



**Mutili v Republic (Miscellaneous Criminal Application  
E005 of 2023) [2024] KEHC 6766 (KLR) (7 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6766 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
MISCELLANEOUS CRIMINAL APPLICATION E005 OF 2023**

**FR OLEL, J**

**JUNE 7, 2024**

**BETWEEN**

**KIOKO BONFACE MUTILI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Introduction**

1. The applicant was charged and convicted, with the offence of Defilement contrary to section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No 3 of 2006 by Principal Magistrate (Hon J Omenge) in Machakos CMCRR SOA No 9 of 2010 and was sentenced to life Imprisonment; He appealed against the said conviction and sentence vide Machakos HCCR Appeal No 126 of 2011 and the said appeal was dismissed on 25<sup>th</sup> January 2016.
2. The applicant did file this petition under provision of Article 22, 23, 25, 27(1),(2), 28, 29(f), 48, 51 52(2)(q), and 165 of the *Constitution* of Kenya 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 rehabilitative 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 the court of Appeal decision in *Evans Wanjala Wanyonyi Vr Republic; Cristorpher Ochieng v Republic* (2018) eKLR, *Edwin Wachira & 9 Others v Republic* & *Philip Mueke Maingi & 5 Others v Republic* Macahkos Petition E017 of 2021 where it had been held that mandatory sentences were unconstitutional as they infringed on the sentence discretion of the trial court.
3. The Applicant submitted that he was a first offender and was remorseful to the harm he caused the complainant and her family. He was convicted at 26 years and had been in prison for 13 years and 11 months. He prayed for the court to have mercy on him as he had learned from his mistake and prayed



to be given a second chance. During the period in custody he had gone back to school and sat for his KCSE and other certificate courses to improve on his social skills and thus had been adequately rehabilitated. He also requested the court to consider the period already served in prison to be adequate and prayed that and he be released to reintegrate back into the society as a reformed person.

4. This application was not opposed by the state. Ms Otulo for ODPP did confirm that indeed the law had changed on mandatory minimum sentencing and also life sentence had been outlawed. The change in jurisprudence could be applied in favour of the Appellant and could be allowed to mitigate and be resentenced afresh.

## C. Analysis of Law

### Nature and scope of resentencing

#### Jurisdiction.

5. 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

6. In *Samuel Kamau Macharia & Another vs. 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...”

7. 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”.

8. 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.
9. 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.

10. 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

11. 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 14<sup>th</sup> June 2011, for defiling a eleven (11) year old girl. The sentence as provided for under the Sexual offences Act No3 of 2026 was mandatory and the court did not have the discretion to vary the same. The applicant relied on the petition of Philip Mueke & 5 others and other citations, Evans Wanjala Wanyonyi v Republic; Cristopher Ochieng v Republic (2018) eKLR, Kisumu CR Appeal n0 202 of 2011 & Jared koita Injiri v Republic, kisumu CR Appeal no 93 of 2014, which held that mandatory sentence was unlawful, to convince court that jurisprudence regarding mandatory sentencing had changed and thus prayed for a more balanced and fairer sentence.

12. The Supreme Court in “Muruatetu(*Supra*)” 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.”

14. 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.

15. Recently 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.

16. The Applicants appeal on sentence was made 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 and indeterminate nature of life sentence, which has been held to be unconstitutional.



#### **D. Determination**

14. The undisputed facts in this case is that the petitioner defiled a eleven (11) year old innocent child, and was sentenced to serve life imprisonment. So far, has already served approximately fourteen (14) years imprisonment.
15. The petitioner prayed for remorse and submitted that he had learnt from his incarceration and was remorseful for the harm occasioned to the victim. He was of the opinion that the time served was adequate and he should be allowed to reintegrate back into the community as he had suffered adequate punishment for the offence committed. 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.
16. 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 by Principal Magistrate (Hon Judy Omenge) in Machakos Chief Magistrate Court SO Case No 9 of 2010, and substitute the same with a sentence of twenty years (20) which will run from 14<sup>th</sup> June 2011, when the initial conviction and sentence was effected.
17. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 7<sup>TH</sup> DAY OF JUNE, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 7<sup>TH</sup> DAY OF JUNE, 2024.**

In the presence of;

Appellant absent

Mr. Mongare for Respondent

Sam Court Assistant

