



REPUBLIC OF KENYA



**Nyawera v Republic (Miscellaneous Application E010 of 2022)  
[2023] KEHC 19834 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19834 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
MISCELLANEOUS APPLICATION E010 OF 2022**

**CM KARIUKI, J**

**JULY 6, 2023**

**BETWEEN**

**FRANCIS IHUTHIA NYAWERA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the Conviction and Sentence from the  
judgment dated 17/5/2019 by Hon. S N Mwangi (S R M) in  
Nyahururu Chief Magistrate's Court in Criminal Case No. 47 of 2018)*

**JUDGMENT**

1. The Petitioner was charged with the offense of defilement contrary to section 8 (1) as read with section 8(4) of *Sexual Offence Act* No. 3 of 2006.
2. Particulars are that on the night of 15<sup>th</sup> of April 2018 at Nyandarua North Nyandarua County. He penetrated the vagina of MN, a child aged 16 years, with s penis.
3. He pleaded not guilty and was convicted, after trial and sentenced to fifteen (15) years imprisonment mandatory minimum sentence.
4. The trial court held that although the accused mitigated, she could not alter the mandatory minimum sentence; thus, she had to award and did award fifteen (15) years no withstanding the mitigation.
5. The accused appealed, and the court dismissed the appeal on conviction and sentence on 27/10/22. By then, the case of *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of



2021) [2022] KEHC 13118 (KLR) (17 May 2022) had not been rendered, which declared mandatory minimum sentence in Sexual Offence unconstitutional. The court held that;

“To the extent that the *Sexual Offences Act* prescribes minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of article 28 of the Constitution. However, the court is free to impose sentences prescribed thereunder so long as the same are not deemed the mandatory minimum prescribed sentences.

Taking a cue from the decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (*Muruatetu I*), those who were convicted of sexual offenses and whose sentences were passed on the basis that the trial Courts had no discretion but to impose the said mandatory minimum sentence are at liberty to petition the High Court for orders of resentencing in appropriate cases.”

6. The same court prescribed that the affected person by the same scenario can seek High Court re-sentencing in which the High Court can either set aside the sentence and sentence afresh or set aside sentence and refer the matter to the Magistrate Court for sentencing afresh considering mitigations and circumstances of the case. But it is only fair trial court to do sentencing to give aggrieved party two levels of appeal rather than a single level of appeal.
7. In view of the a foregoing, I am inclined to set aside the trial court’s sentence and refer the matter back to the trial court for a fresh sentence taking into account mitigations and circumstances of the case.
8. Thus, the court orders;
  - i. The sentence by the trial court of fifteen (15) years is set aside, and the matter is referred back to the Chief Magistrate Court Nyahururu for a fresh sentence.

**DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 6<sup>TH</sup> DAY OF JULY 2023.**

.....

**CHARLES KARIUKI**

**JUDGE**

