



**Rukita v Republic (Miscellaneous Criminal Application
E039 of 2023) [2024] KEHC 11973 (KLR) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11973 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
MISCELLANEOUS CRIMINAL APPLICATION E039 OF 2023**

**RPV WENDOH, J
OCTOBER 3, 2024**

BETWEEN

SHADRACK MWITA RUKITA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Shadrack Mwita Rukita was on 15/03/2029, arrested for the offence of defilement contrary to section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) (SOA). He was sentenced to two (2) years imprisonment. He appealed to the High Court in Migori and on 6/2/2020 J. Mrima dismissed the appeal both on conviction and sentence. The applicant is back before the High Court with an undated application seeking that the court do proceed under section 333(2) of the [CPC](#) and compute his sentence from the date he was remanded in custody; that he should be given probation.
2. The applicant filed submissions alleging that his rights were breached because he was sentenced to serve the mandatory minimum sentence which fettered the courts discretion in sentencing and that the court failed to consider his mitigation and hence his right to fair trial was infringed. He cited Article 50(2)(q) as having been infringed. He relied on the Court of Appeal case of [Philip Maingi and 5 others v DPP](#) E017/2021 where the court held that minimum mandatory sentences under the Sexual Offence Act with no discretion to the trial court to determine the appropriate sentence to impose, are a violation of Article 28 of the [Constitution](#). The same court observed that courts are at liberty to impose sentences prescribed under the SOA so long as the case are not deemed to be the mandatory minimum sentences.
3. He further relied on Petition No. 97 of 2021 [Edwin Wechira and 9 others v Republic](#) where the court held that the mandatory nature of life sentence being minimum mandatory sentences denies the trial court the exercise of discretion, that the Malindi Court of Appeal was of the same view in CRA.12 OF 2021 [Julius Kitsao Manyeso v Republic](#) (2023) where the court declared mandatory maximum sentence



as unconstitutional. He referred to several other decisions of the Court of Appeal which were of the same view i.e Dismas Wafula Kilwako v Republic (2018)eKLR.

4. I have considered the applicant's arguments. However, the applicant seems not to be aware of the recent decision by the Supreme Court in SC Pet 18/2023 Republic v Joshua Gichuki Mwangi and Amicus curiae, where the DPP challenged the decision of the Court of Appeal in which the mandatory minimum sentences under section 8 of the SOA had been challenged and where the Court of Appeal had held that the mandatory minimum sentence to be unconstitutional. The Supreme Court in setting aside the said decision and reinstating the minimum sentence of (twenty) (20) years under section 8(3) of the SOA, said that the sentence was not unlawful so long as section 8 of the SOA is still the law. The Supreme Court observed that for the sections to be declared unconstitutional, a case had to be filed and go through the hierarchy of courts up to the Supreme Court for the issue to be considered. This court is bound by the said decision of the highest court of the land. (Supreme Court)
5. As to whether this court should consider the period that the applicant was in remand, It is my view that the appellant was before the High Court on appeal and should have raised all issues appertaining to his case. He cannot keep coming back to the court piecemeal.
6. Article 50,(2) (q) of the Constitution which the applicant relied on provides as follows;-
Every accused person has the right to a fair trial which includes the right –
.....
(q) if convicted, to appeal to, or apply for review by, a higher as prescribed by law”
7. The sentence of 20 years having been confirmed by the High Court on 6/2/2020, the applicant cannot come back to the same court seeking review but can only move the Court of Appeal for review or on appeal. This court being of concurrent jurisdiction with J. Mrima, it is functus officio.
8. For the above reasons I find no merit in the application and it is hereby dismissed.

DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 3RD DAY OF OCTOBER, 2024.

R. WENDOH

JUDGE

Ruling delivered in the presence of

Ms. Ikol for the State.

Applicant - Present

Juma/Emma – Court Assistants

