



**Musembi v Republic (Miscellaneous Criminal Application
E125 of 2022) [2023] KEHC 632 (KLR) (8 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 632 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CRIMINAL APPLICATION E125 OF 2022**

A. ONG'INJO, J

FEBRUARY 8, 2023

BETWEEN

ISAAC MUSEMBI ALIAS PETER APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant was sentenced to serve life imprisonment for the offence of defilement in two counts contrary to Section 8 (1) as read with 8 (2) of the [Sexual Offences Act](#) No 3 of 2006 in Mombasa Sexual Offence No 38 of 2016.
2. The particulars of the offence in the first count were that the Applicant on diverse dates between January 2015 and April 2016 within Mombasa County he intentionally and unlawfully caused his penis to penetrate the vagina of VS a child aged 10 years old.
3. The particulars of the offence in the second count were that the Applicant on diverse dates between January 2015 and April 2016 within Mombasa County he intentionally and unlawfully caused his penis to penetrate the anus of VS a child aged 10 years old.
4. Being aggrieved by the conviction and sentence, the Applicant together with 3 others filed High Court Criminal Appeal No 67 of 2017 which was also dismissed and the conviction and sentence upheld.
5. The Applicant has now come before this court seeking that his sentence be revised upon consideration of his mitigation as listed in the application mainly that: -
 - i. That during his incarceration, he has lived well with his fellow inmates and prison authorities and a favourable report has been made by the authorities to that effect.
 - ii. That he is a first offender.



- iii. That he has a wife and 5 children together with his mother who are suffering in his absence as the wife is jobless.
- iv. That he is 33 years of age and is of good conduct.
6. He prayed that his sentence be reviewed in consideration of the holding in *Philip Mueke Maingi & 5 Others v Republic*, Petition No E017 of 2021 where it was held that all accused persons deserve to have their mitigation taken into account and that any court is bestowed with legitimate discretion to impose sentences that befit the offences committed.
7. This court has not had access to the sentencing proceedings in the trial court and it cannot be ascertained whether the Applicant's mitigation was considered before he was sentenced and in upholding the finding of the trial court, the judge in Criminal Appeal No 67 of 2017 did not indicate whether the Applicant's mitigation was considered before the sentence which was found to be lawful.
8. In consideration of the emerging jurisprudence and preference for determinate sentences, this court reviews the life imprisonment to 25 years imprisonment to take effect from April 14, 2016.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 8TH DAY OF FEBRUARY 2023.**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for the Respondent

Applicant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

