



**Mitego v Republic (Miscellaneous Criminal Application
E178 of 2021) [2023] KEHC 18204 (KLR) (5 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18204 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
MISCELLANEOUS CRIMINAL APPLICATION E178 OF 2021**

GL NZIOKA, J

MAY 5, 2023

BETWEEN

SIMON MBURU MITEGO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was arraigned before the Senior Principal Magistrate's Court at Engineer charged *vide* criminal case 944 of 2016, with two counts of defilement contrary to section 8 (1) (4) of the [Sexual Offences Act](#), No 3 of 2006 and two alternative counts of committing an indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act](#). The particulars of each charge are as per the charge sheet.
2. He pleaded not guilty and the case proceeded to full hearing. He was found guilty on both main counts, convicted and sentenced to serve a term of fifteen (15) years imprisonment on 1st count and twenty (20) years imprisonment on the 2nd count and sentences ordered to run concurrently.
3. However, by an application filed in court on November 10, 2021, the applicant is seeking for re-sentencing on the basis of the decisions of; the Supreme Court of Kenya in petition 15 & 16 of 2015 (consolidated) [Francis Karioko Muruatetu v Republic](#) [2017] eKLR and Court of Appeal in [Dismas Wafula Kilweke v Republic](#) (2018) eKLR. He also seeks that the period spent in remand be factored into the sentence.
4. The application is supported by his affidavit wherein he avers that the Supreme Court in [Francis Karioko Muruatetu v Republic](#) (supra) declared mandatory sentences unconstitutional. That, he has never appealed to the High Court and is only seeking review of sentence. Further, the provisions of section 333 (2) of the [Criminal Procedure Code](#) be invoked and the decision in [Vincent Sila Jona & 78 others v Republic](#) petition No 15 of 2020.



5. The application was opposed by the respondent and disposed of by parties filing submissions. The applicant filed submissions on September 27, 2022, and argued that section 8 (1) as read with section 8 (3) of the [Sexual Offences Act](#) provides for a mandatory sentence of twenty (20) years. Thus, the learned trial magistrate did not have the discretion to impose any another sentence, hence depriving the court of judicial discretion.
6. Further, that, the mandatory sentence violates his rights under article 28 of the [Constitution](#) an of Kenya 2010 and cited the case of petition No E017 of 2021 [Philip Mueke Maingi v Attorney General](#). He argued that, the court has jurisdiction to re-sentence in sexual offences and prayed that, the court re-sentence him on the basis that he is a first offender and remorseful.
7. He further submitted that the new sentence be ordered to start from the time he was remanded as provided by section 333 (2) of the [Criminal Procedure Code](#).
8. However, the respondent in its submissions dated December 1, 2022 argued that the learned trial magistrate considered the circumstances of the case and the applicant’s mitigation before sentencing him.
9. Further the Supreme Court in petition No 15 of 2015 [Francis Karioko Muruatetu and another v Republic](#) (2017) eKLR recognized the objectives of sentencing as set out in the Judiciary Sentencing Guidelines to include; rehabilitation, deterrence, rehabilitation, restorative justice, community protection, and denunciation. That in the present suit a deterrent sentence is appropriate, therefore the sentence is sufficient.
10. Having considered the application, I find that it raises the issue of mandatory sentences and the application of the provisions of; section 333 (2) of the [Criminal Procedure Code](#). In that case the subject provisions provide that: -

“Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody”

11. In the same vein, the Court of Appeal in the case of; [Abamad Abolfathi Mohammed & another v Republic](#) [2018] eKLR stated that:

“The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the *Criminal Procedure Code*...By dint of section 333(2) of the *Criminal Procedure Code*, the court was obliged to take into account the period that they had spent in custody before they were sentenced....“Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(s) of the *Criminal Procedure Code* was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person.”



12. The applicant herein was arraigned in court on January 17, 2016. He was tried and judgment delivered on September 17, 2018. The committal warrant indicates that he was in custody throughout the trial. Therefore, he was in custody for a period of approximately two (2) years and eight (8) months. The trial court record does indicate that the subject period was considered as such the sentence herein should run from January 17, 2016 and not the date of sentence.
13. As regards the issue of mandatory minimum sentence and/or fettering of judicial discretion that is not a matter to canvass through a miscellaneous application and even then the Supreme Court has since explained that *Muruatetu case* applies to murder trials only, hence the argument herein in relation to the same is not tenable.
14. Those then are the orders of the court herein.

DATED, DELIVERED AND SIGNED THIS 5TH DAY OF MAY 2023

GRACE L NZIOKA

JUDGE

In the presence of:

Applicant in person virtually

Mr. Michuki for the Respondent

Ms Ogutu: Court Assistant

