



REPUBLIC OF KENYA



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**Kagere & another v Attorney General (Petition E645 of 2024) [2025] KEHC 12530 (KLR)
(Constitutional and Human Rights) (10 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12530 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E645 OF 2024

AB MWAMUYE, J

SEPTEMBER 10, 2025

**IN THE MATTER OF ARTICLES 19(2)(3), 20(3)(4), 21(3), 22(1)(2)(B)(C)(D), 23, 24(1)
(C), 156(4)(A)(B), 153(4)(A), 165(3)(A)(B)(D)(I)(II) AND 258 OF THE CONSTITUTION**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 10(1)
(A)(B), 10(2)(B), 27(1)(2)(4)(5), 28, 47 AND 259 OF THE CONSTITUTION**

AND

**IN THE MATTER OF INVOICATING OF THE 2ND
SCHEDULE OF PRISON'S ACT SUBSIDIARY LEGISLATION**

AND

**IN THE MATTER OF THE APPLICATION OF SECTION
39 OF THE SEXUAL OFFENCES ACT NO.3 OF 2006**

AND

**IN THE MATTER OF APPLICATION AND INTERPRETATION OF PARAGRAPHS 1.1.3,
2.3.6 AND 4.7.5 OF THE JUDICIAL SERVICE ACT SENTENCING GUIDELINES (2023)**

AND

**AND IN THE MATTER OF APPLICATION OF PARAGRAPH 2.7.5 OF
THE JUDICIAL SERVICE ACT SENTENCING GUIDELINES (2023)**

AND

**IN THE MATTER OF THE APPLICATION OF SECTION 30(2) AND
SECTION 47 OF THE PRISON'S ACT (CAP 60) LAWS OF KENYA**

BETWEEN

JORAM MAINA KAGERE 1ST PETITIONER



PAUL ODHIAMBO OGUNDE 2ND PETITIONER

AND

THE ATTORNEY GENERAL RESPONDENT

JUDGMENT

1. The Petitioner approached this Court vide an undated Petition seeking the following orders: -
 - i. An order that the Respondent comply with the demands of Section 47 of the *Sexual Offences Act* and make regulations that would see the prerequisites to Section 39 of the *Act* implemented.
 - ii. A declaration that the continued non application of Section 39 of the *Act* is unconstitutional for it has abjectly violated Articles 10, 24(i)(e), 25(a), 27(1)(2), 28 and 47 of the *Constitution*.
 - iii. An order that all convicts who qualify the requirements of Section 39 of the *Act* be transmuted promptly to the said supervision of rehabilitative nature as therein demanded including those that have been disenfranchised by its lack of application.
 - iv. An order that such transmutation as prayed for in prayer (iii) above be promptly effected by the Prisons Department as by law demanded, and that the covert information be relayed to all convicts of the Petitioners' nature across the country *vide* the demands of Article 35(1) of the *Constitution*.
 - v. An order that all convicts who qualify themselves within the gist of Section 39 of the *Act* be free to make miscellaneous applications for the imposition of the long term supervision albeit of rehabilitative nature to their respective courts as part of their sentence, having served part of their sentence as contemplated in Section 39 (4) of the *Act* – in prison, a move which will greatly augment the ongoing Rapid Response Initiative Program that has been undertaken by the Judiciary in a bid to decongest our prisons which are already filled beyond capacity.
 - vi. An order that as the Respondent contemplates compliance to Section 39 and 47 of the *Sexual Offences Act* the 1st Petitioner be accrued the prerequisites and the benefits of Section 47 as read with the Second Schedule of the *Prisons Act* which provides for how to put into effect the requirements of the Compulsory Supervision orders envisaged therein on priority basis.
 - vii. An order that trial courts promptly apply the gist of Section 39 of the *Act* within the meaning of Section 169(2) as read with Section 219 of the *Criminal Procedure Code* as they pronounce the sentences in an apt crisp and unambiguous manner so as to mirror the aspirations of the provisions of Article 24(1)(e) and 259(1) of the *Constitution*.
 - viii. Any other order that this Hon. Court may deem fair and just in the circumstances of this very humble Petition.
2. The Petition was accompanied by an undated Supporting Affidavit sworn by the Petitioners, Joram Maina Kagere and Paul Ogunde who aver that they were both convicted and sentenced to imprisonment. They state that while in prison, they were both engaged in purposeful and productive rehabilitative avenues which shall foster their re-integration back to the society upon their release from prison.



