



REPUBLIC OF KENYA



**KENYA LAW**  
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**Musyoka v Republic (Criminal Petition E007 of 2020)  
[2024] KEHC 1434 (KLR) (14 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1434 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL PETITION E007 OF 2020  
FROO OLEL, J  
FEBRUARY 14, 2024**

**BETWEEN**

**PETER NTHUSI MUSYOKA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**A. Introduction**

1. The applicant was charged and convicted of the offence of Defilement contrary to section 8(1) as read with Section 8(2) of the *Sexual offences Act* No 3 of 2006 by Senior Resident Magistrate (Hon M.A.O. Opanga) in Kithimani PMCR S.O no. 37/2012 and was sentenced to serve life imprisonment; He appealed against the said conviction and sentence vide Machakos HCCR Appeal No 329 of 2013 and the said appeal was dismissed. Thereafter the appellant exercised his further right of appeal to the court of appeal on issues of law and his appeal being CA Criminal Appeal No 26 OF 2016 was heard on merit. The appeal as against conviction was dismissed on 26<sup>th</sup> January 2018.
2. The applicant did file this application/petition under provision of Article 22, 23, 27(1),(2), 52(2)(q), and 165 of *the constitution* of Kenya and seeks that this Honorable court be pleased to re consider the life sentence passed and be pleased to resentence him to a lenient definite sentence, premised on rehabilitate sentence rather than retributive punishment. The application was lodged purely on the basis on the legality of the mandatory nature of sentencing in line with the court of Appeal decision in Evans Wanjala Wanyonyi vr Republic; Cristorpher Ochieng Vrs Republic (2018) EKLR, Kisumu CR Appeal N0 202 of 2011 & Jared Koita Injiri vrs Republic, Kisumu CR Appeal No 93 of 2014. where it had been held that mandatory sentences were unconstitutional as they infringed on the sentence discretion of the trial court.
3. The Applicant submitted that he was a first offender and had personally reformed and acquired good skill, while in prison. He was remorseful to the harm he caused the complainant and any other person



who had been affected by his action. He prayed for leniency and for the court to have mercy on him. The period already served in prison was adequate and he prayed that this period served be considered adequate for purpose of his punishment and he be released to reintegrate back into the society as a reformed person.

4. The state opposed this petition through their submissions filed on 08.02.2022. it was their contention that the court was functus officio as the applicants Appeal as against conviction and sentence had been upheld by the High court and the court of Appeal and this court did not have locus to reconsider the same

## C. Analysis of Law

### Nature and scope of resentencing Jurisdiction

5. It bears repeating that, the High Court has the mandate under Article 165 (3) of *the Constitution* to hear and determine matters on enforcement of rights and fundamental freedoms enshrined in *the constitution*. A further leapfrog development is found under Article 50(2)(p) of *the Constitution* 2010 which provides that;

50(2) Every accused person has the right to a fair trial, which includes the right—

- (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing

6. In Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Ltd & 2 Others, Application No. 2 of 2011, the supreme court did pronounce itself that:

“A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court 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...”

7. The Court of Appeal in the case of William Okungu Kittiny -v- R (2018) eKLR stated:

“The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit court below it from ordering sentence re-hearing in a matter pending before the courts. By Article 163 (7) of *the Constitution*, the decision of the Supreme Court has immediate and binding effect on all the other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases”.

8. In light thereof, nothing prevents the court from applying the decisional law and ordering sentence review in cases where the penalty imposed can be challenged on valid legal grounds. To me, denying an accused the benefit of court’s discretion to impose appropriate sentence is inconsistent with the right to fair trial. Fair trial includes sentencing. On that basis this court has jurisdiction to determine review of sentence.
9. A similar position was taken by the High Court, in Stephen Kimathi Mutunga -v- Republic (2019) eKLR where it was held that the High Court has unlimited jurisdiction in both Civil and Criminal matters, and was mandated to enforcing fundamental rights and freedoms as enshrined in *the Constitution*. The High Court thus had jurisdiction to deal with the petition for sentencing rehearing.



10. In Michael Kathewa Laichena & Another -v- Republic (2018) eKLR Majanja J. stated:

“by re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by the imposition of the mandatory death sentence”.

