



**Mutemi v Republic (Criminal Miscellaneous Application
E027 of 2022) [2023] KEHC 23174 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23174 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL MISCELLANEOUS APPLICATION E027 OF 2022**

FR OLEL, J

OCTOBER 5, 2023

BETWEEN

MESHACK KIMEU MUTEMI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Introduction

1. The applicant was charged and convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the *sexual offences Act* No 3 of 2006 in Yatta Srmcr No 260 of 2008 and on November 18, 2008 was sentenced to serve life imprisonment. The applicant appealed to the high court being Machakos High Court Criminal Appeal No 156 of 2013, where his appeal against conviction and sentence was dismissed on October 28, 2015. The appellant further did file an appeal to the court of Appeal being Criminal Appeal No 204 of 2016. In the said appeal he only appealed as against the sentence imposed and it was the finding of the court of Appeal that by virtue of provisions of section 361 (1) of the criminal procedure code, they had no jurisdiction to deal with the question of sentence. The second appeal was thus dismissed.
2. The applicant did file this application/petition under provision of article 22, 23, 27(1),(2), 52(2)(q), and 165 of *the constitution* of Kenya and seeks that this Honorable court be pleased to re consider the sentence he was serving (life imprisonment)which was harsh and not premised to rehabilitate but rather to condemn him completely and as such was retributive punishment. There had been new developments in the law regarding sentencing and specifically in the case of *Philip Mueke Maingi & 5 others vrs Republic* Petition No E017 of 2012 At Machakos, it had been held that mandatory minimum sentences prescribed under the *sexual offences Act* were unconstitutional as it infringed on the sentence discretion of the trial court.



3. Further the applicant did refer to the case of *Yawa Nyale Vr Republic* (2018) eKLR where it was held that;

“therefore the provisions of legislation that was in force before *the constitution* of Kenya 2010, such as sexual offence Act No 3 of 2006 must be construed with the said adaptations, qualifications and exceptions when it comes to mandatory minimum sentences and particularly where the said sentences did not take into account the dignity of the individuals as mandated under article 27 of *the constitution* and appreciated in the Muruatetu case.”

4. The high court had wide and unfettered original jurisdiction to handle matters involving fundamental rights of individual and had an obligation to protect them against any violation of the same. In *sabastina Okwengu Murefu*, petition No 151 of 2012 HCC at Kakamega, the court had upheld that it had the powers to review sentences even if the petitioner had exhausted all his appeals. The applicant thus prayed that the orders sought be allowed as he was remorseful for the offence he committed, he had reformed and had been rehabilitated while in custody.

B. Analysis of Law

Nature and scope of resentencing

5. Re-sentencing is neither a hearing de novo nor an appeal. It is a proceeding undertaken within the court’s power to review sentence. The court will ordinarily check the legality or propriety or appropriateness of the sentence. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments. In re-sentencing proceedings, conviction is not in issue.

6. It bears repeating that, the High Court has the mandate under article 165 (3) of *the Constitution* to hear and determine matters on enforcement of rights and fundamental freedoms enshrined in *the constitution*. A further leapfrog development; under article 50(2)(p) of *the Constitution*: 50(2) Every accused person has the right to a fair trial, which includes the right—

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing

7. The applicant has approached the court on the basis of the decisional law in Muruatetu and Philip Mueke Maingi petitions (supra), which specifically outlawed mandatory minimum sentence. The said decisions were made after the appellants appeals had been determined and obviously did not benefit from the same. There is nothing which prevents the court from applying decisional law and ordering sentence review in cases where the penalty imposed was mandatory penalty in law even if the cases are finalized. To me, denying an accused the benefit of court’s discretion to impose appropriate sentence is inconsistent with the right to fair trial. Fair trial includes sentencing. On that basis this court has jurisdiction to determine review of sentence.

8. A similar position was taken by the High Court, in *Stephene Kimathi Mutunga -v- Republic* (2019) eKLR where it was held that the High Court has unlimited jurisdiction in both Civil and Criminal matters, and was mandated to enforcing fundamental rights and freedoms as enshrined in *the Constitution*. The High Court thus had jurisdiction to deal with the petition for sentencing rehearing.



9. In *Michael Kabwera Laichena & Another -v- Republic* (2018) eKLR Majanja J. stated:

“by re-sentencing the petitioner, the High Court is merely enforcing and granting relief for what is in effect a violation caused by the imposition of the mandatory death sentence”.

C.Sentencing

10. Sentencing is a discretion of the court. But the court should look at the facts and the circumstances of the case in its entirety so as to arrive at appropriate sentence. The Court of Appeal *Thomas Mwambu Wenyi Vs Republic* (2017) eKLR cited the decision of the Supreme Court of India in *Alister Anthony Pereira Vs State of Maharashtra* at paragraph 70-71 where the court held the following on sentencing:

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

11. Also See also *Francis Karioko Muruatetu & Another –Vs- Republic* (Supra) where the Supreme Court stated the guidelines and mitigating factors in a re-hearing on sentence were discussed. The has also developed Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 which should be considered.

D.Determination

12. In the circumstances of this case, the court does not have enough material before it to make an appropriate decision on re sentencing. The crime was committed in March 2008 and there is no social inquiry report in the file. I do allow the applicants application for resentencing but direct that he be referred back to Kithimani law court (Previously known as Yatta law court) for re sentencing.

13. The Magistrate in charge at Kithimani court shall take fresh evidence of the applicant’s mitigation and call for a fresh social inquiry report from the probation department before re sentencing the applicant.

14. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 5TH DAY OF OCTOBER, 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 5th Day of October, 2023.

In the presence of;



Appellant

.....for ODPP

.....Court Assistant

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