3. They further aver that they have served a substantial part of their sentences as required by law thus the 1st Petitioner is entitled to the benefits under Section 39 of the *Sexual Offences Act* No. 3 of 2006, and by dint of paragraphs 1.1.3, 2.3.6 and 4.7.5 of the *Judicial Service Act (Sentencing Guidelines)* 2023 as read with the provisions to Article 73(1) and 10(2) of the *Constitution*, the authorities in our Penal Institution have completely refused to apply the doctrines and demands of Section 39 of the *Sexual Offences Act* for our good and the good of Article 47 of the *Constitution* which also negatively impacts the provisions on Article 28 of the *Constitution*.
4. The Petitioners aver that, notwithstanding the fact that the 1st Petitioner satisfies the criteria set forth under Section 39 of the *Sexual Offences Act*, and despite the provisions of Section 47 of the *Prisons Act* conferring the requisite authority upon the Commissioner of Prisons to implement such orders, no convict has, to date, been directed to serve the remainder of their sentence under a Compulsory Supervision Order, nearly two decades after the enactment of the *Sexual Offences Act* (SOA).
5. According to them, this procedural lull belittles the edicts of Articles 24(i)(e), 10(i)(b), 27(i), 28, 47, 73 and 259 (1) of the *Constitution*.
6. They Petitioners contend that Article 47 and Article 24(1)(e) of the *Constitution* delegates to the 1st Petitioner, an entitlement to a less restrictive means of punishment so as to achieve the purpose of our punishment regime, the restrictive means of which is apparently provided vide Section 39 of the SOA as intertwined with the provisions of Article 47 of the *Prisons Act*.
7. In response and in opposition to the Petition, the Respondent filed Grounds of Opposition dated 3rd February 2025 where they averred that the Petition herein does not meet the threshold of a Constitutional petition as laid down in the case of *Anarita Karimi Njeru v Republic* (No.1) [1979] KLR 154 and emphasized in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance* [2014] eKLR.
8. The Respondent further avers that the Petitioners have failed to discharge the burden of proof in demonstrating the specific nature or manner in which their rights have allegedly been infringed, whether under the *Constitution* or any other written law, in relation to Section 39 of the *Sexual Offences Act*. The Respondent contends, in addition, that the reliefs sought by the Petitioners are unconstitutional, being unlawful, lacking legitimacy, tenuous, and devoid of any legal foundation or justification.
9. The Respondent contends that the applicability of Section 39(2) of the *Sexual Offences Act* is limited to instances where the trial court expressly issues an order pursuant thereto as part of the sentence. Furthermore, where an appeal is lodged, the validity of such an order must be raised as a specific ground of appeal, upon which the appellate court shall render a determination in accordance with the provisions set out under Section 39(4) of the *Sexual Offences Act*.
10. The Respondent further argues that a long-term supervision order may only be issued by a competent court as an integral part of the sentencing process. This implies that such an order may be made at the time of trial, during the hearing of an appeal against conviction and sentence, or pursuant to an application for review of sentence by the convict. Accordingly, the Respondent contends that, notwithstanding whether an accused person qualifies as a dangerous sexual offender under Section 39(1) of the *Sexual Offences Act*, in the absence of an express order for long-term supervision incorporated into the sentence by the court, the accused cannot subsequently seek to invoke or enforce such an order after having served their custodial sentence.



11. The Petition was canvassed by way of written submissions, and in compliance all parties filed their submissions.

Petitioners' Submissions

12. The Petitioners filed submissions dated 5th January 2025 where they submitted that ever since the *Sexual Offences Act* was assented to on the 21st day of July 2006, no trial court is known to have applied the provisions of Section 39(4) of the *Sexual Offences Act* while sentencing even after branding themselves as 'dangerous sexual offenders' as branded from the provision.
13. They relied on the case of *Mokela vs The Staate* (135/11) (2011) ZASCA 166 where the Supreme Court of South Africa held that an Appellate Court does not enjoy the carte blanche to interfere with the sentences which have been properly imposed by a sentencing court. They thus assert that Section 39(2) of the *Sexual Offences Act* orders a sentencing court to see to it that during sentencing an individual who qualifies for the edicts of the provision should be placed under long-term supervision of rehabilitative nature for a period of not less than five (5) years being part of a term of imprisonment imposed by Court.
14. The Petitioners further submit that the doctrine in question appears never to have been applied by sentencing courts, and assert that the Attorney General has, in effect, sought to curtail or unduly influence the jurisdiction and discretion of the Magistrates' Courts, particularly with respect to the application of Alternative Dispute Resolution mechanisms in cases involving sexual offenders.
15. It is the Petitioners' submission that the rights of persons who have been sentenced to serve various imprisonment terms *vide* the penal regime of the *Sexual Offences Act* No. 3 of 2006 have been and continue to be denied their rights to the prerequisites of Section 39(4) of the Act for the trial courts have systemically failed to put into gears the relevant provisions of law while sentencing them thus subjecting them to cruel, inhuman and degrading punishment, granting this court jurisdiction to determine the issues raised in the instant Petition.
16. They further submit that after the trial court issues a sentence to a convict under the *Sexual Offences Act*, the Commissioner of Prisons should notify the relevant court about the prisoners who qualify to be placed under the long-term supervision program with a view of undergoing the exposition contemplated in Section 39(4) of the *Sexual Offences Act* in the likely event the supervisory program was skipped during sentencing.

