



**Alukonya v Republic (Criminal Miscellaneous Application
E049 of 2022) [2024] KEHC 4199 (KLR) (15 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4199 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL MISCELLANEOUS APPLICATION E049 OF 2022**

SM MOHOCHI, J

APRIL 15, 2024

BETWEEN

DAVID IHAJI ALUKONYA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant, David Ihaji Alukonya was charged, tried and convicted of Defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act*. He was sentenced to life imprisonment in Nakuru CMCR No. 40 of 2010. It is his position that he filed HCCRA No. 296 of 2010, but was not successful. That he also filed an appeal in the Court of Appeal CR No 150 of 2011 which was also not successful. He moved this Court during pendency of his Court of Appeal in HCMISCCR No. 145 of 2019 invoking the *Francis Muruatetu* decision the application was disallowed owing to his pending Appeal.
2. The applicant thereafter on April 13, 2022 filed an undated notice of motion supported by unsworn Affidavit seeking that the Court receives his mitigation for an appropriate sentencing and this time round he is relying on the *Philip Mueke Maingi & other v Republic*.
3. That this Court is bound by the Supreme Court Decisions and that it has the requisite jurisdiction under article 165 to re-hear sentencing and impose an appropriate sentence
4. Directions on the application were issued on the November 20, 2023, for the application to be heard and disposed-off by way of written submissions and parties were to file their respective submissions.
5. The respondent conceded to the applicant's application to the extent that emerging jurisprudence that circumstances of the case are also considered when imposing sentence and recommended the imposition of an imprisonment for a term of forty (40) years.



6. In the Case of *Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment) the Court of Appeal found and held that:

“the reasoning in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR equally applied to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denied a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences were allowed to be heard in mitigation. That was an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of the *Constitution*.

“An indeterminate life sentence was inhumane treatment and violated the right to dignity under article 28 of the *Constitution*. An indeterminate life sentence without any prospect of release or a possibility of review was degrading and inhuman punishment. It was a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation was achieved”.

7. According to The *Judiciary Sentencing Policy Guidelines*:

“The proviso to section 333(2) of the *Criminal Procedure Code* obligates the Court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the Court must take into account the period in which the offender was held in custody during the trial.”

8. While the Applicant is resigned to his conviction he has in a spirited manner engaged this Court in multiple applications noting the sentence he is serving is indeterminate in nature and for all intents and purpose cannot be said to be a reformatory sentence if unsuccessful here he is destined to remain behind bars for the rest of his remaining life.

9. While this Court has had the benefit of the Subordinate Court record giving rise to the sentence imposed. Which record would enrich this Court on the mitigating and aggravating circumstances the Applicant has availed a remarkable certification and accolades both academic, religious and vocational obtained within the prison system.

10. His Application has received a commendation letter from the Officer in charge of the GK Prison Nakuru Main Symon Odhiambo (SP) who states that the Applicant has been undergoing reformation and rehabilitation and has been trained in various vocations like welding electric grade 3 and tailoring and is amongst their most experienced tailor, he is highly disciplined which has earned him a promotion to become the coach of the prison's soccer team.

11. The Court equally has been furnished with the Applicants theological certifications noting that he has acquired a certificate for completion of ombi classes 2019 from Karura Community Chapel, a one-year certificate in bible studies by Christian Leadership Institute of Minnesota and beyond, a higher diploma in bible studies and theology by Christian Leadership Institute of Minnesota and beyond.

12. It is noteworthy that the appellant was a KCPE candidate from the Kamiti GK Prison with remarkable results.



13. With that said this Court further appreciates that imposition of sentence must be informed by the aggravating and mitigating circumstances and severity of the offence.
14. In the South African case of *S v Nyambosi* (2009 1 SACR 447 (T) 451e-f) the Court held that;

“justice must be done, but it must be done with compassion and humanity, not by rule of thumb, and that a sentence must be assessed, not callously or arbitrarily or vindictively, but with due regard to the weakness of human beings and their propensity for succumbing to temptation.”
15. In the case of *Prosecutor v Stephen Lesinko* [2018] eKLR Nyakundi J outlined the principles which will guide a Court when examining the issues pertaining to section 362 of the *Criminal Procedure Code* as follows: -
 - a. Where the decision is grossly erroneous;
 - b. Where there is no compliance with the provisions of the law;
 - c. Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record; and
 - d. Where the material evidence on the parties is not considered;
16. In this instance the Court shall disturb the sentence owing to its indeterminate nature that cannot be a sentence aligned to reformation approach by our penal institutions. While the in the *Manyeso case* (*supra*) the Court of Appeal substituted Life Imprisonment sentence with a forty-year imprisonment sentence the same duration proposed herein by the Respondent. I don't this life imprisonment is not strictly equated with a 40-year sentence imposed but rather the most egregious of cases will definitely attract the most severe and mitigating circumstances would thus reduce the imprisonment term to be imposed.
17. The Applicant when mitigating in the Trial Court on the September 7, 2010 stated; “I have faith in this Court and I know it will show me meaning. I have four children to take care of I am the sole bread winner, my mother is aged and unwell and I am the one who takes care of her, I ask the Court to show me meaning”
18. The Trial Magistrate Hon B. Kituyi R.M, on her part indicated having heard the mitigation, expressed frustration that her discretion was fettered, “I can see he is remorseful and I would really wish to show meaning and reduce the sentence. But as I have always said, my hands are tied by the law”.
19. David Ihaji Alukonya, this Court shall now give you meaning, fourteen (14) years after your mitigation this Court attaches importance to vigour in which you have embraced the prison reform program to this extend, I accordingly set-aside the life-imprisonment sentence imposed, and substitute thereof with a sentence of fifteen (15) years. Fourteen (14) years to be served in prison and thereafter to be released on Probation for the One (1) remaining year. The sentence shall run from the date of conviction on September 7, 2010 and since the Appellant has been in custody from since April 12, 2010 he shall be forthwith set free after requisite processing by the probation department and unless otherwise lawfully held. This is in line with section 333(2) of the *Criminal Procedure Code* as well as section 12 of the same Act.

It is so ordered.

SIGNED, DATED AND DELIVERED AT NAKURU THIS 15TH DAY OF APRIL, 2024.



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MOHOCHI S.M
(JUDGE)

