



REPUBLIC OF KENYA



**Maina v Republic (Criminal Appeal E003 of 2021)  
[2024] KEHC 10606 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 10606 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL APPEAL E003 OF 2021  
CJ KENDAGOR, J  
JUNE 21, 2024**

**BETWEEN**

**DANIEL KAMAU MAINA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against the judgment on re-sentencing in the Chief Magistrate Court at Nyeri by Honourable W. Kagendo, in Criminal Petition No. 1295 of 2020 on 12th January, 2021)*

**JUDGMENT**

1. Daniel Kamau Maina, the appellant herein, was charged and convicted of the offence of defilement contrary to Section 8(2) of the *Sexual Offences Act* No. 3 of 2006 with an Alternative Charge of Committing an Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act* No.3 of 2006 in Kangema Principal Magistrate’s Court Criminal Case No. 328 of 2014. He was sentenced to life imprisonment.
2. The Appellant lodged an appeal against the conviction and sentence at the High Court at Muranga, Criminal Appeal no. 122 of 2014. The appeal was dismissed and the life sentence was upheld by Mshila, J.
3. The Appellant thereafter petitioned for re-sentencing before the Nyeri Chief Magistrate’s Court - Criminal Petition *no. 1295 of 2020* seeking, inter alia, that the court considers re-sentencing him in line with the Supreme Court decision in Francis Karioko Muruatetu & Another vs. Republic SCK Petition No. 15 & 16 of 2015 (2017) eKLR. The petition was dismissed and the Appellant lodged the present appeal.



4. The Appellant filed a petition of appeal on 25<sup>th</sup> January 2021 and an amended petition of appeal on the 11<sup>th</sup> October 2022. The appellant has advanced the following grounds;

“That the learned trial magistrate erred in law and fact in imposing harsh and excessive sentences thereby overlooking the mitigating circumstances of the case;

That the learned trial magistrate erred in law and fact in failing to consider that I was a first offender, rehabilitated and remorseful which were crucial factors to consider during resentencing thereby ignoring the offenders’ personal circumstances;

That the learned trial magistrate erred in law and fact in failing to consider that the mandatory sentences under the *Sexual Offences Act* No. 3 of 2006 impinge on a fair trial guaranteed under Article 50 of *the Constitution* and that the Appellant was prejudiced by being deprived the right to mitigation and the right to a lesser severe sentence which amounts to discrimination contrary to Article 27 of *the Constitution*;

That the learned trial magistrate erred in both fact and law in abusing her discretion when sentencing the Appellant and failed to apply the Judiciary Sentencing Guidelines [2013].”

5. The Appellant has asked the court to set aside the life imprisonment sentence and substitute the same with a non-custodial sentence, with consideration to the time spent in remand during trial and after conviction.
6. The Appellant in his submissions invited the court to consider the emerging jurisprudence on minimum/mandatory sentences for offences under the *Sexual Offences Act* in setting aside the sentence. The submissions also offer mitigating factors for consideration.
7. The Respondent filed submissions and conceded to the ground for re-sentencing.
8. I have carefully read the documents and submissions filed by the parties. There have been 4 cases in different courts over the Appellant’s conviction and sentence.
9. The issue for determination in this appeal is only on re-sentencing. This Court takes cognizance of the challenges that were posed with the various interpretations of the decision in the Muruatetu Case and also that there is no standard procedure on how parties can move the court in re-sentencing applications.
10. The Magistrate’s Court had no jurisdiction to hear the re-sentencing petition that was presented in the Nyeri Chief Magistrate’s Court- Criminal Petition *no. 1295 of 2020*. This is because the Appellant’s Appeal via Murang’a Criminal Appeal no. 122 of 2014 had already been heard and determined before the High Court. The High Court at Murang’a had upheld the conviction and sentence and that should have been the correct court to approach for the re-sentencing petition. There was no order remitting the case back to the Magistrate’s Court for re-sentencing hearing.
11. I proceeded to consider the question of whether the appellant’s case merits consideration for re-sentencing based on the grounds advanced.
12. The High Court in Murang’a Criminal Appeal No. 122 of 2014 addressed itself on the allegations by the Appellant that he was not accorded a fair trial. The Judge made a finding that the Appellant had been accorded a fair trial and that there was no procedural flaw at the lower court proceedings. (Paragraphs 25 to 30 in Judgment dated 2<sup>nd</sup> December 2016). The record shows that the Appellant opted not to cross-examine the witnesses and remained silent when he was invited to offer his mitigation. The right, which is a core component of a fair trial contemplated under Article 50(1) of *the*