Respondent's Submissions

17. The Respondent filed submissions dated 25th February 2025, wherein the Office of the Attorney General asserted that Section 39 of the *Sexual Offences Act* contemplates the imposition of a non-custodial sentence, namely a long-term supervision order, in certain cases involving sexual offences. It was submitted that the discretion to impose such an order lies exclusively with the trial court. The Respondent further averred that a plain reading of Section 39 reveals that the issuance of such an order is not mandatory, and that it must be expressly made by the trial court as part of the sentencing order.
18. They further stated that regardless of whether the accused in question falls within the category of dangerous sexual offender under Section 39(1) of the *Sexual Offences Act*, without an express order by the court, given as part of the sentence, the accused cannot purport to seek the order later on after serving their sentence.
19. Reliance was placed on the case of *JK v Republic* [2024] KEHC 14934 (KLR) and the case of *Fred Otieno Odmbambo vs Republic* [2019] eKLR.



20. The Respondent submitted that under Section 39(2) the prisons department can only act on the orders issued by the court as it does not have the powers to create a structure for the review of sexual offences in prison, as upon proclamation of the sentence by the court, the decision meted is deemed to be functus officio. Reliance is placed in *Nathan Khaemba Makokha & others v Attorney General & another* [2022] eKLR, and *Langat v Republic* [2023] KEHC 19746 (KLR).
21. The Respondent contends that the Petition has not pleaded with any particulars or with reasonable clarity on how the Petitioners rights have been violated and the extent of the violation and also that the Petitioners have not demonstrated how the Respondent has infringed such rights or even how Section 39 relates to the application of such rights thus the instant petition should be dismissed. They relied on the Supreme Court case of *Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others* [2014] eKLR.

Petitioners' Further Submissions

22. The Petitioners filed further submissions, which were undated, wherein they submitted that paragraphs 39 to 50 of the Petition sufficiently demonstrate the prejudice suffered by individuals who would otherwise have qualified for classification as dangerous sexual offenders, due to the consistent failure to invoke the relevant, albeit expunged, statutory provisions. The Petitioners further reiterated the contents of their Petition and the supporting Affidavit, and maintained their position in opposition to the Grounds of Opposition filed by the Respondents.

Analysis And Determination

23. Having carefully considered the Petition, the responses, the arguments by the parties and the decisions relied on, the following key issues arise for determination: -
 - i. Whether the Petitioners' rights under Articles 10, 24(i)(e), 25(a), 27(1)(2), 28 and 47 of the *Constitution* have been violated by the courts not invoking Section 39(1) and (2) of the *Sexual Offences Act*.
24. It is clear that this petition revolves around the interpretation of Section 39 of the *Sexual Offences Act*, which section the Petitioners contend violates their rights under Articles 10, 24(i)(e), 25(a), 27(1)(2), 28 and 47 of the *Constitution*.
25. 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 as a 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.”

