



**R v Republic (Criminal Miscellaneous Application E059 of 2023)
[2024] KEHC 4207 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4207 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL MISCELLANEOUS APPLICATION E059 OF 2023**

PN GICHOHI, J

APRIL 11, 2024

BETWEEN

PR APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The background of this ruling is that the Applicant convicted for the offence of defilement contrary to section 8 (1) as read with Section 8 (3) of the Sexual Offence Act and sentenced to 20 years imprisonment in Nakuru Chief Magistrate’s Criminal Case No. 295 of 2014.
2. Aggrieved by both conviction and sentence, he filed appeal before High Court vide Nakuru High Court Criminal Appeal No. 58 of 2016.
3. Upon hearing both parties, Joel M. Ngugi j (as he then was) dismissed the appeal, affirming both conviction and sentence of 20 years imprisonment. That was on 30/01/2020.
4. The Applicant has now approached this Court vide a Notice of Motion filed on 09/05/2023 seeking that this Court:-
 1. Grants him re- hearing of the sentence in Nakuru CMCR. No. 295 of 2014 .
 2. Receives mitigation form the Applicant for consideration of an appropriate sentence.
5. In support of that application, he swore an Affidavit filed on 09/05/2023 acknowledging that his appeal was dismissed by High Court. He however deponed that this Court has jurisdiction and bound by the Supreme Court under Article 163 (7) and constitutional obligation under Article 20 (3) (a) (b) of the Constitution .



6. Further , he urges this Court to be persuaded by the case of *Philip Mueke Maingi and others v Republic* [2022]eKLR and consider re-sentencing and in further support of that Application, he filed on 05/12/2023 a letter from Kevin O. Guna SSP for in-charge Nakuru Main Prison annexing documents to show how the Applicant has reformed while in prison and the various courses he has undertaken in that period. These are :-
 1. Certificate in completion in foundation Bible study series.
 2. Certificate in basic first-aid.
 3. Certificate of participation in promotion and human rights .
7. While commending the Applicant’s character in the prisons he has been transferred to during the period of incarceration, the Officer also emphasised that the Applicant is remorseful, and is currently deployed at the Prison dispensary where he assists the medical in offering first aid to the inmates.
8. The Respondent has opposed the Application vide a Replying Affidavit sworn on 13/02/2024 by James Kihara, Prosecution Counsel in the Office of the Director of Public Prosecution. While acknowledging the decision in Philip Mueke Maingi (supra), he deponed that the learned Judge was categorical that not all cases are deserving . He therefore urged the Court not to disturb the sentence.
9. The Applicant filed submissions basically emphasising the Application, expressing his remorse , saying he is a first offender , sole breadwinner of his family and elderly mother and further expressing his desire to re-join them.
10. On his part, the Respondent did not file any submissions opting to rely on the Replying Affidavit .

Determination

11. Having heard the parties, there is no doubt about the applicant’s remorse, his discipline while in custody and his self -improvement in terms of the courses he has undertaken.
12. However, this Court has also accessed the High Court Judgment Nakuru High Court Criminal Appeal No. 58 of 2016 which was made well after Supreme Court decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR from which decision *Philip Mueke Maingi (supra)* took cue on mandatory minimum sentences.
13. On sentence in regard to the matter the subject of this Application, the Judge held:-

“Turning to the sentence imposed, I note that the Appellant was sentenced to twenty years in prison which is the statutory minimum. I note that our Courts have now held that in appropriate circumstances the Court can go below the statutory minimum (See the Court of Appeal decision in *Dismas Wafula Kilwake v R* [2018]eKLR). There is no reason to do so here. The evidence shows that the Appellant had defiled the Complainant at least three other times before. It shows that he was also, at least once, cruel to her- sending her away in the middle of the night. He was quite intentional about it: he bought her clothes to try and buy her silence. Finally , he in a position of trust since he was in a romantic relationship with the mother of the Complainant. I find the sentence imposed proportionate to the offence in the circumstances.”

14. From the above finding, it is clear that the Application herein is an appeal disguised as a re-sentence hearing. What the Applicant is now asking this Court to do is to sit on an appeal on a decision of a



Court of concurrent jurisdiction which this Court cannot do. If aggrieved, his recourse lay in an appeal to the Court of Appeal.

15. In the circumstances, the Application is dismissed for lack of merit.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 11TH DAY OF APRIL, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Peter Rimui -Applicant

Mr. Kihara for Respondent

Yego, Court Assistant

