



**Musau v Republic (Criminal Miscellaneous Application  
E021 of 2023) [2024] KEHC 2532 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2532 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL MISCELLANEOUS APPLICATION E021 OF 2023**

**FR OLEL, J  
MARCH 13, 2024**

**BETWEEN**

**SAMUEL KILONZO MUSAU ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant herein, was charged with the offence of defilement contrary to Section 8(1) of the [Sexual Offences Act](#) No 3 of 2006 the particulars being that on the 16<sup>th</sup> day of March 2008, at Mbusyani Sub –location, Ndithini location, Yatta District within Eastern Province intentionally and unlawfully did an act which caused penetration with his genitals namely penis into the vagina of M. N a girl aged 7 years. In the trial court at Kithimani CR case No 268 of 2008 , he was convicted and sentenced to serve life imprisonment by the Hon A.W. Mwangi.
2. He then appealed the decision of the Trial court in Machakos HCCRA No.269 of 2010 whereby the appeal was heard and dismissed on 28<sup>th</sup> September 2012 by Hon J. M. Ngugi. The accused further lodged a further an appeal at Nairobi Court of Appeal CR appeal No. 153 of 2013 which was also dismissed.
3. Based on the Article 22, 23, 27(1),(2), 52(2)(q), and 165 of the [Constitution](#) and the current prevailing jurisprudence on sentencing, the applicant vide the Chamber Summons filed on 8<sup>th</sup> May 2023, sought for resentencing. According to the Applicant, he had so far served 14 years which was enough for rehabilitation and that the court orders that the remaining sentence if any be served under probation in the community



## **Applicant's Submissions**

4. The Applicant written submissions were filed on 16<sup>th</sup> August, 2023, the Applicant submitted that according to the Supreme Court directives in Muruatetu 2 in Petition No 15& 16 of 2015, the apex court gave fresh directions as to the application relating to mandatory nature of death sentence. It was submitted that further to the directions in Muruatetu, Article 165(3) (a) and Article 50 (6) of the Constitution give this court unlimited jurisdiction in criminal matters and has power to grant the relief sought in the application . Reliance was made to the case of Edwin Wachira and 9 others that persons convicted and imprisoned under the said offences are free to petition the high court for mitigation and resentencing.
5. It was submitted that it was on the basis of the above directives that the affected petitioners in relation to robbery and other offences should approach the High court for similar declaration and that this present matter falls under this intended directive.
6. According to the Applicant, the court should exercise its inherent powers to resentence him, taking into account the period spent in custody since conviction and award a less severe sentence.
7. Reliance was made to the case of R v Transition Authority & Another Ex parte Kenya Medical Practitioners, Pharmacists and Dentist Union (KMPDU) & 2 others [2013] eKLR
8. The Applicant submitted that he was remorseful and that his present indeterminate life sentence will not bring back the past lost. He requested the court for leniency. He was a man of 45 years at the time he was apprehended, relatively naïve and now he was remorseful and mature, he had never been on the wrong hands of the law before and a probation report will confirm the same.
9. He relied on the case of Michael Kalawao v R (2018) where the court took into account the aggravating and mitigating circumstances as held in Muruatetu case considering factors such as age of the offender, being a first offender, character and record of the offender, remorsefulness of the offender, and the possibility of reform. Reference was again made to Article 165 (3)(d) of the Constitution, Muruatetu 2 directives and order No f in the case of Edwin Wachira & others v Republic & Ali Abdalla Mwanza v R [2018] eKLR
10. On sentencing reliance was made to the case of S v RO and another 2000(2) SACR 248. He also relied on the guidelines for active management of criminal cases in Magistrates Courts and High Courts of Kenya. Reliance was also placed in the case of State v Warren Vorster CC No. 125 of 2009, Edwin Wachira & 9 others Petition No 97 Of 2021, Makumbi Subui Wanyeso v R MSA CR. App No 110 of 2022.
11. The applicant prayed that the court finds that the sentence already served was enough punishment by considering mitigating circumstances. The Respondent orally submitted that while the appreciated the new jurisprudence on sentencing, the circumstances of this case were grave. The applicant defiled a seven-year-old girl and while do so placed stones in her mouth. The sentence passed was therefore proper

## **Analysis of Law**

### **Nature and scope of resentencing**

12. Re-sentencing is neither a hearing de novo nor an appeal. It is a proceeding undertaken within the court's power to review sentence. The court will ordinarily check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding inter alia, are the penalty



law, mitigating or aggravating factors, and the objects of punishments. In re-sentencing proceedings, conviction is not in issue.

13. 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; under article 50(2)(p) of the *Constitution*: 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
14. The applicant has approached the court on the basis of the decisional law in Philip Mueke Maingi & Others Rep, Petition No E17 of 2021, which specifically outlawed mandatory minimum sentence. There is nothing which prevents the court from applying decisional law and ordering sentence review in cases where the penalty imposed was mandatory penalty in law even if the cases are finalized. 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 and/or review sentence’s where appropriate.
15. A similar position was taken by the High Court, in *Stephene 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.
16. 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”.
17. Further, the Court of Appeal sitting in Malindi in *Manyeso v Republic* Criminal Appeal No. 12 of 2021 [2023] KECA 827 (KLR) held that mandatory life sentences are unconstitutional and are “an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of the *Constitution*. The said decision is supported by the case of *Vinter and others v UK*, in which the European court of human rights (ECHR) reasoned that indeterminate life sentence with no hope of parole was degrading and inhuman.
18. The facts of this case were that on the material day, the appellant grabbed the minor who had been sent to the posho mill, dragged her to the bush, put stones in her mouth and proceeded to defile her. On reaching home, the minor told her mother what had transpired, who called for help from fellow villagers and they tracked down and identified the assailant. All quarry workers, where the applicant worked were rounded up and the minor positively identified the applicant as her assailant.

## Sentencing

19. Sentencing is a discretion of the court. But the court should look at the facts and the circumstances of the case in it’s entirety so as to arrive at appropriate sentence. The Court of Appeal *Thomas Mwambu Wenyi v Republic* [2017] eKLR cited the decision of the Supreme Court of India in *Alister Anthony Pereira v State of Maharesbtra* at paragraph 70-71 where the court held the following on sentencing:

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence



commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

20. Also see also *Francis Karioko Muruatetu & Another v Republic* (*Supra*) where the Supreme Court stated the guidelines and mitigating factors in a re-hearing on sentence were discussed. The judiciary has also developed Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 which should be considered.

### **Determination**

21. The petitioner was sentenced to life imprisonment, which as per the current jurisprudence has been held to be unlawful and in breached provisions of Article 27 of the *Constitution* of Kenya 2010. The applicant must benefit from equal protection of the law and equal benefit of the law.
22. I do therefore exercise my discretion and set aside the life sentence imposed on the petitioner herein vide the judgment dated 3rd June 2010 in Kithimani Senior Resident Magistrate Court Criminal Case No 268 of 2008 and instead substitute the sentence imposed for the petitioner herein to serve a term of Thirty years (30) years imprisonment from the date he was sentenced by the trial court.
23. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 13TH DAY OF MARCH, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**Delivered on the virtual platform, Teams this 13th day of March, 2024.**

In the presence of;

Applicant present from Kamiti prison

Ms Otulo for Respondent

Sam Court Assistant

