function without interference.

11. The Applicant asserted that sentencing is an exclusively judicial function, and legislative mandates on punishment infringe upon the separation of powers, effectively reducing judges to rubber stamps. He cited *Liyanage v. The Queen* [1967] A.C. 259 and submitted that the Privy Council invalidated a minimum mandatory jail term due to disproportionality and infringement on the separation of powers. Similarly, he quoted the United Kingdom case in *Reyes v. The Queen* [2002] 2 A.C. 235, 258 and *R (Anderson) v. Home Secretary* [2003] 1 A.C. 837 and argued that this doctrine of separation of powers as against minimum mandatory provisions were accepted and applied.

12. The Applicant further cited cases from other jurisdictions to support the importance of judicial discretion in sentencing including; *S v Mchunu and Another* (AR24/11) (2012) Zakzphc 56 Kwa Zulu

High Court and submitted that sentencing is within the discretion of the trial court and that excessive punishment serves neither justice nor society's interests.

13. Further, he cited the case of *S v Toms* 1990 (2) SA 802 (A) AT 806(L)-807(B), and submitted that the South African Court of Appeal deemed mandatory sentences an undesirable intrusion. Similarly, that the Court in *S v Mofokeng* 1999(1) SACR 502 (w) AT 506 (d) stated that minimum sentences curtailing judicial discretion offend constitutional principles of separation of powers and undermine judicial independence. He further cited the case of *S v Jansen* 1999 (2) SACR 368 at 373 (g) - (h) and submitted that the said Court emphasised that mandatory minimum sentences disregard individual characteristics and rehabilitation prospects.

14. Within Kenya's jurisdiction, the Applicant expounded on judicial discretion citing the case of *Dismas Wafula Kilwake v Republic* (2018) eKLR and submitted that the Court of Appeal's holding was that Section 8 of the *Sexual Offences Act* should not remove judicial discretion in sentencing, thus allowing courts to impose appropriate sentences based on case circumstances.

15. Further reliance was placed on several cases including the case of *Paul Ngei v Republic* [2019] eKLR where the Court of Appeal substituted mandatory minimum sentences with more lenient terms.

16. He further relied on several cases including the case of *Sammy Wanderi Kugotha v Republic* [2021] eKLR and submitted that High Court interpreted the word "shall" in Section 8(2) of the *Sexual Offences Act* to mean "may" so as to conform with the *Constitution* in the said case and therefore substituted a life sentence with a 20-year imprisonment,.

17. The Applicant urged the Court to find that the life sentence imposed was a statutory minimum mandatory sentence and that his previous mitigations were ineffective due to the trial judge's hands being tied.

18. He implored tis e Court to exercise its discretionary powers under Article 50 (2)(q) of the *Constitution* and substitute the life sentence with a more lenient one. Consequently, he urged that any custodial sentence imposed put into account the period he has already spent in custody as provided for under Section 333(2) of the *Criminal Procedure Code* as emphasised in the case of *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR.

19. Lastly, the Applicant emphasised on his rehabilitation and referred to a Certificate in Polisher Grade III obtained in prison,. He stated he beliefs that he is ready to be a productive member of society.

20. He stated that having been convicted at 40 years of age and was a first offender, he is now 45 years old and is remorseful, hence seeking another chance to find a family and contribute to nation-building. He prayed that the application be allowed and that the period served be deemed sufficient based on his rehabilitation and mitigating factors.

Analysis and determination

21. After considering the application, Affidavits and submissions, the main issue for determination is whether this Court has jurisdiction to revisit and re-hear a sentence that has already been upheld on appeal by a court of concurrent jurisdiction.

22. The Applicant's argument is that since the life imprisonment was declared unconstitutional, this Court should substitute his sentence of life imprisonment with another lenient sentence, claiming that he has reformed.

23. The Applicant has heavily relied on the case of *Maingi & 5 others v Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR), where G.V Odunga J (As he then was) held that:-

> " to the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of the *Constitution*. However, the Court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences. b) taking cue from the decision in *Francis KariokoMuruatetu & Another v. Republic* [2017] eKLR(Muruatetu 1) those who were convicted of sexual offences and whose sentences were passed on the basis that the trial Courts had no discretion but to impose the said mandatory minimum sentence are at liberty to petition the High Court for orders of resentencing in appropriate cases."

24. However, in the case of *Republic v Manyeso* (Petition E013 of 2024) [2025] KESC 16 (KLR), the Supreme Court handled an Appeal from the Court of Appeal that challenged the Court of Appeal's holding that the sentence of life imprisonment under the Sexual Offenses Act was unconstitutional and in the decision rendered in April this year, the Supreme Court held that the Court of Appeal erred in substituting the life imprisonment sentence with a 40-year sentence. The Court affirmed that legislative authority is vested in Parliament, which defines sentences and the Courts' roles are confined to interpreting and adjudicating the constitutionality of a statute, not rectifying or amending it.

25. The Supreme Court had previously recommended that the Attorney General and Parliament develop legislation to define 'what constitutes a life sentence,' suggesting that this function falls within the realm of the Legislature, not the Judiciary and therefore, by defining a life imprisonment to be 40 years, the Court of Appeal usurped legislative powers.

26. Further the Supreme Court in *Republic v Ayako* (Petition E002 of 2024) [2025] KESC 20 (KLR) held that the Court of Appeal acted ultra vires and usurped legislative powers by substituting a life imprisonment sentence with a 30-year term, as the constitutionality of life imprisonment had not been initially litigated at the High Court, which is the court of first instance for constitutional interpretation.

27. The Supreme Court emphasised that defining the parameters of sentences, including life imprisonment, is a function of Parliament, not the Judiciary, and that such a decision by the Court of Appeal arbitrarily created law without legislative involvement or public participation. Furthermore, the Court found that the Court of Appeal violated the doctrine of stare decisis by misapplying the *ratio decidendi* from *Muruatetu I* (which specifically dealt with the mandatory death penalty for murder) to other offences with mandatory or minimum sentences. Consequently, the Supreme Court allowed the appeal, reinstated the High Court's judgment, and ordered that the respondent serve life imprisonment as originally sentenced by the Magistrates' Court. The Court also criticized the Office of the Director of Public Prosecutions for its inconsistent stance, supporting a term sentence at the Court of Appeal and then appealing against it, stating that such conduct erodes public confidence in the justice system.

28. The Supreme Court has consistently affirmed that mandatory life imprisonment in Kenya remains constitutional. This means that the indefinite nature of a life sentence under Section 8 (2) of the *Sexual Offenses Act* cannot be redefined to include a specific end date. For such a change to occur, Parliament would need to amend the law, as explicitly stated by the Supreme Court.

29. In this particular case, the Applicant was sentenced by the trial court to life imprisonment under the aforementioned Section 8(2) of the *Sexual Offenses Act*. His appeal in High Court in Criminal Appeal No. 19 of 2027 which was on conviction and sentence, was dismissed in its entirety.

30. The Applicant's current application for resentencing was predicated on the belief that mandatory sentencing had been declared unconstitutional. However, in light of the definitive Supreme Court decisions, his prayer for resentencing cannot be granted. Flowing from there, his prayer that any custodial sentence imposed be considered taking into account Section 333 (2) of the *Criminal Procedure Code* also fails. He has no recourse before this Court.

31. Consequently, the Applicant's application, filed on 12th October, 2023 is therefore dismissed.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 1ST DAY OF JULY, 2025.

PATRICIA GICHOHI

JUDGE

In the presence of:-

Nicholas Kipruto Ngetich -Applicant

Mr. Kihara for the Respondent

Ruto, Court Assistant