



**Wambua v Republic (Miscellaneous Criminal Application E036 of 2024)  
[2024] KEHC 14572 (KLR) (18 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14572 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
MISCELLANEOUS CRIMINAL APPLICATION E036 OF 2024**

**MW MUIGAI, J**

**NOVEMBER 18, 2024**

**BETWEEN**

**THOMAS KIOKO WAMBUA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Court Record**

1. The Applicant herein Thomas Kioko Wambua filed an application under certificate of urgency dated 14/03/2024 seeking the following orders;
  - a. Spent
  - b. That this Court find it within the law by dint of Article 50(1) of the Constitution to fashion a remedy in the circumstances of this case in enforcing the law to resolve the dispute of sentence within the fiat of Article 159 of the Constitution in its jurisdiction under Article 165 of the Constitution.
  - c. That this court find that as a matter of law, the High Court has jurisdiction to order for the resentence of the Applicant herein, although the Court of Appeal had rendered a verdict in respect of his case, as an affirmative action designed to redress the disadvantage suffered by him during determination of his appeal by the Court of Appeal, which has since pronounced itself on what life imprisonment ought to mean in law at the highest in terms of years.
  - d. That this Court to overturn the decision of the appellate Court only on sentence and order to resentence the Applicant to a term sentence in order to reconcile the sentence imposed considering he law applicable within the threshold of Clause 7(1) of the sixth schedule of the Constitution.



- e. That this court to invoke its jurisdiction in its mandate under Article 20 of the Constitution to address needs of the Applicant herein by determining the right sentence to impose in light of the recently developed sentencing laws by the Court of Appeal, as a remedy to past discrimination during determination of his sentence by the trial court and the Appellate courts within the meaning of Article 27(6) of the *Constitution*.
  - f. Such other orders that the court may deem fair and just.
2. The Application is supported by the Affidavit sworn by the Applicant stating that he was convicted for the offence of Incest contrary to Section 20(1) of the *Sexual Offences Act* No. 3 of 2006, through Criminal Case No. 1407 of 2013 at Machakos Law Courts and sentenced to life imprisonment on 29/10/2014 which sentence was upheld by the High Court at Machakos on 17/09/2018. The Court of Appeal sitting at Nairobi dismissed his final appeal on 09/02/2024.

### Grounds Of Opposition

3. The Respondent herein filed Grounds of opposition dated 15/10/2024 based on the following grounds;
  - a. That the Application filed herein is misconceived, bad in law and misplaced for the Court is functus officio in this matter.
  - b. That this Court lacks jurisdiction to hear and determine this application for the sentence sought for review was passed by the Court by dint of Article 165(6) of the *Constitution*.
4. On 15/10/2024 both Parties Appeal in Court to argue their case.
5. The Applicant argued that this Court has jurisdiction to hear the matter as per Article 165 Constitution 2010. He cited the case of *Joshua Gichuki Mwangi -vs- Republic* Criminal Appeal no. 84 of 2015.

### Determination/analysis

6. The issue for determination is whether the court should review the sentence meted out to the applicant
7. The Applicant was sentenced to life imprisonment by the trial court in 2014 which was upheld on appeal by both the High Court and Court of Appeal. The applicant is now serving the sentence of life imprisonment, which he is challenging through this application.
8. This court has jurisdiction to entertain matters of resentencing as donated to it through recent jurisprudence, particularly in the Court of Appeal decision in the case of *Julius Kitsao Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023). In this case, it was held thus:
 

“...we are of the view that the reasoning in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of the Constitution ”
9. Article 48 of the Constitution guarantees everyone a right to justice while Article 50 provides for the right to fair trial, which includes the right to downward review of sentence.



10. With regards to mandatory sentences, the Supreme Court in the case of *Francis Karioko Muruatetu & Another v. Republic* (2017) eKLR (supra) (Muruatetu 1):

“Section 204 of the *Penal Code* deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under article 25 of the Constitution ; an absolute right.... We therefore reiterate that, this court’s decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute”

11. This Court is guided by the Superior courts in the above-cited decisions to the extent that mandatory or minimum sentences curtail the trial court’s discretion on sentencing. The Supreme Court offered further guidance on the issue of re-sentencing and warned against haphazard use of the “Muruatetu 1” principles. This was stated in the case of *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) (Muruatetu 2), the Supreme Court stated;

“It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution.”

12. The mandatory sentence can be reviewed purely on the strength of stare decisis. However, since the mandatory death sentence was commuted the indeterminate life imprisonment sentence, this court is still obliged to review the same as well because a superior court has since guided this court in that regard. The Court of Appeal in the case of *Julius Kitsao Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (supra) rendered the indeterminate nature of life imprisonment discriminatory. The court also reviewed the life imprisonment sentence downwards to 40 years imprisonment to run from the date of conviction

13. In light of this decision, the life imprisonment sentence imposed on the applicant should be defined. Further, the Court of Appeal sitting in Kisumu rendered itself on 08<sup>th</sup> December 2023 in the case of *Evans Nyamari Ayako v. Republic* Criminal Appeal No. 22 of 2018 defining the life imprisonment sentence to mean 30 years imprisonment. It was held thus:

“This qualitative survey of how different jurisdictions have treated life imprisonment in the recent past provides objective indicia of the emerging consensus that life imprisonment is seen as being antithetical to the constitutional value of human dignity and as being inhuman and degrading because of its indefiniteness and the definitional impossibility that the inmate would ever be released. This emerging consensus of the civilized world community, while not controlling our outcome, provides respected and significant confirmation for our own conclusion that life imprisonment is cruel and degrading treatment owing to its indefiniteness. On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years’ imprisonment.”



14. I have considered the circumstances of the case and the findings of the various courts at the different stages, Consequently, and being guided by the Superior Court's decisions, I find that the application lacks merit and is hereby dismissed. The sentence of life imprisonment although now by dint of recent and emerging jurisprudence must be deferred and not the remaining life of the Appellant, it is on record that this matter was already handled and determined by Court of Appeal in Case Number 112 of 2020.
15. Therefore, this Court lacks requisite and/or competent jurisdiction to reopen the matter dealt with by Court of Appeal.
16. The legal forum should be review of Court of Appeal decision by Court of Appeal.

It is so ordered.

**RULING DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS HIGH COURT  
ON 18/11/2024 (VIRTUAL/PHYSICAL CONFERENCE)**

**M.W.MUIGAI**

**JUDGE**