### C. Sentencing

11. The appellant was sentenced to serve life in imprisonment as provided for under section 8(1) as read with section 8(2) of the *sexual offences Act* on 21<sup>st</sup> September 2013, for defiling a seven (7) year old girl, which incident occurred on 16<sup>th</sup> November 2012. The sentence as provided under the *Sexual offences Act* No3 of 2026 was mandatory and the court did not have the discretion to vary the same. The applicant relied on the petition of Philip Mueke & 5 others and other citations, Evans Wanjala Wanyonyi vr Republic; Cristorpher Ochieng vrs Republic (2018) eKLR, Kisumu CR Appeal n0 202 of 2011 & Jared koita Injiri vrs Republic, kisumu Cr Appeal no 93 of 2014, which held that mandatory sentence was unlawful, to convince court that jurisprudence regarding mandatory sentencing had changed and thus prayed for a more balanced and fairer sentence.
12. In the Muruatetu Case, the Supreme Court agreed with the petitioners that the mandatory nature of the death sentence was unconstitutional and as a result that the commutation of their death sentence to life imprisonment was equally untenable. For that reason, the persons then serving the mandatory death sentence or whose sentences to death had been commuted to life by executive fiat could now petition for rehearing and re-sentencing. Within the same appeal the Supreme Court was asked to look into the sentence of life imprisonment. The Supreme Court framed the issue thus: “(c) Whether this court should fix a definite number of years of imprisonment subject to remission rules, which would constitute life imprisonment.”
13. In answering the issue, the Supreme Court was of the view that the issue of life imprisonment was not within the jurisdiction of the court to deal with. The court agreed with the view expressed in Jackson Wangui and Another –vs- Republic [2014] eKLR where the court observed: -

“As submitted by the petitioner, however what amounts to life imprisonment is unclear in our circumstances. It is not, however, for the court to determine what should amount to a life sentence; whether one’s natural life or a term of years. In our view, that is also province of legislature...as to what amount, to life imprisonment, this is a matter for the legislative branch of Government. It is not for our courts to determine for the people what should be a sufficient term of years for a person who committed an offence that society finds reprehensible to serve.”
14. The Supreme Court went on to state at Paragraph 95 that:-

“We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as the protection of civilians who may be harmed by some prisoners. We find the comparative jurisprudence with regard to indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevance judicial officer along established parameters of criminal responsibilities, retribution, rehabilitation and recidivism.”



15. The court then proceeded to recommend to the Attorney General to develop legislation on what constitutes “life imprisonment.” That legislation has not come into force yet.
16. In *Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR)(7 July 2023) (Judgment)Neutral Citation:[2023]KECA827(KLR)Court of Appeal at Malindi P Nyamweya, JW Lessit and GV Odunga, JJ which was a second appeal by an accused that was convicted of the charge of defiling a girl aged 4½ years. The appellant was sentenced to life imprisonment at the trial court. The appellant’s first appeal at the High Court was dismissed. The appellant further aggrieved filed the instant appeal on grounds that he committed the offence when he was only 18 years old and was a first offender. The Court of Appeal held that the constitutionality of the mandatory and indeterminate sentence of life imprisonment was discriminatory, inhumane and a violation of the right to human dignity. The Court of Appeal partly allowed the appeal, the life sentence was substituted with a sentence of 40 years’ imprisonment. The 40 years was to serve as a deterrent.
17. This court would not normally reconsider issue of sentencing, where the matter has regurgitated before the high court and court of Appeal. In this matter the court of Appeal did not consider the issue of the Appellants sentencing by dint of section 361(1) of the criminal procedure Code. While the high court finding was made in 2015 before the new jurisprudence had been developed regarding re sentencing. The high court as noted above has original jurisdiction under Article 165(3) of *the constitution* 2010, to hear and determine any petition touching on the petitioner’s fundamental right and where appropriate resentence him based on the current jurisprudence developed on mandatory sentencing, which tied the court hands as at the time he was convicted and sentenced.

#### **D. Determination**

18. The undisputed facts in this case is that the petitioner defiled a seven (7) year old innocent child, MW who had been sent to the shop to buy tomatoes by her mother. He was caught red handed by a neighbor PW5, who was walking home from Kabaa market and heard commotion from the thicket. She went to check what was going on and saw the appellant run away from the scene of the incident. The minor was taken to hospital and medical evidence confirmed that indeed she had been defiled.
19. The petitioner prayed for remorse and submitted that he had learnt from his incarceration and was remorseful for the harm occasioned to the victim. He was of the opinion that the time served was adequate and he should be allowed to reintegrate back into the community as he had suffered adequate punishment for the offence committed.
20. Having considered all the above factors I do find that it is unlawful to jail the petitioner to an indeterminate period of time as that runs contrary to Article 50(2), (q) of *the Constitution* and Article 27, (1) &(2) and 28 of *the constitution* of Kenya 2010.
21. In the circumstances of this case I do exercise my discretion and set aside the life sentence imposed on the Appellant vide the Judgment of by Senior Resident Magistrate (Hon M.A.O. Opanga) In Kithimani Pricipal Magistratcourt SO Case No 37 of 2012, and substitute the same with a sentence of twenty five years (25) which will run from 12<sup>th</sup> September 2013, when the initial conviction and sentence was effected.
22. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 14<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**FRANCIS RAYOLA OLEL**



**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 14<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**In the presence of;**

Applicant present from Kamiti Maximu Prison

Mr. Mongare for Respondent

Sam - Court Assistant

