



REPUBLIC OF KENYA



**Mausa v Republic (Criminal Petition E003 of 2021)  
[2023] KEHC 17476 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17476 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL PETITION E003 OF 2021**

**HM NYAGA, J**

**MAY 18, 2023**

**BETWEEN**

**GEOFFREY MOMANYI MAUSA ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Geoffrey Momanyi Mausa has filed Notice of Motion dated 20/5/2020 seeking orders: -
  1. Spent
  2. That this Honourable Court be pleased to make an order of *Habeas Corpus* in respect of the petitioner herein pursuant to Article 25(d) as read with 51(2) of the Constitution of Kenya 2010 for the interest of justice.
  3. That court be pleased to grant a sentence rehearing in the CM's Court at Molo Criminal Case No 150 of 2014.
  4. That this Honourable Court be pleased to allow the Applicant herein to adduce or tender mitigation afresh for a fresh and proper consideration in view of the fact that Section 8(4) of the Sexual Offences Act which offers a minimum mandatory sentence curtailed the discretionary powers of the lower court thus rendering prejudice to the Applicant.
  5. That this court do receive the applicant's mitigation in accordance with Section 216 as read with 329 of the Criminal Procedure Code and consider an appropriate sentence devoid of the harsh sentence imposed by the trial court in conformity with: -
    - Francis Karioko Muruatetu & others v R – [2017] eKLR (Supreme Court)
    - Court of Appeal – Evans Wanjala Wanyonyi v R [2019] eKLR.



- *Christopher Ochieng v R* [2018] eKLR

- *Jared Koita Injiri v R* Kisumu Court of Appeal 93/14

6. That this Honourable court be pleased therefore to set aside the respective sentence of 15 years' imprisonment imposed upon him by the trial court and upheld by the High Court and substitute it with considerable duration including a probation sentence on humanitarian grounds.
2. The Application is based on the grounds on its face and supported by an Applicant's Affidavit sworn (date not indicated) but filed on 12<sup>th</sup> May, 2021. He deponed that he was initially charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* in Molo CM Criminal Case No.150 of 2014 and was convicted and sentenced to serve 15 years' imprisonment.
3. He averred that consequently he lodged an appeal in the High court vide Nakuru Criminal Appeal No. 66 of 2015 but the same was dismissed.
4. He contended that although he was invited to tender his mitigation after conviction pursuant to section 216 as read with Section 329 of the *Criminal Procedure Code* the same was not considered and resultantly he was prejudiced and that this uniform sentence deprives the court from considering mitigating circumstances and to appreciate that sometimes there may be unequal participation in crime which would result to a different charges and sentences on the accused persons as was cited in the case of *Godfrey Ngotho Mutiso v Republic* [2010] eKLR .
5. He averred that this court has jurisdiction to hear and determine this petition pursuant to Articles 22,23,165(3) and 258 of the *Constitution* 2010 together with all other enabling provisions of the law.
6. The respondent did not file any response to the Application . Miss Murunga for the Respondent orally submitted that there are no grounds for this court to substitute a lawful sentence.
7. In the course of perusing the court record I did note that the applicant had filed a notice of appeal against the decision of this court in dismissing his appeal. The said notice was duly received by the Court of Appeal. It is thus correct to assume that the applicant has a pending appeal in that court.
8. In *Francis Muruatetu* case(*supra*) the Supreme Court was categorical that any applicant who wished to have a resentence hearing and who had an appeal pending had to first withdraw the appeal.
9. In clarifying the import case of its earlier decision, in *Muruatetu* 2 the Supreme Court gave the following guidelines:
  - i. The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the *Penal Code*;
  - ii. ....
  - iii. All offenders who have been subject to the mandatory death penalty and desire to be heard on sentence will be entitled to re-sentencing hearing.
  - iv. Where an appeal is pending before the Court of Appeal, the High Court will entertain an application for re-sentencing upon being satisfied that the appeal has been withdrawn.
  - v. ....



- vi. An application for re-sentencing arising from a trial before the High Court can only be entertained by the High Court, which has jurisdiction to do so and not the subordinate court.
- .....
- viii. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.
10. In view of the directions under paragraph (iv) above I am of the opinion that this court can only proceed with the application once it is satisfied that the applicant has complied by the above directive.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 18TH MAY 2023.**

**HON. H. M. NYAGA**

**JUDGE**

**Applicant present**

**Ms Murunga for state**

