



REPUBLIC OF KENYA



**KENYA LAW**  
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**Chemei v Republic (Criminal Petition 29 of 2019)  
[2023] KEHC 2045 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2045 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL PETITION 29 OF 2019  
PJO OTIENO, J  
MARCH 10, 2023**

**BETWEEN**

**GILBERT CHEMEI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. Before me is an application for resentencing by the applicant in view of the decision by the Supreme Court in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR.
2. The applicant had been charged at the SRM Court in Hamisi in Criminal Case No 283 of 2009 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.
3. Aggrieved with the decision, the applicant lodged an appeal with the High Court at Kakamega, Criminal Appeal No 137 of 2011 which appeal was dismissed vide a Judgment delivered on February 18, 2014 by former Justice Said J Chitembwe.
4. The applicant lodged a second appeal with the Court of Appeal in Criminal Appeal No 51 of 2014 which appeal was again dismissed in a judgment delivered on December 17, 2015.
5. The applicant has submitted on the application in which he argues that the life sentence meted against him was harsh and excessive and that it violated his rights under article 50(2)(p) of the *Constitution of Kenya, 2010*. He claims to have reformed, says that he is remorseful and prays for leniency contending that he is 69 years old and that for the 9 years he has served he has rehabilitated.
6. The jurisdiction of this court is derived from article 165 of the *Constitution of Kenya, 2010* which includes jurisdiction to determine the question whether a right or fundamental freedom in the Bill of



Rights has been denied, violated, infringed or threatened. The applicant claims a violation of rights under article 50(2)(p) of the Constitution which provides that every accused person has 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.”

7. The decision by the Supreme Court in the Muruatetu case, supra, has notably but unjustifiably led to an influx of applications for resentencing in the courts, applications in respect to all manner of offences and convictions. A number of jurisprudential issues do arise in this case namely; what was the import and impact of the Muruatetu case and whether it applies in the instance case; whether the sentence meted on the applicant was unconstitutional and whether this court was rendered functus officio by the decision of the High Court sitting an appellate court.

#### **What was the import of the Muruatetu case and whether it applies in the instance case**

8. In its revelation, the Supreme Court in the Muruatetu’s case made the following orders: -
  - a) The mandatory nature of the death sentence as provided for under section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under article 26(3) of the Constitution.”
9. The import of the above orders was that the Judgment was to apply in respect to the offence of murder under section 204 of the Penal Code for the sole and only reason that the death penalty was rendered unconstitutional. The decision is therefore not applicable in the instant suit since this is a case of defilement. Furthermore, the applicant herein was sentenced to life imprisonment and as directed by the Supreme Court, legislation is yet to be enacted to establish parameters of what constitutes life imprisonment. To set to disturb the reigning sentence would be to preempt the directed legislative intervention expected from the Legislature.

#### **Whether the sentence meted on the applicant was unconstitutional**

10. Article 50(2)(p) of the Constitution of Kenya, 2010 requires that every convicted accused person has the right 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.
11. The applicant was charged with defiling a 7-year-old girl and according to the probation and aftercare service report by Michael Matekwa, the County Probation Director Vihiga County, the young girl was so traumatized by the actions of the appellant that she is currently mentally ill. Such actions are injurious to the society and call for a deterrent sentence as a measure to keep the society safe. There is no demonstration that the trial Court exercised its discretion improperly in meting out sentence prescribed by law under section 8(2) of the Sexual Offences Act, No 3 of 2006. Sentence being a discretionary matter, it takes a very strong case for an appellate Court to interfere.

#### **Whether this court was rendered functus officio by the decision of the high court sitting as an appellate court**

12. It is trite law that a Court of law does not have jurisdiction to review the decision of a court of concurrent jurisdiction in criminal proceedings. This Court, though differently constituted, in High Court at Kakamega, Criminal Appeal No 137 of 2011 dismissed the applicant’s appeal. At that point



this court was rendered functus officio over the matter herein and it is not tenable to challenge that Judgment under the guise of resentencing.

13. That said, the application for resentencing is hereby dismissed.

Dated, delivered and signed at Kakamega this 10<sup>th</sup> day of March 2023.

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of:**

Petitioner in person

Ms. Chala for the Respondent

Court Assistant: Polycap

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