



**Chege v Republic (Criminal Revision E264 of 2023)  
[2024] KEHC 14294 (KLR) (15 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14294 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL REVISION E264 OF 2023**

**RN NYAKUNDI, J**

**NOVEMBER 15, 2024**

**IN THE MATTER OF ARTICLE 22(1), 23(1), 25(C), 27, 28, 50(2)(P)  
(Q), 159(2), 160(1) AND 165 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE COURT OF APPEAL DECISION  
IN MWANGI VS REPUBLIC (CRIMINAL APPEAL 84 OF 2015)**

**AND**

**IN THE MATTER OF PHILLIP MUEKE MAINGI & 5 OTHERS VS  
DIRECTOR OF PUBLIC PROSECUTIONS & ATTORNEY GENERAL,  
PETITION NO E017 OF 2021 AT MACAHKOS HIGH COURT**

**AND**

**IN THE MATTER OF SECTIONS 216, 329, AND 333(2) OF THE  
CRIMINAL PROCEDURE CODE, CAP 75 LAWS OF KENYA**

**BETWEEN**

**PAUL KINYANJUI CHEGE ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

Representation:

Mr. Mugun for the state



1. That the Applicant was charged and convicted for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006 in Criminal Case No 8789 of 2007 at Eldoret CM's Court and Sentenced to thirty (30) years imprisonment.
2. The Applicant lodged an appeal to the High Court at Eldoret in H.C.C.R.A No 37 of 2009 but the appeal on conviction and sentence was dismissed.
3. The Applicant lodged an appeal to the Court of Appeal but he has never been furnished with the record of appeal nor supplied with the record of Appeal and as such he has no desire for following up on the same thus the present application.
4. What is pending before me for determination in a Notice of Motion Application dated 13<sup>th</sup> July 2023, where the Applicant is seeking the following orders;
  - a. Spent
  - b. That the Honourable Court be pleased to review thirty (30) years imprisonment imposed by the Trial Court and grant him a more lenient sentence informed by his mitigation and the unique factors and circumstances of his case pursuant to Article 50(2)(p)(q) of *the Constitution* of Kenya.
  - c. That the period spent in remand custody be computed into the eventual sentence to be awarded pursuant to the provisions of section 333(2) of the Criminal Procedure Code and also pursuant to *Jona & 87 Others Vs Kenya Prison Service & 2 Others (Petition 15 of 2020)* [2021] KEHC 457 (KLR)
  - d. That the Hon Court be pleased to grant him probation orders if my circumstances so fit.
  - e. Any other order that the Hon. Court deems fit to give in the interest of justice.
5. The application is based on the grounds on the face of it among others:
  - a. That the Applicant was charged and convicted for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006 in Criminal Case No 8789 of 2007 at Eldoret CM's Court and Sentenced to thirty (30) years imprisonment.
  - b. That the Applicant lodged an appeal to the High Court at Eldoret in H.C.C.R.A No 37 of 2009 but the appeal on conviction and sentence dismissed.
  - c. That the Applicant lodged an appeal to the Court of Appeal but he has never been furnished with the record of appeal nor supplied with the record of Appeal and as such he has no desire for following up on the same thus the present application.
  - d. That the Applicant was sentenced to a sentence in excess than the mandatory sentence as prescribed by section 8(3) of the *Sexual Offences Act* No 3 of 2006 without consideration of his mitigation or the unique facts and circumstances of his case.
  - e. That the High Court in Petition No 97 of 2021 Edwin Wachira & 9 Others vs Republic as consolidated with Petition No 88 of 2021, 98 of 2021 and 57 of 2021 at Mombasa High Court declared the application of minimum mandatory sentences as being unconstitutional and granted orders that those affected may petition the High Court for resentencing and thus the reason for this application.
  - f. That, the Court of Appeal's decision in Mwangi Vs Republic (Criminal Appeal 84 of 2015) 022] KECA 1106 (KLR) (7 October 2022) is relevant in the present case.



