



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Mwilitsa v Republic (Criminal Petition E001 of 2023)  
[2023] KEHC 3826 (KLR) (2 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 3826 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL PETITION E001 OF 2023**

**RE ABURILI, J**

**MAY 2, 2023**

**BETWEEN**

**HAMPHREY MUTENDI MWILITSA ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. This Petition for resentencing was filed on 17<sup>th</sup> January 2023 by the Petitioner/Convict Humphrey Mutendi Mwilitsa who was sentenced to serve 20 years' imprisonment vide Nyando Senior Principal Magistrate Criminal Case No. 765 of 2014 for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* by Hon. Julius Ngarngar, SPM. This was after a full trial.
2. The Petitioner was sentenced on 26<sup>th</sup> June 2015. He mitigated saying that he was disabled, had many siblings that depended on him for subsistence and requested for leniency. He was represented by an advocate.
3. The Petitioner appealed to the High Court vide Kisumu HCCRA No. 145 of 2015 which appeal was heard on merit and dismissed on 14<sup>th</sup> November 2016. He appealed to the Court of Appeal vide Court of Appeal Criminal Appeal No. 26 of 2017 which appeal was heard and vide Judgment rendered on 21<sup>st</sup> October 2022, the Court of Appeal dismissed the appeal both against conviction and sentence imposed, considering the circumstances under which the offence was committed, where the Petitioner herein stayed with the minor and tortured her in his house, defiling her for a period of about one month.
4. The Petitioner/Convict is before this court for resentencing claiming that the Mandatory twenty (20) years imprisonment is unconstitutional hence the sentence should be reviewed. He filed his 'supporting affidavit' which is unsworn wherein he cites Petition No. E017 of 2021 at Machakos and Articles 27 and 28 of *the Constitution*. He asserts that he has reformed and is remorseful.



5. I have considered the Petition for resentencing, the proceedings and judgment from the three courts, Magistrate's Court, High Court on appeal and the decision by the Court of Appeal.
6. It is worth noting that the Court of Appeal decision was rendered on 21<sup>st</sup> October 2022 after the High Court decision in Petition E017 of 2021 which was on 17<sup>th</sup> May 2022 at Machakos. The Court of Appeal did consider the circumstances under which the offence was committed and so has this court.
7. I am alive to the fact that the sentence imposed was lawful and that had the Court of Appeal wished to reduce that sentence in this matter, it would have done so.
8. The Petitioner abducted and kept the minor hostage, defiling her and torturing her for quite a while, threatening to kill her before she found her freedom and reported to her mother.
9. I do not find any mitigating circumstances that would persuade this court to apply the decision in Machakos HC Petition No. E017 of 2021 to this case to resentence the Petitioner/Convict.
10. I find the Petition for resentencing not merited. It is hereby dismissed.
11. However, as the Petitioner was arrested on 24<sup>th</sup> June 2014 and only released on bond on 10<sup>th</sup> December 2014 after he secured a surety, I order that the twenty (20) years imprisonment imposed on the Petitioner shall be calculated taking into account and discounting the number of days between 24<sup>th</sup> June 2014 and 10<sup>th</sup> December 2014 that he spent in custody pursuant to Section 333(2) of the [Criminal Procedure Code](#).
12. I so order.
13. This file is hereby closed.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 2<sup>ND</sup> DAY OF MAY, 2023**

**R. E. ABURILI**

**JUDGE**

