



**Wekesa v Republic (Criminal Petition E002 of 2023)
[2024] KEHC 3279 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3279 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL PETITION E002 OF 2023**

DK KEMEL, J

MARCH 8, 2024

BETWEEN

MARTIN WANYAMA WEKESA PETITIONER

AND

REPULBIC RESPONDENT

JUDGMENT

1. The Petitioner herein Martin Wanyama Wekesa filed the present petition seeking for re-sentencing in respect of Kimilili Senior Principal magistrate's Court Sexual Offence Case No. 29 of 2018. His case is that he was convicted and sentenced to serve fifteen (15) years' imprisonment. He later lodged an appeal vide Bungoma HCCRA No. 136 of 2019 which was dismissed on 25.2.2022. He opted not to lodge an appeal to the Court of Appeal. His gravamen is that he was deprived of his right to mitigate and a right to get a lesser severe sentence unlike in other offences which amounts to discrimination under Article 27 of *the Constitution*. It is his contention that the mandatory nature of the sentence deprives the court an opportunity to impose an appropriate sentence based on the circumstances of the convicts. His further contention is that the period spent in custody was not considered during the sentencing. The Petitioner finally sought reliance in two cases namely Petition No. 117 of 2021 (Machakos) and Petition No. 97 of 2021 (Mombasa) which were decided by Justices Odunga and Mativo (as they then were) in support of his petition.
2. The petition was canvassed by way of written submissions. Both parties duly complied.
3. The Petitioner's submissions is a reiteration of the grounds in support of his petition.
4. The Respondent's submissions are dated 8/2/2024. It was submitted that the Petitioner's case solely relies on the High Court decision by Mativo J (as he then was in Mombasa Petition No. 97 of 2021) which declared minimum mandatory sentences in the *Sexual Offences Act* as unconditional. It was submitted that the state has since lodged an appeal to the Court of Appeal regarding the decision of



the High Court in the cited petition and which is still pending determination. It was finally submitted that the sentence imposed by the trial court was adequate and should be upheld.

5. I have considered the Petitioner's application as well as the submissions presented. It is not in dispute that the petitioners' appeal was dismissed by this court on 25.2.2022. There is no evidence that the petitioner has lodged an appeal to the Court of Appeal. Be that as it may, it is my considered view that this court lacks jurisdiction to entertain the petition in view of the fact that a court of similar jurisdiction heard the petitioner's appeal and dismissed it. The Petitioner seems to have opted not to proceed to the Court of Appeal. This Petition and a plethora of others have sprung up countrywide following the decision of the Supreme Court in the case of Francis Karioko Muruatetu and 2 Others -vs- R (2017) eKLR which declared mandatory death sentence as unconstitutional. The said court subsequently issued guidelines dated 6.7.2021 to the effect that the decisional law was not an authority to declare minimum sentences as unconstitutional and that the application was limited to murder cases falling within its scope. Hence, the petitioner's case being one of defilement, the request for review on the basis of the Muruatetu case (supra) is without any merit whatsoever. Further, the petitioner has sought to rely on the decision of Odunga J and Mativo J (as they then were) in Petition No. 117 of 2021 (Machakos) and Petition No. 97 of 2021 (Mombasa) respectively. It is noted that the state has already lodged appeals against the said decisions in the Court of Appeal and which have yet to be determined. It is also noted that the Petitioner has averred that he was not accorded an opportunity to mitigate before the sentence was passed. However, a perusal of the record of appeal indicates that the Petitioner duly presented his mitigation before the trial court on 9.8.2019 and that the same were considered before the sentence was imposed. Hence, his claim that he did not get a chance to present his mitigation is not truthful. As noted above, this court is already functus officio and that the Petitioner should move to the Court of Appeal for redress since the said court has powers to interfere with both conviction and sentence. Finally, the Petitioner's reliance on the two Petitions No. 117 of 2021 (Machakos) and No. 97 of 2021 (Mombasa) is not helpful in that the decisions made therein are not binding on this court as they were made by courts of similar jurisdiction and are thus not binding on this court but they could be persuasive. Since appeals have been lodged to the Court of Appeal over the said two decisions, this court has to await their determination and that the issue of its binding nature from this court regarding the constitutionality of minimum mandatory sentences under the [sexual offences Act](#) will then be addressed thereafter. On those grounds, I am satisfied that this petition has been filed without any merit.
6. In view of the foregoing observation, it is my finding that the petitioner's petition lacks merit. The same is dismissed.

DATED AND DELIVERED AT BUNGOMA THIS 8TH DAY OF MARCH 2024

D.KEMEI

JUDGE

In the Presence of:-

Martin Wanyama Wekesa Petitioner

Miss Kibet for Respondent

Peter Court Assistant

