**Mwiti v Republic (Miscellaneous Criminal Application E065 of 2023)**
**[2024] KEHC 12483 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12483 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MERU**

**MISCELLANEOUS CRIMINAL APPLICATION E065 OF 2023**

**HM NYAGA, J**

**OCTOBER 16, 2024**

**BETWEEN**

**GERISHON MWITI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Gerishon Mwiti was charged in Nkubu PM CR. Case No. 19 of 2020 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. It was alleged that on 30th May 2020 at [Particulars Withheld] Village upper Kiongone S/Location Kiongone Location in [particulars withheld] North Sub-County within Meru County, he intentionally caused his penis to penetrate the vagina of NM a child of 9 years.

2. He faced 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 and the particulars were to the effect that on the same day and place, he intentionally and unlawfully touched the vagina of NM a children aged 9 years with his penis.

3. He pleaded not guilty to the charges, went through the trial which resulted in a conviction on the main charge of defilement and was sentenced to life imprisonment. His appeal to the High Court *vide Gerishon Mwiti v Republic* [2022] eKLR was unsuccessful.

4. The applicant has now moved the court through this application seeking resentencing.

5. It has been noted by the court that this same applicant has also filed Petition No. E004 of 2024 at Meru High Court in which he sought similar orders.

6. In the said petition, Justice T. Cherere resentenced the applicant to fifteen (15) years imprisonment and ordered that his sentence commences from the date of his arrest.

7. It is apparent the applicant is playing Russian Roulette, by making multiple applications similar nature in court.

8. Having been heard by a court of concurrent jurisdiction, I find that this court lacks the jurisdiction to entertain this application and it is dismissed.

9. Further I make an order that having exhausted the process before this court, the applicant should not file any other application before this court or any other High Court for that matter.

10. As I pen off, I would want to address a concern over the plethora of applications being made by convicts who are serving sentences in various prisons around the country. These include convicts serving sentences other that murder.

11. Recently, in Petition No. E018 of 2023 *Republic Vs Joshua Gichuki Mwangi (Respondent) & Initiative for strategic litigation in Africa & 3 others (Amicus curia)* delivered by the Supreme Court in the on 12th July,2024 with regard to the mandatory death sentences in offences other than murder, the court held as follows: -

> "(51) In light of the structural and supervisory interdicts issued, the Court issued the *Muruatetu Directions*, wherein it, inter alia, pronounced itself on the application of its decision in the *Muruatetu Case* to other statutes prescribing mandatory or minimum sentences as follows: "
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> > 10. It has been argued in justifying this state of affairs, that, by paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision's expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it. In that paragraph, we stated categorically that:
> >
> > > 48. "Section 204 of the *Penal Code* deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be SC Petition No. E018 of 2023 26 regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under article 25 of the *Constitution*; an absolute right".
> >
> > Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the Judgment is only made to section 204 of the *Penal Code* and it is the mandatory

nature of death sentence under that section that was said to deprive the "courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases

11. The ratio decidendi in the decision was summarized as follows:

> 69. Consequently, we find that section 204 of the Penal Code is inconsistent with the *Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".
>
> We therefore reiterate that, this court's decision in *Muruatetu*, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute." .....
>
> 14. It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the *Constitution*. It bears restating that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court.
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> 15. To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40 (3), robbery with violence under section 296 (2), and attempted robbery with violence under section 297 (2) of the *Penal Code*, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases." [Emphasis ours] ....."

12. As matters stand, the decision in *Republic vs Joshua Gichuki Mwangi* (*supra*) stands and it is to the effect that only convicts for the offence of murder, and who were not allowed to give their mitigation during the sentencing are entitled to apply for re-sentencing.

13. Thus, the window for the application of Muruatetu is very narrow and cannot be used in respect to any other offences. That is the position until the Supreme court have determined the issue for other offences.

14. Consequently, I would strongly recommend and advise convicts, paralegal in prisons and prison authorities to read the said decision carefully and not to bring applications that are flawed in law. These applications are clogging the Judiciary's case system for no good reasons. As stated, these Applicants ought to await their time once the Supreme Court has given its decision.

15. Orders accordingly.

**H. M. NYAGA**

**JUDGE.**

**DATED AND DELIVERED AT MERU THIS 16TH DAY OF OCTOBER 2024.**