6. The Application is supported by the Applicant vide the annexed affidavit sworn by Paul Kinyanjui Chege dated July 13, 2023 in which he avers as follows in addition to the grounds set out in the application:
- a. That the Hon. Court finds useful guidance in the cases of *Dismas Wafula Kilwake Vs Republic* (2019) eKLR; *Korir Vs Republic* (Criminal Appeal 100 of 2019) [2021] KECA 305 (KLR); *Jared Koita Injiri Vs Republic* [2019] eKLR; *Evans Wanjala Wanyonyi Vs Republic* (2019) eKLR and *SS Vs Republic* (2021) eKLR to arrive at a fair and equitable decision.
  - b. That the Hon Court be pleased to review the Life sentence imposed by the Trial Court and grant me a lenient sentence informed by my mitigation and the unique facts and circumstances of my case pursuant to Article 50(2)(p)(q) of *the Constitution* of Kenya 2010.
  - c. That the period spent in remand custody be computed into the eventual sentence to be awarded pursuant to the provisions of section 333(2) of the Criminal Procedure Code and also pursuant to *Jona & 87 Others Vs Kenya Prison Service & 2 Others (Petition 15 of 2020)* [2021] KEHC 457 (KLR).
  - d. That should the sentence reviewed result in a balance of three or less years to the expiry of my prison term, may the Hon. Court be pleased to grant me probation orders if my circumstances so fit.
  - e. That I am a convict hence a pauper; who cannot incur any cost for the preparation of this application thus pray that such costs be waived.

#### **Analysis and Determination**

7. In deciding this application, I have perused and considered the judgment in High Court at Eldoret in High Court in respect of H.C.C.R.A No 37 of 2009 which relate to the same case. I have also considered the application and the mitigation submissions by the applicant. The issue manifest for determination is:

#### **Whether the sentence review is merited.**

8. 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.
9. 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*:

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- (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



10. The applicant has approached the court on the basis of the decisional law in Philip Mueke Maingi & Others Vrs Rep, Petition No E17 of 2021, which specifically outlawed mandatory minimum sentence. It stated;

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 and/or review sentence's where appropriate.

11. 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.
12. In *Michael Kathewa 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".
13. Further, the Court of Appeal sitting in Malindi in *Manyeso v Republic Criminal Appeal No. 12 of 2021* [2023] kECA 827 (KLR) held that mandatory life sentences are unconstitutional and are "an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of *the constitution*". The said decision is supported by the case of *Vinter and others v UK*, in which the European court of human rights (ECHR) reasoned that indeterminate life sentence with no hope of parole was degrading and inhuman.
14. Article 50(6) of *the Constitution* of Kenya 2010 states that; A person who is convicted of a criminal offence may petition the High Court for a new trial if—(a) the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and (b) new and compelling evidence has become available.
15. Sentencing is a discretion of the court. But the court should look at the facts and the circumstances of the case in it's entirely so as to arrive at appropriate sentence. The Court of Appeal in *Thomas Mwambu Wenyi v Republic* [2017] eKLR cited the decision of the Supreme Court of India in *Alister Anthony Pereira v State of Mahareshra* 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.”

16. Also in the case of Francis Karioko Muruatetu & Another v Republic (Supra) where the Supreme Court stated the guidelines and mitigating factors in a re-hearing on sentence were discussed. The judiciary has also developed Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 which should be considered.
17. I am in full agreement with the decision of Mativo, J (as then was) in Edwin Wachira & Others Versus Republic; Mombasa High Court Petition No. 97 of 2021 that “To the extent that the provisions of sections 8(2), (3), (4), 11 (1), 20 (1) and 3(3) of the *Sexual Offences Act* deprive the court the discretion to determine the appropriate punishment taking into account the individual circumstances of each case, then the said provisions offend the notion of a fair trial contemplated under Article 50(1) of *the Constitution* of Kenya, 2010.”
18. A glimpse of the Petitioner’s application clearly calls for a re-hearing of the sentence imposed. Article 50 (2) (p) of *the constitution* provides as follows:

