



**Kweyu v Director of Public Prosecution (Criminal Petition E009 of 2023)  
[2024] KEHC 13886 (KLR) (8 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13886 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL PETITION E009 OF 2023  
S MBUNGI, J  
NOVEMBER 8, 2024**

**BETWEEN**

**DONALD OSUNDWA KWEYU ..... PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

*(Being a petition arising from the sentence of the Honorable T. A Odera SPM  
delivered on 12th June 2019 at Mumias in Sexual Offence No. 9 of 2018)*

**JUDGMENT**

1. The petitioner herein was charged for incest contrary to section 20(1) of the sexual offence act No. 3 of 2006 and an alternative count of committing an indecent act with a child contrary to section 11(1) of the sexual offence act No. 3 of 2006. The case proceeded to full trial and the trial magistrate convicted him and sentenced him to life imprisonment.
2. The petitioner, being dissatisfied with the conviction and sentence., lodged an appeal to the High Court on several grounds of appeal. He averred that the evidence adduced in the trial court was malicious and fabricated, and he was not subject to corresponding medical examination as envisaged by section 36 of the *Sexual Offences Act*. He averred that the case was poorly investigated, the sentence was excessive and that the court shifted the burden of proof onto him.
3. The appeal was canvassed by way of written submissions and the court re-evaluated the evidence on record in respect to the grounds of appeal. In its judgment, the court upheld the trial court's conviction and sentence.
4. The petitioner then lodged this application at Voi High Court and the same was transferred to this court in Kakamega seeking the following prayers: -



- i. That this Honorable court be pleased to review the life sentence imposed by the trial court and grant a more lenient sentence informed by his mitigation and the unique facts and circumstances of his case pursuant to Article 50(2)(p)(q) of *the Constitution* of Kenya.
  - ii. 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.
  - iii. That the Honorable court be pleased to grant the petitioner probation orders if his circumstances so fit.
  - iv. Any other order that the Honorable court deems fit to give in the interest of justice.
5. The application was supported by an affidavit sworn by the applicant on the 23.05.2023.
  6. The petition was canvassed by way of written submissions.

#### **Petitioner/Applicant's Case.**

7. Vide his submissions filed in this court on 19.02.2024, the applicant submitted that the court has got discretion on sentencing and that he was convicted as a first offender as mitigating factors. He further submitted that he has taken full advantage of custodial rehabilitation and acquired skills in mindset course, Kenya Certificate of Primary Education, Paralegal Course and Prisoner's journey in Christian fellowship program.
8. The applicant further averred that the court has the power to divert from the mandatory minimum sentences enshrined in the *Sexual Offences Act*, citing the case of *Francis Kioko MURUATETU & another vs Republic* (2017) eKLR and *Elizabeth Waitibiegen Gatimu vs Republic* (2015) eKLR which speak to the rights of the accused person during hearing and sentencing.

#### **Respondent's Case.**

9. The respondent filed submissions and grounds of opposition to the application on 15.07.2024. The substance of it was that the application filed is res judicata and this court lacks jurisdiction to entertain the same since the application had been considered by a competent court of concurrent jurisdiction and ought to move to the Court of Appeal, if dissatisfied.
10. The respondent further submitted that the application lacks merit, is defective and bad in law and amounts to an abuse of the court process.

#### **Analysis and Determination.**

11. The offence of incest is defined in Section 20(1) of the *Sexual Offences Act* as:

“Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that if it is alleged in the information or charge that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes



penetration or the indecent act was obtained with the consent of the female person.” (emphasis mine)

12. I have looked at the petition, the submissions by both parties and the judgment from the appeal filed by the petitioner in this court.
13. In his plea for re-sentencing, the petitioner has referred the court to several authorities including the Supreme Court in *Francis Karioko Muruatetu & 5 Others v Republic*, [2017] eKLR where the supreme court held that mandatory nature of sentences were unconstitutional to the extent that they deprived the trial court of its discretion to mete out an appropriate sentence against an offender after considering his or her plea in mitigation and the aggravating factors surrounding commission of the offence in question.
14. The petitioner has further referred the court to cases where the Muruatetu decision was applied to sexual offences included the case of Jared Koita Injiri vs Republic in Kisumu Criminal Appeal No. 93 of 2017, the case of Evans Wanjala Wanyonyi v Republic (2019) eKLR, Dismas Wafula Kilwake v Republic (2018) eKLR.
15. However, on 06.07.2021 the Supreme court issued directions in Muruatetu II clarifying the applicability of the decision by the court in Muruatetu I. The court held that its decision in the first Muruatetu case applied only to the mandatory death sentence for the offence of murder prescribed under section 204 of the Penal Code and not to any other sentence.
16. Moreover, it is worth noting that the petitioner appealed against the conviction and sentence by the trial court vide HCCRA 68 of 2019. The appeal was dealt with in this court. The court through Hon. Justice W. Musyoka affirmed the sentence from the trial court stating as follows:

“...The penalty available for incest with respect to fourteen-year-old victims is discretionary life imprisonment under the proviso to section 20(1). The trial court took that into account when it was sentencing the appellant. It noted that the appellant was the father of the child in question, the right of the child to parental care and the effect of the offence on her.

I am satisfied that the trial court made the right considerations. The appellant as the father of the complainant had an obligation to protect her from exploitation of any kind by anyone, including of a sexual kind, it was no doubt a gross breach of trust for the appellant to be the one to exploit her sexually instead of protecting her. The home, ideally should form the bulwark of protection for underage girls. It is where they should feel most secure under the care of their fathers. It is unfortunate that those who ought to protect then turn against them in the most violent manner within the walls of their homes where they should be at the securest. Such conduct calls for the harshest punishment, to make the perpetrator pay for the crime and to deter him from ever exploiting other underage girls under his care. I shall not interfere with the sentence imposed by the trial court as I find it to be deserving in the circumstances.

The appeal herein has no merits, and it is hereby dismissed.”

17. In the case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] Eklr, the court of Appeal held as follows:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has continuation of proceedings pending other evidence. A court of law down



tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

18. According to *Black Laws Dictionary, 2<sup>nd</sup> Edition*, res judicata is defined as follows: “...Once a lawsuit is decided, the same issue or an issue arising from the first issue cannot be contested again... “

19. In the case of Kimosop *v Republic (Criminal Petition 2 of 2023)* [2024] KEHC 2422 (KLR), the Hon. Justice Wananda held as follows:

“As aforesaid, the Appeal was dismissed. The Petitioner has returned to this same Court which has already dismissed his Appeal, asking for the same sentence imposed by the Magistrates Court to be reduced. The Petitioner’s recourse is to appeal at the Court of Appeal, not come back to this same High Court. This Court cannot sit on appeal on a decision of its own.”

20. Clearly, this court while presided over by a judge of similar jurisdiction, gave a judgment to the appeal filed by the applicant (as quoted in paragraph 16 above) and ruled on both the conviction and sentence meted out by the trial court. The petitioner is trying to sneak in another application for sentence review in this court, masked as a petition. The same cannot be tolerated in this court as this court is functus officio and lacks jurisdiction to review the sentence a second time. The applicant herein, if dissatisfied with the decision of his appeal in the High court, ought to move by way of appeal to the Court of Appeal.

21. The upshot of the above is that the petition is wholly dismissed.

22. Let the file be closed.

23. Right of appeal 14 days explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 8<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**S.N MBUNGI**

**JUDGE**

In the presence of :

Petitioner – present online

Mr. Mbonzo for the respondent present online

Court Assistant – Elizabeth Angong’a

