



**Amunze v Republic (Miscellaneous Application E026 of 2023)
[2024] KEHC 7262 (KLR) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 7262 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS APPLICATION E026 OF 2023**

PJO OTIENO, J

MARCH 1, 2024

**IN THE MATTER OF ARTICLES 2, 3(A), 19(2), 20(1), 22 (1), 23(1), 25(C), 26(1),
27(1)(4),28,50(2)(P),159(2) AND 165(3) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION
OF RIGHTS FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE
RULES, 2010 AND IN THE MATTER OF PETITION NO. E017 OF
2021 PHILIP MUEKE MAINGI & 5 OTHERS VS DPP AT MACHAKOS**

AND

**IN THE MATTER OF SECTION 8(1) AS READ WITH
SECTION 8(2) OF THE SEXUAL OFFENCES ACT**

AND

**IN THE MATTER OF SECTION 333(2) OF THE CRIMINAL
PROCEDURE CODE CAP 75 LAWS OF KENYA**

BETWEEN

ANTHONY AMUNZE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Before the court is the applicant’s undated chamber summons application filed in court on 7/6/2023 seeking a review of his life sentence meted in Criminal Case No. 17 of 2012 and affirmed by both High Court and Court of Appeal. He seeks that he be awarded a lenient definite sentence under article 50(2)



- (p)(q) of the Constitution of Kenya. He further prays that this court invokes the provisions of section 333(2) of the Criminal Procedure and takes into account the time he has spent in custody.
2. The application is supported by the affidavit of Antony Amunze and another document titled application in which he avers that he was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 in Criminal Case No. 17 of 2012. He filed an appeal in the High Court at Kakamega, HCCRA No. 203 of 2013 against his conviction and sentencing which appeal was dismissed. He filed a second appeal in the Court of Appeal *vide* Kisumu Criminal Appeal No. 147 of 2016 which appeal was also dismissed with the court stating that he was not barred from seeking resentencing. He argues that the high court has competent jurisdiction to hear and determine the subject application under article 165(3)(b) of the Constitution of Kenya, 2010.
 3. Ms. Osoro for the respondent is not opposed to the application and urged the court to abide by the Court of Appeal directions that the applicant was at liberty to pursue a review in the appropriate court. Counsel equally argued that since life imprisonment was rendered unconstitutional by the Court of Appeal, this court has the requisite jurisdiction to entertain the subject application and resentence the applicant.
 4. From the application and the response thereto, the issue that arises for my determination is whether court should consider revising the sentence the applicant continues to serve.
 5. Following and developing the Muruatetu directions on 6th July, 2021¹, there have been further recent developments on the law on the legitimacy of life imprisonment with the Court of Appeal sitting at Malindi in Criminal Appeal No. 12 of 2021 Julius Kitsao Manyeso v Republic holding as follows;

“21. We note that the decisions of this Court relied on by the Appellant, namely Evans Wanjala Wanyonyi vs Rep [2019] eKLR and Jared Koita Injiri v Republic Kisumu Crim.App No 93 of 2014 were decided before the Supreme Court clarified the application of its decision in Francis Karioko Muruatetu & another v Republic [2021] eKLR and limited its finding of unconstitutionality of mandatory sentences to mandatory death sentences imposed on murder convicts pursuant to section 204 of the Penal Code. This fact notwithstanding, we are of the view that the reasoning in Francis Karioko Muruatetu & Another v Republic [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of Page 13 of 18 Judgment- Mld Criminal Appeal No 12 of 2021 equality before the law under Article 27 of the Constitution. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under Article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in Vinter and others vs The United Kingdom (Application nos. 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that

¹ Francis Karioko Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) [2021] eKLR



all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.”

6. With the court of appeal establishing that life imprisonment amounts to a violation of a convict’s rights to human dignity as espoused under article 28 of the Constitution, this court is empowered by article 23(1) and 165(3)(b) of the Constitution to hear and determine applications on the violations of fundamental rights and freedoms. That jurisdiction was emphasized by the Supreme Court in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate & 4 others [2013] eKLR where it was held as follows;

“ [111]... The Kenyan Constitution has given the High Court the exclusive jurisdiction to deal with matters of violations of fundamental rights (Article 23 as read with Article 165 of the Constitution). The High Court, on this point, has correctly pronounced itself in a judgment by Justices Nambuye and Aroni, in Protus Buliba Shikuku v R, Constitutional Reference No. 3 of 2011, [2012] eKLR.

- (112) The Shikuku Case fell within the criminal justice system; it involved a claim of violation of the petitioner’s fundamental rights by the Court of Appeal, in a final appeal. The trial Court failed to impose against the petitioner the least sentence available in law, at the time of sentencing. On the issue of jurisdiction, the learned judges, relying on Articles 20, 22, 23 and 165 of the Constitution, rightly held that the High Court had jurisdiction to redress a violation that arose from the operation of law through the system of courts, even if the case had gone through the appellate level. In so holding, the High Court stated with approval the *dicta* of Shield J, interpreting the provisions of the 1963 Constitution in Marete v. Attorney General [1987] KLR 690:

“The contravention by the State of any of the protective provisions of the Constitution is prohibited and the High Court is empowered to award redress to any person who has suffered such a contravention.”

- (113) Thus, in answer to Mr. Nowrojee’s first two questions posed to the Supreme Court, my answer is this: There is no injustice that the Constitution of Kenya is powerless to redress.”

7. Guided by the decision of the Court of Appeal in Julius Kitsao Manyeso v Republic (supra) which binds upon this court, it is my finding that the sentence of life imprisonment meted on the applicant is unconstitutional and a contravention of the Constitution and cannot be left to stand. It is set aside and the court is then bound to impose an appropriate sentence.
8. In executing the duty to resentence, the court notes that the victim of the applicant was 11 years old. She narrated how the applicant defiled her by holding her neck which left as at the time of giving her testimony, faded scars on the neck as reminders of the attack by the applicant. After the act, with no remorse, the applicant just left her in the house he had taken her and left with her books because she was attacked on her way from school. That depicts the applicant as a very cruel and heartless human being who deserves retribution and deterrence as an expression of disapproval of the beastly acts. The court notes he has been in custody since 8.11.2013.
9. From the proceedings on the record, the pages on the mitigation appear to be missing. Nonetheless, from the judgment of the trial court the mitigation offered by the applicant was that he was a family man and that he had two children one of whom being aged two months and that he needed to be present and not kept away from the young children.



10. There was no show before the trial court of remorse by the applicant. For that reason in re-sentencing, the court sets aside the life imprisonment term and in its place substituted an imprisonment term of twenty-five (25) years computed from the date of his conviction and sentence because he was tried while on bond.
11. Having being on bond pending trial, section 333 (2) *Criminal Procedure Code* has no beneficial application to him. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 1ST DAY OF MARCH, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Ms. Chala for the Prosecution/Respondent

Applicant in person

Court Assistant: Polycap Mukabwa

