



**Ashigulwa v Republic (Criminal Petition E001 of 2021)
[2023] KEHC 23907 (KLR) (13 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23907 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL PETITION E001 OF 2021
PJO OTIENO, J
OCTOBER 13, 2023**

BETWEEN

JAMES ASHIGULWA APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Before me is an undated notice of application for re-sentencing by the Applicant.
2. The Court has not had the benefit of reading the proceedings giving rise to this application despite several orders being issued for the file to be availed. That notwithstanding, according to the written submissions by the applicant he was charged with the offence of defilement contrary to the section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006 in Criminal Case No. 535 of 2008 at the Chief Magistrate's Court in Butali, was convicted and sentenced to life imprisonment.
3. He then appealed against the decision on Kakamega High Court Criminal Appeal No. 108 of 2009 and the Appeal was dismissed. It is unfortunate that my search for that decision in the internet has not yielded any results to enable the court discern what the Court said on the sentence.
4. In this application, the Applicant contends that the mandatory nature of life sentence is unconstitutional, inhumanly excessive, demeaning, arbitrary and torturous and places reliance on the case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR., Robert Achapa Okello vs R Petition No. 63 of 2018 and *Arthur Muya Muriuki v R* (2015) eKLR. He further contends that the time he had spent in remand since his arrest on 19th October, 2008 was not considered in his sentencing and terming it to be in contravention of the provisions of section 333(2) of the *Criminal Procedure Code*. He then adds that he is a first offender, is remorseful and that he is a victim of the HIV virus which makes him vulnerable to other diseases and is thus praying for a second chance.



5. No Replying Affidavit was filed in opposition to the Petition but the Respondent orally contested the application by submitting that the decision of the Supreme Court in Muruatetu only applied to Murder cases.
6. The Court agrees with the Respondent that the Muruatetu decision only applied to murder cases. However, this Court is equally alive to the Court of Appeal decision in *Maingi & 5 Others v DPP & another* (2020) eKLR declaring mandatory minimum sentences prescribed in the *Sexual Offences Act* to be unconstitutional. In the decision, the Court rendered itself that:-

“To the extent that the *Sexual Offences Act* prescribed mandatory minimum sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of article 28 of the *Constitution*. However, the court was at liberty to impose sentences prescribed thereunder so long as the same were not deemed to be the mandatory minimum prescribed sentences.”
7. As the law stands today, where a trial Court shows restraint from exercising discretion in sentencing purely on account of the prescribed sentence in the statute, such would be amenable to being offset on challenge. It would thus be desirable that a Court to which a request for sentencing is made is availed copies of such previous decisions for purposes of satisfying itself whether or not mitigation was offered and how such was treated. Here the Court is incapacitated in that the previous records cannot be retrieved and even the Applicant did not avail same. It is thus impossible for the Court to even appreciate what the High Court said in dismissing the appeal as much as the Court is unable to establish if the sentence meted out was in conformity with section 333(2) *Criminal Procedure Code*.
8. However, the law being what it is under article 50(2) p of the *Constitution* it is directed that the sentence to be served by the Applicant shall be computed from the 19.10.2008.
9. This is not to say that on the allegations that the Applicant has since reformed and is remorseful is rendered without a remedy. He may still approach the Power of Mercy Advisory Committee, if so advised by Counsel.
10. For the above reasons, the Court directs that the sentence be computed from the date of arrest but the application for resentencing by the Applicant to lack merit and is thus dismissed.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 13TH DAY OF OCTOBER 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Petitioner present

Ms. Chala for the Respondent

Court Assistant: Polycap Mukabwa

