



**Orangi v Republic (Criminal Petition E003 of 2023)
[2024] KEHC 11598 (KLR) (1 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11598 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL PETITION E003 OF 2023
FROO OLEL, J
OCTOBER 1, 2024**

BETWEEN

KELVIN MOTANYA ORANGI APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

A. Introduction

1. The applicant was charged with the offence or defilement contrary to sections 8(1) and 8(3) of the *sexual offences Act* No 3 of 2006 in Kithimani SPMCR (SOA) Case No 21 of 2018 and subsequently was convicted to serve a term of twenty years imprisonment; He appealed against the said conviction and sentence vide Machakos HCCR Appeal No E001 of 2020 and upon considering the merits of the said Appeal, the trial Judge G.v Odunga reversed the lower court decision and sentenced him to serve 10 years imprisonment for the offence of sexual assault contrary to section 5(1),(a),(i) as read with 5(2) of The Sexual Offence Act No 3 of 2006.
2. The applicant did file this application/petition under the provision of Articles 22, 23, 27(1),(2),52(2) (q), and 165 of *the constitution* of Kenya and seeks that this Honorable court be pleased to reconsider the sentence that he was serving (10 years) and be pleased to resentence him to a lenient definite sentence, premised on rehabilitate sentence rather than retributive punishment. The petition averred that his petition was based on new developments in the law regarding sentencing and specifically relied on the case of Philip Mueke & others Vesus ODPP & Others (Petition E017 of 2021), CR Appeal No 312 of 2018 Evans Wanjala Wanyonyi Vrs Republic, Christopher Ochieng Vrs Republic (2018) eklr and Jared Koita Injiri Vrs Republic (Kisumu Criminal Appeal No 93 of 2014), where it had been held that mandatory sentences were unconstitutional as they infringed on the sentence discretion of the trial court.



B. Analysis of Law

Nature and scope of resentencing

3. 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.
4. 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*, which provides that: 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.
5. The applicant has approached the court based on the decisional law in Philip Mueke (supra), which specifically outlawed mandatory minimum sentences in sexual offences matters. There is nothing which prevents the court from applying decisional law and ordering sentence review in cases where the penalty imposed was the mandatory penalty in law even if the cases are finalized. To me, denying an accused the benefit of the court's discretion to impose an appropriate sentence is inconsistent with the right to a fair trial. A fair trial includes sentencing. On that basis, this court has jurisdiction to determine and/or review sentences where appropriate. See Stephene Kimathi Mutunga -v- Republic (2019) eKLR & Michael Kathewa Laichena & Another -v- Republic (2018) eKLR .

C. Sentencing

6. Be that as it may, this application is wholly misconceived and is hopelessly defective as the issue of the applicant's conviction and sentencing was extensively considered by Hon Justice G.V Odunga in the appeal filed by the Appellant's being Machakos Hccr Appeal No E001 of 2020, and vide a considered judgment dated 3rd November 2021, the learned Judge partially upheld the appeal against conviction and reduced the conviction to the offence of sexual assault.
7. On sentencing the appellate court did differ the same and called for a pre-sentence report, which was considered and the appellant was subsequently sentenced to serve ten (10) years imprisonment, with effect from 6th July 2018 when he was arrested.
8. This determination was made with the new jurisprudence in mind and the applicant cannot then be allowed to raise and regurgitate similar issues before this court or any other court for that matter. The issue of resentencing as raised by the applicant is thus res judicata.

D. Determination

9. Having considered all the above factors I do find that this application to be hopelessly devoid of merit. It is dismissed.
10. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 1ST DAY OF OCTOBER, 2024.



FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 1st day of October, 2024.

In the presence of;

Appellant present from Machakos main Prison

Ms Otulo for Respondent

Susan/Sam Court Assistant

