



**Achuti v Republic (Criminal Miscellaneous Application
E072 of 2023) [2024] KEHC 5105 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5105 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL MISCELLANEOUS APPLICATION E072 OF 2023**

PN GICHOHI, J

MAY 9, 2024

BETWEEN

VICTOR MOGI ACHUTI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Victor Mogi Achuti (herein referred to as the Applicant) has moved to this Court by way of an undated Notice of Motion filed on 09/06/2023 seeking re-sentence hearing in regard to Nakuru Chief Magistrate's Court SO Case No. E035 of 2020 on the grounds the life sentence imposed on him is unconstitutional.
2. The Applicant cited several cases including Petition No. E017 of 2021 Philip Mueke Maingi and others case and urged the Court to consider passing a definite sentence that will enable him go back to his family noting that he has reformed while in custody. He further urged the Court to consider the period spent in custody under Section 333(2) of the *Criminal Procedure Code*.
3. Upon being served, the Respondent filed a Replying Affidavit sworn on 01/02/2024 by James Kihara, the learned Prosecution Counsel. He opposed the application and urged this Court to dismiss it on the grounds that:-
 1. The Appellant's appeal on both conviction and sentence had been dismissed by High Court and therefore this Court lacks jurisdiction to review a judgment of a Court of concurrent jurisdiction.
 2. Having exhausted appeal options in High Court, the Applicant's option is an appeal to the Court of Appeal.



Determination

4. The background of the application is that the Applicant was charged with the offence of Incest contrary to Section 20 (1) of the [Sexual Offence Act](#) No. 3 of 2006. He also faced an alternative count which was the offence of committing an indecent act with a child contrary to Section 11 (1) of the [Sexual Offence Act](#) No. 3 of 2006. He was ultimately found guilty of the offence of incest Section 20 (1) of the [Sexual Offence Act](#) No. 3 of 2006, convicted and sentenced to serve life imprisonment by Hon. E.S Soita, Resident Magistrate.
5. Aggrieved by both conviction and sentence, he preferred an appeal vide Nakuru High Court Criminal Appeal No. E007 of 2022 and urged the Court to quash the conviction, set aside the sentence and set him free forthwith unless otherwise unlawfully held. However, High Court dismissed the appeal and upheld both the conviction and sentence.
6. Having heard both parties in this application, the issue for determination in the application before this is:-

Whether this Court has jurisdiction to entertain this application and grant the orders sought.

7. It may be emphasised that in [Maingi & 5 others v Director of Public Prosecutions & another](#) (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment), High Court held:-

“1) To the extent that the [Sexual Offences Act](#) prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of the [Constitution](#).

However, the Courts are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences.

2) Taking cue from the decision in [Francis Karioko Muruatetu & Another vs. Republic](#) [2017] eKLR (Muruatetu 1) those who were convicted of sexual offences and whose sentences were passed on the basis that the trial Courts had no discretion but to impose the said mandatory minimum sentence are at liberty to petition the High Court for orders of resentencing in appropriate cases.”

8. A look at the High Court judgment dated 04/05/2023 shows that in upholding the sentence, the H. M. Nyaga, J held:-

“The appellant faced a charge of incest. The child was under 18 years of age. Under the provision of Section 20 (1) of the [Sexual Offences Act](#), the appellant was liable to a life imprisonment term which the trial court found fit to mete out. There is nothing unconstitutional or illegal about the sentence as it was within the powers of the court to impose it.

In mitigation, the Appellant told the trial Court that he was a first offender. That he is a father of 7 children and sole breadwinner . He urged the court to consider a non- custodial sentence for the sake of his children.



There is no justification for the Appellant to have preyed on a minor, who was his own daughter. He deserves a severe punishment so that others like him will also fear committing such an offence.

In my view the life imprisonment was proper given the age of the victim , and the fact that this was the appellant’s child. Even if I was of the opinion that I could have meted out a different sentence, I cannot fault the trial magistrate on the term imposed upon the appellant. I choose not to disturb it.”

9. Definitely and from that reasoning, the Honourable Judge was well seized of the nature and gravity of the sentence. He was equally seized of the constitutional imperatives on the issue of life sentence.
10. From the arguments in this application, the Applicant is asking this Court to review a finding of a Court of concurrent jurisdiction. In the circumstances herein, that would be tantamount to sitting on appeal on the said judgement. This Court lacks jurisdiction to do so. The forum for handling his grievances would have been an appeal to the Court of Appeal.
11. Having failed on resentence, then the issue of considering time spent in custody in compliance with Section 333 (2) of the *Criminal Procedure Code* does not arise.
12. In conclusion the application herein is hereby dismissed.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 9TH DAY OF MAY, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Victor Mogi Achuti - Applicant

Mr. Kihara for Respondent

Oleperon- Court Assistant

