# Kimuyu v Republic (Criminal Petition E025 of 2023) [2024] KEHC 3818 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3818 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL PETITION E025 OF 2023**

**FR OLEL, J**

**APRIL 11, 2024**

**BETWEEN**

**PATRICK MUTISO KIMUYU ........................................................ PETITIONER**

**AND**

**REPUBLIC ........................................................................................ RESPONDENT**

***(Appeal against Cr(SOA) case no 910 of 2007 by Resident Magistrate (Hon A.W Mwangi in Yatta Srm)***

**RULING**

## A. Introduction

1. The applicant was charged and convicted of the offence of Defilement contrary to section 9(1) of the *Sexual offences Act* No 3 of 2006 by Resident Magistrate (Hon A.W Mwangi in Yatta Srm Cr(*SOA*) case no 910 of 2007). The petitioner pleaded not guilty and after trial was sentenced to life Imprisonment; He appealed against the said conviction and sentence vide Machakos HCCR Appeal NO 167 OF 2008 and the said appeal was dismissed. Thereafter the appellant exercised his further right of appeal to the court of appeal on issue of law and his appeal being CA Criminal Appeal No 33 OF 2016 was heard on merit and again was dismissed on 18th November 2016.

2. The applicant has filed this application/petition under provision of Article 22, 23, 27(1),(2), 52(2)(q), 159(2),(a) &(b) and 165 of the *constitution* of Kenya 2010 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 current jurisprudence on life sentence.

3. The appellant submitted that he had been charged with the offence of defilement contrary to section 9(1), (2) of the *sexual offences Act* No 3 of 2006 in Yatta criminal case No 910 of 2007 and was convicted

and sentenced to serve life imprisonment. He appealed to the high court and court of Appeal but was not successful in overturning the conviction and sentence melted out. This court had jurisdiction under Article 19,22,23,50 and 165 of the *constitution* to hear an determine this petition. Further under Article 50(6) of the *constitution* 2010 even finalized matters could be reopened in the interest of justice if there were fundamental human right issues to be determined.

4. A serious infringement had occurred during trial, as he had been wrongly convicted and punished with life sentence which was not provided for under Section 9(1) of the *sexual offences Act*, No 3 of 2006, yet no amendment to the charge sheet had been effected. This was also compounded by the high court, which also amended the charges in its judgment, without following due procedure and also failed to allow the accused to take a new plea and answer to the same. This resulted to him being sentence to life imprisonment, yet the provision under which he had been charged provided for a ten (10) year sentence. Reliance was placed on *Kioko v Rep* (1983) KLR 289, *Jon Croyden Wagner & 2 others v Rep*, Nrb Criminal Appeal No 404,405 & 406 of 2009,(2011) Eklr , *Dalmar Musa Ali v Republic*, CR App No 58 of 2007,(2008) Eklr, where it has been consistently held that amendment of the charge sheet in the judgment was unlawful.

5. The Applicant further submitted that life sentence had been declared unconstitutional and relied on the court of Appeal case of Cr Appeal No 22 of 2018: *Evans Nyamari Ayako v Republic* (2023) eKLR, *S v Nkosi & others* 2003(1) SACR 91 (SCA), *Makumbi Subui Wanyeso v Republic*, Criminal Appeal No 110 of 2022 & The privy council in *Spencer v The Queen*; *Hughes v The Queen* ( spencer & Hughes), (unreported,2 April 2001),(Byron CJ). He therefore prayed that the court finds favour with this petition and allows the same.

6. The state did not oppose this petition and left it for the court to look at its merit.

**C. Analysis of Law**

7. Nature and scope of resentencing Jurisdiction.

8. 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* 2010:

    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

9. In *Samuel Kamau Macharia & Another v 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…"

10. 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".

11. 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.

12. 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.

13. 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**

14. The appellant was sentenced to life in imprisonment as provided for under section 8(1) as read with section 8(2) of the *sexual offences Act* on 21st September 2013, for defiling a one and half old child, though was charged under section 9(1) of the *sexual offences Act* No 3 of 2006. While the petitioner has submitted at length about the legality of altering the charge at judgment stage, it should be clear to him that re sentence hearing does not deal with the legality of the charge and to determine such issues will fall outside the scope of re sentence hearing.

15. 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."

16. 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 v 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."

17. 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."

18. 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.

19. 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.

20. 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 2014 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

21. The undisputed facts in this case is that the petitioner was left with a one and half year-old child under his care, as confirmed by the child's brother. When the mother came back, she found the baby had breathing problem and took her to hospital. Five days later, while bathing the baby, she screamed loudly and she (her mother) discovered that the baby was bleeding from her private parts. After investigations the Applicant was arrested and eventually convicted based on circumstantial evidence.

22. The petitioner emphasized on the injustice caused by amending the charge sheet at the Appeal stage in order to justify the sentence, and its unconstitutionality, but as already indicated that in not an issue for determination in a resentencing petition as it is tantamount to re-opening the Appeal which had already been determined and upheld by the court of Appeal.

23. Be that as it may, 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.

24. In the circumstances of this case I do exercise my discretion and set aside the life sentence imposed on the Appellant vide the judgement of Resident Magistrate (Hon A.W. Mwangi) In Yatta Senior Magistrate Court So Case NO 910 OF 2007, and substitute the same with a sentence of twenty-five years (25) which will run from 8th August 2008, when the initial conviction and sentence was effected.

25. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 11TH DAY OF APRIL, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 11TH DAY OF APRIL, 2024.**

In the presence of;

Petitioner present from Kamiti Prisons

Ms Otulo for Respondent

Sam Court Assistant