Constitution, was afforded but not utilized. The Appellant was not discriminated against nor deprived of his right to mitigate as indicated in the petition and submissions.

13. The Appellant appealed against the sentence and conviction in Muranga Criminal Appeal No. 122 of 2014 and the Court examined the fidelity of the sentence. The Judge made a finding that the same was neither harsh nor excessive. The Court noted that the age of the victim – 5 ½ years, had been considered by the trial court. The sentence of life imprisonment was with consideration of all factors and circumstances. It was not meted on the basis that it was a mandatory/minimum sentence. The authorities relied upon in the submissions were thus not applicable to this case.
14. On a holistic consideration, the grounds advanced in this appeal all fail. The High Court affirmed the decision of the Trial Court on conviction and sentence. The Appellant ought to have appealed to the Court of Appeal if he was dissatisfied with the determination in Muranga High Court Criminal Appeal 122 of 2014.
15. While determining this appeal, I addressed myself regarding the indeterminate life sentence which the Court of Appeal has declared unconstitutional.

In Manyeso v Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment), the Court of Appeal sitting in Malindi Nyamweya, Lesiit and Odunga, JJA) held that life imprisonment unconstitutional substituted the same with 40 years. They stated as follows: -

“We recognize that although the Judiciary released elaborate and comprehensive Sentencing Policy Guidelines in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence. Nevertheless, we are in agreement with the High Court decision in Jackson Wangui, supra, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature...

... We are therefore of the view that while the appellant should be given the opportunity for rehabilitation, he also merits a deterrent sentence. We, therefore in the circumstances, uphold the appellant’s conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction.”

16. In Ayako v Republic (Criminal Appeal 22 of 2018) [2023] KECA 1563 (KLR) (Okwengu, Omondi & J. Ngugi, JJA) (8 December 2023) (Judgment) translated life imprisonment to 30 years. They stated as follows:-

“26. On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years’ imprisonment.

27. In the circumstances of this case, given the objective severity of the offence committed by the appellant as analysed above, we hereby allow the appeal on sentence to the extent of ordering that the sentence of life imprisonment imposed shall translate to 30 years’ imprisonment. The record shows that the appellant was in custody since he was arraigned in court on July 18, 2011.



By dint of section 333(2) of the Criminal Procedure Code, the imprisonment term of 30 years shall be computed to begin running from that date.”

17. The upshot of the above is that life imprisonment is not left indeterminate.
18. The Respondent proposed a sentence of 20 years. I have considered the lower court proceedings in Kangema Magistrate’s Court Criminal Case 328 of 2014, the probation officer’s report filed in Nyeri Chief Magistrate’s Court- Criminal Petition *no. 1295 of 2020* that gives the victim assessment report, the report by the State Department for Correctional Services, the appellant’s age and submissions on record. The life imprisonment sentence imposed on the Appellant is hereby translated into 30 years.
19. I therefore substitute the life sentence, with its equivalent, that is 30 years. The period shall run as per Section 333 (2) of the Criminal Procedure Code from the date of arraignment in court.
20. It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 21<sup>ST</sup> DAY OF JUNE, 2024.**

.....

**C. KENDAGOR**

**JUDGE**

Judgment delivered through the Microsoft Teams online platform.

In the presence of:

Court Assistant: Hellen

ODPP: Mr. Kaniu

Convict: Daniel Kamau Maina