26. It is the trial court that makes an order for that in the event the offender is released after serving part of his sentence, the prisons department shall ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence.
27. The Petitioners seek a declaration that Section 39 of the *Sexual Offences Act* No. 3 of 2006 allows a court of law to release a dangerous sexual offender after he or she has served a substantial term of the imprisonment. In the instant Petition, the 1st Petitioner states that he is remaining with a five-year sentence and should therefore be placed under long-term supervision to serve the remaining term.
28. Section 39 however provides that where a convict is declared to be a dangerous sexual offender and is sentenced to imprisonment without an option of a fine and, as part of the sentence, the court orders that in the event such offender is released, for any reason, before serving his full term of imprisonment imposed by a court, the prisons department should ensure that the offender is placed under long-term supervision. The section does not oblige a court of law to release a dangerous sexual offender after he or she has served a substantial term of imprisonment as implied by the Petitioners. The Court is not obligated to direct release of a person declared to be a dangerous sexual offender upon serving a substantial term of imprisonment since such a term is neither provided for nor is it defined.
29. The Petitioners further seek a declaration that all offenders sentenced under the sentencing provisos of section 8 of the *Sexual Offences Act* qualify to be termed dangerous sexual offenders and are thus eligible to the long-term supervision of five (5) years as provided under Section 39 of the *Sexual Offences Act*. Whereas one of the situations where a convict may be declared a dangerous sexual offender is where a convict has been convicted of a sexual offence against a child, the provision does not state that in these circumstances, the convict must be declared to be a dangerous sexual offender.
30. It is for the trial court to consider the circumstances of the offence and decide whether or not to declare the offender a dangerous sexual offender. The Petitioners have not shown or attached any evidence to show that they were declared “dangerous criminals” and even though the 1st Petitioner qualified as a dangerous sexual offender under Section 39(1) of the *Sexual Offences Act*, the trial court never declared him so therefore, the prayer for declaration for long-term supervision fails. In addition, this Court cannot declare that all offenders sentenced under the sentencing provisions of Section 8 of the *Sexual Offences Act* do qualify to be termed dangerous sexual offenders as that would amount to fettering the discretion of the trial courts that make decisions depending on the circumstances of each case.
31. I also agree with the decision in *Fred Otieno Odhiambo vs Republic* [2019] eKLR where the court stated as follows:

“(9) It is for the foregoing reason that I find that, in the absence of an order of the trial court, made as part of the Appellant’s sentence, Section 39 of the *Sexual Offences Act* there would be no basis for an order that the Appellant be released on probation or placed on community service for the remainder of his imprisonment term. To my mind, Section 39 aforementioned would only kick in were it to be demonstrated that the Appellant, say after having earned remission, is due for release soon before serving the full term. There is no such indication herein, save the assertion that he has served a substantial part of his sentence.”



32. The Petitioners were tried and properly sentenced however, they seek what is essentially a review of the sentence meted out and seem to be seeking for an appeal through the backdoor. In the absence of an order by the trial court made as part of the Petitioners' sentence, there is no basis for their release to long-term rehabilitation as provided under Section 39 of the *Sexual Offences Act*. The Petitioners have also not demonstrated that they are due for release soon before serving the full term.
33. The guidelines for interfering with sentence were set out in the Court of Appeal in the case of *Benard Kimani Gacheru v Republic* [2002] eKLR where it was held that:
- “It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on the wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states it exists.”
34. The Petitioners were convicted of a serious offence and sentenced accordingly. Both courts of appeal upheld the conviction and sentence. The process to set aside the conviction and sentence is well set out in law. This court cannot therefore simply overturn conviction and sentence accordingly issued by the trial court.
35. From the foregoing it is evident that whereas the Petitioners qualify for declaration as a dangerous sexual offender or purposes of Section 39 of the *Sexual Offences Act*, granted the fact that they were convicted of a sexual offence against a child, it is noteworthy that they were not so declared by the Court that convicted and sentenced them.
36. The court for the purposes of Section 39(2) of the *Sexual Offences Act* is the trial court and therefore in the absence of an order of the trial court, made as part of the Petitioners' sentence, the orders sought in the instant petition are untenable.
37. Further, the Supreme Court in the decision in Petition No. E018 of 2023, *Republic v Joshua Gichuki Mwangi & Others* was emphatic that the sentences prescribed under the *Sexual Offences Act* remain legal, lawful and valid until such a time when the said *Act* will be repealed. In its own words, the court held as hereunder;
- “...the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence.”
38. Having considered the issues raised in the instant petition, I have no basis for finding that the Petitioners' rights under Articles 10, 24(i)(e), 25(a), 27(1)(2), 28 and 47 of the *Constitution* have been violated. In light of the above I am satisfied that the Petitioners' Petition is misconceived and lacks merit and the same is accordingly dismissed.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 10TH DAY OF SEPTEMBER 2025.



BAHATI MWAMUYE

JUDGE

In the presence of: -

The 1st Petitioner – Joram Maina present at Kamiti Maximum

The 2nd Petitioner – Paul Odhimabo present at Kamiti Maximum

Counsel for the Respondent – Mr. Weche h/b Ms. Robi

Court Assistant – Ms. Lwambia