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; and
19. Article 50(6) further provides for conditions under which one can petition for a new trial, which in this case is a new trial only on sentence. The provision speaks in the following terms.
  - (6) A person who is convicted of a criminal offence may petition the high court for a new trial if: -
    - a. The person’s appeal, if any, has been dismissed by the highest court to which the person is entitle to appeal, or the person did not appeal within the time allowed for appeal; and
    - b. New and compelling evidence has become available.
20. The foregoing provisions are instructive in matters brought before the high court for a new trial. The application before me seeks a new trial only on sentence. So that then my mandate is to view the application through the lens of Article 50 (2)(p) and (6) and determine whether the same is proper for a new trial only on sentence.
21. Has the application passed the test laid out in the foregoing legal provisions? Yes, I believe so. First, the applicant has exhibited that indeed his appeal was dismissed by a higher court and the court being conscious of the developments in our current jurisprudence on mandatory sentences i.e. the Muruatetu case. It then follows that the applicant ought to benefit from the least prescribed punishment as per the provisions of Article 50(2)(p).
22. The offence of defilement contrary to the provisions of Section 8(3) of the *Sexual Offences Act* attracts imprisonment of not less than 20 years. In R v Bieber [2009] 1 WLR 223 the Court of Appeal of the United Kingdom had held as follows:

“The legitimate objects of imprisonment are punishment, deterrence, rehabilitation and protection of the public. Where a mandatory life sentence is imposed in respect of a crime, the possibility exists that all the objects of imprisonment may be achieved during the lifetime of the prisoner. He may have served a sufficient term to meet the requirements of punishment and deterrence and rehabilitation may have transformed him into a person who



no longer poses any threat to a public. If, despite this, he will remain imprisoned for the rest of his life it is at least arguable that this is inhuman treatment...”.

23. In the premises, what is required of the Court is to consider what would have been an appropriate sentence in the circumstances. The approach suggested at Paragraph 23.9 of the Judiciary Sentencing Guidelines, which are guidelines formulated to ensure objectivity and uniformity in sentencing, is that:

“The first step is for the court to establish the custodial sentence set out in the statute for that particular offence. To enable the court to factor in mitigating and aggravating circumstances/factors, the starting point shall be fifty percent of the maximum custodial sentence provided by statute for that particular offence. Having a standard starting point is geared towards actualizing the uniformity/impartiality/consistency and accountability/transparency principles set out in paragraphs 3.2 and 3.3 of these guidelines. A starting point of fifty percent provides a scale for the determination of a higher or lower sentence in light of mitigating or aggravating circumstances.

24. Additionally, in the Muruatetu Case, the Supreme Court proffered the following guidelines for consideration in respect of a sentence re-hearing:

- (a) age of the offender
- (b) being a first offender
- (c) whether the offender pleaded guilty
- (d) character and record of the offender
- (e) commission of the offence in response to gender-based violence
- (f) remorsefulness of the offender
- (g) the possibility of reform and social re-adaptation of the offender
- (h) any other factor that the court considers relevant.

25. In *Dismas Wafula Kilwake v Republic* [2018] eKLR, the Court of Appeal set out the factors to be considered in sentencing under the Act. It observed as follows:

We hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

26. Therefore, in sentencing, the gravity of the offence and the consequences of the offence on the victim are relevant factors.



27. Section 333(2) of the Criminal Procedure Code provides that in sentencing, where an accused person was in remand custody the period spent in custody should be taken into account. It reads:

“Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to conclude the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

28. I have considered the application and the record and I find no compelling evidence to review the custodial sentence of 30 years imprisonment save that the sentence shall be subjected to the provisions of Section 333(2) of the Criminal Procedure Code to give credit to the period spent in pre-trial detention before trial and conviction.

**DATED AND SIGNED AT ELDORET THIS 15<sup>TH</sup> DAY NOVEMBER, 2024**

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**R. NYAKUNDI**

**JUDGE**

In presence of

